MEDICAL JURISPRUDENCE

from the

JUDICIAL STANDPOINT.

M. D. 1913.

This thesis is an endeavour to set forth systematically the principles of English Medical Jurisprudence and the most important details of practice, from a new standpoint. In it, State Medicine, as a science in itself, is surveyed from the point of view of the bench. Its chief claim is that it defines, limits and thus simplifies the work of the court - the defence and the prosecution alike - by setting forth the legal principles,, and the concrete medical facts that are required and are available and admissible as evidence, especially in criminal trials. The subject is illustrated by original researches in law and in medicine, made while for many years engaged in criminal expert investigation, but especially during thirteen years of judicial work as Coroner in a city of nearly two hundred thousand inhabitants.

As a necessary preliminary, the broad principles of law, the functions of law courts, and the routine legal procedure areset forth in the earlier chapters, and illustrated by examples showing recent trends and new developments of legislation.

The chief advances in medical knowledge and practice, with reference to medical jurisprudence, detailed

in the rest of the thesis may be set forth as follows:

In Chapter IV "medical proof" is contrasted with legal proof. The danger of accepting probability, or absence of knowledge, as evidence is illustrated, with special reference to cerebral apoplexy occurring in young persons. The chapter contains a critical statement of the law and practice regarding medical evidence at coroners' inquests.

In Chapter V the qualifications of the expert witness are defined according to recent English and American decisions. The limitations of expert evidence as to facts and inferences are illustrated by original anatomical investigations; and the causes of the chief dangers to which an expert is exposed are pointed out. Proposals for overcoming apparent conflict of opinion between experts are set forth and considered.

Chapter VI is an account of investigations into a particularly difficult case which became the subject of a trial for abortion. The narrative sets forth a peculiar situation of the Prosecution arising from differences of opinion on the part of the Crown witnesses.

Chapter VII is a record of investigations into two cases of murder in which the identity of the bodies and the cause of death had to be established. It shows how the facts that are intended to be submitted as legal proof of crime have to be sifted from a mass of all sorts of investigations, anthropological, pathological, physical, photographic, experimental, developmental, which, though necessary to establish medical facts and infer-

ences, may not be required from the witness in the box. The relations of the Prosecution to counsel for the defence, as a new departure facilitating procedure, are set forth.

Chapter VIII is an original inquiry into the principles involved in fractures of the skull, founded upon a large number of observations and experiments. Taking account of the chief contributions on this subject from the very earliest times, I have critically examined and experimentally tested these, and have here set forth the conclusions that may be considered as scientifically established.

Chapter IX is an investigation into Infanticide, one of the most important andmost difficult subjects in Medical Jurisprudence. I have critically reviewed, in historical order, all the leading decisions, and have traced the development of the law, and sifted out the law itself from a large number of obiter dicta and principles that were referred to incidentally by the judges. The medical facts of parturition, and their relations to the law as now definitely stated, are specified in detail, and the points on which medical evidence is necessary to establish live birth in the legal criminal sense are stated. Variations in the law, introduced by criminal codes, are set forth.

Chapter X, which is a historical and critical survey is, with the exception of certain criticisms by Baron Pollock and Lord Bramwell, perhaps the only critical

contribution on the anomalous and unsatisfactory law regarding Concealment of Birth by a Secret Disposition of the body. Recent developments by way of improvement in the common and statute law are set forth.

In Chapter XI the evolution of the common law regarding Fright as a cause of injury and death is traced historically, and recent statutory enactments are quoted and examined in the light of new psychological theories and medical facts. This subject is almost new to Medical Jurisprudence.

The chief interest of Chapter XII centres in the subject of the relative resistance of old and young, healthy and diseased persons, to noxious gases, poisonous emanations, and virus infections. The relation of the illustrations here adduced to legal proofs in court is scarcely recognised in Medical Jurisprudence, conclusions to the contrary effect being usually assumed without inquiry.

Chapter XIII consists largely of new material. Regarding the appearance of bodies in sea water, it may be stated that the facts here set forth, many of which were published in "The Medical Magazine" in 1896, formed perhaps the only literature on this subject until Professor Harvey Littlejohn's comprehensive communication appeared in 1903.

Chapter XIV contains a statement of the law relating to insanity and crime, distinguishing between settled and disputed points. This is followed by a discus-

sion of the question "When is a man punishable?" which is illustrated by critical observations on the subject of irresistible impulse. The cause of the so-called "conflict" between law and medicine in the law courts is stated, and the remedy is outlined. Recent important developments, especially in American law, are stated. In connection with insanity and suicide, recent changes in statute law are set forth. The chapter contains a fairly exhaustive statement regarding mental states allied to insanity, illustrated by personal observations and instances found in medical and general literature.

Chapter XV deals with the points where law and medicine meet in respect to life and accident insurance. From the common law of contracts and a large mass of recent case law, the present position of the law is evolved. The chapter contains a legal and psychological examination of the subject of the suicide exemption clauses in life insurance policies.

Chapter XVI brings many of the subjects treated of by Glennin "The Laws Affecting Medical Practitioners" up to date.

Chapter XVII is a continuation of Chapter XVI and deals with a special subject of much importance on account of recent statutory enactments and proposed changes in the law of medical privilege. One important part of this chapter is a critical examination of the meaning and intention of the Hippocratic and graduation oaths. The advantages and disadvantages of complete medical privilege are illustrated.

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MEDICAL JURISPRUDENCE

from the

JUDICIAL STANDPOINT,

by

W. RAMSAY SMITH, D.Sc., M.B., C.M., F.R.S. (Edin.).



M.D.
1913.

Law is the science in which the greatest powers of under-

standing are applied to the greatest number of facts.

Dr. Johnson.

1 Blackstone, 27, f.n.

P R E F A C E .

Medical jurisprudence, as Casper said, is a science of itself, and not a mere encyclopaedia of the other medical sciences. In the following chapters I have set myself the novel task of viewing the principles and practice of medical jurisprudence from the standpoint of the court, the bench, the Judge. The broad principles of law as they come before the jurist in connection with all proceedings, whether medico-legal or not, are set forth. The law of England, including its recent trend, as applicable to the medico-legal subjects most commonly before the courts, is stated; the nature of the medical evidence required as legal proof in cases at issue is shown; and the present position of medical science in relation to facts required in evidence is sketched in greater or less detail as the circumstances seem to demand. From an accumulated mass of materials, legal and medical, culled from others and ~~selected~~ from ~~a mass of~~ original observations and experiments, I have selected illustrative examples, showing the methods of science, in its various departments, applied to medico-legal investigation, especially in criminal cases.

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C H A P T E R I.

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THE UTILITY OF A STUDY OF THE LAW.

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C H A P T E R I.

THE UTILITY OF A STUDY OF THE LAW.

The biographer of Lord Bramwell tells (a) that one spring day in the year 1889 the local constable at Edenbridge noticed the baron intently watching a noisy group of village boys, apparently much excited about something. It was the first day of the cricket season, and they were, in fact, drawing up rules for their cricket club. Fancying they might have annoyed the old lord in some way, the constable approached, and asked whether such was the case. "No, no," said Lord Bramwell; "those lads have been teaching me something - how the Common Law was invented." The constable considered this a remarkable proof of juvenile precocity, and observed: "It's wonderful what they do learn at school nowadays, my lord - over-education, I call it."

It is not improbable that the interest and point of the story depend less upon the constable's complete misunderstanding of Lord Bramwell's use of the term teaching, than upon the absurdity of the constable's idea that such a subject as the Common Law should find a place in the modern "utilitarian" school curriculum.

(a) Charles Fairfield: A Memoir of Lord Bramwell, 1898, p. 180.

And yet, why should there be any absurdity in the notion that a matter that concerns us daily in our social and business relations with our fellow men should be taught in schools, along with other subjects of practical utility, general interest, or liberal education? Why should a study that is said to induce a habit of temperate criticism and of respect for authority and experience be neglected by the young or by the old? If people only knew the origin of their laws, and the reasons for their existence, they would be more ready to submit to, more eager to obey, and more anxious to conserve these laws.

Over thirty years ago Sir James Fitzjames Stephen claimed a place for law in the scheme of public education. "I have long been of opinion," he said, "that such subjects as the criminal law, the law of contracts, and the law of wrongs are in themselves quite as interesting as the subject of political economy; and I think that if the law were thrown into an intelligible shape, the result would not only be of the greatest public convenience, but would constitute a new branch of literature and of public education."

Professor Bain (a) in referring to this passage, says: "There can be little doubt that Law is a most valuable discipline in many important matters connected with everyday life. It tends to arrest precipitate

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(a) Alexander Bain: Education as a Science, 1880, p. 166.

conclusions as to the guilt of supposed wrongdoers, and promotes justness of dealing in our relations with others. If these lessons could be extricated from the lead of details necessary to the professional lawyer, and presented in a brief compass, they would deservedly rank as a liberalizing study."

The philosophical interest of the law is thus referred to by Burke (a):- "The science of jurisprudence is the pride of the human intellect, which with all its defects, redundancies, and errors, is the collected reason of ages combining the principles of original justice with the infinite variety of human concerns."

Lord Bramwell, whom I have referred to as learning the art of law-making from village boys,, told the British Association that he believed that law should be taught. He said (b): "One could suppose that every educated person would like to have some acquaintance with the laws of his country; certainly that Englishmen would, since they are proud of their laws and responsible for them. But it is said, "The law is so dry." I deny it .... With respect to study - not of the practice, but of the broad general principles of law - it is quite otherwise. Of the four volumes of "Blackstone's Commentaries,"

(a) 1 Blackstone 27 - f.n. 21st Edn. 1844.

(b) Charles Fairfield: A Memoir of Lord Bramwell, 1898, p. 9.

three, to my mind, are most agreeable reading; these general principles should be taught as part of ordinary education."

Blackstone himself, in enumerating the reasons why various classes of people should study law, says (a): "For the gentlemen of the faculty of physic, I must frankly own that I see no special reason why they in particular should apply themselves to the study of the law, unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved." Then he pays physicians a somewhat doubtful compliment by saying that they might be of use to families if they were acquainted with the formal part of the execution of wills.

A century and a half ago, "gentlemen of the faculty of physic," like other gentlemen, may have been induced to study law merely as a means of general culture and without utilitarian motives; but now-a-days the relations between medicine and law affect the public more intimately than they did then, and the completion of the round of general knowledge is not the inducement that appeals most to physicians when they are advised to familiarise themselves with the general principles of the law. Not only does medical practice border upon a greater variety of social interests than it did in

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(a) 1 Blackstone, 13.

Blackstone's time, but the importance now attached to medical testimony in courts of law is immensely greater than Blackstone could possibly have imagined or foreseen when he wrote.

It cannot be said that much has been done to meet the necessities of these changed conditions by way of diffusing a knowledge of the law. True, there are now one or two school reading books dealing with law; but until law finds a place in the lists of compulsory subjects of examination, it is safe to say that but little attention of any sort will be devoted to it. True also, that some Universities afford facilities for attendance on law classes by students who do not intend to graduate in that faculty; but neither medical students nor physicians have to any great extent availed themselves of these opportunities of liberalising their general education. True, further, that Medical Jurisprudence is included in the medical curriculum; but the teaching usually consists principally of medical facts combined with a little of the general practice of law. The principles of the law may never be referred to. Thus it happens that the lawyer and the physician fail each to understand the other's position; and both fail to appreciate the points at issue between them.

To the physician, the law seems an agglomeration of absurdities. There are many things he cannot understand: Why a man can be convicted of murder in England if the victim lives

only for a year after the deed but not if he lives for a year and a day: Why the breaking and entering a dwelling-house (with intent to commit a felony) in winter or summer at 9.1 p.m. should be burglary, but not at 8.59: Why a man should be regarded as twenty-one years old on the first moment of the day previous to his twenty-first birthday, and why he should be presumed to be alive till the close of a particular day if he died any time during that day: Why no amount of medical evidence will prove in court that a boy under fourteen years of age is capable of sexual intercourse: Why the presence of the prisoner when a certain statement was made makes the statement evidence, while his absence makes the statement inadmissible: Why unborn children should be counted capable of possessing all sorts of civil rights, while all children are presumed to be born dead till the contrary is proved: Why it should ever and in any place have been law that the stealing of an ox was only a trespass, while the stealing of a fowl was a felony: Whythere should ever have been any difference in the civil rights of a child born naturally and born by Caesarean section: Why, since law is usually supposed to be mandatory, there should be no English act of parliament authorizing the performance of necessary surgical operations, and why, at the same time, such performance is not illegal.

To the lawyer, on the other hand, medicine seems a multitude of apparently contradictory facts, with few or

no principles. He fails to see why a physician cannot say whether a bullet fired through a man's head will kill at once, or in a week, or even at all: Why there is no "authority" in medicine as in law: Why the physician cannot tell whether a given dose of any poison will kill or not: Why symptoms alone, or post mortem examination alone, or both together, may fail to show the cause of death: Why there should be two opinions regarding the same set of facts submitted to two physicians: Why two opposite plans of treatment of a given patient should both be adjudged proper: Why no medical witness can give a common-sense statement of the certain and crucial signs of death.

Thus it is that law appears to the physician ridiculous, as being contrary to common sense and fact; medicine appears to the lawyer useless - i.e., legally useless, as being devoid of accuracy and authority: while to the logician, be he lawyer or not, medicine is unscientific, because its conclusions are scarcely ever warranted for its premises.

These matters, both in their scientific and in their practical aspects, have often been brought prominently before me in connection with (1) cases in the coroner's court, when counsel appear and examine or cross-examine medical witnesses; (2) cases in which I have been consulted by the Crown prosecutors as to what medical evidence was necessary and available in specified cases; and (3) the every-day duty of studying the medical facts

given in police-reports of violent and sudden deaths, and of considering how far such facts were pertinent to the subject of the cause of death, and how far they were admissible as evidence in court. It has often appeared to me that a great deal of time might be saved, and a vast amount of misunderstanding might be removed, if, on the one hand, physicians had the means of looking at a case from the point of view of the legal requirements of the issue, and if, on the other, lawyers understood something of the principles of the logic of medicine and the necessary limitations of medical science as a source or means of legal evidence.

Usually Medical Jurisprudence is studied from the point of view of medicine; i.e., medical facts, actual or supposed, are examined in their relation to certain "laws" that are presumed to exist as written, clearly defined, enacted entities and which, if not universally known, are at least capable of being more or less easily found out. Such a method of study tends to confuse the student, to obscure the points at issue, and to cast unmerited discredit on the whole science of Medical Jurisprudence, because it gives a distorted image of the subject; it places the facts in a false perspective. A principle that has been enunciated in another connection (a) is applicable here: "The first right of every sys-

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(a) Sir Frederick Pollock: The Expansion of the Common Law, 1904, p. 9.

tem is to be judged in its own field, by its own methods, and on its own work." It will be my task, therefore, to survey the field of Medical Jurisprudence from the legal or judicial coign of vantage, pointing out the broad principles of law and evidence, and the recent tendencies towards any change in legal practice. In the course of executing this task it will be necessary to state the common law of England and its local and statutory modifications; to point out the nature of the medical evidence required as legal proof in causes at issue; to set forth the present position of medical science in relation to the facts required in evidence; and to illustrate the subject from original observations and other sources.

C H A P T E R 11.

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THE REPOSITORY OF THE LAW.

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C H A P T E R II.

THE REPOSITORY OF THE LAW.

The New Zealand Criminal Code, 1893, s. 69, says: "Every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit." This is statutory permission for a surgeon or any other person to perform a necessary surgical operation. There is no similar enactment in England. Is it therefore to be inferred that prior to the year 1893 the performance of a surgical operation was contrary to law in New Zealand, and is illegal in England at the present time?

Take another aspect of this subject. Sir James Fitzjames Stephen says (a): "Every one has a right to consent to the infliction of any bodily injury in the nature of a surgical operation upon himself or upon any child under his care, and too young to exercise a reasonable discretion in such a matter." He adds: "I know of no authority for these propositions, but I apprehend they require none. The existence of surgery as a profession assumes their truth."

From these statements it would appear that usage is accepted as a sufficient reason for consenting to the performance of surgical operations as well as for

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(a) "Digest of the Criminal Law," p. 128.

performing them. Herein we have an indication of where we are to look for the source of the law.

All law is rooted in custom, and derives its strength and stability from usage. To the Greeks, law and custom (a), were one thing. There was but one term for both - νόμος. Professor Bryce says (b): "The great bulk of the rules which determine the relations of individuals or groups to one another have in most countries, until comparatively recent times, rested upon Custom - that is to say, upon long-settled practice which everybody understands and in which everybody acquiesces. In such countries customs were or are laws, and do not need to be formally enounced in order to secure their observance by the people. Custom is simply the result of the disposition to do again what has been done before. What Habit is to the individual, Custom is to the community." Mr Sydney E. Williams says (c): "The usages which common-sense and reason have prescribed as the rules by which men's conduct is to be governed are not only the origin of the law but the law itself. It is only in an ironical sense that we hear the law described as the embodiment of common-sense and the perfection of reason; but these hackneyed defini-

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(a) It is interesting to note the connection in Latin between habit or custom (mos) and morality or morals (mores).
(b) Studies in History and Jurisprudence, 1901, Vol. 11, p. 44.
(c) Forensic Facts and Fallacies, 1885, p. 92.

tions are literally true. For the customs and rules which the common-sense and reason of mankind adopt for their convenience, are, when reasonable and certain, stamped with the authority of the legislature or judges, and become law. And even before they are so stamped they are part of the unwritten common law, and are ready to be declared such at any moment that the occasion offers. It is possible, therefore, without sarcasm to say that law is the perfection of reason, and that what is not reason is not law."

It must not be supposed, however, that all usages and customs are good as laws, or will be recognised as law. On the contrary, there are many tests by which they must be tried before their validity is established. Only three, however, need be mentioned. They are, (1) the custom must be proved actually to exist; (2) it must be reasonable, or rather it must not be unreasonable; (3) it must have the sanction of antiquity - as Blackstone says (a), "In our law the goodness of a custom depends upon its having been used time out of mind; or in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary," - nunquam aliter viderunt esse. The legal definition of "time immemorial," be it noted, is "prior to A.D. 1189, i.e., 1 Ric. 1."

Law is antecedent to statutes; it is antecedent to

(a) 1 Blackstone, 67.

courts; it is presupposed by judges. "The Law," says Lord Mansfield, "consists of general principles, illustrated and explained by cases." Those principles, however, are nowhere found systematically set forth. Many a self-obvious, well-known, universally assumed principle is nowhere enunciated in a written statute, but obtains its validity solely from immemorial custom - "the common law of England," as Blackstone says (a), "being not committed to writing, but only handed down by tradition, use, and experience." "Law consists of principles, not of cases, and cases do not establish principles, but merely illustrate them (b)." On the other hand, "with us the binding force of a rule depends on its having been actually applied to the determination of a concrete case (c)."

It will thus beseen that the principles of the common law become crystallised out in actually tried cases; and the officially recognised reports of these cases do not consist of mere statements of the points at issue and records of the verdicts, but contain also definitely enunciated statements of the principles that were applied to the determination of the facts submitted, and that must be taken into account in every similar case that falls to be decided afterwards, wherever

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(a) 1 Blackstone, 17.
(b) Sydney E. Williams: Forensic Facts and Fallacies, p. 262.
(c) James Bryce: Studies in History and Jurisprudence, Vol ii, p. 267.

English law prevails. Suppose, for instance, that a white man, A, in sport, points a death-bone at B, a blackfellow, who dies in consequence. C, a fellow tribesman, kills A. Can the law of the time of Alfred the Great be applied to such a case? It not only can be, but it is applied; and the judge who tried the issue would lay down the great principles of English common law, having regard also to native customs, on which his decision of the case was founded.

The popular use of the terms "Common Law" and "Case Law" will be apparent. There is, however, another popular term, viz., Statute Law. "Statutes," says Blackstone (a), "are either declaratory of the common law, or remedial of some defects therein." "An ancient custom," says Broom (b), "may be abrogated by the express provisions of a statute; or where inconsistent with and repugnant to its positive language. But "the law and custom of England cannot be changed without an Act of Parliament, for the law and custom of England is the inheritance of the subject, which he cannot be deprived of without his assent in Parliament (c)."

There is no doubt that a vast amount of prejudice against existing laws would be removed if the people

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(a) 1 Blackstone, 86.

(b) Broom's Legal Maxims, 7th edn., p. 23.

(c) 12 Rep. 29.

who are bound by them understood the reason for their existence. "The policy of the law is wise and beneficient, its principles are founded on sound considerations of justice and morality, and law itself is but custom founded on common sense, or in other words is nothing but reason," (a). The more the law is studied the more will it become manifest that the one connecting thread running through all cases, details, technicalities, and seeming absurdities, is the simple principle of custom founded on common sense, that is, of reason. Bolingbroke says (b): "They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws." Such is the connection between law and reason that, as Blackstone says (c), "If it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined."

No doubt much of the law does seem unreasonable to the superficial observer; but in many cases, in order to reveal the reasonableness, one has only to ask the question "Suppose the opposite were the law, what then?"

(a) Sydney E. Williams: Forensic Facts and Fallacies, p. 11.
(b) Study of History, p. 353.
(c) 1 Blackstone, 70.

Suppose the law presumed every person to be insane until his sanity were established: suppose it presumed all children, born in wedlock in circumstances of access of husband to wife, to be illegitimate until the contrary were shown - how could society hang together for a day? When, therefore, we speak of the law as being "reasonable" this, "is no question-begging term, but is the last word of impartiality, learning and common-sense, interpreting trustworthy information. The best human beings can do." (a).

The principles, then, embodied in cases, and the statutes which either declare or modify the same, form the law which is administered in Courts. Neither the legislature nor the executive can interfere with the judicial administration of the law, although the King may exercise, in accordance with law, certain prerogatives in respect to the modification of a sentence passed. The court, by which is meant the Judge, is the only authorized interpreter of the law which it administers. This is why one never hears counsel tell a jury what the law is, without adding "subject to His Honour's direction."

It must not be suppoed, however, that the judge is at liberty to interpret and apply the law as he pleases. On the contrary, he subjects himself to strict rules of

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(a) Charles Fairfield: A Memoir of Lord Bramwell, 1898, p. 195.

interpretation. Some of these rules are set forth in such Statutes as Acts Interpretation Act, Language of Acts Act, Shortening Ordinance. Other principles of interpretation are embodied in the common law itself. For example:- there are strict definitions of time; of whether the singular includes the plural, and the masculine the feminine; of the relation of later to earlier sections; of the proper antecedents in grammar; of impossible or meaningless phrases; of ambiguities in meaning or punctuation; of the values of headings and side notes; of technical and common terms; and a hundred other matters. Not only so, but acts of parliament themselves will be declared by a judge to be void if they bind subsequent parliaments, or be impossible of performance, or contradictory to common reason, or against public policy.

A strict adherence to the principles of the letter and intention of the act and to theother rules of interpretation conduces to make the law as administered by various Judges uniform and therefore certain. No consideration of what the law ought to be, will ever have any weight with a judge when interpreting it. He has to regard it simply as it is. Bacon says (a): "That system of law is best which confides as little as possible to the discretion of the Judge; that Judge

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(a) De Augmentis, Aph. 46.

the best who relies as little as possible on his own discretion."

It is a maxim of law that the honesty and integrity of a judge cannot be questioned, but his decision may be impugned for error either of law or of fact; hence the existence of appeals, in which, again the judges are the interpreters of the law. Blackstone says (a): "Every man knows what satisfaction he is entitled to expect from the courts of justice, and as little is left in the breast of the judges, whom the law appoints to administer, and not to prescribe the remedy." "The known certainty of the law is the safety of it." "Law without equity," says the same author (b), "though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind."

The intention of the legislature, and the reason for the law, may now, and in former times usually was, to be learned from an act itself. For instance, the preamble to the Western Australian Act No. 1 of 1863

(a) 3 Blackstone, 266.

(b) 1 Blackstone, 62.

says: "Whereas from the speedy decomposition consequent on death in this climate, it is advisable to make some provision that will admit of the early interment of bodies on which it may be necessary to hold Inquests, when death may have happened on a Sunday, or at such time before, or under such circumstances, as may have prevented the holding of an Inquest on some earlier day;" and it was enacted that the Coroner may "summon, assemble, and hold an inquest on Sunday, for the purpose of viewing, examining, or dissecting the body, and thereupon such body may be interred, and the Coroner may adjourn the said inquest to any subsequent day for the further investigation of the matter." It is not clear whether, in this case, the legislature contemplated that an inquest might be finished on Sunday; but in practice this is usually done: and acts of parliament in other States, without preamble or limitation, give authority to coroners to hold inquests on Sundays in exactly the same way as on other days.

This illustration will show that before a custom or law is departed from there ought to be good reason for the change - it ought to be distinctly perceived and felt to be necessary - otherwise difficulties may arise. Blackstone says (a): "It hath been an ancient observation in the laws of England, that whenever a

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(a) 1 Blackstone, 70.

standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation." It is indeed a maxim of law that "every innovation occasions more harm by its novelty than benefit by its utility."

One sometimes hears of the elasticity of the law, of how the law can be extended to apply to things and conditions that were not in existence when the law was framed. This notion of elasticity is misleading; for law should if anything, be exact and unchanging. The true view of the law's application is set forth in the following opinions of various judges: "Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules where they are not plainly unreasonable and inconvenient, to all cases which arise, and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised." "It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a

science." "An unnecessary departure from precedents, whether it spring from the love of change, or be the result of negligence or ignorance on the part of the pleader, ought not to be encouraged. It can only lead to useless litigation, delay, and expense." "When the law has become settled, no speculative reasoning upon its origin, policy, or expediency, should prevail against it." "If, by the means of new lights occurring to new judges, all that which was supposed to be the law by the wisdom of our ancestors, is to be swept away at a time when the particular limitations are to take effect, mischievous indeed will be the consequence to the public." The subject of the application of the law is put thus by Sir Frederick Pollock (a): "Forms of pleading and rules of procedure pass away like the matchlock and the pike; but our fundamental methods and traditions, like the principles of the art of war, do not pass away. Julius Caesar would know what to do with a cyclist battalion, and Gustavus Adolphus would recognize his own ideas in the machine gun." Elsewhere he says (b): "This, our law, is now a system capable of dealing with the most complex interests of modern affairs, and disposing of a variety of remedies adapted to different needs.... No development of business or science comes amiss to it."

(a) The Expansion of the Common Law, p. 136

(b) Ibid, p. 26.

I have used the term "English law" without defining what is meant by it. Speaking broadly, for many centuries there have existed two great systems of law and procedure in European Courts - the one termed Roman and the other English, or, as it is sometimes called, Germanic. English law prevails in England, Wales and Ireland. In the third kingdom of the British Isles, Scotland, at the foundation of the Court of Session in 1532, Roman law was adopted, chiefly by French influence, on account of the friendship and alliance of the Scots and French against their common adversary England. Elsewhere throughout Europe, Roman law had existed from the earliest times. Colonization had also carried these systems to many other parts of the world - each nation being a miniature of its parent, and "reproducing, each in its own way, the features of the constitution and government of the old country." (a). At the present time, English Law obtains in Australia, New Zealand, Canada (except Quebec), the United States (except Louisiana), the Hawaiian Islands and India. Roman law is almost universal elsewhere in places colonized from Europe, including Ceylon, British Guiana, and South Africa. It is not to be expected, however, that English law where it exists in "the Colonies" presents exactly the same form as it does in England. On the contrary, it is but natural and necessary, as I have illustrated above, that law should e-

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(a) James Bryce: Studies in History and Jurisprudence, Vol i, p. 5.

volve, and continuously evolve, in other countries to meet special circumstances, just as it is constantly doing in England. Notwithstanding such evolution, however, the law in these colonies "is one law in many varieties, not many laws which happen to resemble one another in several particulars."

A question not infrequently arises as to what laws are in force in a British self-governing colony. The law by which all courts are regulated, and of which they are obliged to take judicial notice, without proof of it, consists of:- (a) The common law and the statutes of England existing on the date of the proclamation of the colony, so far as these are applicable to the circumstances of the colony and are not laws having merely a local and special application in England; (b) all acts of the Imperial Parliament passed since then, applying to and affecting all the King's dominions, or all the colonies, or any colony especially; (c) all ordinances and acts of the legislature of the particular state or colony passed since the proclamation thereof, and at present unrepealed; (d) English statutes passed since the proclamation and adopted by statutory enactment of the legislature of the state or colony. The subject of the application on English law to the colonies is set forth at length in the argument in the case of the Attorney-General v. Stewart, recorded in 2 Merivale, 143.

In America the evolution of the English common law is of peculiar interest, because each State has not only its own statutes but also its own Supreme Court; and there-

fore in questions of common law there is a theoretical possibility of great diversity, since the Supreme Federal Court has not such a comprehensive jurisdiction over States as the Privy Council has over the British Colonies to maintain uniformity. Pollock says that the shock of severance from England and a century of independent judicial and legislative activity have left the organic unity of our legal institutions and science, in all essential features untouched. It will be found then that American developments cast a great deal of light on the modern trends of English law, and that the reports of cases will yield fruitful results to those who are endeavouring to reach definiteness on those principles that lie at the root of all law. It will not be surprising, therefore, if American cases occupy a prominent position in illustrating questions of principle in relation to recent developments of the common law.

C H A P T E R III.

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THE FUNCTION OF LAW COURTS.

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C H A P T E R III.

THE FUNCTION OF LAW COURTS.

A trial is the investigation and the determination of issues between parties. Trials are conducted in courts according to certain recognised rules of procedure. The aim of every trial, civil or criminal, is to consider facts submitted in evidence, to discover and apply the law bearing upon the case at issue, to adjudicate between parties, and to punish if there has been a violation of the law. It is not the aim of a criminal trial to find a victim to bear punishment for an actual or a supposed crime; but to make certain, first, that an offence has been committed; and, secondly, that no person who may be charged with it shall be penalised in any way unless and until he be proved guilty beyond all reasonable doubt.

The chief characteristics of law courts are thus summarized by Sir Frederick Pollock (a): "Courts of justice are public; they judge between parties, and do not undertake an official inquiry, not even in criminal cases or in affairs of State; the court itself is the only authorised interpreter of the law which it administers; and there is no personal or official privilege against its jurisdiction." It is the second and third of these propositions that are most important from the present

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(a) The Expansion of the Common Law, p. 51.

point of view, and that are most commonly forgotten, or misunderstood. Having already dealt with the third, and incidentally with the fourth, I shall now direct attention to the second, which sets forth specially the functions of law courts. The first, the publicity of the court, will call for some remark in another connection.

"Litigation is a game in which the court is umpire" (a). The judge is not a player, much less is he an instructor. He will speak only when appealed to on a question of the rules of the game, which he is expected to know thoroughly, and to state and to apply as may be demanded of him. For instance, in a prosecution for theft, the case may break down because the prosecutor omitted to prove that the thief had not the owner's permission to take the goods: a murderer may be found not guilty because the Crown failed to prove that the articles delivered to an analyst were those taken from a body. In neither case will the court point out, until after the case is closed, the lack of the link in the chain of evidence. Lord Bowen said (b): "The rule that the court is not to dictate to parties how they should frame their case is one that ought always to be preserved. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading that have been laid down by the

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(a) The Expansion of the Common Law, p. 32.

(b) Knowles v. Roberts, 38 Ch. Div. 263.

law." Sir Frederick Pollock adds (a): "Even those rules are not generally enforced by the court, except on the application of a party..... This neutral or expectant attitude of the court is significant for the substance as well as the practice of law..... Another branch of the same principle is that, according to the immemorial custom of Germanic procedure, the court will have nothing to do with making inquiries to find out things for itself. It is not there to inquire, or to do anything of its own motion, but to hear and determine between parties according to the proofs which the parties can bring forward.... Outside the bounds of manifest public knowledge, the court knows nothing but what is properly set before it by the parties, and, except for quite recent statutory powers which in England are not much used, has no means of informing itself."

The "rule of neutrality," so called by Pollock (b), than which "nothing in our procedure is more characteristic, more settled, or more continuous," has of late been less strictly followed. In England there has been a marked tendency to depart from it even in civil cases. Regarding Lord Bowen himself Lord Davey says (c): 'Lord Bowen, in his anxiety that justice should be done, was indulgent - some of his colleagues thought,

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(a) The Expansion of the Common Law, p. 33.
(b) Ibid, p. 34.
(c) Sir Henry Stewart Cunningham: Lord Bowen, 1897, p. 149.

over-indulgent - to slips of practice and mistakes. He would never let a client suffer, if he could help it, from the ignorance or carelessness of his advisers, or even his own obstinacy. One who sat with him for many years speaks of the extent to which he would "let a blundering or obstinate litigant turn round and restate his case, or get his case tried, or do whatever he wanted." "It arose," he said "from his great fear lest the litigant should not, in the end, get whatever was his right in the beginning.""

In criminal trials this tendency is even more noticeable. Sir James Fitzjames Stephen (a) speaks feelingly of the not uncommon scene of a lawyer trying to understand "the confused, bewildered, wearisome, and half-articulate mixture of question and statement which some wretched clown pours out in the agony of his terror and confusion." He also refers to circumstances when the prisoner, confused by the unfamiliar surroundings, and by the legal rules which he does not understand, tries to question the adverse witness, and muddles up the examination with what ought to be his speech for the defence, and, not knowing how to examine, is at last reduced to utter perplexity, and thinks it respectful to be silent. He was of opinion that the interrogagation of the prisoner might be introduced under such restrictions as would prevent any unfair bullying, and yet

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(a) Leslie Stephen: The Life of Sir James Fitzjames Stephen, 1895, p. 209.

tend both to help an innocent man and to put difficulties in the way of sham or false defences of the guilty. Lord Bramwell (a)said: "I quite agree with your leader that the defendant in a criminal case ought to be able to give evidence if he wishes to do so, on oath and subject to cross-examination. And I agree that the time will come when it will be as much a matter of astonishment that the law was once otherwise, as it now is that the law formerly shut out the evidence of parties to civil cases." He agreed that the prisoner should be subject to cross-examination. The jury had a right to know what sort of character the prisoner-witness had. The provision would be bad for the guilty - good for the innocent."

This has now been achieved, and on the whole tends to accomplish the aim Stephen had in view. A prisoner can now be examined on oath, which renders him liable to cross-examination; or he can make a statement as formerly. Sometimes a judge does not hesitate to ask questions of a witness in order to make clear what may have been doubtful either in the examination or in the cross-examination; and in some instances a judge will put a question to a witness which counsel for the defence could have rightly objected to if put by the prosecution.

Of course, such a departure as allowing a prisoner to give evidence on oath has, like every alteration in

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(a) Letter to the "Times," December 15, 1883.

law or procedure, its risks and its disadvantages to the prisoner. In September, 1901, in this State, a prisoner was defended by counsel, who advised him to give evidence. The judge, in passing sentence for manslaughter, said: "I don't know very well what to give you. I want to be as easy as possible with you. In fact, if you had held your tongue you would have got off altogether." The prisoner in his voluntary deposition supplied the one link that was missing in the Crown's chain of evidence. He was sentenced to one month's imprisonment.

It must be pointed out that this expansion, which allows a prisoner to give evidence on his own behalf on oath, is not likely to lead to such a method of examination as is too often presented in the French Courts. Not only are the ordinary rules of procedure strictly enforced in connection with such examination and cross-examination, but recently, in India and in several of the Australian Commonwealth States and in New Zealand, Evidence Acts have been passed defining what questions are improper and what are proper, especially in relation to a cross-examination intended to test a witness's accuracy, veracity, or credibility. The following provisions in the Tasmanian "Evidence Act," 1889, ss. 3-6, are typical of recent legislation. "When a witness is cross-examined to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character, and such question relates to a matter not rele-

vant to the suit or proceeding except in so far as it affects the credit of the witness by injuring his character, the court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it.

In exercising this discretion the court shall have regard to the following considerations:-

(a) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies.

(b) Such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect or would affect in a slight degree the opinion of the court as to the credibility of the witness on the matter to which he testifies.

(c) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

Nothing herein contained shall be deemed to make any witness compellable to give evidence upon any matter

which he is by law now protected against disclosing.

The court may forbid any questions or inquiries which it regards as indecent or scandalous, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

The court shall forbid any question which appears to it to be intended to insult or annoy or which appears to the court needlessly offensive in form.

Such enactments are very necessary in view of the abuse that was formerly possible when there was doubt regarding the law on the point. In the Tichborne case, for instance, a witness who testified that he had made tattoo marks on the arm of Roger Tichborne was asked, and compelled in cross-examination to answer, the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he had committed adultery with the wife of one of his friends. On this incident Sir James Fitzjames Stephen said (a): "The practice which it represents is modern... I shall not believe, unless and until it is so decided upon solemn argument, that by the law of England a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transaction of his past life, however private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by do-

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(a) Digest of the Law of Evidence, 4th Edn., p. 187.

ing so. Suppose, for instance, a medical man were called to prove the fact that a slight wound had been inflicted, and had been attended to by him, would it be lawful, under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs, extending over many years, and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved? If this is the law, it should be altered."

As has been stated above, Stephen's recommendation is being given effect to, and the alteration is being justified by the results. The law has also been expanded in this direction in the matter of the evidence of husband and wife. It is a principle of common law that a husband or wife cannot give evidence the one for or against the other. By statute, in civil proceedings, they are competent and compellable to give evidence for or against each other. By statute also, in criminal proceedings, each is a competent witness for the other on trial, but only on the application of the accused. The necessity for such an alteration in the law has often been exemplified in courts. About forty-five years ago, Mr Montagu Williams (a) defended a man for sheep stealing. The prisoner's wife's evidence would have conclusively proved an alibi, which, by the way, was ridiculed by the judge, but by the law then existing she could not be called. The man was sentenced to five years' penal servitude. A year later he was proved to have been innocent and was "pardoned."

(a) Montagu Williams: Leaves of a Life, 2nd edn., pp. 71-73.

But his wife died during his imprisonment, the remainder of his family were driven to the workhouse, and the man himself became hopelessly insane.

It is to be observed that this law that allows a wife to give evidence on behalf of her husband is a natural outcome of the changed public sentiment regarding the relations of husband and wife as to social and legal standing, rights of property, and such like.

The attitude of the prosecution towards the prisoner in English law courts, and in fact in all courts where the law of England is administered, is characteristically fair. The Crown shall not press unduly any fact in evidence against the prisoner. The law must not be strained so as to establish an offence. Nothing is to be deemed a crime or an offence unless it is clearly forbidden. An ambiguous act is not to be interpreted or applied in a way that is a hardship on the individual. Due effect shall be given to every circumstance consistent with innocence. If there be one single circumstance inconsistent with guilt, then the prisoner shall of necessity go free. If a prisoner makes no statement, or does not take advantage of his right to give evidence on oath, no comment is to be made thereon. But if he does make a statement which obviously is capable of being proved but which he makes no attempt to corroborate, then the judge may point out the significance of the position. Evidence of good character is admissible, but not of bad character, except to rebut the former. If there is any link omitted in

the chain of evidence, by which there may be reasonable doubt as to guilt, the prisoner is to go free.

It is often said the prisoner should be given "the benefit of the doubt." But, as Mr Montagu Williams says (a) "I confess I never could understand what this phrase means. There is no benefit of the doubt. Every person is presumed to be innocent until he or she is proved to be guilty. If there is a doubt in the minds of the jury, it follows that guilt has not been established, and, consequently, that the person is, in the eyes of the law, innocent."

While it is true that in this sense there is no such thing as a benefit of the doubt, there is a sense in which there is such a thing. In a case in which Mr Montagu Williams himself was counsel for the defence, a man was charged with stealing jewels, the property of the husband whose wife he had run away with. The judge said that if the prisoner knew the jewels did not belong to the woman herself, then the prisoner would be guilty, but if the jury had any doubt aboutthe matter - if the prisoner possibly had reason to believe that they were the wife's own property, they might give him the benefit of the doubt and acquit him. I give another instance (Chapter VII, page 103) in which a prisoner was given the benefit of the doubt as to whether or not a child was alive in utero at the time when abortion was

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(a) Later Leaves, 1891, p. 41.

induced.

The morality of an act shall not be taken into consideration in any case where its legality is at issue, however unsatisfactory the law may be in itself. This is illustrated by the case of the R. v. Ashwell, in 1885. A man had borrowed a shilling from another, who gave him a sovereign by mistake. The borrower discovered the mistake an hour afterwards, and appropriated the sovereign. Morally, no doubt, he was as dishonest as a thief. But the question arose whether he was in strict law guilty of larceny. Sir James Fitzjames Stephen delivered an elaborate judgment to show that, upon the accepted precedents of law, he was not guilty, inasmuch as the original act of taking was innocent.

While the physician wishes an account of the patient's former diseases in order to come to a finding in respect to his present condition, a prisoner's former crimes must not be referred to in a trial - nothing must be heard of except what is strictly relevant to the present issue. Further, the prosecution is bound not to conceal any fact they know that is in the prisoner's favour if the law of evidence will allow its admission.

Sometimes a case occurs, as extraordinary as it is rare, and so extraordinary as to give rise to the impression that a fuller report would show that there was misunderstanding somewhere. Such a case is recorded (a) where a physician when testifying to the finding of ar-

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(a) "Medicine," 1898, p. 436.

senic in a dead body was hindered, by the prosecution, from testifying to the fact that the fluid used for embalming the body contained arsenic.

Finally, while the rights mentioned above are allowed a prisoner, he will not be permitted to frustrate the ends of justice by an improper exercise of them. Justice, for instance, demands that a prisoner shall be present during the whole of his trial: but justice also requires that the trial shall take place; and therefore, if a prisoner wilfully interrupt the proceedings when the facts in issue are being tried, he may be removed from the court, and the trial may go on in his absence. If, however, his sanity is being tried, he must be present during the whole proceedings.

In considering the question of court procedure, and especially when advocating changes therein, we ought never to forget that while the Laws of Evidence may on occasion be used as shields of the guilty, they are nevertheless the only safeguards of the innocent.

C H A P T E R IV.

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T H E W I T N E S S .

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C H A P T E R IV.

T H E W I T N E S S.

John Hunter once, only once, appeared as a witness in court. The circumstances and his evidence are detailed by Sir James Fitzjames Stephen (a). The account of his examination, which is somewhat eliptical, is as follows:

"The gist of his evidence was, that all the symp-
"toms were consistent with epilepsy or apoplexy, though
"also consistent with poisoning by laurel water. The
"greatness of John Hunter's name, and the curious dif-
"ference between the practice of that day and our own,
"will excuse an extract of some length from his evi-
"dence. After being examined as to some of the circum-
"stances of the case, he was asked:-

"Q. Do you consider yourself as called upon by
"such appearances to impute the death of the subject to
"poison? A. Certainly not. I should rather suspect
"it to be an apoplexy, and I wish the head had been
"opened. It might have removed all doubts. Q. From
"the appearance of the body . . . no inference can be
"drawn for me to say he died of poison? A. Certainly
"not; it does not give the least suspicion." He was
then cross examined. "Q. Having heard before to-day
"that a person, apparently in health, had swallowed a
"draught which had produced the symptoms described -

(a) History of the Criminal Law, Vol. iii, p. 384 et seq.

"I ask you whether any reasonable man can entertain a "doubt that that draught, whatever it was, produced those "appearances? A.I don't know well what answer to make "to that question. Q. I will therefore ask your opin- "ion. Having heard the account given of the health of "this young gentleman, previous to the taking of the "draught that morning, and the symptoms that were pro- "duced immediately upon taking the draught - I ask your "opinion, as a man of judgment, whether you do not "think that draught was the occasion of his death? A. "With regard to the first partof the question, his be- "ing in health, that explains nothing. Some healthy "people, and generally healthy people, die suddenly, and "therefore I shall lay no stress upon that. As to the "circumstances, I own there are suspicions. Every man "is as good a judge as I am. Court.- You are to give "your opinion upon the symptoms only, not upon any o- "ther evidence given. Q. Upon the symptoms immediate- "ly produced upon the swallowing of the draught, I ask "your judgment and opinion, whether that draught did not "occasion his death? Prisoner's Counsel.- I object "to that question, if it is put in that form; if it is "put 'after the swallowing it,' I have no objection." (Probably the objection was that the words "produced upon" implied causation). "Q. Then 'after' swallow- "ing it. What is your opinion, allowing he had "swallowed it? A. I can only say that is a circum- "stance in favour of such opinion. Court.- That the "draught was the occasion of his death? A. No; be-

"cause the symptoms afterwards are those of a man dying,
"who was before in perfect health; a man dying of an
"epilepsy or apoplexy. The symptoms would give one
"those general ideas. Court.- It is the general idea
"you are asked about now; from the symptoms which ap-
"peared upon Sir Theodosius Boughton immediately after
"he took the draught, followed by his death so very
"soon after - whether, upon that part of the case, you
"are of opinion that the draught was the cause of his
"death? A. If I knew the draught was poison I should
"say, most probably, that the symptoms arose from that;
"but when I don't know that that draught was poison, whe n
"I consider that a number of other things might occasion
"his death, I can't answer positively to it."

"Here more questioning followed, the most important
"part of which was an inquiry whether laurel-water, if
"taken, would not have produced the symptoms; to which
"the answer was, 'I suppose it would.' At last, the
"judge asked the following question:- Q. I wish you
"would be so good as to give me your opinion, in the
"best manner you can, one way or theother, whether,
"upon the whole - you have heard of the symptoms des-
"cribed - it is your opinion the death proceeded from
"that medicine or from any other cause? A. That ques-
"tion is distressing. I don't mean to equivocate when
"I tell the sentiments of my own mind - what I feel at
"the time. I can give nothing decisive."

"Upon this evidence, the judge observed as follows:-

"For the prisoner you have had one gentleman called who "is likewise of the faculty, and a very able man. One "can hardly say what his opinion is; he does not seem to "form any opinion at all of the matter; he at first said "he could not form an opinion whether the death was occa- "sioned by that poison or not, because he could conceive "it might be ascribed to other causes. I wished very "much to have got another answer from Mr Hunter if I "could, - What, upon the whole, as the result of his at- "tention to this case? what his present opinion was? "But he says he can say nothing decisive. So that, on "this point, if you are determining in the case upon the "evidence of the gentleman who are skilled in the facul- "ty, why, you have a very positive opinion of four or five "gentlemen of the faculty, on the one side, that the de- "ceased did die of poison; and, upon the other side, what "I really cannot myself call more than the doubt of ano- "ther - that is, Mr Hunter."

In the case in question there was a very strong chain of circumstantial evidence that would have been corroborative evidence, <u>if it had been proved that the deceased died from poison</u>. This, the most important link of all, was absent; and it will be observed that the court evinced a strong desire that Hunter, without being supplied with any facts from which a trustworthy inference could be drawn, would give an opinion that would decide the matter, i.e. that he would be witness,

judge, and jury all in one. This case was undoubtedly one in which the truth was to be determined "less by science than by probative circumstances which lie beyond its pale."

One can conceive the amazement of the great master of inductive research - the man who "loved to think," on being expected to say whether a draught was the cause of certain subsequent symptoms if he had no knowledge of what was in the draught - of whether poison was present or not. How can any thinker logically say that A is the cause of B, unless it is proved that A exists? It will be observed that Hunter was told he was to give his evidence upon the symptoms only, not upon any other evidence given. The symptoms were consistent with poisoning and with apoplexy. This being so, only an examination of the brain, which Hunter said might have removed all doubts, could have shown that death was not due to natural causes. It is probably safe to say that no jury to-day would find a verdict of "Guilty" if the symptoms were consistent with death from cerebral apoplexy and if the head had not been opened, no matter how many medical witnesses might say that in their opinion poison was the cause of death. If there is a possibility that death is due to natural causes the prisoner will go free - Tutius semper est errare in acquitando quam in puniendo, ex parte misericordiae, quam ex parte justitiae.

The question of the probability of apoplexy occur-

ring in a person of the age and build of the deceased (twenty years and a thin man) was raised, but received little consideration. Casper, speaking from a very long experience says: "Very considerable cerebral haemorrhage seldom or never occurs spontaneously." It was assumed at the trial as a matter of common knowledge that such a cause of death in persons of that age was too uncommon to be pleaded. But such assumptions, opinions, observations and generalisations are subject to review in the light of definite evidence. The following cases came under my observation within the course of two years.

In May 1902, a woman 21 years old, went to a dance one evening. She used to complain of headaches and sideaches. Before going into the hall she complained of feeling not very well. In the hall she said that she was not well. After dancing for half an hour she complained of feeling very bad, and she was taken home in a cab. A physician saw her at 12.25 a.m., when she was in a state of profound unconsciousness, with slow irregular pulse, stertorous breathing and unequal pupils. She died a few minutes afterwards. The post mortem examination showed recent haemorrhage into the left ventricle of the brain. There was no sign of any physical injury, no hereditary syphilis nor anything to account for the haemorrhage - unless it was some "headache wafers" she had taken.

In March 1904, a girl, 15 years old, in domestic ser-

vice, was well at 9.30 in the evening. Next morning she was taken ill, became unconscious, and died in a few hours. The post mortem examination showed blood over the whole surface of the brain. There were no signs of violence, nor was there anything to account for the haemorrhage. The girl was always healthy, save for "bilious attacks" at times.

In April 1904, a barmaid, 27 years old, went on duty in a hotel on a Monday. On Tuesday, the landlord thought she was suffering from drink, and told her to go and lie down. On Thursday, he noticed something peculiar in her manner; and the housekeeper found her lying on her bed and looking as if she had been drinking. She was dismissed from her situation on the same day. Next day she was found in the sea, with her underclothing undone and marked by faeces, the rectum being empty. The post mortem examination showed the brain bathed in fluid blood, but otherwise healthy. There was no injury to the skull or scalp, and nothing to account for the haemorrhage. She was not in the habit of drinking, and had not had any drink. It is probable that the haemorrhage had existed from the Tuesday, and that she had fallen from a platform on the jetty at the water's edge when defaecating.

In February 1905, a boy 13 months old, son of a physician, began to suffer from symptoms suggesting meningitis. He died one week later. The post mortem examination showed a haemorrhage as large as a pigeon's

egg in the substance of each frontal lobe of the brain. There was no history of any injury, nor any sign of violence.

From these cases it will be apparent that cerebral haemorrhage is by no means unknown in young subjects, and probably it is far commoner than is suspected; for it is extremely likely that had no post mortem examination been made, death would not in any of these four instances have been ascribed to cerebral haemorrhage. But supposing death from this cause in youthful subjects were rare, very rare, and occurred only once in many thousand cases, how can anyone say, without a post mortem examination, that any particular case, like the one in which Hunter gave evidence, is not the once?

The appearance of John Hunter as a witness has also formed the subject of a criticism by Dr. Vivian Poore (a). Dr. Poore thinks Hunter made a phenomenally bad witness. Most Judges, lawyers and logicians, however, will say that Hunter was a logical reasoner and a sensible witness. The replies he gave were the natural outcome of logical thinking applied to scientific investigation. To have given an "opinion" such as was desired would have been to yield to that temptation to which medical men so easily succumb that it has become a reproach to the profession that some medical witness can

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(a) Clinical Journal, August 23, 1899.

always be obtained to testify to the possibility of any fact however improbable, to any theory however devoid of foundation, and to any opinion however extravagantly wild.

Dr. Tidy says (a): "It is often a matter for regret that medical men neglect the study of the rules of evidence, and suffer accordingly." If the matter of medical testimony be found fault with, the manner of it is even more open to criticism. In fact it is proverbial that medical men and lawyers make the worst witnesses. On one occasion Mr Montagu Williams appeared for Mr Justice Hawkins, afterwards Lord Brampton, and had to put a few simple questions to his client in the box. Mr Williams says (b): "Another singular circumstance was that he (Mr Hawkins), who ought to have been a scientific witness, was about the worst I ever had on my hands. Instead of giving simple answers to the questions, he did what counsel and Judges always scold witnesses for doing - he made statements."

There is much to be said in explanation if not in excuse for the faults and shortcomings of medical men in the matter of giving evidence in court. Medical practice requires men to be constantly employed in reasoning from signs and symptoms more or less definite to con-

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(a) Legal Medicine, Part I, 1882, p. 7.

(b) Leaves of a Life, 2nd edn., 1890, p. 199.

clusions that are more or less probable and that are seldom capable of being actually verified. Medical proof, in disease, being based necessarily on modes of reasoning that violate every canon of strict logic, seldom amounts to more than a reasonable degree of certainty, for the purpose of action. Legal proof, in a trial, being subject to the strictest laws of evidence, must be beyond all reasonable doubt, for the purpose of punishment. Then if there be a difference in the end in view, there is a much greater difference in the nature of the evidence admissible. To the physician investigating his "case," everything is evidence, and every circumstance, no matter how it comes under his notice, is utilized by him in coming to a finding. If, by training, the natural mind is antipathetic, the medical mind is antagonistic to logic and law. The judicial frame of mind is rare, and perhaps can only be acquired by training. It is human nature to be an advocate, not a judge." (a) "Man," says George Eliot, "cannot be defined as an evidence-giving animal." Assertion is not fact; belief is not proof; and neither assertion nor belief is evidence.

The path of legal evidence, therefore, is a narrow one. A witness must not give hearsay or secondhand evidence; he must not give his own opinion; he must not

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(a) Sydney E. Williams: Forensic Facts and Fallacies, p. 237.

state similar if unconnected facts; he must not say anything as to the character of the person who is being tried; he must confine his attention to questions put to him. Whatever his evidence may amount to, it is but a portion of the evidence which is brought forward by counsel on the one side, tested in cross-examination by counsel on the other, commented on by the judge, and made the basis of a verdict by the jury. It will therefore be apparent that the physician, as a witness, has a double bias to contend with - the natural bias of every human being to be an advocate, and the professional bias acquired in his daily work of dealing with what is legally non-admissible evidence.

Scarcely a week passes without the publication of an article in some medical journal or newspaper dealing with the subject of medical evidence; and seldom does one find that the writers have any definite guiding principles or any intelligent appreciation of the subject they are discussing or of the factors of the problems with which medicine is concerned. What Sir Henry Holland wrote (a) about sixty years ago, is of three-fold force to-day: "It must be admitted, indeed, that this matter of medical testimony is too lightly weighed by physicians themselves . . . No science, unhappily, has abounded more in false statements and partial inferences; each usurping a place for the time in popular esteem;

(a) Medical Notes and Reflections, 3rd Edition, pp. 2, 14, 15.

and each sanctioned by credulity, even when most dangerous in application to practice . . . I am the rather led to these remarks on the nature of medical evidence, and the causes moral as well as physical affecting it, looking at the wondrous advances which have been made in all other branches of science; not merely by the addition of new facts, but yet more by new methods and principles of research, by instruments of greater delicacy, and by increasing exactness of details in every point of inquiry. . . The dissimilarity of the proofs, and the greater difficulty of their certain attainment, must ever keep practical medicine in the rear of other physical sciences."

A physician, being not only a citizen but also an individual specially privileged by acts of parliament and so under special as well as general obligations to the State, may find himself summoned to give evidence in Coroners' Courts, Local Courts, and Supreme Courts. The circumstances regarding "actual practice," "attendance on the deceased" &c. in England and in Australasian countries, as well as the obligations of medical witnesses, have been detailed at length elsewhere (a) Some matters, however, may be referred to as assisting to an understanding of the existing law.

The section of the Coroners Act dealing with the summoning of the physician who last attended the de-

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(a) W. Ramsay Smith: A Manual for Coroners, 1904.

ceased hasbeen much misunderstood. The statutory enactment which allowed a coroner to call such witness did not limit, and was not intended to limit, his powers of summoning any medical witness he chose; but it allowed him to call a certain witness, the medical man in attendance, who otherwise, from the public point of view, should probably not be called if an inquest were deemed necessary. The legislature, by the statutory enactment, showed its confidence in the integrity of the medical profession. In order, however, that the ends of justice might not be frustrated by such a course, a proviso was added that such practitioner should not make a post mortem examination of the body of the deceased if there were grounds for believing that he had directly or indirectly caused the death.

In some States, statutory enactment, as a matter of administrative expenditure binds the coroner in the first instance to the medical attendant or attendants; but nowhere need justice fail, or evidence be wanting, since either the corner or the jury or both, may, before an inquest is finished, call all witnesses they may deem to be necessary. Elsewhere, as a matter of administrative expenditure and departmental instruction, a coroner is expected to call the Government District surgeon if no practitioner has attended. This operates in another direction in furtherance of the ends of justice, since it is generally recognised that a surgeon or physician who is constantly employed in making post

mortem examinations and in giving evidence in Courts is, or ought to be, a more satisfactory witness than the practitioner who has seen but few examinations of any kind and perhaps never saw one made in a medico-legal case.

This tendency to specialism shows itself elsewhere than in Government districts. For some years a London coroner made a practice of calling a certain practitioner as medical witness in almost all inquests, to the exclusion of even the practitioner in attendance - a procedure, be it noted, which is quite legal there. For this he was criticized by members of the profession, by medical journals, and even by jurymen. On the other hand, in other places where similar procedure has been adopted, as in the capitals of some of the Australian States, the medical journals have expressed their approval of the principle and the practice. In America the trend of medico-legal work is in the direction of having specially qualified physicians for this work, preferably as Medical Assessors to coroners.

Counsel sometimes complain of the skill, or want of skill, exhibited by ordinary medical witnesses, and not without some cause. I have seen a witness begin a post mortem examination by making two longitudinal cuts down the skin of the chest in order to remove the whole of the front wall between them; and I have also seen a physician, many years in practice, remove scalp, calvarium &c. by horizontal incision at the level of the

eyebrows, and describe the most obviously diseased organs as healthy.

But such lack of skill is not confined to one profession. A solicitor once applied to me for permission for a witness whom he had brought, to remain in court during the coroner's inquest, on the ground that he proposed to call him to give evidence as to his client's character. Against this client there was no evidence except what he himself might volunteer to give; yet the solicitor was prepared for the conviction and sentence of his client in a coroner's court. Again, in a case of alleged poisoning in which the depositions were submitted to me by the Crown authorities, I had to point out that the depositions were of the most meagre description, and that the statements they contained had no continuity or coherence. There was no evidence of identification of the body, no statement of deceased's name, age, place of abode, date of death, general health, history of illness, or movements. The verdict of the jury stated no real cause of death. It said: "The deceased came to her death through not having medical aid during and after confinement." In another instance, in 1904, the verdict at an inquest on the body of a male child, name unknown, was: "The cause of the death of the said child was suffocation, but there is not sufficient evidence to say whether the child was born dead or alive." The coroner who recorded this verdict was the

leading solicitor in the place.

Having referred to the common law powers of a coroner to summon what witnesses he may please it will be well to state that apart from statutory powers of the coroner (and in some instances of the jurors) to prosecute, a coroner can order the arrest of an unwilling witness whether medical or other, who disobeys a precept, and cause him to be brought into court, and may commit him for contempt if he should refuse to give evidence. At the same time, no witness is compelled to give evidence unless he knows relevant facts; nor is anyone required to do anything that he is incapable of doing or unqualified to do: "lex non cogit ad impossibilia." It follows, therefore, that although a medical practitioner may be ordered to make a chemical analysis of organs of the body of which he has made a post mortem examination, he cannot be compelled to do so if he says on oath he has not the ability. His time or convenience, however, cannot be taken into account in the matter, if he has the ability, and if the coroner should order him to make the analysis. But nowadays, by general custom, such analyses as are required are made by experts at Government expense.

As to post mortem examinations, while a physician may lay himself open to criticism or rebuke by fortifying his opinion which he gives in evidence with the opinions of others who were present, this does not imply that no one else may be present at the examination.

On the contrary, as much "professional publicity" may be allowed to the proceedings as is consistent with securing that no evidence shall be destroyed. Therefore a medical practitioner who is accused of causing the death is allowed by statutory provision in some places to attend but not to take part in the examination, and in all cases solicitors who wish their clients to be represented by physicians at the examination should be met in every possible way. I am aware of what has been said tothe contrary, and also what happened when Dr. Lamson was allowed to be present at the post mortem examination of his victim, but none of these things appear to furnish a reason for departing from the legal principle of allowing every prisoner to have the fullest possible opportunity of knowing and of refuting the charge against him.

The disinterested bystander sometimes if not often sees more than those whose duty it is to examine and report. On one occasion a medical witness in a coroner's court testified that an abscess cavity was at the apex of the lung. As the case was a highly important one involving the professional reputation of an operating surgeon, I was called and testified that I had seen the examination and that the cavity was at the base. The examiner, after a careful verification, was recalled, and he informed the jury that somehow on his first examination he "had got the lung topsy-turvey."

Should the same principle of "professional publicity" be applied to analyses and biological investigations? I believe it should be. I have seen much to commend it and nothing against it. The following extract from the speech of Mr Montagu Williams at the trial of George Henry Lamson will show the attitude of a legal man towards this subject. "The suggestion came from the prisoner, that he should have an analyst present at the experiments. If the evidence of medical experts was to be taken against him, why, in the name of common fairness and common humanity, did you not allow him to have an analyst present, to speak as to the means by which the analysis was conducted? We complaint, and that bitterly, of this. Was there ever a greater piece of red-tapeism than the letter which has been read from the Home Office? Says the Home Office: 'The presence of a third medical man at an official analysis, ordered by this department, is contrary to all practice.' If it is contrary to all practice, the sooner that practice is remedied the better. In common fairness the prisoner was entitled to have some one. To try a man on speculative theories on the one hand, and upon an analysis taken behind his back on another, is trifling with life."

Such a proceeding as I have advocated would obviate the very undesirable and much regrettable occurrence with respect to the evidence of analysts in the case of Cook and Ann Palmer, mentioned in Taylor's "Principles

of Medical Jurisprudence," 1883, p. 9. For, seeing is one thing; criticising without seeing is another. On one occasion, in a case in which I was employed as expert witness for the Crown, counsel in addressing the jury animadverted on the fact of my being engaged. The Chief Justice, who tried the case, while stating that there was no legal objection to the course the Crown had pursued, in engaging one who held a judicial position unconnected with the case, said it would be well that some independent physician should be present at investigations such as I had made. As a matter of fact, this was the invariable practice; and the solicitor for the defence knew that a physician was present in this particular instance on his client's behalf and checked all my observations and experiments. The fact of such checking could only have been brought out by the defence, but they preferred to allow the case to go to the jury as if there had been no checking - and the Crown was helpless.

A medical witness at a coroner's inquest, especially if the inquest is likely to be followed by criminal proceedings, has, unfortunately, but little time to make a complete investigation of the facts and a thorough study of the principles involved in the case regarding which he is giving his evidence. He is therefore in a difficulty; either he must ask for an adjournment of the court, or he must leave the evidence incomplete. Usually the latter course is the only one open

to him. In such a case he ought to be careful not to state any facts beyond what he has actually observed, and not to give an opinion beyond what is warranted by those facts; and, particularly, not to state anything that may be found to be inconsistent with facts of the post mortem examination that he has not had an opportunity of finding out for himself.

It is doubtful if many records of cases of illness can be looked on as trustworthy statements of fact, and, as of value as legal evidence, if they do not contain an account of the post mortem examination.

On one occasion certain hospital authorities issued a certificate of death from natural causes. The police intervened, and I held an inquest. The case-book contained a very careful and completely satisfactory account of the diagnosis and symptoms of an interesting idiopathic ~~"meningitis case,"~~ meningitis, such as might have brought the writer credit in any medical journal; but the post mortem examination showed that death was due to recent fracture of the skull and injury to the brain.

Much examination and cross-examination in coroners' courts might be avoided if facts and theories that had no possible bearing on the case were sifted out beforehand. For instance: The post mortem examination of a body showed a thin skull, and an extensive fracture on the right side at a point of impact marked by a wound of the scalp. The medical witness did not observe whe-

ther or not there was grit in the wound. There was an extensive superficial laceration of the temporo-sphenoidal lobe of the brain on the left side without any superficial mark on the left side of the head. The general evidence was that there had been a good deal of drinking going on, that the deceased was pretty drunk, that there was some scuffling under the verandah of a hotel, that the deceased went along the road for some distance and was found lying on his back unconscious, and that he died unconscious a few hours after. The following questions from the legal point of view required answers: (1) Could the left side laceration and the right side fracture have been caused by the same impact? (Yes). (2) Could the laceration of the brain have been caused by an impact that might leave no marks on the scalp or the skull? (Yes). (3) Could a man in such a case have fallen down from the effects of the laceration and so have received the wound and fracture on the right side? (Yes). (4) Could he have so fallen from the effects of drink? (Yes). There was no evidence to show that the deceased had been struck. A man made a statement to the police that the accused had struck him in the scuffle and that he had hit him back on the jaw; but the circumstances in which this statement was made would have made it inadmissible at a trial and even had it been admitted at the inquest, as it might have been, there was no means of proving that

death was due either directly or indirectly to such a blow; and, apart from this, it would have been the coroner's duty to point out that this statement, being inadmissible elsewhere at trial, had better be disregarded by the jury in arriving at a finding.

Some time previous to this case, there was another, where fracture on one side and haemorrhage on the other existed without any mark of injury to the scalp.

Two days after the former case, a man died who had been drinking and had been brought up in the police court as a lunatic. He had a fit at the police station about the time he was to be examined, and fell down. He was taken to the Adelaide Hospital. There was found, post mortem, a large wedge of "haemorrhage" on the left side of the brain, with its base on the surface, and its apex deep in the substance, evidently several days old. On the right side there was a linear crack of the skull with sub-dural haemorrhage, evidently recent. It was thus probable, if not morally certain, that the haemorrhage on the left side existed before the fracture, and that the fracture was the consequence of the fall which was due to the haemorrhage. The two questions arising here were (1) Could the haemorrhage on the left side be due to "natural causes?" (2) Could it have existed prior to the fracture?

In every case the medical witness should be prepared to give an answer to the questions, "Could the deceased have died from natural causes?" and, "If not,

why not?"

The cases I have narrated will show the advantage of going directly to the point on which evidence is required. No good purpose is served by asking a witness all sorts of questions about the probable length of time a haemorrhage may have existed when the law requires merely to know if it could possibly have existed before a given date.

It will be found in many cases, if not in most, that after the most obvious post mortem appearances have been described, the relevant evidence will best be elicited by asking "What, in your opinion, caused death?" and then asking the grounds on which this opinion is founded. Of course in cases involving a charge of murder or manslaughter, the medical evidence in a coroner's court is usually given in greater detail, much of the non-essential evidence being omitted at the subsequent trial.

It is unwise ever to omit asking the reasons for an opinion. A striking example of this occurred some years ago. On 23rd February, 1904, a man was found with his throat cut. He was seen by a physician who found but little bleeding and sent him to hospital, where he was admitted to a surgical ward. The doctor who attended him in the hospital stated in evidence that he found the man suffering from shock through loss of blood, from which he died about ten hours after. He had made a post mortem examination of the body, except

the head, but he could not say what vessel was cut. The haemorrhage, however, was easy to control. The jury naturally wished to know why it had not been controlled. I therefore summoned the physician who first saw him and ordered him to make another post mortem examination. He stated that when he saw the man the bleeding had stopped by clotting, that he had washed and dressed the wound, that there was no large vessel cut, that the man was semi-conscious and rather comatose but could be roused, the pulse regular and easily compressible, and the pupils about normal. Post mortem he had found the brain congested. The doctor of the hospital was then recalled, who gave an account of the treatment, and said that the man's breathing was heavy and rather stertorous all through, and that when it ceased altogether he was brought round by artificial respiration. He said "I did not consider it necessary at the time to make an examination of the brain: I had what I considered the cause of death." He stated, on being questioned, that he saw nothing inconsistent with opium poisoning. The jury found, no doubt correctly, that death was due to narcotic poisoning. It was proved by other evidence that the man had taken chlorodyne.

Reference has been made above to opinions. The question has been raised whether a medical witness may, or should, give his opinion. Tidy says (a):

(a) Legal Medicine, Part I, p. 17.

"No witness can be compelled to give his opinions in the witness box." On this subject the law is that if a witness has not got an opinion he is not compelled to give one. The Coroners Act, 1887, England, s. 21 (1), says ~~requires~~ a witness, may be asked to give evidence as to how, in his opinion, the deceased came to his ~~to give an opinion as to the cause of~~ death: that is, of course, if he is asked for an opinion and has one. It does not appear whether this is a common law requirement or not; but coroner or counsel would have little difficulty in placing before a jury the bearing of a witness's facts and statements given in answer to questions on the cause of death, whether the witness put his evidence in the form of an opinion or not. The subject of expert opinion is dealt with in the chapter following.

This subject of opinion cuts two ways. In some cases a witness is too ready with an opinion without any facts to support it. Not infrequently a statement is made, e.g., "The body was two hours in the water" or "the child was born alive," which looks like a statement of fact, whereas the question "How do you know?" will show forthwith that it is merely an opinion, and perhaps a worthless one when the witness states his reasons for it. A witness may, as I have seen, endeavour to veil his ignorance by asking whether he is required to answer questions, or give evidence, on matters of opinion; but he has to be told that such questions as whether he has ever seen a man die, say, from

haemorrhage, and whether he has read or heard an account of the symptoms of such dying, are matters of fact, not of opinion. If he did neither, his evidence as to the cause of death is worthless.

No witness, not even the newest graduate, is expected to know everything; and no one, not even the oldest, need be ashamed to say that his attention has not been directed to some particular point on which evidence is required. If the point is really essential, or is said to be essential by either party, he will no doubt be given opportunity to consider it carefully.

C H A P T E R V.

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THE EXPERT WITNESS.

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C H A P T E R V.

THE EXPERT WITNESS.

The law in England as to experts is stated by Stephen (a) thus: "When there is a question as to any point in science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts. Such persons are hereinafter called experts. The words 'science or art' include all subjects on which a course of special study or experience is necessary to the formation of an opinion.....It is the duty of the judge to decide, subject to the opinion of the Court above, whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert. The opinion of an expert as to the existence of the facts on which his opinion is to be given is irrelevant, unless he perceived them himself. Facts, not otherwise relevant, are deemed to be relevant if they support or are inconsistent with the opinion of experts, when such opinions are deemed to be relevant."

It has been decided that the question of a witness's competency as an expert may be raised before he is sworn. In such a case he is examined on the voir dire as to his knowledge or his qualifications to testify on the sub-

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(a) A Digest of the Law of Evidence, 4th edn., pp. 57-59.

ject. On the other hand, the question of his competency may be taken in connection with any particular point that may arise in the course of the examination after he has been sworn. The judge will satisfy himself regarding the qualifications of the witness as an expert; and judges usually do so in a common sense, matter-of-fact manner. The possession of a medical qualification would not necessarily prove one an expert in anthrax; nor would the want of one have disqualified Pasteur as such. There is, however, an impression that a medical witness should be able to give evidence on the facts of any case he has seen, and should be in a position to make himself acquainted with the general literature of the subject in such a way as to give an intelligent opinion on the case. Thus far he is recognised as an expert and treated accordingly. But beyond this there is the witness who by special investigation or study has made himself so conversant with the matter that he may be expected to give the latest scientific statement of facts and of the opinions of others, and to state and defend his own opinion. Casper says (a): "That every 'licensed' medical man is not also an 'expert' in medico-legal, and particularly in psychological matters is very well known to each of my readers of either faculty, who is accustomed to tread the halls of justice and who has gathered his- often very remark-

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(a) Forensic Medicine, New Sydenham Society, Vol. IV, p. 123.

able - experience there!"

The principles involved in the matter of the competency of experts has been well set forth in reference to a decision of the Supreme Court Judicial Court of Maine in the case of Conley v. Portland Caslight Co. (a) The court held that when a witness is offered as an expert it is the duty of the presiding justice to hear and consider the testimony as to his qualifications, and to decide whether the witness is qualified to so testify. He is not bound to determine the fact in advance of the question to the witness which calls for expert testimony. The question itself will then show in what capacity as an expert he is asked to testify, and the presiding justice will rule whether the witness has qualified upon that subject, and also that the subject is one proper for expert testimony. Whether a witness called as an expert possesses the necessary qualifications to enable him to testify is a preliminary question addressed to the discretion of the presiding justice, and his decision must oe final and conclusive unless it is made clearly to appear from the evidence that it was not justified or was based on some error in law. Expert capacity is a matter wholly relative to the particular question. A witness may be sufficiently qualified for one question, and totally unqualified for the

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(a) Journal of the American Medical Association, Aug. 6, 1904.

next. Special skill and knowledge in regard to a particular subject can only come from experience or special study, or both. Mere casual observation, superficial reading, or slight oral instruction is not sufficient.

In the Court of Appeals of Kansas a case involving a question of treatment of cancer was heard which turned upon the exclusion of the evidence of a 'Cancer specialist' in the lower court (a). The Court of Appeals found that the evidence was properly excluded, on the ground that it showed that the witness was incompetent to testify as an expert. Speaking of the competency of the witness, it said, "Competent testimony concerning the value of the plaintiff's services should be given by men of science - physicians of training, knowledge and experience. The witness testified that he was not a physician, and it did not appear that his preceptor was himself a physician, and his opinion was not based on reading and study." On these grounds the Court of Appeals held that the testimony was properly excluded, and in accordance with this view affirmed the judgment for the plaintiff.

The value of an expert's evidence will depend upon the amount of study he has been able to give either by observing personally, or reading about, or discussing with others, such facts as bear upon the points in is-

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(a) Journal of the American Medical Association, April 21, 1900.

sue. A witness will be esteemed, not for his age, nor even for his "qualifications," but for his "experience," which means the amount of thinking he is capable of bringing to bear on the subject under consideration. Buckle says, "For one person who can think, there are at least a hundred who can observe; an accurate observer is no doubt rare, but an accurate thinker is far rarer." Dr. George Keith (a) tells that he asked a sanitary official how much earth he supposed would be necessary for a medium-sized family, say of six or seven, to use in an earth closet. Dr. Keith says: "He considered a little, and then to my astonishment said he supposed about a ton a month. This is of course absurd, but it shows how little an expert on all things connected with water supply may know about a matter certainly cognate to his business. He was, however, equally astonished when I told him that not from calculation, but from actual careful trial over a sufficient period, I had found that half a ton sufficed for a year." To the student of evidence this is no isolated example. How many anatomists or dentists can tell whether the first or second bicuspid tooth oftener shows a double root? How many people, accustomed to estimate size and time, can tell the height of the ordinary tall hat, or how long they themselves have been under examination in the witness box? How many people who read books can tell in what proportion of publications

(a) On Sanitary and Other Matters, 1900, p. 3.

the first line of every chapter is indented? Only an experienced investigator can give an answer with the necessary legal certainty to the most ordinary questions that arise in course of a trial.

If one has been called to give expert evidence, say in gynecology, toxicology or skull fractures with reference to a case at issue, he is expected to make himself thoroughly conversant with the facts of the case as they appear in specimens produced and in the general evidence tendered. But beyond (a) a knowledge of the facts of the individual case, he must be specially conversant with (b) the facts of his subject generally, (c) the limitations of his subject, which will necessitate (d) familiarity with cognate and collateral subjects; and he ought to have (e) some skill in the law applicable to the subject with which he is dealing, in order to prevent waste of his energy in investigations that cannot or will not be brought forward as evidence in the case.

No greater mistake can be made than calling a man with only a general knowledge of a subject as a witness and expecting him to answer questions as to particular facts, in other words, to use him as a deductive logic machine. He is certain to come to grief in cross-examination. Medicine is not a deductive scientę. Dr. Moxon says (a): "Deductive reasoning has been the curse

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(a) Pilocereus Senilis, 1887, p. 161.

of medicine." John Hunter says (a): "The man who judges from general principles only shows ignorance; few things are so simple as to come wholly within a general principle. We should never reason on general principles only, much less practise upon them, when we are or can be master of all the facts; but when we have nothing else but the general principle, then we must take it for our guide."

The man who tries to deduce function from structure, to infer lesions from symptoms, to reason from principles of chemistry, biology, or bacteriology to what "must be the case" in medicine, or surgery, will usually find himself in fault. Even in cases where the answer to a question seems a statement of fact it will be found that it is really a matter of inference, which may or may not be a legitimate one from the premises. I will take an example from "Anatomy" which is looked upon as one of the most "exact" or "authoritative" departments of medical science.

Holden (b) says, "When both sterno-mastoids act simultaneously they drew the head and neck forwards and downwards." Ellis (c) says, "Both muscles acting bend the cervical part of the spine, carrying the head

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(a) George Mather: Two Eminent Scotsmen, William and John Hunter, 1893, p. 184.

(b) Manual of Anatomy, 5th Edn., p. 72.

(c) Demonstrations of Anatomy, 11th edition, p. 64.

forwards." Leidy (a) says, "Most authorities assert that the two muscles acting together bow the head forward, but this appears to be an error in the view that their insertion is posterior to the articulation of the skull with the vertebral column." And MacAlister (b) says, "Each sterno-mastoid rotates the head to the opposite side or abducts it; both can draw it backwards." What is to be made of such statements by these "standard authors?" They are all right in a sense, and all wrong. And they all arise from their authors, even Dr. Leidy, who gave some critical thought to the subject, endeavouring to deduce function from structure, instead of establishing function by studying the muscles in action.

It may be said that such a matter is really a question of physiology, and as such should have no place in works of Anatomy. Possibly this is so, but while the statements are retained in standard works on anatomy they bear the stamp of exactness and are regarded as being well established, uncontradicted facts of science. Let me take another illustration: Suppose a question arose regarding the identification of a spine. The fifth lumbar vertebra in it presents a hiatus in its arch. The question is asked, Might this be the bone of an Australian aboriginal? The witness consults

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(a) An Elementary Treatise on Human Anatomy, 2nd edn., p. 259.

(b) A Text-Book of Human Anatomy, p. 540.

"authorities" and finds that although the malformation in question is found in about 5 per cent. of all white subjects examined, and is found in many different races, it was not found in any of the "Challenger" skeletons of Australians and had not been anywhere recorded as found among such. Would he be justified in saying that the bone produced did not belong to an Australian skeleton? He would be justified in saying that he "did not know" of any case of its occurrence in an Australian. But he ought at the same time to state, if asked, that he saw no reason why such a condition should not occur; and if pressed for an opinion he ought to say that from that bone he could not with any degree of certainty form any opinion as to whether the spine was an aboriginal's or not. As a matter of fact not only has this abnormality been since found, but I have shown that this region of the spine is extremely liable to malformation in Australian aboriginals, and that all the known divergences of lumbar and sacral vertebrae occur in them, and at least one other abnormality not recorded as found elsewhere (a).

In other departments of science greater caution is required, since they are even less exact. In Chemistry one knows what will happen if a certain substance is added under certain conditions to a solution in a test-tube; but a witness is prone to forget, in a question of

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(a) Journal of Anatomy and Physiology, Vol. XXXVII, p. 359.

the physiology of digestion, that the human stomach is not such a test-tube and that the effects cannot be "deduced" in the same way. Where a question of a diseased condition and its cause is involved, the uncertainty is still greater. To an ordinary, untrained, non-cross-examined mind, the following reasoning seems all right: A brain tumour in a certain locality produces certain symptoms: these symptoms are present in this case, therefore a tumour exists in that locality. But, post mortem, no tumour is found. A logician would have told the reasoner that affirming the consequent in a conjunctive hypothetical syllogism gives no conclusion. An expert on brain disease might have told him that most if not all the symptoms that occur in organic diseae may be present, and that nearly all of them may not only be due to functional causes, but may be produced by two different and opposite conditions, e.g. hyperaemia and anaemia of the brain.

Where communicable diseases are concerned the common reasoning, being mainly analogical, leads to even greater errors. Sir James Paget says (a): "There is no disease so specific but that its signs may be confused or complicated with the things that are peculiar to the patient. Syphilis is a specific disease as sharply defined as any, but its course and appearance in a scrofulous man and in a gouty one are very differ-

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(a) Selected Essays and Addresses, p. 70.

ent. Vaccination produces a well-marked specific disease; but in one patient it may be followed by inflammation of lymphatics, in another by eczema, in others by various other troubles; but all these are due in only a minor degree to the vaccination; they come out from the personal constitutions of the several patients which are disturbed by the vaccination, as they might have been by anything else producing some slight fever. This is not a mere question of doctrinal pathology. It is among the first necessities for success in practice that, in the several phenomena of a disease observed in any patient, you should be able to estimate what belongs to the disease and what to the man. A farmer may as well expect success if he sows his fields without regard to their soils or to the weeds that may "of themselves" come up in them, as one of us may expectit if we treat diseases without exactly studying the constitutions of those in whom they occur. And it is remarkable that different effects may be produced by the same poison acting on different persons. Mr Erichsen mentions a case in which six students were infected by the same body; 'two had suppuration of the areolar tissues under the pectoral muscles and in the axilla; one was seized with a kind of maniacal delirium; a fourth had typhoid fever; and the other two were seriously though not dangerous indisposed.' I advise you to read-up the subject of his Art and Science of Surgery. He has given an excellent account of it; and so has Billroth in

his and v. Pitha's Handbuch der Chirurgie."

Facts like these should make witnesses extremely careful in giving evidence as to the effects of treatment on various persons. There is a popular fallacy that every diseaee has its proper drug remedy, and that once an accurate diagnosis is made the physician has merely to turn up some medical "authority" on therapeutics in order to fulfil his whole duty to his patient. But it is the man, not the disease, not even always the disease organ, that has to be treated. A lung may recover from pneumonia, but the patient may die from the effects of the remedies that were employed in the cure. Another fallacy is that very drug has but one action, whereas many drugs have two, a "stimulating" action in small doses and a "paralysing" one in large doses. Further, idiosyncrasies towards drugs are far from common. Finally, few medical practitioners are even in a position to say definitely how much in a patient's condition is due to the disease, how much to the drug employed, and how much to the nursing.

The chief dangers to which an expert is exposed arise from (1) the plurality of causes and the intermixture of effects; (2) the temptation to reason deductively and analogically; (3) the fallacies of the conjunctive hypothetical syllogism; (4) the assumption that something does not exist because it has not come under his notice; and (5) the assertion that since one fact is "true" another and

apparently opposite fact cannot also be "true."

In the mode of examining expert witnesses the practice of the law courts allows a considerable latitude. Not only may "leading questions" be put; but the whole method of examination-in-chief may, and usually does, partake of the nature of "leading." This is necessary; since under the ordinary rules of examination and cross-examination it would be almost impossible to extract the information in a reasonable time and in a useful way.

Books, as most people know, are not received as evidence. In one case (a) counsel for the defence, in addressing the jury, set up insanity on the part of the prisoner as a defence, and proposed to read a case from Taylor's "Medical Jurisprudence." Mr Justice Brett, who tried the case, said, "That is no evidence in a court of justice. It is a mere statement by a medical man of hearsay facts of cases at which he was in all probability not present. I cannot allow it to be read." In the case of Collier v. Simpson (b) which turned upon medical facts, counsel asked that a medical book should be allowed as evidence, on the ground that "When foreign laws are to be proved, it frequently happens that a witness produces a foreign law book, and states it to be a book of authority." Chief Justice

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(a) 13 Cox, 78.

(b) 5 C.&.P? 73.

Tindal said, "Physic depends more on practice than law;" and he held that medical books, which were stated by the medical witnesses to be works of medical authority, could not be put in; but, that the medical witnesses might be asked their judgment, and the grounds of it, which might in some degree be founded on these books as a part of their general knowledge. The books themselves, he said, cannot be read.

A case occurred in which the question was raised whether book knowledge alone could constitute a witness an expert in a trial for poisoning. The Supreme Court of Oregon (a) says in the case of the State v. Simonis that there is some conflict among the authorities as to whether a medical witness is qualified on a trial for poisoning to give an opinion that the symptoms indicate poisoning, when his knowledge was not obtained by personal experience or observation. The books agree that before one can testify as an expert it must first be shown that he is qualified either by actual experience, or by such careful and deliberate study as enables him to form a definite opinion of his own in reference to the matter. He must have a particular and special knowledge upon the subject, and his competency which is a question for the court, must be shown before he is permitted to testify. The mere fact of a

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(a) Journal of the American Medical Association, September 21, 1901.

witness being a regularly licensed, practising physician, is not in itself sufficient to qualify him in a case in which poisoning is claimed.

Reference has been made above to books of authority in medicine. Only two books are recognised in English Law as authoritative in connection with the medical profession and medical practice, viz., the Medical Register and the British Pharmacopoeia. In legal matters "authority" is on a very different footing.

Sir Frederick Pollock says (a), "The judgment looks forward as well as backward. It not only ends the strife of the parties but lays down the law for similar cases in the future. The opinion of a Superior Court embodied in the reasons of its judgment stands, with us, on a wholly different footing from any other form of learned opinion."

In the legal profession there are many "authorities," from the Privy Council downwards. A decision is authoritative as a principle of law, and as law itself, until it is upset or altered. The lower courts are bound to follow the higher. But in medicine, no matter how eminent a physician or a writer may be, his views are of value only according to his experience and are not binding on himself or on anybody else. He may teach a certain doctrine and follow a certain practice for years, and then all at once turn completely round

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(a) The Expansion of the Common Law, p. 48.

on the strength of a single observation, or on no observation at all. Statesments of the most incorrect sort are made and are copied in book after book, and edition after edition, simply because nobody has thought of testing whether they are right or wrong. Even should they be found to be altogether wrong, they die hard. A statement in a medical work, even if original, is only the author's own opinion founded on certain premises. His logic may be at fault, or his premises may be found to be wrong.

There is a class of evidence to which I should hesitate to refer were it not that two eminent American authors, Doctors Peterson and Haines, have written as follows (a): "Quacks and empirics are with us still, making all sorts of fraudulent claims and ridiculous assertions. We have them in our own profession - adventurers, seekers after notoriety and fortune, exploiting some panacea or other. On a plane but little higher than this we have a class of pseudo-scientists, men who occupy a quasi-reputable position in the profession, and seek by every means to enhance their reputations, even by deliberate falsification of their observations, proclaiming new discoveries in pathology and therapeutics which they know to be untrue, but which they feel may pass scrutiny for a long time because of the obscurity of our scientific data and the intricacies

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(a) A Text-Book of Legal Medicine and Toxicology, 1903, Vol 1, p. 16.

of the problems they pretend to solve."

From these considerations it will be evident that there is room for much apparent conflict among medical witnesses. In many cases the divergence of opinion is not so great as the public may imagine, because the real points at issue are not clearly set forth. This may be illustrated by reference to the Maybrick case which has at various times caused so much discussion in medical, legal, and social circles. From the post mortem examination and a knowledge of the results of the chemical analyses of the organs of the body, Dr. Humphreys and Dr. Carter ascribed the death of Maybrick to poisoning by arsenic. Dr. Barron said death was due to some irritant poison. On the other side, Dr. Tidy said that the symptoms did not point to arsenical poisoning, nor did the post mortem appearances. All the witnesses agreed that Maybrick died of gastritis, and that the gastritis was due to <u>some</u> irritant. It is when the question is asked, What irritant? that a difference of opinion becomes manifest. The experts called for the prosecution, finding no irritant except arsenic, said arsenic was the cause of the gastro-enteritis. Dr. Humphreys could make no distinction or recognise any difference between gastro-enteritis due to arsenic and that due to other causes. Dr. Tidy, on the other hand, held that arsenic caused a definite, specific, recognisable gastro-enteritis, and that this was not the sort that was found in Maybrick's body. The conflict

of evidence is thus resolved into a question as to whether or not the gastro-enteritis caused by arsenic is different and distinguishable from every other form of gastritis - a matter that can be determined only by medical research. This was the position that should have been clearly set forth to the jury.

On a critical review of the whole case from the medico-legal standpoint one cannot say that the medical evidence proved that arsenic was the cause of death. The utmost that Dr. Humphreys evidence, like the rest of the evidence for the prosecution, amounted to was that death was due to gastro-enteritis, of which arsenic might have been, not <u>the</u> cause, but <u>a</u> cause. It was not to be supposed that a verdict based on such evidence would be allowed to pass unchallenged; and from the day of the finding to the present time the verdict and the position of the prisoner have formed the subjects of criticism.

Mrs Maybrick's counsel was Sir Charles Russell, afterwards Lord Russel of Killowen. For his biographer (<u>a</u>) the interest in the case is the characteristic persistency with which Sir Charles assailed Home Secretary after Home Secretary, seeking, as it were, to carry his former client's freedom by storming the positions of those who kept the key of her prison house. Immediate-

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(<u>a</u>) R. Barry O'Brien: The Life of Lord Russell of Killowen, 1901, p. 259 <u>et seq</u>.

ly after the trial he wrote to Mr Matthews, then Home Secretary: "I am sorry to say it will be necessary for you to consider this case. Against her, there was a strong case, undoubtedly, of the means being within her reach to poison her husband; but there was no direct evidence of administration by her. But further; but a small quantity of arsenic was discovered in the body after death, and none in the stomach, bile, heart, spleen, &c. The symptoms, all were agreed, were those of gastro-enteritis; but while witnesses for the prosecution attributted it to arsenical poison, a very strong body of evidence was given for the defence that it was not so."

In November, 1895, he wrote to Sir Matthew White Ridley conveying his "strong and emphatic opinion that Florence Maybrick ought never to have been convicted, and that her continued imprisonment is an injustice which ought promptly to be ended. I have never wavered in this opinion. After her conviction I wrote and had printed a memorandum which is, I presume, preserved at the Home Office. Lest it should not be, I herewith transmit a copy. As you know, what happened was that Mr Matthews, after consultation with the present Lord Chancellor (Lord Halsbury) and Mr Justice Stephen, and after seeing Dr. Stephenson, the principal Crown witness, and also the late Dr. Tidy, respited the capital sentence on the express grounds that there was sufficient doubt whether the death had been caused by arsenical

poisoning to justify the respite, and that he ordered Florence Maybrick to be kept in penal servitude for life, on the ground that the evidence led to the conclusion that the prisoner administered arsenic, and attempted to administer arsenic, to the deaceased with intent to murder him. It will thus be seen (1) that such a doubt existed as to the commission of the offence for which Florence Maybrick was tried as rendered it improper, in the opinion of the Home Secretary and his advisers, that the capital sentence should be carried out, and (2) that for more than six years Florence Maybrick has been suffering imprisonment on the assumption of Mr Matthews that she committed an offence for which she was never tried by the constitutional authority, and of which she has never been adjudged guilty. This is itself a most serious state of things. It is manifestly unjust that Florence Maybrick should suffer for a crime in regard to which she has never been called upon to answer before any lawful tribunal. Is it not obvious that, if the attempt to murder had been the offence for which she was arraigned, the course of the defence would have been different? I speak as her counsel of what I know. Read the report of the defence and you will see that I devoted my whole strength to, and massed the evidence upon, the point that the prosecution had misconceived the facts; that the foundation on which the whole case rested was rotten, for that in fact there was no murder; that, on the con-

trary, the deceased had died from natural causes. It is true that incidental reference was made to certain alleged acts of Florence Maybrick, but the references were incidental only, the stress of my argument being that in fact no murder had been committed, because the evidence did not warrant the conclusion that the deceased had died from arsenical poisoning. On the other hand, had the Crown counsel suggested the case of attempt to murder by poison, it would have been the duty of counsel to address himself directly and mainly to the alleged circumstances which, it was argued, pointed to guilty intent. That these alleged circumstances were capable in part of being explained, in part of being minimused, and in part of being attacked as unreliably vouched, cannot, I think, be doubted by anyone who has with a critical eye scanned the evidence.... I do not deny that my feelings are engaged on this case. It is impossible they should not be. But I have honestly tried to judge the case, and I now say that, if called upon to advise in my character of Head of the Criminal Judicature of this country, I should advise you that Florence Maybrick ought to be allowed to go free."

In 1898 he returned to the subject, writing still more strongly to the Home Secretary: "I think it my duty to renew my protest against the continued imprisonment of Florence Maybrick. I consider the history of this case reflects discredit on the administration of the criminal law.... I think my protest ought to be at-

tended to at last. The prisoner has already undergone imprisonment for a period of four times (or more) as long as the minimum punishment fixed by law for the commission of crime of which she has never been convicted, or for which, indeed, she has never been tried, but of which she has been adjudged guilty by your predecessor in the office of Home Secretary."

The subject of reform has been very much discussed. The case of Adolf Beck in 1904 was probably the means of showing strongly the unsatisfactory state appeals to the home office only. A Court of Criminal Appeal was established by the act of 1907. As regards procedure in the lower courts, much has been said, especially in America, for the appointment of a coroner's assessor. In England, it is urged that medico-legal work should be done by the Health Officer for the City or County. No doubt such a system is calculated to work well, provided that a physician suited to the work can be found; but in the case of even the best, there is a tendency to fossilise medico-legal science, instead of allowing a natural development which comes from free statements of facts and opinions by different men in the witness-box. The state expert system of the continent of Europe has been repeatedly denounced by Virchow and other scientists for its fossilizing tendency.

In an editorial article in "Medicine," 1902, p. 499, dealing with this subject in reference to a civil case, (the Patrick case), it is said: "To our mind the only

practical solution of some of the difficulties attending the introduction of expert testimony relates to the manner in which experts are summoned into court. Some extension of the discretion of the court, probably with the consent of the parties to a litigation, is about the only remedy that seems practical. The invasion of the function of the jury, which is proposed in the appointment of a commission, is a reform in the wrong direction. Now and then such a conspicuous case as the one under consideration attracts attention to some polemical defects in the introduction of expert testimony. Those who criticise the present system seem to forget that opinion testimony is given daily throughout the United States, and to a large extent it is accurate and truthful evidence, and is a valuable help in the administration of justice. Now and then a cause célèbre furnishes a text for presenting the diametrically opposed opinions of experts in parallel columns, and it is proposed that by some legal machinery these opinions shall be made to fit into each other so that the medical profession may not be "discredited" by appearing to hold opposite opinions upon the same topic....What is true of opinion evidence is often true of matters of fact. Frequently in courts of law testimony is given as to the state of facts diametrically opposed to each other. As it is impossible that both can be true, it is the business of the jury to decide which is correct. That the juries do not always decide correctly is true, but their

opinions are subject to revision by the judge and the higher courts. If on a certain state of facts leading men in our profession differ, it is important that such difference should appear in the testimony, even though it be said that physicians never agree. We have long been of the opinion that changes in the introduction of expert testimony can be made, such as permitting the trial judge to exercise some discretion in summoning experts, but such changes should come in the way of a gradual development of the practice in our courts and not through abrupt statutory alteration. There should be a gradual evolution in the practice of our courts."

This judicious and temperate criticism will commend itself to everyone who has had much experience of criminal trials in our law courts.

In civil actions under the Workmen's Compensation Act, an attempt has been made in some places to solve the difficulties that arise from a conflict of evidence, by giving power to the Governor to appoint a medical referee. His duty is to examine the applicant and report when called on to do so by the Court under the following conditions:- That the Committee, arbitrator, or special Magistrate shall be satisfied that the medical evidence tendered is unsatisfactory, conflicting or insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee. The practical

value of any system depends much on the manner in which administrative authority is exercised. In one State the Governor appointed two medical referees under the Workmen's Compensation Act; and with the view, perhaps, of obviating any possible objections, the two were specialists - one in gynecology and the other in lunacy.

In crminal cases it has appeared to me that the method detailed in Chapter VII, page 123, has great advantages. In practice in this State it has worked well. In none of the numerous criminal cases in which I have been engaged as expert witness for the Crown has any medical witness ever been called by the defence, although many have been engaged in assisting in the preparation of the defence. It is not the least recommendation of this system that counsel are quick to recognise that facts in favour of the prisoner tell with manifold effect when given in evidence by the Crown witness.

The expert witness ought to know that medical science recognises no "authority." In respect to fact, he ought to be able to state what usually happens, what has exceptionally happened, what not impossibly may happen, and what is improbable as regards happening. The "probability" in any given case is a matter for the jury. He ought to preserve a "clear space" between his facts and his opinions, and to be able to give the reasons for the opinions he states. He ought to be too scientific to be partial or unfair; and he should realise that, having given clear and unambiguous replies, he

is not responsible for the use that counsel may make of them, or for the view the jury may take as to their bearing on the case.

The place of expert evidence in general is well shown in the following quotation from Lord Bowen, one of the most scholarly English judges of recent times (a): "If we are to act in the present instance, we must fall back upon the opinions of experts, and I wish emphatically to state my view, that in a matter like the present, so far from thinking the opinions of experts unsatisfactory, it is to the opinion of experts that I myself should turn with the utmost confidence and faith. Courts of Law and Courts of Justice are not fit places for the exercise of the inductive logic of science. Life is short; it is impossible to place endless time at the disposal of litigants; and the laws of evidence are based upon this very impossibility of prolonging enquiries to endless length. There is hardly a scientific theory in the world which, if we were to examine into it in Law Courts, might not take year after year of the whole time of a tribunal.....

I believe there are many persons in India who endeavour to connect the existence of famine raging over tracts of country with spots on the sun. Supposing that theory ~~be~~ were brought up in an English Court of Law, we should be bound to embark on an endless enquiry into all the in-

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(a) Sir Henry Stewart Cunningham: Lord Bowen, 1897, p. 162.

stances in which spots on the sun had been found to be coincident with famines in India. The truth is, when you are dealing with scientific theories, it is hopeless for Courts of Law to do more than to take the evidence of the scientific man, subject, no doubt, to cross-examination which may or may not condescend to particular instances, which may be brought home to them to show, if it exists, the uncertainty of the grounds upon which their opinions are founded. The result of the admission of this evidence, assuming it, as I do, to be admissible, has been, in my judgment, to show that the endeavour to utilise such evidence launches us upon an enquiry fit only for the leisure of learned and scientific men, but for which the jury system and the judicial system are probably inadequate."

C H A P T E R VI.

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ILLUSTRATIONS OF MEDICO-LEGAL INVESTIGATION.

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C H A P T E R VI.

ILLUSTRATIONS OF MEDICO-LEGAL INVESTIGATION.

Regina v. Madam M.H. for Murder.

There are some points of special interest in this case in which law and medicine touch. For one thing, it was the first case of the sort in this State in which a conviction wassecured, although many prosecutions had occurred, and although proceedings had been stopped in a still larger number of cases but stopped on account of the difficulty of finding evidence. Again, there are some legal points of unusual importance.

On January 29th, 1897, I received from the Police a sealed jar containing, in spirit, the uterus, ovaries, and Fallopian tubes of a woman. The uterus had been cut open along the right side posteriorly. It was 6 inches long and 4 inches wide; the uterine wall had a fairly uniform thickness of about an inch. The uterus and ovaries weighed 19 ounces. The upper part of the vagina, which was present, was healthy, as were also the two ovaries. The os uteri allowed two fingers to pass. The round ligament on the right side was enlarged as if from old inflammation, and it showed recent haemorrhages into its substance. On the inner surface of the wall of the uterus on the right side there was a deep ragged depression, oval in shape, with its long axis an inch

and a quarter in extent, and not quite vertical. This depression, whose lower maegin was a full inch above the internal os, was crossed by a band of tissue formed of the remains of the uterine wall at the spot. Under this band two fingers could be passed. From thefloor of this depression a tunnel extendedupwards in the uterine wall and opened on the outer surface, the external opening being bounded there by a sharp clean margin. The opening was a quarter of an inch in diameter, and it was situated between the layers of the broad ligament. The adjacent part of the exterior surface of the uterine wall, extending from this opening to the level of the cervix uteri, was discoloured and ragged.

The questions submitted to me for opinion, to be given on the depositions and from my own observations, were:- (1) the date of delivery; (2) the term of pregnancy; and (3) the cause of the injuries to the uterine wall.

Had either of the two first questions been given as a known quantity, theother might have been comparatively easy to answer; but in this case both of these unknown quantities had to be discovered or inferred from the condition of the inner surface of the uterus, the size of the uterus as a whole, and a knowledge of the rate of involution of the organ in normal and in septic conditions. Taking all these matters into account, I gave the opinion that death took place not less than four days, and not more than ten after child birth; that pregnancy was far advanced, certainly beyond the seventh

month, and most likely nearly to full term; that the injuries were not caused by spontaneous rupture, but that they might have been caused by a stiff catheter passed through the os uteri; that the depression with the band across it could hardly have been caused by one act or wound, and that the act or wound causing it was not the same act or wound that caused the perforation through the wall.

At the trial the case for the Crown depended very largely on the evidence of an accomplice of the prisoner. Such evidence is sometimes entirely rejected. When it is received, it must be corroborated by other evidence in every essential particular. Unfortunately in this case, before the nature of the accomplice's evidence was known, but after I had given the opinion stated above, I found, on being summoned as expert witness for the Crown, that the medical man who had attended the woman and had given evidence at the Coroner's inquest had committed himself to opinions that could not be substantiated, and that differed essentially from the facts as stated by the accomplice. The trial, accordingly, promised to be of the most searching description, especially as the prisoner was defended by one of the ablest and most eminent counsel in the State.

The original line of defence, I believe I am right in saying, was a theory of spontaneous rupture of the uterus, but this was abandoned while my evidence was being given. In its place the defence made much of

the strong bias shown against the prisoner by the medical attendant of the deceased and the presumption that the woman need not neeessarily have died. On this behalf the defence showed that the doctor on his first visit on January 2nd, thought the woman might have had typhoid fever, and he did not look on her condition as serious. Next day he saw her and found her delirious, and concluded she had blood-poisoning; and he informed the Police that he would not give a certificate, in the event of death, without a post morten examination. The same evening she was moribund, and she died early next morning. These were his own statements. At the Coroner's inquest he give his opinion that deceased had been gone four months in pregnany - more probably over four than less: that the presence of the same sort of material in the uterus and the abscess led him to think they communicated one with the other: that such a rent involved an act of considerable violence: and that it was impossible for the woman to do it herself. At the trial he said on cross-examination that he had omitted to make an examination of the stomach and the head at the post mortem examination, and had been asked about them by the prisoner at the inquest, and had gone back to do so: that the rent let through his fore-finger (obviously incorrect if he referred to the perforation which I found): that he kept the uterus for two days in summer heat without preserving it: that he had it at a meeting of a medical society where it had been handled

by others before it was given over to me: that he had changed his mind about the term of pregnancy: that if he had made a vaginal examination on his first visit he would have done something to save the deceased; and that, if a person who was present had not told him on the second visit that an illegal operation might have been done, he would not, from his examination of the patient, have suspected it.

In my examination I stated that from the evidence given regarding the clinical condition and the post mortem examination and the specimen I saw had examined, death had occurred from blood poisoning, and that the wound in the uterine wall, or the abscess in the broad ligament, either or both, could have supplied the materials or been the source of the poisoning; that recovery from such a condition was not inherently impossible; and that the wound in the uterine wall was prior to the abscess, if there was a causal connection between the two.

In cross examination I said there was no impossibility in the patient herself making the wound in question, considering how expert some women were in procuring self-abortion; that, assuming that the perforation was made by the catheter produced (a gum elastic one), I thought it was not all made by the first insertion: that, if the catheter hadnot been removed, repeated applications to an ulcerated surface, continued over a day or two, would cause loss of substance at that part

of the wall, and that at lest the catheter might, by the patient herself or some other person, have been pushed through.

The difficulties beset the Crown prosecutor were serious and unusual. He had to call the original medical witness and tender his evidence as given at the inquest which, in many essential particulars, was obviously inconsistent with fact; and then he had to lead other medical evidence, different on these essential points, in such a way as to convince the jury of its accuracy and trustworthiness.

After the examination by counsel was concluded, the Chief Justice, who tried the case, put a few pertinent and necessary questions to me about symptoms produced by a dead foetus in utero and the occurrence, or not, of decomposition after insertion of a catheter with or without puncture of the membranes.

In summing up, the Judge directed the attention of the jury to the peculiarly painful aspects of the case. Deceased was a woman of a quiet, retiring, stay-at-home disposition, who had several children, and she had become pregnant during her husband's long absence in another Colony. In this condition she consulted the prisoner, who advertised as a "doctoress," with the result that the prisoner undertook to perform an operation. Since there was no definite proof regarding the condition of the foetus at the time of the consultation and operation, and since it was born in a putrid and offen-

sive condition, the judge thought the jury might reasonably give the prisoner the benefit of the doubt (a) as to its being then alive. That being so, they might find that the prisoner undertook to bring on premature labour in the case of a woman carrying a dead foetus, an operation not in itself unlawful; but that, in carrying it out, she exhibited such want of skill and such neglect of proper precautions as led to a fatal result. The jury found her guilty of manslaughter, and she was sentenced to three years' imprisonment with hard labour.

In this narative I have not given details of all the difficulties connected with the non-medical aspects of the evidence. As regards the medical facts, I am able to supply a statement, gleaned afterwards, of what actually occurred. The deceased went to the prisoner's house on December 16th, and had a catheter inserted next day. Up to the 20th, deceased was not very well, and when the catheter came down she herself kept pushing it up. On the 24th she was delivered of a dead and putrid child, with a double coil round its neck. She left the house in a weak state on 31st December.

It may not be amiss in connection with this case to give in detail, the evidence which was corroborated by others, of the witness who was considered an accomplice, since it shows the relation of the subsequent

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(a) See above, p. 38.

evidence to the facts and opinions set forth in the evidence in the Crown's possession previously.

Evidence of A.M., single woman, Adelaide. "I know Madam H, the prisoner. I went to her house in December. (The judge intimates to the witness that the Crown Solicitor has informed him that she has been communicated with, and that she is willing to give evidence. Witness - "I am willing to tell the truth"). I went to the prisoner's on the 12th December, Saturday night. I had known her before, about four years ago. I met her about a month before the 12th December, and told her something then. I was in the family way and went there to live. Prisoner, her husband, and their daughter E. lived in the house. While at the prisoner's I saw the deceased on the night of the 16th December. She came late at night when I was asleep in bed. I heard walking and talking in the room, and it woke me up. When I woke up the prisoner was in the room beside deceased and E. There was another bed in the room in addition to the one I was in. I heard the prisoner ask the deceased what her name was, and she said "Fanny." Prisoner said "I can't remember you at all." Fanny brought a black Gladstone bag and a brown paper parcel. Next morning I saw she had a wrapper, two night dresses, and some other things, two or three handkerchiefs, two pairs of stockings, one pair on and one pair off, and an old pair of stays in a bag and one

pair on. She wore a black serge skirt and a double breasted street jacket and black hat, low crown and crape flowers. She looked as though she was pregnant; she looked like a woman about to go to bed; that is on the verge of confinement. Fanny did not go to bed while the prisoner was there. The prisoner went away and told her not to get up till she came to see her in the morning. Next morning, 17th December, Fanny got up and had breakfast between 9 and 10 o'clock, and went to bed again. E. came into the room after she had gone to bed. After breakfast the prisoner came in: she wished me good morning. She told me to get some warm water. I brought it in. She told me this outside. I took hot water in a kettle. I put the water in a dish, a wash-hand basin. The prisoner came in. She brought a bottle of vaseline in one hand and something she called a catheter in the other hand, an instrument like this one, but I think a little bit smaller. It had what prisoner called a stilleto in it. The stilleto was like the one produced. I saw it when it was new with the ivory end on, but prisoner told me she cuts them off: they are too long sometimes. She washed her hands and I saw her put the point of the catheter in the vaseline, and put a pillow on the floor by the side of the bed. She said "That will do Annie," and I went out and closed the door after me. No one told me to. After I had finished washing up, I went back to the room. Fanny was on the bed when I went in: she had a morning wrapper on. The prisoner was in the room. She washed

her hands and told me to empty the basin. The water was coloured. The basin was on the wash-stand all along. The liquid in it looked like Condy's fluid. I emptied the basin - I went back into the room, and took the basin back. Fanny was putting her stockings on. She spoke to me and showed me on her chemise what looked like blood. She had a towel on over her private parts. The towel had blood on it. She undid it in front and showed me. She was standing at the side of the bed when she showed me this. All she had on was a night-dress and chemise and dressing-gown. She was about after this. In the middle of the day she said something, and she took the towel off. The towell was saturated with blood. When she was putting her stockings on in the morning and after I had emptied the basin she said something to me. (Crown asked for the statement to be received (1) As a statement as to deceased's ~~death~~ health. (2) As a complaint. The Chief Justice said he thought it safer to reject it as evidence). Up to Sunday the 20th, deceased was up and not very well. On Sunday morning she got up. She had only a cup of tea for breakfast, She lay down on the bed all day. She had a wrapper on, and had breakfast in her room. She always did. Madam went backwards and forwards. The prisoner came into the room. The deceased was lying on the bed. The prisoner was sitting on the side of the bed. The prisoner she she was not to be afraid; that she would be all right. She asked if she felt any

pain. She said she felt pain her head and back, and slight pains in the stomach. The prisoner went out of the room. The deceased kept pushing the catheter up. Deceased took the catheter out; she put her hands up her clothes and took the catheter out. There was water in the dish. I brought water in. Before the prisoner went out of the room the deceased said to the prisoner that it wouldn't keep up, and the prisoner told her to take it out and Annie would give her water tp put it in. The prisoner said the womb was too open, and it would not keep in. The catheter was like the one I first saw, about the same size. The deceased wore clothes, I saw them. The deceased was up on the 22nd, Tuesday, for a little while. D.W.* came there on the 22nd December. Prisoner spoke to me on the evening of that day. I was in the verandah washing up. She said "Bring in some water into the back bed-room." She was going to see to the girls. I did so. It was warm water. I went to the back bed-room where Fanny was. D. was in another room. On Wednesday Fanny was a little better, but complained still of the pains in her back. The deceased wanted to lie down in the afternoon. She was crying. Prisoner told her not to be

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* The facts about D.W. are these: Her menses stopped on the 22nd August. In October she took medicine from a woman. On 22nd December she went to Madame's where a catheter was passed into the uterus. There was a good deal of pain and some discharge of blood. On the 23rd she had intermittent pains. On the 24th at 1.15 p.m. the waters broke and she was delivered of a child. The placenta came away at 2.30 p.m. On the 26th she went home.

afraid; everything was going on all right. Deceased was very restless that night. She was not very well. The prisoner spoke to the deceased when going to bed. She said "If you should be taken bad in the night call Annie or Mr. F.; I will leave a candle." She was not very well. The prisoner said "Go and ask if she will have an egg for breakfast, I will be in directly." The prisoner came to the deceased after beakfast, and asked her where she felt the pain. The deceased said in her head and back. The prisoner said "You are coming on nicely." The deceased seemed to be the same. The prisoner told me to bring in some warm water. I brought it in in a basin. Mr F. brought a bucket of water to the door. He put it down at the door. The prisoner was in the bed-room. She took it into the bedroom. In the afternoon the deceased was confined. That was after the bucket was brought. The prisoner said if she did not hurry up she would have to send her to the hospital in a cab. The prisoner told the deceased to bear down. I gave the deceased a towel. She put it on the foot of the bed, and tied it on to the iron and held the other end in her hand. The prisoner came into the room and said the deceased would soon be all right. The prisoner put a pillow down on the right side of the bed. She said all her pains had left her. The prisoner told me to go and get water to wash her hands. I went out for a little, and was not out very long. The prisoner told me to make the other bed up

so that she could put the deceased in it when all right. I put blankets on the bed. Prisoner said "Come here Annie, if you want to see a sight you might never see again." I was at the foot of the bed. I saw the prisoner deliver the deceased of a child. I noticed the child had the cord around its neck, the navel string twice around the neck. The body was turning black. The face was white. The smell was nasty. The child was dead and had an offensive smell. Prisoner went out for about ten minutes and came back and put the child in a bucket. The child was fully developed. The bucket containing the child was put into the back verandah which was enclosed. I saw the child again in the evening. D.W's sister, Mrs Q., was also there. Prisoner also showed it to her. I went to town that evening. I returned the following night, Christmas night. I saw the prisoner. She said "What brings you back tonight." I said "You knew I was coming back this evening." Prisoner said "I have had a terrible time of it all day with Fanny;" she has been singing out about going to die and frightened the other one into hysterics and I want the house in quietness." She said my baby would make a noise running about and the only thing for her patient was quietness. I asked where I was to go and what I was to do, she said if you be quiet you can sleep on the sofa in the dining room. She said she did not want any funeral or inquests at her house. The deceased was in bed all the time; she always seemed the same. I remember E.B. Prisoner asked E.B. if he

would take the responsibility of removing the deceased. She said "I don't think she is capable of walking." E. then said the deceased wanted to go. E. said "I will go out and take her over." She went out to the verandah where her mother was, and she came back and said to Madam "She wants to go." The prisoner said "Will you take the responsibility? I don't think she can walk, but if you like Annie will help you." Madam asked me, and I went. I accompanied them to the Adelaide Railway Station. We went by the Glenelg train to Victoria Square, and took a cab to North Terrace Station. She walked a little way without assistance and then caught hold of my arm. E. was walking beside her. The deceased said she felt weak. She leaned on my arm pretty heavily going down the station steps."

On the subject of "Self Abortion," the possibility of which formed one of the subjects of examination, I may remark that this operation is not uncommon. On one occasion I was called in consultation in the case of a married woman suffering from septicaemia who, without special training or instruction, had procured self abortion by instrumental means, and this proved to be the third occasion on which she had done so.

Casper (a), after describing the recognised and proper procedure for inducing abortion says: "This

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(a) Forensic Medicine, The New Sydenham Society, Vol iii, p. 408.

method of procedure is only known to experts, and can only be employed by them with any prospect of attaining the desired result." Since Casper wrote the number of "experts" both inside and outside of the medical profession has increased, and it has also become amply evident that many women who lay no claim to expert knowledge have induced abortion in themselves by employing the expert's method.

The practice of criminal abortion, judging from the instances that have come under my notice, is common, and people's ideas on this subject are sometimes, to use no harder term, very peculiar. On one occasion, a solicitor called on me and informed me that a gentleman had come to him and stated that a young lady had arrived in town with a catheter in position, which had been placed in the vagina there by a female abortionist. The lady, during the day or two it had remained there, after paying a ten guineas fee, had changed her mind and wanted to retain the child and carry it to term, seeing that circumstances had rapidly changed; and the gentleman who had accompanied her, who was not the paramour, wished to know whether an information should not be lodged against the abortionist. The legal position had been laid before him by the solicitor, who now asked my advice about the medical position. I saw the gentleman with the solicitor and advised them to send the lady to a private hospital; and I said that I would explain the circumstances to a reputable medical practitioner

and see the patient in consultation with him if he consented to take charge of the case. This was done. We made an examination and found that a gum elastic catheter that had been introduced into the vagina, had coiled up there and was in a harmless position; also that the course of pregnancy had not been interfered with and that no mechanical injury had been done. The young lady took the advice we proferred which was to go home and arrange for her marriage, and she was thankful to get off without bodily injury and with only the loss of her fees to the abortionist.

C H A P T E R VII.

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ILLUSTRATIONS OF MEDICO-LEGAL INVESTIGATION (Contd.).

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C H A P T E R VII.

ILLUSTRATIONS OF MEDICO-LEGAL INVESTIGATION (Contd.).

Regina v. Beard for Murder.

The annals of crime contain many instances of clues that have been found in most unexpected ways and that have led to the clearing up of known mysteries; but the records are fewer that tell of the discovery of unknown crimes through trivial statements made and commonplace acts done by the criminal. To this latter class, however, the following narrative belongs. It shows that, had it not been for what might be called the merest accident, at least one murder might have for ever remained undiscovered or unknown. The narrative moreover shows the advantage of the co-operation of the medical witness with the detective staff in inquiries involving intricate medico-legal problems.

On the 17th May, 1897, I received from the Police authorities a broken skull with a lower jawbone and some pieces of cranial bones, a packet of hair, a specimen of soil, and a Snider Carbine and cartridges. I received also another skull and lower jawbone, the bones of the two upper arms and two forearms and one metacarpal, a packet of hair and some bones of a horse. Briefly the facts were these:- A kangaroo hunter, Beard by name, had been arrested and charged with "unlawful posession" of goods, consisting of clothing and other ar-

ticles which had belonged to a young man who had been in company with him. The prisoner, in volunteering an explanation of how the property had come into his possession, stated that the young man, Wallie Richards, had shot himself accidentally, between two or three months before, in pulling a rifle out of a cart, and that another young man, Joe Marlo, whose property he also possessed, had been killed by the kick of a horse some thirteen months previously: and he took the police constable to the place where he had buried the bodies, and identified the remains as those of his companions. In consequence of these visits the coroner was informed. As the result of proceedings, Beard was committed for trial at the June Session of the Supreme Court of South Australia on a charge of two murders.

At the time I received the skulls, there was no evidence, apart from the statement which the prisoner had volunteered to make, that the remains were those of Richards and Marlo. Since nothing but the skulls had been inspected I informed the authorities that it was seential that the bodies and everything belonging to the bodies should be exhumed and brought to Adelaide. This involved a journey of 428 miles by steamer, 380 miles by coach over a track termed by courtesy a road, a night's camping out, and all the unpleasantness inseparable from exhuming and conveying remains that were by no means fresh. All this was accomplished in twelve days by an active and intelligent young tropper of the name of Clarke, who had investigated the case to this point.

So many and such a variety of important subjects fall to be considered in connection with these two cases, ~~and~~ that I shall detail the facts at some length. The bodies, which were buried about 18 inches deep, had been twice exposed for inspection and twice re-interred, except the skulls which had been taken away at the second exhumation. Clarke took up the remains, put them separately in sacking, placed them in a specially made zinc box, 30 x 22 x 10 inches in size, brought them the long journey I have mentioned, and handed them over to me on the 30th May.

Meanwhile I had examined the skull, A large part of the left side of it was wanting. Packed inside the skull were some teeth, nine pieces of bone, and a packet of hair; also a lower jawbone. This lower jawbone was strong and well ridged. The teeth in both jaws were all present except two, which had probably fallen out when the skull was exhumed, since their sockets were fresh and open. The last-come wisdom teeth had grown through the jaws and were probably just cutting the gums at the time of death. On filling the skull with damp sand and placing all the pieces in position, I found there was a rounded hole - apparently a bullet hole - on the left parietal bone above and external to the point of junction of the sagittal and lambdoid sutures. From this as a centre five cracks radiated outwards, most, though not all of them, stopping at one or other of the sutures. In addition to these radiating cracks there were others at right angles to them. They thus formed

a spider's web pattern. All the pieces of bone fitted together accurately, and all the parts of the skull were present except one or two small pieces in the temporal region. The direction of the bullet appeared to be from the point of entrance towards the foramen magnum. There was no appearance of any opening of exit, nor was there any sign of the bullet having struck any part of the interior of the skull. The outer part of the left orbit was fractured just above the frontomalar suture; and a crack extended from this orbit across the forehead and ended above the outer part of the right orbit. The inner table was not involved in this last crack.

My experience of gunshot wounds and my knowledge of the conflict of statements among authors on this subject, showed me that it would be impossible to express a decided opinion and give trustworthy evidence on these injuries without having recourse to accurate observations and experiments. Accordingly I tested the general shooting qualities of the Snider carbine, which was said by Beard to be the one with which Richards had shot himself, and which was the only serviceable weapon they had with them; and I studied the effects of bullets fired from it at bones of varying hardness, brittleness, curve and tickness. Comparison experiments were made with the Martini-Henry rifle and an Adams's Army revolver, the effects of the shots being examined and the

condition of the spent bullets noted in every case. I wished to determine the size and shape of the hole of entrance on firing at a surface perpendicularly and at an angle; how far this hole gave an accurate indication of the "line of fire;" also the size, shape, and amount of fracture at the hole of exit. I was also able to compare the effects of gunshot wounds on the living and the dead body.

It was found that a bullet fired so as to strike the surface of a skull or similar bone perpendicuarly, may cause so much shattering or pulverising just at the spot, and may show such an absence of bevelling of the bone, that one could not venture an opinion as to how the bone had been struck. On the other hand, a bullet striking the surface at an angle usually produces more or less bevelling of the bone; and this bevelling, when present, is a very accurate indication of the bullet's course. The presence of bevelling I would regard as positive evidence; its absence I should not regard as evidence at all. The hole of entrance, in the case of bullets fired at an angle, is more or less oval according to the smallness or largeness of the angle made by the bone and the trajectory of the bullet, and gives a good indication of the line of fire. The size of the entrance hole depends on many conditions. In a soft bone, like the nasal bone of a sheep or ox, it may be considerably less than the size of the bullet that made it. When a hard bone is hit with a soft bullet, the

hole may be much larger than the bullet, which usually flattens out in its passage through, if the charge of powder is sufficient to drive it through the bone. In a skull hit at a distance of a few yards with a Snider or Martini-Henry rifle the hole is usually a little larger than the bullet. As regards the hole of exit, I have never found this smaller than the entrance hole but invariably larger. The amount of breaking or shattering also depends on several conditions. The snider bullet, larger heavier, softer than the Martini-Henry, travelling at less velocity and with less spinning, causes more fracturing on a large scale; while the smaller, lighter, harder solid bullet of the Martini-Henry travelling at greater velocity and with a high amount of spinning causes more pulverising at the spot but less extensive fracturing around and away from it. My experiments in this respect agree in results with what is generally accepted as true where observations have been carefully made. The fracturing at the point of exit was invariably greater than that at the point of entrance. Whether this applied to long ranges as it did to short I did not then determine.

I was able to compare the effect of bullets on the living and the dead subject in this way. A young man named Brown shot himself in the forehead with a small Colt's pistol, slightly rifled. The bullet flattened itself against the surface, entered the glabella by a round hole, causing a fissured fracture of the outer

table, splintering the inner table and damaging the dura mater. The bullet was extracted during life along with the pieces of bone amongst which it was lying just within the entrance hole. I procured the pistol, and a cartridge similar to the one Brown had used, and took for a mark a fresh skull-cap wrapped in a fold of waterproof. This skull was older than Brown's but thicker and belonged to a subject worn out with cancer; and the point of the forehead aimed at was higher up than the glabella. The hole of entrance was larger than the bullet - the size of the flattened out missile.

Further comparison was afforded in this wise. As suming that the injury to Richards's skull - whether suicidal, accidental or homicidal - was caused during life, I tried the effect of the rifle and bullet which caused the injury, first on a skull-cap, and then on an untouched head of a dead body. In both instances the conditions were made as similar as possible to those existing in the living body, and the results closely resembled the injuries to Richards's skull. The bevelling, the stellate fracturing, the lines of fracture at right angles to the radiating cracks, were all reproduced. But these experiments showed one striking result - viz: the breaking up of the bone at the entrance point into five segments. I wondered if this was characteristic of the Snider rifle and bullet, or if the Martini-Henry produced a similar effect. In order to determine this, I made experiments with the two ri-

fles on kerosene tins at distances of four and fifteen paces. The result was unforeseen and curious. The Snider bullet showed a five-sided hole and the Martini-Henry a four-sided, at four paces; while at fifteen paces the Snider showed a six-sided hole and the Martini-Henry a five-sided. This was the uniform result of about a dozen trials. How far this result could be relied on as an indication of the distance at which the fatal shot was fired is a question I could not determine, but it demanded to be included among the circumstances that one had to bonsider.

Another point had to be determined by experiment, viz., the amount of singeing that would occur at a definite distance: not, on the one hand, because this was of vital importance, nor, on the other hand, solely because "some fool was sure to ask about it," but because it had been raised at the Coroner's inquest by a medical witness, and in such a way as to make one certain that counsel for the defence could make the most of it at the trial. My experiments were made with the Snider rifle, and in order that they might be as delicate as possible, and the results made easily demonstrable, I used, not hair, but sheets of cotton-wool. The result I arrived at in this particular case is, I believe, applicable to the majority of cases, viz., that absence of singeing means nothing and that its presence rarely allows one to form an opinion sufficiently definite to

be of much use in doubtful cases.

When I came to examine the exhumed remains, I found the following conditions. The bones of the neck were among the earth brought with the body. The bones of the forearms and legs were among earth inside the clothes. The bones of the upper arms, thighs, pelvis, spine and chest were surrounded by adipocere and the decomposing soft parts. A leather strap was fixed tightly round both ankles with its long end loose. The skin had remained on the chest and arm-pits, and it resembled dried parchment. The hair of the arm-pits and of the pubes remained, and was preserved. Parts of the clothing were covered with larvae and flies. The carpal bones were all missing save one; as were also most of the metacarpals and also the phalanges both of the hands and of the feet. One cervical vertebra was also missing. Otherwise the skeleton was complete. Before cleaning it I examined every bone separately. The right tibia and fibula were a quarter of an inch longer than the left. On the inner surface of the right tibia, a little way above the ankle, there was a raised roughened surface of bone like the outside of half an almond, and lower down, the region of the epiphyseal line showed overgrowth, presumably from irritation. The proximal part of the first phalanx was smashed through the middle of its shaft, the distal portion being missing.

At the trial, I was engaged as expert witness for the Crown. In this State a prisoner on trial for a cap-

ital offence is given all possible facilities for his defence. This man was defended by a well-known Q.C., and everything that could tell in his favour received due weight. As counsel informed the judge and jury, a great deal of time that would have been taken up in examination and cross-examination was saved, and the facts for and against the prisoner were much more definitely determined, by the counsel and solicitors for the defence having a detailed statement of all my observations, experiments, and opinions, and by conferring with me before the trial. At this conference they had the further benefit of the advice and criticism of two medical men of their own choosing, who, however, were not examined at the trial. This was the second occasion on which such a procedure was followed; and the judge and the counsel on both sides expressed their appreciation of its great value in cases involving technical details and grave issues.

One other incident of this trial is noteworthy. It was the first occasion in the history of criminal trials in the State on which a skull had been produced in Court, and the judge explained that he allowed, or ordered, its production because certain statements made in evidence made an inspection of it by the jury necessary. The sight of a battered skull by a jury of laymen is no doubt calculated to work on their feelings consciously or unconsciously, and it influence their verdict; and the necessity of breaking a wise rule arose

in this case from a possible difference of Crown medical evidence on one particular point, but that a vital one, which intelligent laymen could perfectly appreciate and judge when demonstrated to them on the skull in question.

The father and sister of the murdered lad gave evidence as to a long illness of the deceased during which a piece of bone was removed from his leg. A woman who was in the habit of mending his clothes indentified her own sewing in portions of the clothing that I had removed from the decomposing remains. Other witnesses testified to peculiarities in the teeth; and these and other pieces of evidence placed the identification of the body beyond any reasonable doubt.

The only plausible defence that could be led was the theory of accident, but to this theory there were two almost insuperable difficulties. In the first place the prisoner had committed himself to a story that could not be substantiated. He had stated on oath at the Coroner's inquest that he had found the body with the head six feet from the tail of the cart and pointing in that direction. Now, assuming, as one must almost necessarily assume from the state of the skull, assume that the man fell where he was shot, with his feet as the pivot, this would mean that he was over eleven feet distant from the cart when the rifle went off - a manifest impossibility, seeing that the distance from the hammer to the muzzle of the rifle was 25 inches

and the length from the fingers to the breast of the deceased was 32 inches - an available total of only 4½ feet when one allows for the grasp of the muzzle. A drawing, made to scale, showing an inner line at 4½ feet within which a man must have been in order that the rifle could go off accidentally, and an outer line at 6 feet near which the head must have been lying, with a rod to represent 5 ft. 8 ins. - the man's height, showed that one standing within the inner line could not possibly fall with his head about six feet from the cart and pointing towards the off tail. Such an accident to one standing in such a position would have brought the head to within at most two feet of the cart.

The theory of accident involved the following assumptions - (1) that the rifle had been placed loaded in the cart with the muzzle over the tail and the hammer down on the pin; (2) that the deceased, a right handed man, pulled the rifle from the cart with his left hand; (3) that the hammer caught upon something in the cart (there was no tail-board) in such a way that it raised just short of half-cock (I had found that this was the only way in which the rifle would fire without pulling the trigger - if the hammer were snapped anywhere beyond half-cock it stopped in its descent at half-cock): (4) that the deceased by some means was in a position with his head thrown far back when the rifle went off; (5) that he did not fall where he was shot, but when some yards forwards. For none of these pos-

sibilities was any evidence offered; and while none of these accidents taken singly would be pronounced impossible, yet taken all together they formed such an aggregate of improbabilities as to be incredible unless the evidence of their occurrence had been unimpeachable.

But besides this there was a second difficulty connected with the theory of accident - the difficulty of accounting for the fracture through the orbit and the forehead, and a break through the shaft and a crack through the base of the first phalanx of the middle finger of the left hand. Knowing that a sufferer from a head injury instinctively and even unconsciously raises the hand to the injured part, one feels inclined to theorise that the butt of the rifle or some other weapon was brought down upon the hand over the forehead and smashed both the finger and the skull. Such theorising would hardly be received as evidence. The Judge, himself an old rifle-shot, asked whether the fracture of the forehead could not have been caused by a bullet (explosive or other) from the interior of the skull. The answer to this was obviously, "No," since, as I have said, the inner table was uninjured. I am not certain, however, whether the fracture across the forehead, though not continuous with any other crack, might not have been the result of the bullet wound at the back.

As regards the position in which the deceased was

when the shot was fired, it was easy to demonstrate to the jury by means of a rod passing through the bullet hole and representing the line of fire according to the bevelling, that he might have been lying on his back, right side, left side - in fact in any position except standing on his head. The soil brought from the spot where the prisoner said the head was lying, contained a large quantity of blood. In small portions of soil kept in solution of freshly damped, I found, by the microscope, blood corpuscles, fibrin, epithelial cells of various shapes, and active infusoria at work on them. A specimen of soil moistened and allowed to stand for some days gave the characteristic stench of decomposing animal matter. Examination of the hair helped to strengthen the evidence for identification.

The result of all these enquiries was to form an indictment so complete and so conclusive that the jury found Beard guilty of the murder of Richards, and he was executed a month after the trial.

As Beard had been found guilty of murdering Richards, he was not tried for the murder of Marlo. The cause of death in this case would perhaps have proved less difficult to establish inasmuch as the element of accident would no doubt have been entirely eliminated on the evidence; but the identity of the body would have been much more interesting than in Richards' case. The two points submitted for consideration and evidence were

(1) the identification of the remains and (2) the cause of death.

(1) The skeleton brought to me was fairly complete, only the bones of the hands and one or two other presumably unimportant bones being absent. The dried bones gave a height estimated at from 5 ft to 5 ft 1 in. The age could be estimated at from 21 to 25 years. The skeleton as a whole seemed to belong to a somewhat primitive race, and showed a low state of development. There was a hole in the sternum; the canal for the vertebral artery was very small on the left side; and there were some other peculiarities of development pointing to the same conclusion. The thigh bones were much curved and were equal in length, and the left showed diseased catilage of the knee-joint. These facts agreed with what was known of Marlo's appearance and size; and a critical examination of the skull supplied evidence strongly confirmatory of the identity. The teeth in the upper jaw had all come. The front right incisors of the upper jaw had gone, leaving the sockets open. The central left incisor had grown over the middle line. In the lower jaw the second right incisor projected left edge forewards, and the two centrals were large and not so much worn as the others. From these facts one could infer that the upper incosors had decayed gradually and had disappeared only recently, which was found to be the case with Marlo. But there was further evidence. The police authorities possessed a photo-

graph of Marlo taken in 1890 when he was 16 years old. I procured the original negative of this and the camera and lens with which it had been taken. I fixed the inverted negative on the focussing plate of the camera, and placing the skull in position in front of the lens, with the help of the photographer I superposed the image of the skull on the negative by manipulating the skull. The negative was removed and a plate was inserted in the camera and a photograph was taken of the skull in this position. The images were superposed in the printing. The position of the skull showed that Marlo had been photographed with his chin well down towards his breast, and the photographer remembered that this was so, his recollection ~~very~~ being very clear on account of the difficulties he had had with Marlo who could at that time speak scarcely a word of English. In the old photograph by the help of a lens one could make out the peculiarities in the front teeth. The "full-face-on" position of the photograph and the almost unique characteristics of the skull gave evidence of altogether unusual weight. I doubt if any other skull could be found to fit the photograph, considering the aberrant characters of the skull. Its capacity, measured with dry sand, was 48 ounces. The circumference round the glabella and occipital point was 52 c.m. The gnathic angle was 82°. The cephalic index was 75.8; the index of height 73.6; the nasal index 43.6; the orbital index 93.75 (distinctly "Mongolian" in index, but not in shape); the gnathic

index 93.8. I had been told that Marlo was said by many people to have a head like a Mongolian, and I thought this must surely be a mistake; but some of the above measurements, particularly the "height index," perhaps the truest test of all, show that the popular observation was correct. Marlo's French extraction accounts for several of these characters - the skull being really a modified Basque or Iberian form. These and other data of identification, such as known peculiarities of the hair, put the identitfy of the remains beyond the possibility of dispute.

(2) The cause of death had next to be determined. On the left side of the skull there was a hole two inches by one and a half in size. On the base there was another hole 1½ inches by one. The hole on the left side showed a depressed fracture. The opening could be closed up by the bevelled pieces of bone accompanying the skull. From this fracture a crack extended downwards through the glenoid fossa as far as to the foramen magnum. On the left side there was a fracture through the zygoma and glenoid fossa. On the right side of the skull there was an elevated stellate fracture of the parietal bone. The inner table at this part was fractured but not to the same extent nor in quite the same directions as the outer table. So far as definite and trustworthy evidence goes, the hole on the base may be disregarded. The piece or pieces to fill it up were not found, and it occurred just at the spot where there

is often a hiatus in skulls of young people that have been handled. In was, therefore, not conclusive in any way. But the two other fractures, the hole on the left side and the elevated fracture on the right were distinctive. In the depositions submitted to me there was no mention of the elevated stellate fracture by any of the witnesses, medical or lay, and the opinion had been freely and firmly expressed that the holes mentioned had been made by a pick-axe.

I found, however, two difficulties about the pick-axe theory. In the first place, the pick-axe commonly used by miners and others might not impossibly produce such a wound, but I am sure it would be extremely difficult to inflict the injury with such a weapon. In the second place, Beard and Marlo almost certainly did not carry a pick-axe with them; nobody had ever seen one in their possession, and there was no reason why they should have such an implement with them when engaged in kangaroo hunting. In these circumstances I felt bound to try whether any weapon known to have been in their possession could have caused the injuries found in the skull. By employing the muzzle of the Snider rifle belonging to Beard I was able to produce a fracture in a skull very closely resembling the hole in the right side. Further, by using a hammer on the interior of another skull I was able to reproduce very closely the stellate fracture with non-correspondence of fractures of the outer and inner tables. My experiments were

sufficient to show that this rifle might have been the weapon employed - not such a weapon as one would naturally think of in connection with these injuries.

Beard had told a circumstantial tale of an accident witnessed by him as the cause of Marlo's death, viz., a kick behind the ears from a horse by both hind feet at once. Beard had shot this horse about two months after Marlo's death. The hind legs and all the hoofs of the horse were exhumed; the horse was identified by its hair and tail and an injury to one of its legs. The hoofs showed no indication of having ever been shod - certainly they had not been shod, as Beard had said, two months before. The stellate raised fracture on the right side could not have been produced by a kick from a horse; it was undoubtedly caused by impact on the inner table.

The fractures through the glenoid fossae have to be considered. The fracture on the right side could be accounted for by an extension downwards of the fracture on the vault, a common occurrence according to authorities and my own investigations on fracturing of the skull. But the localised fracture through the right fossa could hardly, I think, be accounted for in the same way; and the most probable explanation appears to be that this fracture was caused by a blow on the chin, which also might be an element in the production of the fracture through the left fossa.

I have said that Beard told a circumstantial tale

about Marlo's death being due to an accident. It is somewhat remarkable to find that the whole of his story about the marks on Marlo's head, the groans but speechlessness of the lad, the flow of blood from his ears and nose, as well as the story of his observations of the condition of Richards's body, would correspond very accurately with the conditions that had actually existed, judging from the injuries found. It is also remarkable that Richards was shot in very nearly the same part of the head in which Marlo was brained. And further, one is led instinctively to ask whether it is not likely that the murderer followed up the first attack by the butt end of the rifle, in the once case fracturing the skull through the glenoid fossae and in the other through the orbit and frontal bone.

C H A P T E R VIII.

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ILLUSTRATIONS OF MEDICO-LEGAL INVESTIGATION (Contd.).

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C H A P T E R VIII.

ILLUSTRATIONS OF MEDICO-LEGAL INVESTIGATION (Contd.).

On the Principles Involved in Fractures of the Skull.

Descriptions of wounds as they come under the surgeon's observation on the battlefield or in the base hospital, give but little help to the medico-legal witness. As a rule, suicides are not committed, nor murders perpetrated, by the most modern weapons; and carefully observed and accurately described wounds made by .303's, dum-dums, Mark IV's, &c., are of little assistance in investigating wounds by revolvers, Sniders, and shot guns, in cases where murders and suicides are in question.

Older books on Military Surgery, and observations of authors at a time when surgeons were searching for principles, prove of much interest and value to the jurist, surpassing those of recent times, in which principles are lost sight of, either in a mass of details, or in records of the results of operations or other forms of treatment. The work of stating principles has not kept pace with the accumulated materials for formulating them at the disposal of the profession. My chief concern has been with the medico-legal aspect of injuries; and from the comparatively large number of cases brought under my notice, I have ventured to educe some principles that hitherto cannot be considered as settled,

although many authors have searched for or discussed them.

It has been my fortune to see a large number of head injuries from bullets, and to compare these with fractures and injuries arising from other causes. As officer commanding a battery of field artillery, I have had opportunities of studying, in a practical manner, many of the problems connected with various branches of gunnery and various kinds of projectiles. The facilities for observing the effects of the less modern weapons and ammunition are becoming fewer and fewer, and therefore it behoves us to make the most of them.

In Chapter VII a detailed account is given of the methods of investigation employed in two cases of head injuries. Similar investigations, extending over a number of years, made on a great variety of specimens where the histories of the injuries were accurately known and the specimens were carefully and critically examined, have yielded trustworthy results. From a consideration of the various specimens,* the following conclusions may fairly be drawn:-

1. <u>The character of a gun-shot wound varies according to the hardness and velocity of the bullet</u>.- A hard

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* The specimens referred to by numbers belong to the Collection of Anthropology and Pathology which I have made, many of the specimens illustrating fractures here referred to being lodged in the Museum of the Royal College of Surgeons, Edinburgh.

bullet, or one with great velocity, pulverises at the spot; its characteristic action is intensive. A soft bullet, or one with less velocity, tears up softer tissues and splinters bones; its characteristic action is extensive. These statements are made apart from all considerations of special provision for "explosive" effects, such as hollow-noses, soft-noses, wooden-plugging. The diminution in velocity is the reason why wounds of exit are always at first more extensive than wounds of entrance; and it explains also, as Bell pointed out (a), why entrance wounds, at first smaller than exit wounds, become, later on, larger. When in South Africa I had many conversations with brother officers regarding explosive bullets. Almost all the combatant officers were clear on the subject of the Boers having employed explosive bullets; but, on being asked if they had seen any such bullets, they almost invariably replied, "One could tell quite easily from the wounds" - these wounds having been effected at long ranges, and, as a matter of fact, being such wounds as would be caused by an ordinary bullet with low velocity. Personally I saw nothing to support the accusation that the Boers used explosive bullets.

2. The hole of entrance.- This is invariably round, unless the bone is soft, or thin, or the bullet has been fired very obliquely to the surface. The hole may be

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(a) "Operative Surgery," 2nd edn., Vol. ii, p. 449.

of the same size as the bullet, or larger (a). The bone at the spot is broken into several small pieces. The margin is bevelled internally, except in rare instances, notably those in which the tables are spongy. The bevelling shows very accurately the direction of the bullet. There may be no lines of fracture radiating from the entrance hole. On the other hand, there may be one or more lines from it passing outwards, which also may have cracks at right angles to them, thus forming a spider's web pattern. There may also be "concentric fracturing" at a greater or less distance from the margin and on the outer table. If the bullet should strike the bones at a suture it usually opens it up, and other cracks are generally at right angles to it.

3. The hole of exit.- This is larger than the hole of entrance, and its margin is bevelled externally. The fracturing results in pieces fewer in number and larger than those made at the hole of entrance. I have not seen a case where cracks have not radiated from the margin, but it is conceivable that such a condition might occur with a hard bullet of great velocity. I have not observed "concentric" fracture of either table. If the bullet should fracture the opposite side of the skull by internal impact without passing through, the

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(a) In thin membranous bones, the hole may be smaller than the bullet. See p.118, above.

pieces are large and bevelling is well marked.

The subject of bevelling is rendered more intelligible when one considers the forces at work, especially in the light of the experimental fractures caused by a wedge-shaped spike driven into the skull, as in specimens Nos. 271 and 272. The wedge penetrates to a certain extent without causing much, if any, splitting. If forced farther it acts on the outer table laterally in such a way as to split off a wedge-shaped piece from the upper surface. On the lower or inner table it acts, not as a lateral force, if it be fairly blunt, but as a perpendicular force, thrusting part of the table before it, either as a single piece (rarely), but more often as several pieces which, combined, have a low pyramidal or conical form. The inner table will be bevelled to a greater extent than the outer, provided that the instrument is not forced vary far in; for it will be observed that the wedge removes a relatively larger piece of the inner table by its "perpendicular" action than it does of the outer by its "lateral" action. Further forcing down will result in cracks involving the whole thickness of the outer table some time before the wedge can act as a lateral compressing or fracturing force on the inner.

This wedge action in producing bevelling will become clearer if one considers what takes place when, say, a disc is buried in the earth and is pulled upwards. It will be found that it displaces the superincumbent

earth in the form of a truncated cone, whose base is the surface of the ground, the extent involved varying with the nature of the ground in which it is buried. Conversely, if the disc be hammered down on the surface of the earth, the material affected will have the form of a truncated cone whose apex is the disc, and whose base is at a greater or less depth in the earth, according to the nature of the material and the force exerted on it.

A bullet is intermediate between such a sharp-pointed instrument as was used in the experiments, and a hypothetical disc such as is here presumed, not being pointed enough, when flattened after first impact, to produce "scaling" of the proximal table of entrance by exerting any lateral compression.

A consideration of this subject of bevelling explains some of the extraordinary cases met with in brain surgery. Hennen (a) records a case in which he had to trephine over a bullet hole in order to extract a piece of bone which had been forced into the brain, the internal table forming so large a part of its circumference that it could not be extracted through the hole in the external table.

4. Locality of the bullet.- I have seen only one or two cases in which a bullet fired from a pistol or re-

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(a) Military Surgery, 3rd edition, 1829, p. 310.

volver has gone completely through the head. This occurrence appears to be rare. I have seen several cases in which the bullet, after passing through the skull on both sides, has been arrested by the skin, and has been removed by simply cutting through the skin. It will be understood that the skin forms a barrier much more difficult to penetrate at exit than at entrance, since its distortability and elasticity are not counteracted by comparatively unyielding material on its distal aspect; anda pistol bullet, with such diminished velocity as results from penetrating two layers of bone, is rarely able to make good its exit through the last layer of skin. The bullet may break the skull at the point of exit, and remain among the fragments or under them. Again, it may, as I have seen, rebound from the interior of the skull and be found at the opposite side in the interior of the skull, i.e. at the same side of the head as it entered, after having marked the bone at the point of rebounding. It thus leaves two tracks through the brain. It may fail to reach the opposite side of the skull, and may consequently be found either in the brain or among the fragments of bone at the point of entrance. Finally it may hit the skull, break it in pieces, and, more or less flattened, may pass onwards with pieces of the skull clear of the head, as happened in the case of a man who committed suicide with a shot-gun loaded with a small, round bullet made of pure lead, similar to Specimen No. 289.

5. Appearance of the bullet.- This depends upon the hardness of the bullet and the conformation of the part of the skull struck. Hofmann makes the assertion that the shape of the spent bullet also depends upon its velocity - the greater the velocity the greater the flatenning out. While this is undoubtedly true as regards bullets striking an impenetrable target, I believe that in case of a mark that is penetrable or breakable more careful experiment is required before the matter can be considered settled. Fairly hard conical bullets usually flatten out to some extent, and thus make a round hole larger than the original calibre of the bullet. The flattened out part may be stripped off and left outside the entrance wound on the bone. Sometimes the bullet becomes pointed in a different manner, the point being less elevated and its boundary line from tip to base being straight.

A bullet may become partly or wholly split, according to the conformation of the part struck. In Specimen 277 the bullet is seen partly split. In another case, specimen 256, one-half of the bullet became detached from theother, and was almost completely pulverised amongst the bones of the neck and the base of the skull.

As a rule, it will be found that bullets that have caused death by injury to the human skull do not present such an amount of distortion as those that have

injured other parts of the body, or other animals.

6. Fractures of the skull from bullets follow the same general lines as other fractures, so far as regards direction, relation to sutures, and the relative extent to which they involve the tables of the skull.- This is one of the most important generalisations which a long series of observations and experiments has yielded; and the extent of its application is very remarkable. While there are many injuries that one can say positively cannot have been made by a bullet, I doubt if there is any single character that will enable one to say a certain injury was caused by a bullet and by nothing else. A bolt or other body may be forced through the skull in such a manner, either with or without radiating cracks, as to mimic perfectly a bullet-hole. Of course, in cases where there has been double penetration of the skull, the presumption in favour of bullet injury may be strong, but one cannot be too careful in giving an opinion even in those cases.

In examing injuries by bullets, one is struck by the strong tendency that is shown for cracks to run from wounds in the vault down to the base, as in the case of fractures of the vault arising from any and every cause. It was this fact that led me to inquire how far bullet fractures correspond with other fractures in other respects.

7. The two tables of the skull act, to a large extent, independently of each other, as regards fractures.-

This applies both to the direction and extent of the fracture lines, as may be seen in many of the specimens. In cases where the sutures are obliterated on one table, but patient on the other, this independent behaviour is particularly well marked.

Here I may call attention to the fact that the inner table may be fractured and depressed to either a greater or less extent than the outer. The statement made by Gant that "Fracture of the inner orvitreous table is always much more extensive than of the outer table," would appear to be applicable only to gunshot wounds, although the limitation is not clear.

8. Obliteration of sutures favours the extension of fractures.- It was for long disputed whether a fissurencould pass over a suture of the skull. Daniel Turner, in discussing this subject in an admirable resumé of fractures of the cranium (a), says he does not see how contra-fissures, otherwise resonitus, can occur, unless in cases, not often met with, in which the sutures are obliterated, seeing that "where the Globe is divided into several Sections, however close they are held together, yet will the Force break through the first of these upon striking either. Now the same Office that these sections perform, in warding off the Blow, affecting Parts at greater distance, especially such as are opposite, or stopping its farther Progress,

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(a) The Art of Surgery, 5th edn., 1736, Vol ii, p. 191.

is done by the Indentures, called, by Anatomists, the Sutures in a humane Skull."

The specimens I have described show very plainly how fractures behave with regard to sutures. Summarised, the conclusions are: (a) a fracture may stop at a suture; (b) it may pass over a suture in a straight line; (c) it may pass along a suture, opening it up or not, and may then leave it at a more or less obtuse angle, whether the suture deviates from the straight line of fracture or not. The more compact the suture, the greater is the likelihood of a fracture passing across it.

9. Fractures may cross foramina.- There is, at least, one instance of this in the collection - a fracture crossing the foramen magnum.

10. The skull is very elastic.- It is this elasticity that is the great cause of rupture of the extra-dural vessels, and that also makes fracture of one table possible by impact on it of the other, without fracture of that other. By elasticity, I mean the property of returning to the original shape after a distorting force has been removed. Specimen No. 260 illustrates this well. The outer table recovered perfectly its original position after displacement, and in the rebound it caught and imprisoned a lock of hair. There is a linear fracture of the inner table, corresponding to a linear fracture of the outer. The question arises whether such a linear, or other, fracture

of the inner table could occur without fracture of the outer. Daniel Turner says (a): "The outward Table I have seen depress'd, when the inner had escaped and continu'd whole: but I cannot say I have ever discover'd the inward fractur'd or beat in, the outer at the same time whole; though I shall not take upon me absolutely to deny the Possibility of these Accidents at some times, and in some Skulls, having several Authorities to countenance the same, particularly those of Celsus, Valeriola, Nich. Florent. as also Fallopsius, who acquaints us, that after Death he had open'd several Heads, where immediately under the part the Blow was given, he could discover nothing, yet on that opposite, great quantity of Matter was collected: but this might be the effect of Concussion simply, or Extravasation from the Vessels, by the force of the same, without that ἀποχείμα, or Resonitus in the Bone it self."

From this quotation it is not clear whether Turner and the authors he quotes were talking of the same thing; but he goes on to mention actual cases of fracture of the inner table without injury of the outer, from Parey, Fallopsius and Cortesius.

Hennen (b) records a case that occurred in the practice of Staff-Surgeon Cooper at Waterloo, where a bullet, without fracturing the outer table, caused a

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(a) Loc. cit. p. 192.

(b) Military Surgery, third edition, 1829, p. 326.

fracture of the inner with splintering, the pieces being "driven at one point more than half an inch into the membranes and substances of the brain."

Fracture of the inner table, without injury to the outer, is very rare; but Gant says(a) he finds twenty instances of this fracture recorded in the "Surgical History of the American War, 1861-65." I have succeeded in producing it experimentally. Teevan has produced not only this sort of fracture, but also fracture of the outer by impact on the inner table without breaking. Specimen No. 608 is a very good example of this form of fracture resulting from accident. The subject was a lad 17½ years old, who was riding, when the horse slipped on turning and fell down on its shoulder. The boy had an abrasion of the skin over the left frontal bone, above the left eyebrow. From a corresponding point on the inner table alone, without any injury to the outer, a fracture extends backwards for a distance of 3½ inches, crossing the coronal suture on its way. This suture in the vicinity of the crossing is fairly compact; but as it passes to the right it becomes opened up, the maximum amount of gaping being at the right temple. Downwards on the left side the fracture, starting from the suture, passed through the middle fossa of the skull in front of the petrous portion of the temporal bone. The sagittal suture showed oozing between its margins in the fresh state, and appears opened up on the inner table. There was extra-dural

(a) Science and Practice of Surgery, 2nd. edn., Vol. ii, p. 150.

haemorrhage in the fossa of the left frontal bone, of the left parietal, and of the right parietal. The right temporo-sphenoidal lobe of the brain was lacerated and haemorrhagic, and there was a localised haemorrhage about three-eighths of an inch in diameter in the right corpus striatum.

It is this elasticity of the skull that makes extra-dural haemorrhage so common with or without fracture. In Hofmann's "Atlas of Legal Medicine," Plate 8, there is a drawing, with description, of a case of extra-dural haemorrhage in a boy, caused by a fall on the side of the head, without external mark, and with consequent fine fracture of the skull, spreading from the parietal bone to the left middle fossa of the skull, where it gave off several branches, and ended in the foramen spinosum. Symptoms were delayed, the boy being able to walk home. A rupture of the middle meningeal artery was found post-mortem.

A specimen of skull-cap with brain <u>in situ</u>, which I sent to Sir William Turner, is an exact counterpart of this drawing; and the history of the case is strangely similar in its details. One man hit another, who was drunk, with a broom handle, on the left side of the head, leaving no external mark of injury or contusion. The drunk man, twenty-eight years of age, was taken to hospital by the police, where he was examined. Being found in a fighting, quarrelsome, and excited state, he was sent to the police cells. There, after a time,

symptoms of compression appeared, and he was again taken to hospital, where he died eight hours after the injury. Post-mortem, an extensive fracture was found on the left side of the skull, involving the parietal bone, and spreading to the base, as seen in specimen No. 262. The blood clot measured two and a half inches by one and a half in its extreme diameters.

This case, like Hofmann's, is a very good illustration of what Percival Pott (a) described regarding this form of head injury: "By blows, falls, and other shocks, some of the larger of those vessels which carry on this communication between the dura mater and the skull are broken, and a quantity of blood is shed upon the surface of that membrane. This is one species of bloody extravasation, and indeed the only one which can be formed between the skull and dura mater."

Pott proceeds to speak (b) of the results of another form of injury to these vessels, in which "the vessels which carry on the circulation between the pericranium, skull, and dura mater, are so damaged as not to be able properly to execute that office, although these are none so broken as to cause an actual effusion of blood." The intimate connection between the pericranium and the brain, including its membranes, has long been recognised. Hunter called attention to the fact, that, from a slight blow on the head, the membranes of the brain

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(a) The Surgical Works of Percival Pott, 1779, Vol. i, p. 31.

(b) Loc. cit. p. 32.

oftener suppurated than the tibia and fibula do from a similar blow on the skin. Charles Bell said, "There is an intimate sympathy existing between the brain and the scalp." Abercrombie (a) has an interesting chapter under the heading, "Of Certain Affections of the Pericranium," in which he shows the intimate connection between scalp and dura mater. This sympathetic connection, which Bell attributes to the nerve supply, must not lead us to under-estimate the direct communications between pericranium and dura mater through the medium of the blood-vessels. Apart from the fairly constant parietal foramina, of which a good example is seen in Specimen No. 222, there are many large, and unfortunately irregular, foramina containing blood-vessels, and so disposed as to seriously disconcert one in coming to a diagnosis or deciding on a course ofaction in certain cases. All this is of great importance in the question of "What to do in any given case of head injury," a question that fortunately is very seldom asked of the medical jurist. The summary by Francis Adams in the Sydenham Society's edition of Hippocrates' works (b) would form a very useful subject of discussion by a chirurgical society. Such a discussion would show how very little is even now settled regarding the surgical treatment of head injuries.

(a) Diseases of the Brain, 1828, p. 196.

(b) Vol. i, p. 440.

11. Fractures may commence at a distance from the point of impact.- Such fractures, in classical works, are termed Counter-Clefts (Contra-Fissurae) and Counter-Fractures (Contra-Fracturae). Specimen No. 253 shows what I have called an "interrupted linear fracture." The part of the skull where the bone was unbroken was the point of impact, and from near this the fractures extended in two opposite directions. A case very similar to this is described in Hofmann's "Atlas of Legal Medicine," Figure 87, under the title, "Fracture of the Skull due to Compression." In this case a blow on the vertex left the bone there unbroken, but caused a linear fracture from the anterior third of the inter-parietal suture down the frontal bone to the ethmoid; and a second fracture from the posterior third of the inter-parietal suture extended into the left posterior fossa of the skull. Hofmann says this case represents in a certain measure "a type of fractures due to compression. These are caused by a sudden force striking the skull, and causing a compression of it in the direction of the force, and distension in the direction of a line at right angles thereto. Thus the skull, similarly as a compressed hazelnut, fractures at the point of greatest distension situated equatorially to the point of impact of the force. On the one hand, then, the fracture ascends meridianly toward the point of impact; and on the other, continues toward a point situated oppositely. Thus is explained why the fractures gape mostly at a situation most distant from the point

of impact, and toward the latter become hair-like; and why, as is particularly evident in the present case, the fractures do not necessarily reach the point of impact nor the opposite point of the skull."

Several questions immediately present themselves regarding this description. Does Hofmann assume the condyles as an actual opposite pole of resistance (a) in his theory of fracture by compression? In my case such a pole existed only as a "potential," if one might use this term to describe a pole, the force at which was simply its inertia or momentum. The maximum gape in bith cases was at "an equatorial point;" and in my specimen, as in his, the fractures did not reach the opposite pole: but if this is all a question of compression why did the lines of fracture in both specimens take a meridianal instead of an equatorial direction? (Cf. Specimen No. 265 for equatorial opening up of the sagittal suture). From a consideration of my own specimen alone I was led to think that the lines of cleavage of the skull had something to do with this

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(a) To test this I repeated Humphry's experiment of dropping a dried skull on its vertex, Specimen No. 601. The left temporal bone was displaced upwards and outwards, remaining attached only at the posterior part of the mastoid portion. The extremity of the lambdoid suture was opened up. The coronal suture was opened up to the vertex. The zygomatic arch gave way at the site of a previous fracture which had united out of position. The basi-sphenoid was dislocated from the bones in front, and the sphenoidal process of the right palate bone was separated. The right temporal bone was loosened but not detached. All these were immovable before the skull was dropped.

fracture as with other sorts, and I still incline to that opinion which Hofmann's own remarks on another case (fig. 86) seem to bear out. The name, therefore, "interrupted linear fracture," as being a description of this injury, appears preferable to the designation, "fracture of the skull due to compression," which involves a theory that may or may not be altogether true. Specimen No. 608 shows what may be looked upon as an example of equatorial opening up of the coronal suture and extension of fracture to the base from impact on the frontal bone, the anterior extremity of the fracture of the inner table only being the mark where the impact affected the outer; and in Specimen No. 253 the limb of the fracture crossing the coronal suture is perhaps an example of opening up in an equatorial direction.

In connection with this subject of linear fractures I would draw attention to the Specimen No. 254, exhibiting parallel and unconnected linear fractures of the occipital bone, a condition that I cannot account for, but one that shows, like the preceding, that two fractures, either in one line or parallel, may result from the same impact, a fact of paramount import in medico-legal matters.

If this "interrupted linear fracture" or "fracture due to compression" be the same thing in principle as fracture by contre-coup, and it appears to be what many writers (a) on contre-coup understood by that

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(a) See Francis Adams: The Genuine Works of Hippocrates, Sydenham Society, 1849, Vol. i, pp. 429, 451.

term, then the subject cannot be cavalierly dismissed after the manner of Guthrie who says, "Whatever may have happened formerly, there is so little proof of such occurrence having taken place of late years that the accident generally is altogether unnoticed by writers on injuries of the head;" for one who denies fracture by contre-coup may find on further investigation that he has been dealing with them to a large extent all his life.

12. The point of impact cannot be determined, in any given case, solely from such characters of simple and single fissured fractures, as their direction and the manner in which they "tail."- This follows as a corollary from the principle stated in the last paragraph, and from a consideration of the appearances of ordinary fractures that occur at the point of impact.

C H A P T E R IX.

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INFANTICIDE AND LIVE BIRTH.

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C H A P T E R IX.

INFANTICIDE AND LIVE BIRTH.

Probably no subject in the whole range of Medical Jurisprudence is more important than the matter of Live Birth in Criminal Cases. It derives its general importance from the relation it bears to the rights of the infant, the mother and the State, which means the citizens. It acquires a special significance from the difficulties that constantly occur in connection with medical evidence and legal proof. A perusal of chapter after chapter, in works of Medical Jurisprudence, on Proofs of Live Birth, Respiration, Putrefaction, Hydrostatic test, &c., &c., shows that, however interesting the subject may be medically, much of the writing on it has tended only to obscure the points at issue and the nature of the proofs demanded, and to show what an amount of irrelevancy and misunderstanding can be introduced into a subject, which from its extreme importance, ought to be as simple, and as simply set forth, as possible. I shall endeavour to state with some degreee of clearness the law and the medical facts relevant in evidence.

As a preliminary I may set forth, on the one hand, what is clearly defined and universally recognised, and on the other what is doubtful or in dispute, and show where medico-legal difficulties arise. Firstly, homi-

cide is the killing of a human being. Secondly; all killing, every degree and form of homicide, is presumed to be murder unless and until it is shown to be otherwise; and the burden of proving that it was justifiable, or by misadventure, or excusable, lies upon the person who did the killing. Thirdly; the person killed must be "a reasonable creature in being, and under the King's peace" - an unborn child in its mother's womb cannot be the subject of felonious killing.* Fourthly; every child is presumed to have been born dead until the contrary is shown; and in a prosecution for infanticide the burden of proving live birth is on the Crown, or the prosecution. So far there is no dispute, no point in issue. But the matter of dispute is introduced when the question is asked, "When does a child become a human being within the meaning of the Criminal Law?" or, in other words, "What, in law, constitutes Live Birth?" The medical definition of live birth, if there is one, does not arise in connection with the subject.

With respect to the law, it will be well to pass in review the common law of England regarding Infanticide, and examine it critically, from the point of view of

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* Tidy in his Legal Medicine, Part ii, 1883, p. 107, says: "It can never be too often repeated, that the womb of the pregnant woman contains within it from the first moment of impregnation a living human being, and that to kill this living ovum is murder." Statements of this sort, though morally well-intentioned, are a blot upon the science and practice of legal medicine.

Live Birth. In doing so, it will be necessary to quote at length and study the cases as recorded, not in medical journals and newspapers, but in the Law Reports, since these are the accepted repositories of the decisions and the only records in which the principles on which the cases were decided are set forth from the legal or judicial standpoint. Further, it will be necessary to distinguish accurately between the principles on which the cases were decided, and such principles as were mentioned only incidentally, and remarks that may be classed as mere obiter dicta. The cases in which the law is embodied are those set forth in Archbold (a): "But it must be proved that the entire child has actually been born into the world in a living state; R. v. Poulton, 5 C. & P. 329; and the fact of its having breathed is not a conclusive proof thereof. R. v. Sellis, 7 C. & P. 850; R. v. Crutchley, 7 C. & P. 814. There must be an independent circulation in the child before it can be accounted alive. R. v. Enoch, 5 C. & P. 539: R. v. Wright, 9 C. & P. 754. A child is born alive when it exists as a live child, breathing and living by reason of breathing through its own lungs alone, without any connection with its mother. R. v. Handley, 13 Cox, 79, Brett, J. But the fact of the child's being still connected with the mother by the umbilical cord

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(a) Pleading, Evidence, and Practice, 24th edn., p. 878.

will not prevent the killing from being murder. R. v. Crutchley, ubi supra: R. v. Reeves, 9 C. & P. 25: R. v. Trilloe, 2 Mood. C.C. 260; C. & Mar. 650:" R. v. Pritchard (1901) 17 T. L. R. 310, Wright, J.

In order to understand the present position and the development of the law, it will be necessary to examine all these cases in detail.in the light of the original records as set forth in the revised reports.

In 1832 Ann Poulton was charged before Mr Justice Littledale with strangling her illegitimate infant. Three medical witnesses were called for the prosecution. The first said: "It frequently happens that a child is born as far as the head is concerned, and breathes, but death takes place before the whole delivery is complete. My opinion in this case is, that the child had breathed; but I cannot take upon myself to say that it was wholly born alive." The second said that death might have occurred when the child was partially born, if no medical man was present to assist in the delivery. The third said: "It is impossible to say when the child respired; but there is no doubt, from the state of the lungs when they were examined, that it had breathed: children may breathe during the birth." The judge, in summing up, said: "With respect to the birth, the being born must mean that the whole body is brought into the world; and it is not sufficient that the child respires in the progress of the birth." Verdict: Not guilty of murder.

It is to be observed that the only question that arose here was the one of the child being "fully born," i.e. of the complete separation of the child's body from the mother's. This requirement could not be proved, so the prosecution failed. There is nothing said about the placenta or the umbilical cord or the circulation of the blood.

In 1833 Richard Enoch and Mary Pulley were charged before Mr Justice J. Parke with wilful murder of an illegitimate child. A puncture was found in the child's skull; but when the injury that had caused it was inflicted did not appear: some questions were asked as to whether the child had breathed. Mr Justice Parke said: "The child might breathe before it was born; but its having breathed is not sufficiently life to make the killing of the child murder." Thus far he is in accordance with Mr Justice Littledale in R. v. Poulton. Mr Godson for the prosecution said: "The wound might have been given before the child was born, and the child might have lived afterwards." Mr Justice Parke said: "Yes, but there must have been an independent circulation in the child, or the child cannot be considered alive for this purpose." Verdict: Not Guilty.

It is to be observed that while the prosecution failed to prove that the child was "fully born," the judge introduced a new principle, incidentally, in this case - viz: "an independent circulation in the child." No indication is given of the relation of this to the

subject of breathing. The legal reporter of the case adds a footnote to this effect: "It may be a question whether a child has a completely separate circulation till the umbilical cord is divided; because, if that be divided, and not properly secured, the child would bleed to death; which would rather lead to an inference, that while it is undivided, some, at least of the blood circulates through it." It does not seem to have struck the annotator to refer to the condition in which there might be a complete separate circulation, beyond all doubt, while the umbilical cord is undivided, viz, in the case in which the child, cord and placenta are fully delivered outside the mother's body.

In 1834 Eliza Brain was charged before Mr Justice Park with murder of her illegitimate child. It was proved by two surgeons that the child had never breathed. The prosecution failed to prove that the child had been wholly born at the time it was killed. Verdict: Not Guilty of murder, but guilty of concealment.

Park, J., (in summing up). A child must be actually wholly in the world in a living stat to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed; as many children are born alive, and yet do not breathe for some time after their birth. But you must be satisfied that the

child was wholly born into the world at the time it was killed, or you ought not to find the prisoner guilty of murder. This is not only my opinion, but the law was so laid down in a case as strong as this, by a very learned Judge (Mr Justice Littledale) at the Old Bailey."

Thus, Mr Justice Park held, with Mr Justice Littledale, that being wholly born was necessary. He also held that breathing was not essential to constitute "live birth," a matter on which Mr Justice Littledale did not express a definite opinion, only remarking that breathing was no proof of complete delivery of the child's body.

On the subject of complete birth without respiration, the reporter of this case adds a footnote detailing an instance where a child was removed from the womb by Caesarean operation thirteen minutes from the last respiration of the mother. Two minutes later artificial respiration was begun, and after fifteen minutes natural respiration was established. In another case resuscitants were employed for an hour and five minutes by the watch before obvious signs of life appeared, the child recovering.

In 1837 Ann Crutchley was charged with murder in having strangled her newly born child. The first count of the indictment charged that the prisoner, being big with a female child, did bring forth of the body of her, the said Ann Crutchley, the said female child alive, and did afterwards strangle it. There were other

counts, varying the statement of the mode of the death, but all of them stated the birth of the child as above-mentioned.

It appeared that the dead body of the child was found concealed under the prisoner's bed, with a black ribbon tied tightly around the neck, the knot being exactly in the middle of the back of the neck.

It was proved by Mr Ashwin, a surgeon, that the brain was gorged with blood, the lips livid, face swollen, and the lungs entirely inflated; the umbilical cord being severed, but not secured in any way, but there did not appear to have been any effusion of blood from it. In his cross-examination Mr Ashwin said "The child might be wholly born, and the umbilical cord still remain attached to the mother by the placenta; the child might breathe and fully inflate the lungs, yet the circulation from the mother would still go on for a few minutes. I think that the circulation from the mother to the child must have been going on when the ligature was tied around the child's neck. The circulation from the mother would go on for a few minutes after the child was fully born; and if the cord was not divided, the circulation from the mother would stop after a lapse of a few minutes, and an independent circulation take place in the child."

This evidence was corroborated by that of Mr Steel, also a surgeon, who gave it as his opinion that the ligature caused the death of the child and that it was tied before the circulation between the child and the

mother had ceased; and he further said, "I think, from the knot being tied so exactly at the back of the neck, the ligature was applied to the neck of the child after the head had protruded,and before the body had turned half round for the shoulders to pass."

Godson, for the prisoner.- "A child cannot be the subject of murder till it has a complete independent circulation, and has been wholly detached from the mother. By the term "born alive" is meant the being completely separated from the mother; and having a completely independent circulation; and the child would not have an independent circulation for some time after it was completely brought forth unless the umbilical cord was divided."

(The term "completely separated" is not altogether unambiguous. It may mean either "organic separation" or it may mean merely that the body is fully born from the mother. This latter condition I shall hereafter call "extrusion").*

Parke, B.- "There are several cases on this subject in Messrs Carrington & Payne's reports."

Godson.- "The cases of Rex v. Poulton (a), Rex v. Enoch, (b), and Rex v. Brain (c), in which the law is laid down as I have stated it."

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* "Extrude, to thrust out; to urge, force, or press out; to expel; as to extrude a foetus" Imperial Dictionary. One wonders how this word ceased to be used where it is so aptly applicable.

Parke, B.- "It has been frequently so said in cases where the death has been caused by suffocation, or other injuries, which might have occurred in the course of unassisted delivery; but I should like to know if there has been any case where it has been so held when a wilful wound has been inflicted during the birth of the child. At all events this indictment will not be supported, unless it be shown that the child was completely born, as it is distinctly averred that the child was brought forth before it was strangled."

Parke, B., (in summing up).- "I am not aware that the law, as stated by the learned counsel for the prisoner, has ever been applied to a case where it has been proved that the woman has wilfully destroyed the child in the progress of delivery; however, I am satisfied about it on this indictment, ihe language of which precludes any question. It avers that the child was delivered forth from the body. The first count states as a fact that the prisoner, being big with child, did bring forth of her body the said child alive, and afterwards strangled it. There are other counts, but I do not think it necessary to call your attention to them, whether there might be any question on a count differently framed, it is not necessary to say; perhaps there might not; but in order to conviction the first count of this indictment, you must be satisified that the whole body of the child had come forth from the body of

the mother when the ligature was applied. If you think that the child was not killed after it had come forth, you will acquit. I think it is essential that it should have been wholly produced. But supposing you should be of opinion that the child was strangled intentionally, while it was connected with the umbilical cord to the mother, and after it was wholly produced, in that case I should put the matter into a course of future inquiry directing you to convict the prisoner, and reserving the point for a higher tribunal, - my present impression being, that it would be murder if those were the facts of the case."

Verdict: Not Guilty of murder - Guilty of concealing the birth.

In this case the prosecution failed to prove that the child was "wholly produced." The judge incidentally stated his opinion that if the child was killed intentionally while connected with the umbilical cord to the mother, he would direct the jury to convict and he would reserve the point, his own impression being that it would be murder. This opinion, it will be observed, is not stated to have been founded on any consideration of an independent circulation as necessary to constitue live birth.

In 1837 Elizabeth Sellis was indicted for the wilful murder of her illegitimate child, by cutting off its head. It appeared that the head of the child, severed

from its body, was found in a privy belonging to a house at which the prisoner's father had lived, and that in the same privy the body of the child was also found. Evidence was given of a confession made by the prisoner, in which she stated that the child was born in the privy, and made "a low gruffling noise, but did not cry;" that she went to the house and got an old knife, with which she cut off the head of the child.

The surgeon who examined the lungs of the child stated that they were of a florid colour, and were inflated, from which he was enabled to say decidedly that the infant had breathed, but he could not swear that the whole body of the child was born at the time when the act of breathing and the consequent inflation of the lungs took place. He also said that it was possible for the head of the child to have been born, and the child to have breathed, and yet the child might have died before the ~~whole~~ entire body was born, and that spasm of the muscles of the uterus might, and sometimes did produce this effect.

Coltman, J., in summing up.- There are three questions in this case. First, was the child born alive? Secondly, was it alive at the time ~~when~~ the head was cut off? Thirdly, was the act of cutting off the head done by the prisoner? With respect to the first question, in order to justify a conviction for murder, you must be satisfied that the entire child was actually born into the world in a living state. The fact of

its having breathed is not a decisive proof that it was born alive: it may have breathed and yet died before birth. You must be satisfied that the child was wholly born into the world in a living state; and if you are not so satisfied, you ought not to convict the prisoner of murder.

Verdict: Not guilty of murder, but guilty of concealment.

In this case the prosecution failed to prove that there was complete extrusion of the body from the mother.

In 1839, a woman named Reeves was charged with the murder of her infant, by striking it on the head, and by beating its head against the wall of a room.

Bodkin, in stating the case for the prosecution, said that he had been informed there was a case before Mr Baron Parke, in which it had been decided, that the child must have a separate ~~and~~ independent existence from that of the mother, in order to make the killing of it amount to murder.

Clarkson, who was for the prisoner, stated, that, as it was on his information that Bodkin had acted, he felt it his duty, having since read the case referred to, to say that it did not go to so great an extent as his learned friend had supposed.

Vaughan, J.- "I should have been very much surprised if it had; because if that were the law, the child and the afterbirth might be completely delivered,

and yet, because the umbilical cord was not separated, the child might be knocked on the head and killed, without the party who did it being guilty of murder.

Verdict: Not guilty of murder; but guilty of concealing the birth.

The misunderstanding arose from not observing Baron Parke's words "connected with the umbilical cord to the mother."

The important fact to be noted here is that Mr Bodkin apparently assumed that separate and independent existence could only mean ~~separation~~ severance of the cord. Mr Justice Vaughan could not believe that if the afterbirth of the child were delivered the child had not a separate and independent existence unless the umbilical cord were also severed. The point established, incidentally, is that separation of the after-birth constitutes a live birth without severing of the cord.

In 1841 Ann Wright was charged before Baron Gurney with the murder of her child by suffocating it. F. V. Lee, for the prosecution, in his opening, said, that as the prisoners had no counsel, it was his duty to call the attention of the learned Baron to the evidence of the surgeon, who would state, that, in his judgment, the child must have died before it was fully born, so as to have an independent circulation; and that, if His Lordship agreed with the opinion expressed by Baron Parke in the case of R. v. Enoch, it would not be necessary to proceed on the capital part of the charge. Gurney, B. said "I entirely concur in the opinion of Baron Parke, as expressed in the case of R. v. Enoch." Mr

Martin, a surgeon, was called, and he stated, that, in his judgmentthe child must have died before it had an independent circulation.

It has to be noted that there is a possible confusion here of "fully born" with "having an independent circulation." As the report of the case stands, it would appear that the prosecution failed to establish the presence of a complete circulation - which was incidentally referred to by Baron Parke. Thus the law is advanced a stage by this case.

In 1842, Milborough Trilloe was charged before Justice Erskine with murder of her infant by strangling it with a handkerchief. On the part of the prosecution there was strong evidence to prove that the child had been whooly produced alive from the prisoner's body, and that she had strangled it by fastening a handkerchief or some such thing round its throat; but it was also clearly proved by Mr Wood, the surgeon who examined the body of the child, that it must have been strangled before it had been separate from the mother by the severance of the umbilical cord: and it was further stated by Mr Wood that a child has, after breathing fully, an independent circulation of its own, even while still attached to the mother by the umbilical cord,* and that in his judgment the child in question had breathed fully after it had been wholly produced, and had therefore an independent circulation of itx own before and at the time it was strangled, and was then in a state to carry on a separate existence.

* The italics are mine. It was this statement that determined the conviction, and that gave rise to so much confusion regarding the law.

W. H. Cooke, for the prisoner, referred to the cases of R. v. Enoch and R. v. Crutchley.

Erskine, J. "I agree with the view of the law taken by my Brother Parke in the case of Rex v. Crutchley; and if it should become necessary I shall adopt the course he suggests in that case, and reserve the question for the opinion of the Judges."

Erskine, J. (in summing up).- "If you are satisfied that this child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully and of her malice aforethought strangled the child after it had been so produced and while it was alive, and while it had, according to the evidence of the surgeon, an independent circulation of its own, I am of opinion that the charge in the second and third counts of this indictment is made out against the prisoner, although the child, at the time it was so strangled, still remained attached to the mother by the navel-string. Verdict: Guilty. The case was reserved by the learned Judge for the opinion of the fifteen Judges, who held the conviction right.

With these cases before him Sir James Fitzjames Stephen in "A Digest of the Criminal Law," 3rd. edn., published in 1883, stated the law thus (a): "A child becomes a human being within the meaning of this definition, when it has completely proceeded in a living state from the body of its mother (R. v. Poulton), whether it has or has not breathed (R. v. Brain), and whether the navel

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(a) P. 158.

string has or has not been divided (R. v. Trilloe), and the killing of such child is homicide, whether it is killed by injuries inflicted before, during, or after birth (1 Russ. Cr). A living child in its mother's womb, or a child in the act of birth, even though such child may have breathed, is not a human being within the meaning of this definition, and the killing of such a child is not homicide (R. v. Enoch; R. v. Wright; R. v. Sellis)."

Stephen does not cite, and apparently has not noted, in this connection the case of R. v. Handley, tried in 1874, in which Justice Brett stated the law differently. The following quotation gives the position as reported in 13 Cox, 80. "Brett, J., in summing up, directed the jury that though the indictment was for wilful murder, it was open to them on such an indictment to convict the prisoner of manslaughter, or of the lesser crime of concealment of birth. As to this last head, it did not signify whether the child was born alive or not, and as it was clear that the prisoner had wrapped the body in an apron and put it into a box under a bed, and that she had told no one, she was at least guilty of concealment. But, as to the graver question, though there was no evidence of any act of violence, he told them as a matter of law that if, either before or after the birth of the child, she had made up her mind that the child should die, and after it was born alive she, with intent that it should

die, left it to die, and it did so in consequence, she would be guilty of murder; or again, if she made up her mind to conceal the birth, and did attempt to conceal it by methods which would probably end in death, and they did end in death, she would be guilty of murder, even though she did not intend murder; but, supposing the prisoner had not made up her mind that the child should die, yet had determined that none but herself should be present at its birth, without intending final concealment, but only for the purpose of hiding her shame for a time, and had to that intent delivered herself, she would in the eye of the law, have invested herself with a responsibility from the moment of birth - namely, that of the care and charge of a helpless creature; and if, after having assumed such a care and charge she allowed the child subsequently to die from her wicked negligence, that would make her guilty of manslaughter. His Lordship then reviewed the evidence as to murder, and said that though he would not say there was no evidence, yet, as such as there was consistent with innocence as well as with guilt, it was the duty of the jury to yield to the milder interpretation. The real question for them, therefore, was, whether the prisoner was guilty of manslaughter as he had defined it. As to this, they would have to consider whether the child was born alive - i.e., whether it existed as a live child, breathing and living by reason of breathing through its

own lungs alone, without deriving any of its living or power of living by or through any connection with its mother. If they were satisfied of this, and that the mother, having made up her mind to be alone at the birth, caused its death by wicked negligence after its birth, they would return a verdict of guilty accordingly.

Verdict: Manslaughter. Sentence, ten years' penal servitude."

The development of the law may be traced through these cases. The first requirement is that "the whole body be brought into the word" (Littledale), i?e. complete extrusion. Next is the further requirement of "an independent circulation" before the child can be considered alive. The first is a matter of ordinary non-professional testimony. The second depends upon the medical answer to the question, What constitutes an independent circulation? The evidence of Mr Ashwin in R. v. Crutchley, that the circulation from the mother to the child would go on after full breathing, is in accordance with the facts of ordinary parturition. The statement of Mr Wood in R. v. Trilloe "that a child has, after breathing fully, an independent circulation of its own, even while still attached to the mother by the umbilical cord" is unjustifiable except by straining the etymological meaning of "independent," or by making an assumption that is entirely disproved by medical facts of everyday occurrence. If by "independent" he meant

that, whereas all blood formerly went from the child ~~from the child~~ to the placenta, some now goes, on the establishment of respiration, to the child's own lungs and that this is an independent circulation, then he was right. But this will not satisfy the requirements of the law; and there can be no doubt that the decision of the fifteen Judges in supporting the verdict was based upon a medical fallacy. Mr Wood was wrong in his opinion that a child after breathing fully and "while still attached to the mother by the umbilical cord" must necessarily have "an independent circulation." It might or might not have, as will appear presently. His "independent" was at most a potentiality; the law requires an actuality - a complete cutting off of the "living and the power of living through any connection with the mother." It would appear that Mr Justice Brett in order that there might be no misunderstanding regarding the application of medical facts to cases in issue, stated the law in a manner that admits of no misconception. "A child," he says, "is born alive when it exists as a live child, breathing and living by reason of breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother."

Such being the law, the question now arises: What are the medical facts regarding parturition? The broad features of this process are: The child is usually born, i.e. is extruded, and breathes or cries (cry-

ing presupposes breathing, although one or two extraordinary cases suggest a caveat), or is helped to breathe or cry, within a few seconds after; the cord is then tied and severed, whether it has ceased to beat or not; and the after-birth comes away in from, say, five to twenty minutes.

We may now state some propositions in greater detail:-

1. A child whose body is completely extruded from the mother's may still, as regards actual living, be in the same condition as it was when in the womb.

2. On the other hand, a child whose body is completely extruded from the mother's may be breathing, moving, and crying. It is thus capable of living, and liable to have this capability made an actuality by the tieing or breaking of the cord, or the severing of the organic connection of the placenta with the uterus.

3. Breathing may occur in the progress of the birth, before the child's body is completely extruded from the mother's. Breathing, therefore, is not evidence of complete extrusion of the body.

The cord may continue to beat for a considerable time after the child is extruded and is breathing and crying. But breathing is not evidence of an independent circulation while the placenta is attached to the uterus, although unfortunately it has been stated ~~in~~ by expert medical ~~evidence~~ authority that "the pulsations of

the cord cease as soon as respiration commences."(a).

4. If the placenta is in organic connection with the uterus, and the cord not interfered with: (1) pulsation of the cord would mark probable passage of blood from the child to the mother and probable return: (2) non-pulsation would not exclude the possibility of the passage of some blood from the mother to the child. Therefore, unless one be certain that the placenta is actually separated, one cannot be certain that there is an independent circulation in the child. In other words: while any portion of the placenta retains an organic connection with the uterus, whether the cord be pulsating or not, there is a possibility that blood may be passing from the placenta to the child; i.e. that the child may still be deriving, or be capable of deriving, some of its living powwe (or) of living from the mother.

5. On the other hand, the cord may continue to pulsta not only after breathing has been established, but after the placenta has been completely separated from the mother. On March 14th, 1905, Dr. R. S. Rogers, of Adelaide, who had been making observations at my request, delivered a woman at her fourth confinement of a full term, full sized, healthy female child. The cord pulsated for seven minutes, and then he expressed the placenta. The cord continued to beat after the delivery of the placenta for a period of three minutes. There was no bleeding to

(a) Marjolin, Roux and Marc, Annales d'Hygiène, 1838, i, 98

harm or endanger the child.

6. Complete birth, then, *in the legal sense,* with an independent circulation, ~~legally~~ requires, *medically,* a child with its body completely extruded from the mother's and (1) the placenta separated from the womb, or (2) the cord severed. It is to be observed that while the cord is merely tied but not actually completely severed (so far as regards the umbilical vein), one cannot definitely say, even if there is no pulsation observable, that all circulation in it has actually stopped.

Thus, to state a case that will put the position in the proverbial nut-shell; Suppose a physician saw the child on the bed, living and breathing a quarter of an hour after delivery, the cord not cut, but pulsating or not pulsating, and the after-birth not visible by examination; and that he left the room and on his return found the after-birth delivered and the child's head cut off; could he say whether the child had been legally born alive or not when the head was cut off? He could not; because he could not say whether or not he decapitation was done after the delivery of the placenta, or whether or not there was an organic connection between the placenta and the uterus when he left the room. This is the medico-legal position, assuming that Mr Justice Brett's statement of the law is correct; and it has not been upset or even challenged. Further, it is logical, consistent, and agrees with the law as laid

down by the fifteen Judges.

One question more on this subject:- If the physician were not present at the birth, could he say that any circumstance, other than (a) the finding of food in the stomach, or (b) the presence of organic changes in the cord, was certain evidence of live birth in the legal criminal sense? If he should say so, it is probable that after counsel's cross-examination and address, the jury would give little weight to his evidence.

It is advisable to consider in some detail the subject of the death of a child after it is fully born, when such death is due to causes arising before, or during, but not after, the birth.

Russell says (a): "An infant in its mother's womb, not being in rerum natura, is not considered as a person who can be killed within the description of murder; and if a woman being quick or great with child, takes any potion to cause an abortion, or if another gives her any such potion, or if a person strikes her, whereby the child within her is killed, it is not murder or manslaughter (h), but is punishable under 24 and 25 Vict. c. 100, s. 58, post, p. 829 (i).

(a) A Treatise on Crimes and Misdemeanors, 7th edn., Vol. i, p. 663.
(h) 1 Hale, 433.
(i) 3 Co. Inst. 50. 1 Hawk C. 31 [should be 13], s. 16. 4 Bl. Com. 198. 1, East, P.C. 227. Contra, 1 Hale, 433, and Staundf. 21; but the reason on which the opinions of the two last writers seem to be founded, namely, the difficulty of ascertaining the fact cannot be considered as satisfactory, unless it be supposed that such fact can never be clearly established. See Exod. c. XXI. v. 22, 23.

"Where a child, born alive, afterwards dies by reason of potions, or bruises received in the womb, those who administered the potion or caused the bruise seem to be guilty of murder (i). On an indictment for manslaughter it appeared that the prisoner, who practised midwifery, was called in to attend a woman in labour, and when the head of the child became visible, the prisoner, being grossly ignorant of the art which she professed, and unable to deliver the woman with safety to herself and the child (as might have been done by a person of ordinary skill), broke and compressed the skull of the infant, and thereby caused its death immediately after it was born. It was argued that the child being en ventre sa mere at the time the wound was given, the prisoner could not be guilty of manslaughter; but, upon a case reserved, a conviction of manslaughter was held right (j).

"Upon an indictment against a woman for the murder of her child, Maule, J., told the jury that if a person intending to procure abortion does an act which causes a child to be born alive so much earlier than the natural time that it is born in a state much less capable of

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(j) R. v. Senior, 1 Mood. 346; 1 Lewin, 183n. See R. v. Brown, 62 J.P. 521. The murder of bastard children was specially punished by 21 Jac. I c. 27, which, with an Irish Act on the same subject, was repealed in 1813 (43 Geo. III, c. 58). Concealment of birth is now punished under 24 and 25 Vict. c. 100. s. 60. post p. 773.

living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings a child into the world, and puts it thereby into a situation in which it cannot live, is guilty of murder (k)."

Russell in a footnote to the cases of Enoch and Wright says (a): "The true test of separate existence in the theory of the law (whatever it may be in medical science) is the answer to the question, 'whether the child is carrying on its being without the help of the mother's circulation.' R. v. Pritchard (1901) 17 T.L.R. 310, Wright, J. R. v. Izod, 20 Cox, 690, Channell, J."

The argument in the case of Pritchard turned on criminal negligence generally at the time of the birth, as being a cause of the death; and Mr Justice Wright stated that it must be proved that the child had been fully born before it died, otherwise there could be no murder or manslaughter in consequence of acts done before or during the birth. On the subject of complete birth he directed the jury that "the true test of separate existence in the theory of the law (whatever it might be in medical science) is the answer to the question 'whether the child is carrying on its being without the help of the mother's circulation?' If yes, then it had a separate existence, even though it might not be fully born; if no, it had no such separate legal

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(k) R. v. West, 2 C. & K. 784; 2 Cox, 500.

(a) Ibid, p. 664.

existence."

Medically, the only condition in which a child could be positively said to be carrying on its being without the help of the mother's circulation while not "fully born," would be the condition in which the placenta was completely extruded before the living child was delivered.

In the case of Izod the question arose as to death due to neglect, a subject which was dealt with by Mr Justice Brett in R. v. Handley, and Mr Justice Channel directed the jury that in order to convict of manslaughter, it must be proved that the neglect was subsequent to and not prior to the complete birth.

It will be observed that Russell, unlike Archbold, has doubt as to whether a child born alive and dying thereafter by reason of potions or bruises received in the womb, is the subject of murder; and he gives references. An examination of these shows the position of authorities in respect to the law.

Hale says (a): "If a woman be quick or great with child, if she takes, or another gives her any potion to make an abortion, or if a man strikes her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet in rerum natura, tho it be a great crime, and by the judicial law of Moses (Exod. XXI, 22) was punishable

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(a) 1 Hale, 432.

with death, nor can it legally be made known, whether it were killed or not, 22 E. 3 Coron. 263. So it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide. I. E. 3. 23. b. Coron. 146."

Hawkins, c. 13 [misquoted as 31 in both Russell Vol. i, p. 663, and Archbold, p. 877 , s. 16] says (a): "And it was anciently holden, that the causing of an abortion, by giving a potion to, or striking a woman big with child, was murder. But at this day it is said to be a great misprision only, and not murder, unless the child be born alive and die thereof, in which case it seems clearly to be murder, notwithstanding some opinions to the contrary." Vide 1 Hale, 433. 23. Ass. 94. B. 2. c.29. s. 18. 3 Inst. 50. 3 Ass. 2. B. Cor. 68. Dalt. c. 93. Exodus, c. xxi, v. 22, 23."

East says (b): "Malice may be directed against any person within the king's peace. Therefore to kill an alien enemy within the kingdom is murder, unless in the actual heat and exercise of war. So to kill one attainted of felony otherwise than by a lawful execution; or one in a praemunire. But to kill a child in its mother's womb is no murder, but a great misprision: and Staundford and Lord Hale are of the same opinion, even where the

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(a) 1 Hawk. 94.

(b) 1 East, 227.

child is born alive, and afterwards dies by reason of the potion or bruises it received in the womb; which opinion they seem to ground on the difficulty of ascertaining the fact: certainly not a satisfactory reason, where the fact is clearly established; and according to all other opinions the latter is murder."

Coke says (a): "If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a deadchilde, this is a great misprision, and no murder: but if the childe be born alive and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive. And the book in 1 E. 3. was never holden for law. And 3 Ass. p. 2 is but a repetition of that case. And so horrible an offence should not be unpunished. And so was the law holden in Bracton's time."

As the outcome of all this, a good many questions on anomalies present themselves to the ordinary medical mind: (a) Why destruction of a foetus in utero is not murder, while the killing of it, say an hour after, when it is fully born, is murder; (b) Why injury to a foetus in utero, afterwards causing death of the child - though it may have moved, breathed and cried but while not completely separated from its mother is not murder, while

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(a) 3 Coke, 50.

if the injury waspresumably or possibly less, and caused death only after the child was fully separated, the crime is murder; (c) Why a mother who so neglects herself as to cause her child to be born in a non-viable condition should be guilty of no crime; (d) Why neglect after a child is fully born may be manslaughter, but neglect before such birth, causing death after, is not so; (e) Why a person who inflicts such an injury on a child in the process of its birth as to kill it before it is fully separated from the mother should be guilty of no crime whatsoever. A discussion of these questions would prove very interesting as a study of the origin of and the reason for the law, but it would be beside the point here. The most outstanding anomaly is the one last mentioned.

It will be apparent that the common law definition of a person or human being embraces a number of requirements. The New Zealand Criminal Code, 1893, furnishes an instance of the other extreme of the law's requirements regarding what constitutes a human being. It is there laid down, s. 154, "Homicide is the killing of a human being by another directly or indirectly, by any means whatsoever. S. 155, A child becomes a human being within the meaning of this Act when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, or whether the navel string is severed or not. The killing of such a child is homicide when it dies in consequence of injuries received

before, during, or after birth." By these definitions the law stretches out to form a link to bridge the gap that the English Common Law leaves between abortion on the one hand an infanticide on the other. A supposed case will make this evident. If, when a child's head in the process and progress of birth, protrudes from the mother's body, some person should cut off the head or destroy the brain so that the child ceases to live, under the English law this would be no murder, since the child was not legally born alive not having had a complete and separate existence from the mother; on the other hand, under the New Zealand law this would be murder, seeing that the child was a human being within the meaning of the statute before it died. The New Zealand Act meets the requirements referred to by Baron Pollock in connection with the subject of Concealment of Birth. A Bill introduced into the Imperial Parliament in 1909 proposed to make it a felony to destroy an infant during birth under circumstances, which would have made the act murder if the child were fully born. Such legislation as the New Zealand Code enacts, besides removing glaring anomalies in the law, has very distinct merits from the point of view of definiteness in the requirements of evidence. It leaves little place for the possibility of a conflict of medical opinion, since the law's requirements involve little if anything else than matters of fact or observation that can be testified to by an ordinary witness almost as conclusively and satisfactorily as by an ordinary medical practitioner or a medi-

cal expert. It is this same tendency to simplicity and definiteness in evidence that is exhibited in recent health and food legislation in which all conflict of medical opinion regarding what is "injurious to health" is obviated by the addition of the words "within the meaning of the Act"- the act itself containing the definitions or statements as to what is to be considered injurious.

C H A P T E R X.

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CONCEALMENT OF BIRTH.

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C H A P T E R X.

CONCEALMENT OF BIRTH.

One cannot help being struck with the number of trials for infanticide in which a verdict is brought in, "Not Guilty of Murder, but Guilty of Concealment of Birth." It is not uncommon to try a man for an offence of a major degree, e.g. murder, and to find him guilty of one of a minor degree, e.g., manslaughter. But to be tried for one offence and found guilty of another, and that of an apparently different sort, is not common. In fact, the position set forth in the verdict referred to is most peculiar in law, if not unique. The Crown fails to prove murder of a child in consequence of failure to prove the preliminary necessity, "live birth." Thereupon, falling back on the legal presumption that every child is born dead until the contrary is proved, the prosecution assumes dead birth as a preliminary to the crime of concealment of birth by the secret disposition of a dead body, and the judge punishes for this latter statutory crime. Thus it happens that a common law presumption, which was meant to act as a protection to the innocent, is used as an assumption, without proof, not as an indictment to be proved, of existing evidence for another and a different crime. The failure of the Crown to prove the child born alive is not legal or logical proof that it was not so born; but the law introduces a general or universal presumption which is assumed as equivalent to

this, in order to establish an "alternative" offence. In all probability the offender would have been found not guilty of any crime whatsoever on an indictment for concealment by a secret disposition. But in the failure to prove murder, there is found a possibility of arriving at a verdict of Guilty of something else. And the more difficult it is to prove live birth, taking into account the requirements of the law and the nature of the evidence usually available, the easier will it generally lie on the consciences of the jurors if they bring in a verdict of Concealment of Birth. This subject is of such importance that a detailed historical statement of the law will not be out of place.

In 1623 there was passed 'An Act to prevent the Destroying and Murthering of Bastard Children" (21 Jac. 1, c. 27). The preamble of this Act shows the intention of the legislature: "Whereas many lewd Women that have been delivered of Bastard Children, to avoid their Shame, and to escape Punishment, do secretly bury or conceal the Death of their Children, and after, if the Child be found dead, the said Women do allege, that the said Child was born dead; whereas it falleth out some time (although hardly it is to be proved) that the said Child or Children were murthered by the said Women, their lewd Mothers, or by their Assent or Procurement;" By this Act, any woman who endeavoured to conceal the death of her bastard child or procured others to do so, by secret disposal of the body, whether it was born

alive or not, should suffer death as in case of murder unless she could prove by one witness at least that the child was born dead.

In 1803 this Act was repealed on account of some doubts having been entertained respecting its true sense meaning and "it having in sundry cases, been found difficult and inconvenient to be put in practice;" and 43 Geo. 3, c. 58, s. 4, enacted that trials for child murder were to be governed by the same rules of Evidence and Presumption as other trials for murder. A proviso was added that any prisoner charged with such murder and acquitted might be imprisoned for two years, if the endeavour to conceal the birth "by secret burying or otherwise" were shown in the course of the evidence. Concealment of death was no longer a capital offence, but concealment of birth by a secret disposal of the dead body was established as an offence to be punished by imprisonment, contingent, however, on the failure to prove murder.

The next stage is reached in the Consolidating Act, 9 Geo. 4, c. 31, s. 14. By it, the law was made applicable not merely to bastards but to all children; and concealment of birth was established as a Misdemeanor independent of any charge of murder. At the same time concealment was retained as an alternative offence, contingent on the failure to prove murder.

The third and present stage of the law was reached in 1861. The Criminal law Consolidation Act of that year (24 & 25 Vic. c. 100, s. 60) says: "If any Woman shall be delivered of a Child, every Person who shall,

by any secret Disposition of the dead Body of the said Child, whether such Child died before, at, or after its Birth, endeavour to conceal the Birth thereof, shall be Guilty of a Misdemeanor and being convicted thereof shall be liable at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided that if any Person tried for the Murder of any Child shall be acquitted thereof, it shall be lawful for the Jury by whose Verdict such person shall be acquitted to find, in case it shall so appear in Evidence, that the Child had recently been born, and that such Person did, by some secret Disposition of the dead Body of such Child, endeavour to conceal the Birth thereof, and thereupon the Court may pass such sentence as if such person had been convicted upon an Indictment for the Concealment of the Birth."

Under the former Act, (1) if there were no evidence to convict the mother, then aiders and abettors, on an indictment for concealment, escaped conviction; and (2) under the proviso, only the mother could be convicted. As the law now is: (1) every person who assists in concealment can be indicted, whether there is any evidence against the mother or not; (2) every person who assists can be indicted as a principal and not merely an aider and abettor; (3) any secret disposition is sufficient; and (4) any person, not merely the mother, tried for the murder, may be convicted under the proviso, whether the mother be so convicted or not.

Thus it has happened that a law that was intended

at first to check the murder of full term or viable bastard children by their lewd mothers who secretly buried their bodies, has been expanded in such a way as to subject to two years' imprisonment with hard labour any woman married or unmarried who disposes of the dead body of a two months' foetus in such a way as to prevent the world at large from knowing she has been delivered of it; and also every one who, with or without her knowledge does similarly.

The evidence in suppcrt of this almost incredible statement is found in the following reported cases. (1) In 1854 when the Act 9 Geo. 4. c. 31 was in force Justice Erle in the case R. v. Berriman (6 Cox, C.C. 388) said:- "It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself or of its mother, it might have been born alive. There is no law which compels a a woman to proclaim her own want of chastity, and if she had miscarried at a time when the foetus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may, perhaps, be safely assumed that under seven months the great probability is that the child would not be born alive." (2) In 1864, under the present Act, Baron Martin (a) held that

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(a) R. v. Colmer; 9 Cox, C.C. 506.

a foetus about half the length of a man's finger, having the shape of a child, was a child within the meaning of the statute. He said that he saw nothing to limit the word "child" in the statute to a child likely to live or die, but as soon as the foetus had the outward appearance of a child it was sufficient: but he promised to reserve the point in the event of a conviction of Guilty. Verdict: Not Guilty.

The act of parliament in question has given rise to other anomalies. One judge, Mr Justice Smith, in the case of R. v. Hewitt, 1866, 4 F. & F., 1101, left it to the jury to say whether "the offspring had so far matured as to become a child, or was only a foetus, or the unformed subject of a premature misscarriage."

Talk about the indefiniteness of medical language after this legal pronouncement !

Further, in the case R. v. Sleep (9 Cox C. C. 559) Mr Justice Byles, left it to the jury to say what a secret disposition was; while in R. v. Nixon, (4 F. & F. 1040) Baron Martin held that it was a question of law for the Judge, whether there had been a secret disposition of the body, i.e., a disposing of it in such a place as that the offence may have been committed.

Again, the secret disposition must be in order to conceal the birth "from the world at large." Now, what definition of "the world at large" can be given that will not either stultify law or offend decency? Under this act it is no offence, but a complete proof of innocence, to throw a two months' foetus into the public street; whereas a woman and her husband are both guilty

if he with her knowledge should bury it in their garden or cremate it privately. Will anything short of a register, not of merely, still births and abortions, but of pregnancies, shield the innocent under this law? "It is not how a law is applied, but how it may be applied, which governs its validity."

It was not to be expected that the justice of such an enactment, which tosses the accused with one horn of a dilemma and impales her with the other, by making practically alternative charges and proving neither, should be allowed to pass unchallenged. Four years after the act was passed, Baron Pollock, in two letters to Baron Bramwell, dealt with the subject. He said: (a)

". . . The papers have been making a great fuss about the lenient sentence of Judges when women are convicted "of concealing the birth by putting away the body." The fault is in the Legislature, which made an imaginary crime, and wished to make the Judges parties to the fraud of convicting the accused of one thing and punishing her for another. I have no doubt the Legislature meant the Judges to give a very severe sentence when there had been foul play with the child, and a nominal sentence almost when there was no suspicion of anything wrong. But the Judges WON'T be parties to this kind of fraud - one can call it nothing else . . . Why should not a woman who had occasioned the death of her child by carelessness, negligence, some improper conduct (not amounting to murder), be convicted of manslaughter? The State seems to take it for granted

(a) Charles Fairfield; a Memoir of Lord Bramwell, 1898, p. 37.

that she must be convicted of murder or be acquitted. Is that so? And would not conviction of manslaughter be some remedy for the evil? *

" . . . Practically I quite agree with you as to the imaginary crime of concealing a birth. As a fact, it is consistent with perfect innocence of anything, save want of chastity. It may also be connected with, and arise out of, a foul and cruel murder. All that the jury find is a fact consistent with perfect innocence, or possibly with great crime; then the Judge has to decide which. I have a rooted aversion to punish prisoners for a crime of which the jury have not found them guilty. You are quite right; I never did pass any such sentence as eighteen months' or two years' imprisonment for concealing a birth. It would be for the jury, not the Judge, to find that the child had not fair play. Our law (it is one of its greatest defects) has only two kinds of criminal slaying - murder and manslaughter. You may object to my analogy, that a Judge is bound to look into a case of manslaughter and decide between a fine of one shilling or penal servitude for life. But the jury there find criminal slaying. Here they do not. Next time I have a case that admits of it, I will leave to the jury to find a verdict of manslaughter. Why not?"

Pollock said the concealing of a birth is consis-

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* See Voltaire, Commentaire sur les delits et les peines, 1766; developing the ideas of the Marchesi di Beccaria.

tent with perfect innocence of everything, save want of chastity. But the case of R. v. Curtis, Lincoln Lent Assizes, 1872, in which husband and wife were found guilty of this imaginary crime, shows that concealment is consistent with everything without any exception, even with perfect chastity.

It is gratifying to be able to record signs of improvement in respect to this law. The Criminal Code of New Zealand, 1893, 3. 174, says: "Every one is liable to two years' imprisonment with hard labour who disposes of the dead body of any child in any manner with intent to conceal the fact that its mother was delivered of it, whether the child died before, or during, or after birth," and it omits the proviso of the English Act. This is certainly an advance, but it leaves something still to be desired. Other provisions of the statute, on account of the definition they gave of a "human being," would appear to provide for an indictment for manslaughter for gross carelessness in connection with the birth. This would meet Baron Pollock's suggestion.

The position in most places is highly unsatisfactory. In South Australia the penal enactment in The Criminal Law Consolidation Act, 1876, s. 80, is the same as in the English Act. Still-born children do not, of course, come within a coroner's jurisdiction. No certificate of burial is required, and there is no obligation on the part of a curator of a cemetery to permit burial in the cemetery. Where there is no concealment

of birth by a secret disposition of the dead body and no nuisance created, and where there is no statutory enactment to the contrary, it would appear that the body of a still-born child may be buried anywhere without licence or order. The consequence is that, at a time when a comparatively large number of new-born bodies were being found more or less exposed, due no doubt to the attitude and action of the curator of a cemetery, I had occasion to point out, when the medical evidence showed still-birth, that the finding of that body and of others in similar circumstances, did not mean that murder had been committed, or even that any crime at all had been committed. This view was borne out by the discovery that a newly born child's body had been surreptitiously buried in a grave in a Roman Catholic cemetery without the consent of the owners of the grave. The medical report showed that the infant was still-born, without marks of violence, decently and carefully dressed, and that it had been skilfully attended to at birth. On more than one occasion dead bodies of still-born children were brought to my office and house by the relatives and friends, on account of their inability to give them cemetery burial and their ignorance of what to do with them.

C H A P T E R XI.

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DEATH OR INJURY FROM FRIGHT.

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C H A P T E R XI.

DEATH OR INJURY FROM FRIGHT.

Sir James Fitzjames Stephen, in stating the law regarding homicide, says that it is said that death does not amount to homicide when it is caused without any definite bodily injury to the person killed. In criticising this statement of the law, which is given on the authority of Hale (a), he says (b): "Lord Hale's reason is that 'secret things belong to God; and hence it was that before 1 Ja. 1, c. 12, witchcraft or fascination was not felony, because it wanted a trial' (i.e. I supposc because of the difficulty of proof). I suspect that the fear of encouraging prosecutionsfor witchcraft was the real reason of this rule. Dr. Wharton rationalizes the rule thus: 'Death from nervous causes does not involve penal consequences.' This appears to me to substitute an arbitrary quasi scientific rule for a bad rule founded on ignorance now dispelled. Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him, might not this be murder? Suppose a man kills a sick person intentionally, by making a loud noise which wakes him when sleep gives him a chance of life; or suppose

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(a) 1 Hale, 429.

(b) Digest of the Criminal Law, 3rd edn., p. 155.

knowing that a man has aneurism of the heart, his heir rushes into his room, and roars in his ear, 'Your wife is dead !" intending to kill and killing him, why are not these acts of murder? They are no more 'secret things belonging to God' than the operation of arsenic. As to the fear that by admitting that such acts are murder, people might be rendered liable to prosecution for breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct, gradually 'breaking a man's heart' could never be the 'direct or immediate' cause of death. It it was, and it was intended to have that effect, why should it not bemurder? In R. v. Towers, 12 C. C. C. 530, a man was convicted before Denman, J., of manslaughter, for frightening a child to death (See Wharton on Homicide, para. 372, on this case). Lord Hale doubts whether voluntarily or maliciously infecting a person of the plague, and so causing his death, would be murder (I 432). It is hard to see why. He says that 'infection is God's arrow.' A different view was taken in the analogous case of R. v. Greenwood, 1 Russ. Cr. 100, 7 Cox, C. C. 464. As to the proviso, see Illustration (1)."

The law is different now from what it was in Lord Hale's time. It is expressed thus: When A., in unlawfully assaulting B., who at that time had in her arms an infant, so frightened the infant that it had convul-

sions, although previously healthy, and from the effects of which it eventually died in about six weeks, A. is guilty of manslaughter, if the jury thinks that the assault on B. was the direct cause of death (a). The Judge in this case left it to the jury to say whether the death of the child was caused by the unlawful act of the prisoner, or whether it was not so indirect as to be in the nature of accident. The verdict was Not Guilty.

In the case of Hayward (b) the prisoner was found guilty of manslaughter for causing the death of his wife from fright. The medical evidence was that death was due to cardiac inhibition in a subject who had a persistent thymus gland.

The presence of convulsions in this case may have given the jury some idea of bodily harm and so have influenced them in bringing in a verdict of manslaughter. Another influence at work in expanding the law may be the fact that an indictment nowadays is valid though it does not set forth the particular manner in which the death was brought about - if a man should die from an injury it is unnecessary to state the proximate cause of death or the intermediate diseases. There may be still another reason why death from fright finds a

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(a) R. v. Towers, 12 Cox, C. C. 530.

(b) 21 Cox, 692.

place in criminal trials, viz, the advance made by medical science in showing how fright operates on the system as a direct cause of death.

According to Professor James's theory of the emotions (a) the mental state of fright is secondary to the bodily condition that has been induced by the external cause. That condition may be one of very severe strain or injury on account of serious interference with the normal course of things by the suddenness of the action of the external causes. In not a few instances such shock leads on to insanity, bodily changes of nutrition and other nervous manifestations. The important fact, from the legal point of view is that these can be traced medically, and with a great degree of certainty, as cause and effect.

That death may occur from mental impressions, either of fright or of some other sort, is beyond doubt. Mr Justice Williams of Jamaica narrates the following (b): "A planter told me a sad story. He ordered a black boy of his, some fourteen years old, to go down one evening, after dark, from the estate to the wharf - three miles distant - with a letter. The boy objected, on the ground of "duppies," but his master, thinking it merely a lazy excuse, "overruled the objection." The boy returned in the course of a couple of hours with an

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(a) William James: Psychology, 1905, p. 375.

(b) From Journalist to Judge, p. 173.

answer to the letter sent, and, after delivering it, said, "Duppy track me, marsa, I'se dead boy." His master laughed, but next day at ten o'clock the boy was indeed dead. He had gone straight to bed in his cabin, and in the morning was found to be in a sort of speechless coma, from which nothing could rally him. The scientific explanation would doubtless be that he died from the effects of fright."

Another illustration is given by Mrs Rowan (a) from Maori life. "Some years ago a native servant that we had, having taken more wine than was good for him, stuck a lighted match into a chief's beard, when in an impressive manner the chief told him in three days he would die - and he did, though my husband and I did our utmost to persuade him to take food and that there was nothing wrong with him."

In this case there was a fixed idea with probably no element of actual terror or fright. A similar phenomenon is found among Australian aboriginals where the mere pointing of a death-bone is followed by the death of the person at whom it is pointed. In some places another way of killing is employed. In addition to pointing a bone the tribesmen, or even a single individual, will sing magic over the selected victim and go on singing until he is sung "dead-fellow." A good account of this, as practised in the Northern Territory

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(a) A Flower Hunter in Queensland and New Zealand, p. 194.

is given by Mrs Gunn (a).

Cases of death by suggestion are not uncommon in medical and general literature. The incident of "Downie's slaughter" in which a number of Aberdeen students were involved is well known. The students believed they had cause of complaint against the janitor, so they subjected him to a mock trial, condemned him to death, and made him kneel with his head on a draped block while the headsman struck his neck with a towel. Dowmie died on the spot. The popular impression is that the incident, after inquiry, was hushed up on account of the number and the social position of those implicated; but it is more probable that at that time the law took no cognizance of death caused by fright as Downie's death probably was.

In the New Zealand Criminal Code death from fright is recognised as a form of homicide but in a more restricted application. The enactment says (s. 159):

"No one is criminally responsible for the killing of another by any influence on the mind alone, save by wilfully frightening a child or sick person, nor for the killing of another by any disorder or disease arising from such influence, save by wilfully frightening a child or sick person."

The results of fright, short of causing death, have been recognised at law as proper subjects for recovery

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(a) The Little Black Princess, 2nd edn., p. 96 et seq.

of civil damages, if it be shown that such arose from the wrongful act or omission of another and that the sufferer was not a person of less than ordinary physical and mental vigour.

In the case of Braun v. Craven (a) the Supreme Court of Illinois decided that the plaintiff, who had been frightened by the entrance of the defendant into her house and the boisterous manner in which he demanded payment of the rent, was not entitled to damages for consequent inebility due to chorea, on the ground that the defendant was not unlawfully on the premises, and that although his conduct might have been reasonable supposed to cause terror and fright, yet these are sel-dom followed by an incurable disease. Mere words and gestures are sought to be made actionable because of the nervous temperament of the plaintiff, without which such words and gestures would not be actionable. If this ruling were adopted it would introduce and incorporate a new element of damage and a new cause of action.

In the Supreme Court of New York, in the case of Williams v. Underhill (b), it was held that injuries resulting from fright alone could be recovered for, provided they resulted from wilful wrong-doing. It has been generally held that injuries due to fright, or men-

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(a) 175 Illinois, 401.

(b) Journal of the American Medical Association, Sep. 28, 1901.

tal suffering, apart from physical injury or violence, could not be recovered for if they resulted from negligence. The decision referred to upholds this rule, but says that it is not applicable in cases of wilful tort or wrongful acts. The reason for limiting liability in actions for negligence is founded on the principle of the law governing such actions, namely, that the measure of damage shall be confined to the natural and probable consequences of the act or omission constituting the cause of action. The Supreme Court of Texas gave a similar decision regarding recovery in case of a wrongful act or omission.

In an English case (a) tried before Mr Justice Bingham at the Devon Assizes it was held that damages might be awarded to the plaintiff in respect to the shock caused by fear of her personal safety, though not by fear of the safety of her children.

The Privy Council, in an appeal case from the Colonies, held that an action will not lie for negligence where the damages arise from mere sudden terror occasioning a nervous or mental shock, but unaccompanied by any physical injuries, on the ground that injury to health in such circumstances cannot be considered as a natural consequence of negligence. This rule has not always been followed. In an English case a man was held lia-

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(a) "Lancet," Feb. 14, 1903.

ble who had made a woman ill by giving her fictitious bad news of her husband by way of a "practical joke." (a)

It is interesting to note that Casper (b) gives a definition of Injury that would include, unintentionally apparently from the context, such a cause as fright. He says: an "injur" may be simply defined as: every alteration of the structure or function of any part of the body produced by any external cause." Of recent years this definition, with all that it literally implies has come to be regarded as properly describing many injuries or accidents within the meaning of Workmen's Compensation Acts. For example: in one case (c) the plaintiff, a signalman, through excitement and alarm caused by the anticipation of a railway accident which he was able to prevent, suffered such a shock to his nervous system that he was incapacited from work for a year. It was held that the fright was an accident within the meaning of the policy.

Other cases of injury without impact have gone to juries.

(a) See Medicine, 1903, p. 245.

(b) Forensic Medicine, New Sydenham Society, Vol. i, p. 237.

(c) Pugh v. London, Brighton and South Coast Railway, C. A., on appeal, 1896, 2 Q. B., 248.

C H A P T E R XII.

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S U R V I V O R S H I P.

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C H A P T E R XII.

S U R V I V O R S H I P.

In Roman law, when there was no direct evidence as to survivorship there was a presumption that a child above puberty survived the parent, that the parents survived a child under puberty, and that the husband survived the wife. In France, Italy and Spain, which are dominated by Roman law, "arbitrary survivorship" finds a place. In English law there is no presumption; survivorship is a matter of evidence; and where one person is claimed to have survived another the onus of the proof rests upon the party asserting. In the States of Louisiana and California the presumption is as in Roman law; in the rest of the United States it is as in English law.

The Supreme Court of the United States (a) has laid down a law on this subject in a recent case as follows:- "The rule is that there is no presumption of survivorship in the case of persons who perish in a common disaster in the absence of evidence tending to show the order of dissolution and the circumstances surrounding the calamity of the character appearing on this record are insufficient to create any presumption on which the courts can act. The question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been

(a) Medicine, 1903, p.316.

simultaneous."

One aspect of this subject is interesting medically as illustrating the kind of evidence that might be accepted by the law courts in places where there is no presumption of survivorship, I refer to deaths by suffocation or asphyxia. In death from this cause the chances of survivorship are usually assumed as being in favour of women rather than men, this conclusion being based upon observations on charcoal poisoning in Paris, showing that the chances are as 15 to 14. A recent writer says (a) in criticism "The foregoing evidence is interesting and valuable, but far from conclusive, for a single series of observations must be regarded as entirely inadequate to prove any general rule relating to facts in medicine. Observations in such cases, to be reliable, must include the minutest details of age, habits, state of health, and especially of the position of the bodies with reference to the possible sources of air." I am able to give two cases in Adelaide in which the bodies were subjected to the same conditions.

In January, 1902, a mother aged 38 years and her son aged 3 years were found in a room in which one gas jet was burning very low and the supply to a gas stove wasturned full on but not lighted. The mother had

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(a) Petersen and Haines; "Text-Book of Legal Medicine and Toxicology," i, p. 158.

been drinking heavily, and said she could not remember how she went to sleep on the previous evening. She was found in the morning in a dazed, semi-conscious condition - the child was dead. There was little doubt, from the evidence, that the case was one of murder and attempted suicide by the mother; and in August of the same year she poisoned herself by caustic potash and cyanide of potassium.

On the 23rd August, 1902, a young man, 26 years old, thoughtlessly broke off the end of a gas supply pipe underground outside the wall of the house in which he and his mother, aged 68 years, lived. The two were last seen alive between 3 and 4 o'clock on that afternoon. On the 27th a neighbour noticed a smell of gas outside the house; and the police broke into the house. A physician at 8.20 p.m. found the man's body in bed, cold and stiff, and with some froth at the mouth. He saw the mother, who had been taken outside, deeply unconscious, and sent her to the hospital, where she died on the 29th. The gas had soaked underneath the foundations and through the walls of the house. When a constable held a light to the ground outside a flame burned five or six inches high.

As a bearing on these cases I may refer to what is perhaps not so generally well known now as it used to be in connection with survivorship in suffocation. Claude Bernard (a) experimented with a sparrow under a

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(a) Sir George Henry Lewes; The Physiology of Common Life, 1859, Vol. i, p. 374.

bell jar. He found that without renewing the air it would live for three hours. A second sparrow, fresh and healthy, was introduced at the end of the second hour, and it expired almost immediately. A sparrow taken from the glass at the close of the third hour and revived, perished immediately when put back into the jar. The system of the healthy bird, accustomed to, and receiving an abundance of, fresh air could not accommodate itself sufficiently quickly to the altered circumstances. The same thing applies to human beings. George Henry Lewes (a) tells of two young Frenchwomen who were in a room heated by a coke stove. One of them was suffocated, and fell senseless on the ground. The other, who was in bed, suffering from typhoid fever, resisted the poisonous influence of the atmosphere, so as to be able to scream till assistance came. They were both rescued, but the healthy girl, who had succumbed to the noxious air, was found to have a paralysis of the left arm which lasted for more than six months. The poisonous action of a vitiated air is better resisted by the feeble, sickly organism, than by the vigorous, healthy organism. It is also better resisted by the adult than by the young, who requires more fresh air, in proportion, for his bodily needs of energy and tissue repair.

(a) The Physiology of Common Life, 1859, Vol. i, p. 375.

In connection with the subject of exposure to cold, it must be remembered that although the production of heat in a child's body is very active, the amount of heat losing surface is much greater in proportion to the body mass than in the case of the adult; and therefore children suffer more from exposure than do grown up people.

Dr. Inman of Liverpool (a) made some enquiries into the question of how far nauseous smells are really prejudicial to health. He says "We have long been accustomed to believe they are so, but an investigation I was called upon recently to make leads me to doubt the absolute truth of the doctrine. Amongst the nasty odours which are rife amongst us, the amanations from pigs is pre-eminent; yet pig-drivers are a sound lot. To some the smell from sheep is intolerable; yet shepherds are healthy. In hot climates, the scent from the negro skin is horrible; yet the blacks carry neither fever nor pestilence in their train. In all our towns there are gas-works, and around about them the air reeks with nastiness; yet the inhabitants living within this range are as healthy as their neighbours. The poor wretches who gain a precarious living amongst the sewers (b)

(a) Foundation for a New Theory and Practice of Medicine, 1861, p. 75.

(b) Compare with this the unqualified statement of an expert in legal medicine: "Speaking generally the following lives are considered more than usually hazardous...(2) Those exposed to the action of sewer-gas, or to emanations from decomposing animal and vegetable matters, e.g., scavengers, the makers of blood-manure, &c." Tidy: Legal Medicine, Part I, p. 364.

are not consequently the prey to fever - even the scent of diluted sulphuretted hydrogen is not deadly, for the nymphs of the Harrogate and other sulphurous springs have as blooming compelxions, and as good health and constitutions, as their neighbours. Recent inquiries in London have demonstrated that the stinking Thames is not so deadly as the newspapers prophesied it would be. Sextons, nightsoilmen, fish-manure makers, glue-boilers, labourers in abattoirs, curriers, dissecting-room porters, and tallow-chandlers - all are daily exposed to nauseous smells, yet their duration of life and general condition is an average one."

There is a physical explanation of these facts. It has been found that when an individual is subject to the conditions in which his constitution has to do battle with disease, he becomes more powerful, more alert, less likely to be taken at a disadvantage, and more able to withstand the attack, or recover from any disease. His blood cells, which are the trained soldiers that war against the disease germs, become stronger after every victory until at last they can withstand the onslaught of almost any enemy.

Sir James Paget (a) has referred to this subject. In speaking of his own experience of dissection-wounds

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(a) Clinical Lectures and Essays, 1875, p. 326.

he says: "Years ago no virus of a dead body could hurt me; but then came a time in which I made few or no examinations after death. I stood by and watched others making them; and I became again susceptible to poisons that were once innocuous. My blood and textures regained the state they had before ever virus was introduced into them, and I became again more poisonable." He refers also to the case of Dr. Symes Thompson which that pathologist himself described in the "Lancet," June 24, 1871. When he was Pathological Registrar at King's College Hospital he was constantly exposed to the various contagious fevers and, at post mortem, examinations, to the poisonous fluids of dead bodies; yet, so long as he remained at his post, he escaped all infection, although his general health broke down from over-work. But on his return, strong and well, from a holiday in the pure air of the coast, he had so lost this immunity that he was immediately attacked with scarlet fever in a severe form, and also with erysipelatous inflammation of the hand and arm, and mischief in the axillary lymph-glands, following a scratch on his finger at a post-mortem examination.

Another influence, however, requires to be taken account of besides the vital necessities in considering the chances of surviving, viz., the difference in the interdependence of the vital organs in old and

young. This has been made the subject of an essay by Sir Henry Holland, who, in speaking of old age, says (a) "at this period of life the several organs become, as it were, more insulated from each other:- the relations of nervous sympathy between them are enfeebled; and in effect of this, their diseases also assume a more detached character than in earlier age. In connexion with the same cause, but depending also on the want of reaction in each part from feebleness of the general functions, we find that organs may take on a condition of specific disease with comparatively little excitement to the system, or suffering in the part itself; and often, it may be affirmed, with less danger to life, from a given amount of organic change. We have good reason to look upon these circumstances as a beneficient provision for abridging or mitigating the bodily ills, which in certain measure are inevitable as life advances towards its close."

In popular language, the organs in youth are like a team of young bloods; touch one and all respond: in age they are like a team of"broken downs;" one may be ready to drop with exhaustion or flogging, but the rest are hardly affected. In otherwords, and concretely, a nephritis that would prove fatal in a child or a

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(a) Medical Notes and Reflections, 2nd edition, p. 286.

young man might persist in an old person for many years and even might not, at last, prove the cause of death.

C H A P T E R XIII.

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I D E N T I T Y .

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C H A P T E R XIII.

I D E N T I T Y.

In these days of rapid means of communication and multiplied facilities for disappearance or transformations of persons and of bodies, the subject of Identity of the living and the dead acquires a new importance. Formerly the general appearance of a person was considered a sufficient and proper ground of identification. Nowadays more exact and refined methods permit of greater accuracy of identification, and when a case of mistaken identity occurs it is usually an illustration of almost incredible coincidence, or of such reckless neglect of some obvious line of procedure as proves that carelessness is a perennial factor in all investigation and evidence.

Reference has been made to two cases, in one of which (p. 124) identity was established or confirmed by clothing and marks of former disease, and in the other (p. 130) by peculiar features of the skull and the art of the photographer. The following is a case that illustrates identification under somewhat unusual difficulties.

On 30th October, 1895, I received a coroner's summons to inspect a body that had been washed ashore at Rhyl, and to give evidence at the inquest to be held about an hour after - as the messenger said: "Just to

look at the body and say what you think was the cause of death, since the corpse is past all recognition." I had to make the examination alone.

The body was clothed in yellow oilskin overalls. The head and hands were unclothed. The whole of the soft parts and cartilages of the face, forehead, and crown of the head were gone, leaving nothing but a bare macerated skull and lower jaw-bone. On the part of the scalp remaining on the back of the head were a few hairs, about a dozen in all, of fine quality, between colours, and inclined to light when dried. The left ear was gone, as was also the lobe of the right. The tongue was protruded between the jaws to the extent of half an inch, and was swollen. The series of teeth was complete with the exception of the upper left wisdom tooth, which had not come, and two bicuspids, one on each side of the lower jaw. These had been extracted some years previously, since the sockets were quite obliterated and the gaps almost filled in by encroachment of the other teeth. The backs of the hands were bared to the tendons and ligaments. The skin of the palms was sodden. The fingers, which were turned in on the palms, were so macerated that the skin and nails came off like the fingers of a glove.

A casual survey of the body gave one the impression that it must have been in the water for many weeks, if not months, and that identification must be difficult or impossible. Thinking, however, that a careful examina-

tion might give some clue to the identity of the "person unknown," I made a minute inspection of every possible detail, short of a sectio.

The oilskin overalls were rotten: their pockets were filled with dirty sand. Between the overalls and a jersey and the trousers there was a large collection of sand with clinkers, algae, certain living crustacea, some worm tubes, and such like materials. There were two blue worsted jerseys, darned, but with no name or distinctive marks. The trousers, which were almost rotten, were of brown checked tweed, some of the buttons being bone, the rest metal and all of one pattern, with the same maker's or tailor's name and address on them. The trousers ended at the knee with a band. One pocket had been cut open by the police, and, as appeared afterwards, a tobacco-pouch, pipe and ordinary pocket-knife had been removed. The other pocket was full of sand. The drawers at their exposed part seemed of a dirty brown colour; but their true colour, where preserved, was seen to be red: the meteriel was flannel. The stockings were grey with white tops. On the left foot was a clog with wooden sole and continuous iron. I removed the clog after cutting the laces. The shirt was striped, but it was hard to say what the original colour had been. A muffler round the neck attracted notice, since it looked, for all the world, like a dirty dish-cloth. Careful inspection of the rotten fibre showed, however, that it was of fine cashmere, and

that the colour was white or cream.

On slitting up the clothing and exposing the body, I found no distinctive marks. The skin was everywhere whole, with the exception of a slight abrasion over the left shin bone. The hair on the body was light in colour; on the pubes it was red. The arms were marked with the brightest vermilion and blue bars; but these were not tattoo marks. The body was muscular and well nourished, and showed no greater changes on the clothed parts than what I have seen in bodies that had been in the sea for only a few days; and its general appearance was such that, but for the clothing, I should not have taken it for the body of a seafaring man at all.

At the inquest I gave a detailed account of the appearances described, especially as previous witnesses from a superficial inspection, had made statements that were altogether erroneous; and, without going over the grounds on which the conclusions were founded, I stated that the man had been about 25 years of age, over 5 ft. 8 in. in height, with somewhat light hair; that the body had been lying on its back imbedded in and half covered by sand in shallow water; that the time might have been a few weeks; and that death was due to drowning.

During the description the superintendent of police left the court, and on his return he handed to the coroner a circular with an account of a missing man as follows, which I was asked to read:-

"J.J., 23 years of age, 5 ft. 9½ inches high, very light complexion, small light moustache, gold ear-rings;

had on a pair of brown worsted knickerbockets, with buckles at knee, striped union shirt, with odd sleeves, red flannel drawers, grey stockings with white tops, with cashmere muffler with blue spots, blue peak cap, blue jersey, and lace-up clogs. Drowned off Formby on the 2nd October."

This man and another, the sole occupants of a fishing boat, had both been lost in a storm. The boat had been cast up in fragments, but there was no record of the men.

The coroner's first question was: "Do you think the missing body could have reached the condition in which the found body is within the time - four weeks?" The thing seemed impossible to the jury, who had viewed the body; but the reply was: "Yes, since the body has been lying in hallow water where the amount of ground movement was sufficient to fill the pockets and clothes with sand within that time, and since the exposed parts have been eaten away, and nave not rotted away." A question about the presence of ear-rings elicited a restatement of the fact that one ear had gone entirely and the lobe of theother, both having been eaten, which was just what a ground-feeding fish like a cod would do had an ear-ring been there. The question: "Are there any marks on the body by which a relative or friend could identify it?" was answered by: "No."

The coroner adjourned the inquest in order that the friends of the missing man might appear. At the adjourned inquest the father identified the trousers' band

and buckle and the clog without the slightest hesitation, saying he would know them among a thousand. When asked if he could identify the body by any marks, he said: "No." He could not identify the pipe and tobacco-pouch, since the son, if he smoked at all, which the father did not know, had never done so in his presence. A cousin, however, who was present at the inquest, identified the tobacco-pouch. The father informed me that he knew his son had lost two teeth, and only two, since they had been extracted by Sequah when at Southport some six years ago. The body was given over to the relatives, who took it home for burial.

This case illustrates the saying that a medical man called to inspect a dead body should note everything, not that it is his business to give evidence on details such as I have mentioned, but because there is no saying when a coroner or a juryman may ask and expect accurate answers to questions referring to matters that do not properly come within the scope of the medical inspection and examination; and any shortcoming in ordinary observation on the part of the medical witness is apt to be taken as evidence or carelessness or incompetence in his special work. In this particular case it appears that the superintendent of police had brought the report of the missing man under the notice of two officers, and had asked them to note particularly whether the body found could possibly be the one that was reported as missing. The officers viewed the body, and reported that it certainly was not the missing one. Had the

superintendent not thought of the document during the description of the clothing, which was given almost verbatim according to the report, the verdict would certainly have been: "Found drowned: unknown," and there would have been two mysteries instead of none at all.

Apart from this, however, the case is instructive as a record of the actual condition reached by a drowned body imbedded in sand in shallow water within a period of four weeks. At the first inquest I was asked whether a post mortem examination of the body could reveal anything as to the death being caused by drowning. From experience of drowned bodies in the dissecting-room, I was able to say unhesitatingly: "Yes; the body is in such a state that the internal organs might show positive and conclusive evidence that death had been due to drowning." This point, however, did not in the particular circumstances require to be pressed.

In this State I have had many opportunities of studying the relative appearances of bodies taken from fresh and salt water. From a consideration of these and other cases I am forced to conclude that it is very difficult to express an opinion regarding the time a body may have been in the water. The ordinary appearances as set forth in text-books furnish very little guide to even an approximation; and the identification will depend on points of anatomical similarity and the character of the clothing more than upon the date of disappearance of the individual whose identity is in question.

Sometimes the differences exhibited by bodies im-

mersed in sea water under similar conditions is very remarkable. In one instance which I observed, a mother aged forty-five years and her child aged two and a half years were drowned together some time after nine o'clock in the evening. The mother's body was found at 8.12 a.m. next day; the child's at 10.20 a.m. The body of the mother had undergone little or no change. In the case of the child there were some small holes in the skin of the neck; and the post mortem examination showed that not a trace of either lung or of the tongue remained. The walls of the thorax and the diaphragm were untouched, and the cartilages of the larynx remained, denuded of their muscles.

The investigations of Casper (a) show how very difficult it is to form an opinion as to the putrefactive changes that will appear in any given case.

It is somewhat remarkable that no standard English work on legal medicine contains any reference to the appearance of bodies that have been in sea water. The only literature that I know of on the subject is a communication by Professor Harvey Littlejohn in the "Edinburgh Medical Journal" for February, 1903. This is a careful account of observations made on bodies the periods of immersion of which were accurately known; and the investigations are therefore of extreme value. They give the expert sufficient data to enable him to

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(a) Forensic Medicine, New Sydenham Society, Vol. i, p. 33.

form an opinion in any given case; and, above all, they teach him to be careful.

Identification for the purposes of law, in criminal, civil or coroners' courts, should be as careful and complete as possible. Sometimes, in spite of what seems all reasonable care, cases of mistaken identity occur. Their occurrence serves to show how coincidences may occur in such a way as to "give the lie" to mathematical rules of probability. Ogston (a) mentions a remarkable case in which mistaken identity by the relatives occurred from the living man and the corpse not only corresponding closely in general features but in both having the left ear and the forefinger of the left hand awanting. In March, 1905, a similar instance occurred at Beaufort in Victoria. A man believed to be James Kellyer, was found lying dead under a hedge near Burrumbeet. A constable, to whom Kellyer was well known, and George Kellyer, his brother, positively identified the deceased. Another brother came from Creswick to inspect the corpse, and he, too, positively identified the dead man as his brother, James Kellyer. It is supposed that James Kellyer was a labourer, of wandering and intemperate habits, and was well-known as James Hilliard, and while the deceased was buried at the expense of George Kellyer, in the Beaufort cemetery on Sunday,

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(a) Medical Jurisprudence, 1878, p. 67.

and the relatives went into mourning, the real James Kellyer, under the name of James Hilliard, was on Saturday sentenced to a month's imprisonment at Ballarat for drunkenness. George Kellyer visited Ballarat, and settled beyond the shadow of a doubt that Hilliard and James Kellyer were one and the same person. A strange coincidence concerning this case of mistaken identity is that the deceased and James Hilliard had each lost the left eye, that they were of exactly the same height and the same complexion, had the same coloured hair and whiskers, and thateven their teeth were similarly marked through smoking a pipe.

By the kindness of Dr. R. S. Rogers I am able to give remarkable coincidence in the occurrence of monstrosities. He says: "Congenital absence of the globe of the eyes is such an extremely rare condition that a specialist in Adelaide to whom I referred the matter informed me that as far as he could ascertain only five cases had been published in ophthalmic literature. Yet singular to relate it came to my lot to come across three cases in the short period of seventeen months. In a Maternity Home of which I am Honorary Accoucheur, I found two sisters awaiting their confinement. Both these girls owed their misfortune to the same brother. Alice B. aged 18 was delivered of a female child, apparently healthy after a short normal labour of six hours, on 8th August, 1903. The eyelids were normal and closed as though in sleep, but both eyeballs were

absent. The Sister, Olive, scarcely 15 on entering the Home, was confined on the 17th of the following October after a normal labour of ten hours. The child, a female, suffered from exactly the same congenital defect as the other one. Both children are, I believe, alive to-day. The father fled the State and consequently no history of gonorrhoea could be obtained from him; nor could I obtain one from the mothers. On the 22nd January, 1905, I was called to attend a respectable married woman Mrs B., for her fourth child. The birth was normal labour six hours. The child, a male, was found to suffer from congenital absence of both eyeballs. It had also a malformation of the throat, which led to its death within a few hours of its birth. I made careful inquiries in this case, and feel confident that neither parent had suffered from any venereal trouble. The parents, indeed, were firmly persuaded that it was due to a maternal impression, as the mother had witnessed, and been much shocked by, a serious accident to her husband's eye in the early stages of her pregnancy."

Dr. Hill in his "Introduction to Science" gives a case of so startling a coincidence that no Law of Chance seems adequate to account for it. The President of the Royal College of Surgeons of Edinburgh told him that some time ago a woman was brought into his ward in the Infirmaryat Edinburgh shot through the head by a bullet from a revolver which some one was examining in a sale-

room. She died. Nine years afterwards a woman was brought into his ward shot in the chest by a bullet from a revolver which her husband had bought in a sale-room. She recovered, but a judicial inquiry was held. Some days after the inquiry, the Chief of Police entered Dr. Chiene's consulting-room, and producing a revolver said, "I have something here that will interest you. You said at the inquest that it was a very remarkable coincidence that you should twice have had in your ward a person shot in such an unlikely way. I have looked up the old case, and I find that this pistol which recently wounded a woman is the same one which killed your patient of nine years ago. Dr. Hill adds "Anyone with a touch of superstition would as likely to remark that, until that pistol had been dropped into the deepest hole in the Pacific Ocean, it is not safe to enter a sale-room."

Coincidences in which no causal connection can be found make one extremely cautious in declaring that any particular occurrence, or anatomical feature or even cocatentation of features is impossible on account of its extreme improbability, judged from the law of mathmematical probabilities. The chances may be a thousand to one against a particular event and yet it may occur at the first observation. Where the chances are millions to one against an occurrence it may be found twice in the first twenty cases.

The subject of mathematical probability is more especially interesting in connection with the identifica-

tion of persons, particularly criminals, by means of finger prints. The chances of any two persons having finger prints indistinguishable from each other are very small indeed - they have been estimated by Miss Baxter (a) as 1 in 64,000,000,000. The first case in New Zealand in which the prosecution depended solely upon finger print evidence was heard in the Wellington Police Court on March 6th, 1905. John Clancy was charged with breaking and entering and robbery. The story of the crime is briefly that the house of Mrs Williams, Wellington Terrace, was broken into during the absence of the occupants between 4 and 5.15 o'clock on the evening of February 23rd. The bedroom of Mrs Williams was ransacked, and two gold rings and a pair of gold brooches were stolen. Entrances was effected through one of the front windows, the upper pane of which was broken by the offender near the catch. The following morning a detective found finger prints on the broken pane of glass, near where the breaker had evidently caught hold of the sash to pull the window down. Pieces of glass where the prints showed were cut out and submitted to the finger print branch of the Police Force for examination. The result was that one of the finger-marks was found to correspond with the imprint of the third finger of the right hand of John Clancy, impressions of whose fingers had been taken a considerable time ago by the

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(a) "Lancet," Nov. 12, 1904, p. 1354.

police. This was reported, and Clancy was arrested next day. Experts found 21 similarities between the imprint on the glass and Clancy's finger print, and the opinion of experts is that the chances against the marks on the glass having been made by any other finger than Clancy's are over two thousand billion to one. Clancy was committed for trial.

It is doubtful whether a jury would consider that finger print evidence alone could be relied on for identification. In some of the Australian States it has been rejected. As corroborative evidence it is important; but it is not beyond the possibility of being tampered with.

In former times when medical science was less advanced than it is now, many prosecutions for crime were allowed to lapse on account of the difficulty of identifying remains of bodies. Nowadays anatomical features and bodily peculiarities are so carefully studied that identification becomes in many instances wonderfully accurate.

There have been many instances of remarkable identification by the condition of the teeth. A few years ago there was a great deal of discussion in France regarding certain human remains that were said to be those of the Dauphin Louis XVll. Careful critical examination by several experts at different times has shown that the bones belonged to a subject 16 or 18 years old and could not possibly be those of the Dauphin, who had

not reached 11 years. An eiptome of the investigations is published as a communication to "Medicine," June, 1899, by Dr. E. S. Talbot, under the title "What becomes of the Dauphin Louis Xvll? A Study in Dental Jurisprudence."

Remarkable abnormalities occur in connection with teeth, and this fact should always be remembered in connection with any case of identification. In one case I found in the lower jaw of a man seventy years of age a left bicuspid and a right wisdom erupting, just cutting the gums. These were the only teeth in the jaw.

Further, it must not be forgotten that teeth of the second dentition when extracted may be replaced by new teeth of a third dentition. I know of one instance of this, a lady who when ~~at~~ thirty-six years of age cut several new teeth - bicuspids and molars, replacing others that had been extracted some years previously.

In these days when dentists are in the habit of keeping charts of the condition of their patient's teeth this source of evidence of identification should not be overlooked.

Dentition as a racial character is very important, and exceptions to the general rule are therefore to be studied with great care. The Australian aboriginal has been looked upon as being nearest to primitive man in the matter of dentition, and yet (a) some remarkable

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(a) I reproduce this sentence as it was written some years ago; but the word I should use now after several years of study of the osteology of this race is not "yet" but "therefore."

deviations have been recorded. Sir William Turner (a) describes an aboriginal skull which I send to him, the upper jaw of which had a supernumerary molar on the right side and two on the left side. He makes reference to his "Challenger Report" in which he had described two Australian skulls in each of which one supernumerary tooth existed.

In dealing with identification by racial features, it must not be forgotten that certain sorts of soil cause changes in skulls leading to easy distortion by pressure; also that many tribes in various parts of the world compress the skull and so distort it out of scientific recognition. Dr. Graves (b) refers to this and says: "I mention these facts, because, at a late meeting of the British Association at Edinburgh, there was a debate as to whether some skulls dug up in Mexico, did or did not belong to an extinct race, inasmuch as they happened to be shaped in a curious manner, similar to that now spoken of."

It may be well to point out that some of the statements in books of Medical Jurisprudence require revision. It is usually said that the presence of hair on the chest and along the middle line of the abdomen above and below the umbilicus is evidence that the subject is

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(a) Journal of Anatomy and Physiology, Vol. XXXIV, p. 273.

(b) Studies in Physiology and Medicine, 1863, p. 117.

male and not female. This is by no means so. I have seen a woman about 18 years old who had such a growth of hair on the chest that she periodically shaved it: and I have seen many cases of exuberant growth in the middle line. The women who possessed these characters had not a specially marked growth on other parts of the body. One lady about twenty-seven years old had a remarkable development of long and strong hair on the legs from the knees downwards, while the rest of the body showed no abnormal growth. No special reason could be assigned for this growth.

It is stated not infrequently that women of masculine character, i.e. with little development of the generative organs and few female mental characters are usually very hairy. This, in many cases is true; but it must be noted that the converse is far from being the case.

Peculiarities of hair are often hereditary; but one must not forget how the hair changes in certain diseases, e.g., phthisis and Graves's disease. The skin also may change very much.

Questions of identify and paternity sometimes involve anatomical peculiarities that may run in families. I have noticed very frequently that peculiarities of teeth, say the overlapping sideways of one tooth over another, are observable in the whole of the members of a family. So also do certain muscular peculiarities that affect facial expression both in action and repose. These facts are apparently not recorded in text-books of medi-

cal jurisprudence, but they may be constantly observed by any one who takes an interest in them. Evidences of heredity are also shown in other parts of the body. In the "British Medical Journal" of July 7th, 1894, I published, in conjunction with Mr Stewart Norwell, an extensive family history of polydactylism, a subject which Sir William Turner was one of the first to study extensively. Polydactylism has been accepted in court as corroborative evidence of paternity (a). The experimental study of Mendel's theory of Heredity promises to be of some practical use in this connection.

In the "Journal of Anatomy and Physiology," Vol. XXVl, I published an account of a case of "Abnormality of the "Finger Nails," The subject of it inherits a peculiar formation of the joint of the thumb from the mother. The anatomical peculiarities can be traced through the family of five in a very interesting fashion. With reference to the abnormality of the finger nails it has to be noted that if one had interpreted the age of the full term child by the ordinary rules for finger development there would have been a discrepancy of several months between the actual and the apparent term of foetal life.

Mental characters are also notably hereditary. Dr. Oliver Wendell Holmes has pointed out that at different times we resemble different ancestors, and this

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(a) "Lancet," March 21, 1903.

holds in some cases for both mind and body. It is a striking fact that two brothers who are both taken from home very early in life, and reared in different circumstances in different parts of the world will, without communicating with each other in any way, develop along parallel lines as to speech, actions and tastes.

Medical science has recently become much more accurate in regard to certain facts bearing upon the evidence of identity and paternity, such as polydactyly and syndactyly; and the courts have for a long time accepted personal resemblances of form, feature, voice, habit, mannerisms, as evidence. Non-resemblances, be it noted, are not accepted as evidence to the contrary. The proof of identity is usually a subject for the jury, who will consider the medical along with other evidence in coming to a finding. Physicians must not feel aggrieved if their views are sometimes apparently ignored. A physician would no doubt be justified in saying that a mulatto child was not the offspring of two white parents; but if the husband had access to the wife, the law's presumption no doubt would be that the said child was legitimate, as was held by Lord Campbell in 1849.

Coincidence sometimes gives rise to peculiar cases of mistaken identity. This has been referred to in connection with a case recorded by Dr. Montagu Williams (a). In the case of Beck which caused a great deal of excitement a few years ago, the identification of Beck as

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(a) Leaves of a Life, 2nd edition, p. 324.

Smith was apparently due to carelessness in procedure and reckless evidence.

Cases of forgotten identity and of double and even triple "consciousness" are recorded from time to time, and are perhaps more interesting psychologically than criminally (a). The following is recently reported two or three years ago from Melbourne. Charles Lima Braun, an ex-member of the New South Wales Mounted Rifles, who mysteriously disappeared from the steamer "Buryalus" on March 1, has been found. He is a victim to loss of memory. On the date mentioned he left the steamer for a walk. Subsequently some of his clothes were found on the Port Melbourne beach, and it was feared he had been drowned. As the socks found with the other clothes had not been worn it was thought possible that Braun was still alive. His father did not go on with the steamer to Sydney, but remained here to continue the search. On Tuesday morning Arthur Tarkover, a friend of Braun's family, noticed the missing man gazing into a chemist's shop window in Bourke Street. Tarkover sang out, "Hallo, Charlie, how are you?" but Braun declared his name was not Charlie. Tarkover persuaded him to go round to the Federal Coffee Palace, where his father was staying, but the latter was unfortunately out. Braun refused to accompany Tarkover home,

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(a) For a very complete and interesting study on this subject see Morton Prince: The Dissociation of a Personality, 1906.

and persisted in the statement that his name was not Braun. An appointment was made for the next day, but Braun failed to keep it. Subsequently he was found in a cafe, and with the assistance of the polce was induced to go to meet his father. He is suffering from loss of memory, and can only remember the events of three days' duration. His memory, he says, is a complete blank, so far as the "Buryalus," or what occurred immediately after his leaving it, is concerned. He did not even recognise his mother's photograph. When found he was without his coat and watch, and had evidently lived on the proceeds of pawning his personal property. He states he was afraid his people would lock him up in an asylum.

C H A P T E R XLV.

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INSANITY AND ALLIED CONDITIONS.

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C H A P T E R XLV.

INSANITY AND ALLIED CONDITIONS.

The subject of insanity comes before the physician medico-legally (1) in criminal cases, when the questions are raised, (a) was the prisoner sane when he did the deed? (b) is he sane enough to plead? (c) has he become insane since his conviction? (2) in connection with civil suits, when the physician is called on to give testimony to a person's capability (a) of managing his own affairs, or (b) of making a will: (3) when the physician is called to certify, or give evidence in connection with committing to an asylum or other place of detention (a) a pauper, or (b) a person not a pauper. In some of the States of America, laws have been passed regulating marriage with the view of preventing insanity, but this subject has not as yet proved of much practical importance as regards the medical profession.

Of all these, the most instructive, if not the most important, is the question of a person's sanity at the time when he committed an offence, say, murder. From this point of view we may examine the subject generally, and then, in the light of the discussion, treat the other matters referred to above.

Insanity and Murder.

It will be well to set forth the law, and then to

note what points may be said to be settled, and what are doubtful or unsettled.

The law.- (1) Every person is presumed to be sane, and to be responsible for his acts. (2) The burden of proving that he is irresponsible is upon the accused. (3) No act is a crime if the person who does it, is, at the time when it is done, prevented by any disease of the mind from knowing the nature and quality of the act and from knowing that the act was wrong. (4) An act may be a crime although the mind of the person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects abovementioned in reference to that act. (5) The decision as to sanity rests with the jury. (6) The evidence consists in (a) the appearance and behaviour of the prisoner in court; (b) facts connected with the deed, or with the previous acts, parentage and character of the prisoner; (c) expert testimony as to what diseases or defects of bodily constitution suspend or destroy the mental elements of guilt.

The following are the points on which doubt arises: (1) The meaning of "wrong" in (3). There seems reason to believe that formerly it meant moral wrong. The test was a knowledge of right and wrong generally, or in the abstract. Now it is narrowed down to the concrete act. Does "wrong" then mean morally wrong, or legally forbidden? There is a tendency to depart from religious or moral definitions and to judge by legal

definitions, e.g. the "swearability" of a witness does not depend on his belief in a God or a future state of rewards and punishments but on his statement (1) that the oath or affirmation is binding on his conscience, and (2) that he knows he is liable to prosecution for perjury if he gives false evidence. It may be doubted if there is much difficulty in saying that "wrong" here, as almost invariably, means "legally forbidden," on the same principle that the lawfulness of an act is to be judged not by any moral standard but by the law of the land. This is in accordance with sound reason. How many people are there, and who are they, who have an intellectual conviction, or a moral feeling, that poaching or breaking a speed-limit by-law is wrong in any other sense than that it is legally forbidden? An act that to people in one country or condition would be an imperative duty, to others in another might be a mortal sin or crime.

(2) Fitzjames Stephen is doubtful as to whether "defective mental power," i.e., idiocy, should be placed along with disease of the mind, i.e. madness or insanity in (3) in the statement of the law. Hale separated them. Stephen puts them together. He says (a): "I have done this because it seems desirable that the province of law and medicine in this matter should be kept distinct. It is the province of lawyers to define as well

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(a) A Digest of the Criminal Law, 1877, p. 332.

as they can the mental elements of guilt. It is the province of physicians to say what diseases or defects of bodily constitution suspend or destroy those elements. I cannot see how the legal effect of ignorance of the nature of an act can be affected by the question whether it is a temporary ignorance produced by curable madness, or a permanent one produced by congenital idiocy."

(3) Whether a man is responsible, if by disease of the mind he was prevented from controlling his own conduct, unless the absence of the power of control has been produced by his own fault. Stephen thought there was a place for this in the opinions on Macnaughton's case.

The whole subject of criminal responsibility hasn been obscured by discussing the question, "When is a man legally or medically insane?" involving a discussion of the difference between legal and medical insanity. The attempt to settle this has given rise to all sorts of legal casuistry, psychological refinements, and medical sophistries; and very little advance either in knowledge or in practice is possible while this question is intruded. The real question is, "When is a man punishable?" The answer to this, in turn, depends upon the reply given to another question, "What is the aim of legal punishment?"

Between the practice on the one hand of those who hanged a man for stealing a handkerchief as a deterrent to others and a preventive of a repetition of the act by the criminal, and the precepts on the other of those who speak as if the whole social organism existed merely

for the reformation - which usually means the well-being - of the criminal parasites that infest it, there is a wide gulf fixed. In practice, we have departed from such modes of prevention as stated; but we have not yet adopted the view that the criminal by-way is the easy road to the virtuous life, and that the struggling and honest poor must enter by the criminal portal if they are ever to receive the same individual sympathy, social consideration, and State aids to the attainment and retention of virtue that are meted out to the habitual criminal. Society is still founded on principles of law and morality, not on the tenents of religion. We have not yet, in our legal dealings with our fellow men, adopted the teaching of any religious body; and, although a nation may be, Christian in profession and in practice, it does not follow that it deals with its criminals after the fashion of the First Legislation or the Deuteronomic Code, the vindictive psalms as interpreted by Messrs Kettledrummle and Poundtext, or the Sermon on the Mount according to the exegesis of Tolstoi.

At one time prisons were merely houses for the detention of criminals before their trial and during the brief interval between the dock to the gallows. Two hundred years ago citizens would have stared in amazement at a proposal to use prisons as houses of punishment. Were there not the plantations? Less than a hundred years ago, they would have been equally surprised at the idea of making a prison a house of reformation.

Two hundred years ago Insanity, like small-pox, was something to be treated socially, if not medically, by whipping the subject of it. The law gave short shrift to the defendant whose counsel dared to raise the plea of insanity as a defence. "Shall a man" said the court, "be permitted to blemish himself by pleading his own insanity?" (a).

But we take credit to ourselves for great changes in two directions, the study of insanity and the treatment of the criminal. The combination of these two things has raised an enormous number of false issues, and has clouded not only the questions of what and why the law is, but has threatened to prevent a calm consideration of the questions, "What is the law?" "Is a change in it desirable?" "If so, in what direction?"

In this State there is a "criminal" - a man sometimes convicted of drunkenness, but one of the gentlest and least harmful of men. He makes a round of the General Hospital, the Destitute Asylum, and the Gaol, and he once asked me to use my influence to obtain for him"a spell in the Lunatic Asylum"* He suffers from "Voices", which, he says continually urge him to do

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(a) See 2 Blackstone, 291.

* On one occasion I was speaking to the Sheriff, and telling him about this request. He seemed doubtful, if not unbelieving. I turned to the Medical Officer of the Asylum who happened to be present and asked if he had heard of P.W. lately. He said "He called on me to-day and I took him. I told him he would be better of a rest for a while."

wrong. But he has no inclination to do the acts he is told by the "Voices" to do; and he does not do them. Would he be punishable if he did? If not, why not? Take another aspect of the subject. Mrs Rowan says (a) regarding certain natives: "The temptation to kill is so strong in them, that a black boy that my father once had for a good many years begged him not to walk in front of him alone, as the wish to knock him on the head was too great for him. They cannot be trusted, and the idea of gratitude is unknown to them. These last sentences apply to all the Australian races."

Would this man be punishable if he were to kill his master? If so, why? The answers to these questions depend upon the view taken of the object of the English Criminal Law. This is dealt with at some length in a letter in the "Spectator," 3rd February, 1872, now known to have been written by Lord Bramwell, "one of the brightest, soundest, and most lucid Judges that ever sat upon the English bench." (b). Probably no one ever took more interest than he did in this question which lies at the root of the whole meaning and origin of the English Criminal law and the purpose of the administration of it. Certainly no one ever took more pains to make the subject clear; and no apology is

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(a) A Flower-hunter in Queensland and New Zealand, p.84.

(b) Montagu Williams: Leaves of a Life, 2nd edn., 1890, p. 81.

required for stating his views at length in his own words. He says (a): "The two recent trials of Watson and Edmunds have shown the uncertainty and contradiction of opinions on the subject of how far insanity should exempt one who breaks the criminal law from its penalties. The following is an attempt to ascertain the principle: 'Whom should the law punish?' It is obvious that it should punish all whom it threatens, who knowingly break it, and are convicted thereof. To threaten punishment and not punish would be idle. To say that stealing should be punished with three months' imprisonment, arson with eight years' penal servitude, and murder with death, but on conviction not to pass or emforce those sentences, would be nugatory. The question, then, first is, Whom should the law threaten? It seems an obvious answer to say: All on whose minds it may operate, all whom it may deter by its threat. It would be useless to threaten those who could not understand the threat. It would be useless to threaten punishment to an idiot for disobeying the law, doing wrong, or injuring another, if the intellect of the idiot was such that it did not understand the meaning of disobedience of the law, doing wrong, and injuring another. So if a man laboured under a delusion that someone was attempting his life, and believed that facts existed,

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(a) Charles Fairfield: A Memoir of Lord Bramwell, 1898, p. 41.

which, if they really existed,
would justify his taking the other's life, it would be useless to threaten him. He would say, 'I have obeyed your law," and he would have meant to obey it. His mistake would be no reason for punishing him as for wilful breach of a law. It is so in the case of a sane person. If a man shoots another in the apparent act of committing burglary, the shooter is not punishable, though it turns out he was mistaken in supposing burglary was being committed.

"The law then, should threaten, and consequently punish, those on whose minds it may operate, all whom it may deter. This is the law of England at present as laid down by the Judges in their answers to questions put to them by the House of Lords in ~~Macnaughton's~~ McNaghten's case. Should there be any exception to this rule?

"Let us examine the supposed exemption of an offender of unsound mind. It is said mad people ought not to be punished. If not, they ought not to be threatened. But why ought they not to be threatened if the threat may operate on their minds, if it may deter them? It is said that there are certain manias which irresistibly impel to crime, and that though the threat of the law is understood, there is no wilful disobedience of it. Now, what are these manias? The two most frequently heard of in connection with crime are the homicidal mania and the stealing, or kleptomania. A man troubled with these has a strong desire to kill and to steal. These manias, as they are called, do not con-

sist in disease, unsoundness, or a non-sane state of the mind but of the passions or appetites. The homicidal maniac has a morbid craving for taking life. The not doing so is painful to him, the doing ~~is~~ so pleasurable. We may wonder that it should be so, but so it is. Not a natural appetite, or source of pain or pleasure, it is so in the man. So of the kleptomaniac. He likes to take from others the property that belongs to them, and have it in his possession . . .'

"We read in the papers a few days ago of a boy in London, of about fifteen years of age, whose delight was to fracture the skulls of small children. He had done it on several occasions. That was his mania. Now the mad-doctors call these cases cases of moral insanity. But would it not be more correct to call them cases of insane morality: i.e., are theynot cases where the desire to do mischief is not counteracted by a morality sound enough to prevent commission of the offences they lead to? Why should the persons who commit offences under the influence of their vicious desires or appetites - or 'manias,' if that is the right word - not be punished, i.e. not be threatened with punishment? It is said by the mad-doctors and their followers that they, the persons breaking the law under such influences, do not break it wilfully - that they can't help it. 'See,' it is said, 'what is the use of your threat of punishment on this man. He has disregarded it under an irresistible impulse.' He has dis-

regarded it, no doubt, and the impulse or temptation was too great for the countervailing considerations. The same argument might be used in the case of all offenders, however sane; the temptation has been too great for them. But the justification of punishment, the reason for the threat of punishment, is not to be found in its effect on those whom it does not deter, but on those whom it does."

Lord Bramwell goes on to discuss the question as to whether a person of small intellect or little self-control, who kills in consequence, is as hateful as a person of strong mind and no morbid tendency who does so deliberately for his own profit and gain and he says (a):

"No. But that is not the question. The question is, Should the law not direct its threat against one who stands so much in need of it, who, unless fortified by it, is so likely to do wrong? What would be thought of the law if it should say in so many words: 'You have a strong propensity to kill, therefore if you do you shall not be punished; you have a strong propensity to steal, therefore if you do you shall not be punished; and, further, if you, the homicidal maniac, steal, you shall not be punished, because your mind must be feeble. So of you, the kleptomaniac, you may commit robbery with impunity - in short, both of you, having evil propensities, may commit any offence without punishment?

(a) Ibid, p. 44.

What would be said of a father who should say to his sons: "You John, are a good boy, but if you rob an orchard in my absence I will flog you; you Thomas, are a badly-disposed boy, who, when my back is turned, will certainly steal my neighbour's apples if you can, therefore I will not punish you"? And where is this argument to stop? I have a homicidal mania, therefore do not punish me for homicide or other offences; I have a kleptomania, therefore do not punish me; I, says the Monmouth offender, have a peculiar physical or mental development, therefore do not punish me; I says a fourth, am really not a bad man, but have lived all my life among thieves, and am as much inclined to steal as a kleptomaniac; I, says a fifth, am really a good and well-conducted person, but I was in great want, there was no witness near, the owner was rich, so the temptation to steal the watch was irresistible. Irresistible ! All we know is that the deterring considerations were not enough. Had a policeman been present when Watson slew his wife, would his temptation have been irresistible? Would Edmunds have given the poisoned sweets to be taken to the confectioner if a policeman had been within hearing? The argument comes to this: "Wherever a person is likely, from feeble intelligence or morbid appetite, to commit a crime, wherever the threat of the law is most needed, there the person is to be pitied, and the threat withheld. Why not in every case where the offender is to be pitied?

"It may be said the man ought to be punished, but not

so severely as the man of strong mind. Why, the question is, What punishment ought to be threatened? Give what is threatened - all or none."

Lord Bramwell's biographer says (a) that he had a reputation for taking a stern rather than a sentimental or neo-humanitarian view of a judge's duty. Nevertheless, he was not one to inflict needless or useless punishments. A prisoner was once convicted before him of a very terrible and repulsive crime, committed under circumstances never likely - indeed, impossible - to recur. Sir George Bramwell saw no necessity for a "deterrent" sentence: there was no danger of that kind of crime spreading. Accordingly, although it was technically a capital offence, he passed sentence of nine months' imprisonment only; thus, as he told a friend, expressing the law's vengeance or disapprobation - one of the ingredients in all sentences - without inflicting needless suffering.

From this it will be evident that the object of the English Criminal Law is (1) by threats, to deter from crime people and especially those who by reason of weak moral sense or strong criminal propensities are likely to offend; and (2) by punishment, to deter the offenders and others from similar crime.* Further it is evident

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(a) Ibid, p. 71.

* Long ago Hobbes said: "In revenges or punishments men ought not to look at the greatness of the evil past, but for the greatness of the good to follow, whereby we are forbidden to inflict punishment with any other design than for the correction of the offender and the admonition of others." Chief Baron Pollock wrote: "It must be remembered that a legal sentence is not a punishment for moral sin (scarcely for legal guilt); its object is to deter others

that Lord Bramwell's only limitation is that those should not be punished, nor threatened with punishment, who do not understand the meaning of disobedience of the law, doing legal wrong, and injuring another. This, when examined in the light of his illustrations of it, is the same as the principle laid down by Baron Alderson. When addressing the jury he said: "In the first place, they must clearly understand that it was not because a man was insane that he was unpunishable; and he must say that upon this point there was generally a very grevious delusion in the minds of medical men. The only insanity which excused a man from his acts was that species of delusion which conduced to, and drove a man to commit, the act alleged against him. If, for instance, a man being under the delusion that another man would kill Him, killed that man, as he supposed, for his own protection, he would be unpunishable for such an act, because it would appear that the act was done under the delusion that he could not protect himself in any other way; and there the particular description of insanity conduced to the offence. But, on the other hand, if a man had the delusion that his head was made of glass, that was no reason why he should kill another man; and that was a wrong act, and he would probably be subjected to punishment for that act. These were the

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with as small an amount of human suffering as will answer that end." (Letter to Baron Bramwell, August 7, 1858).

principles which ought to govern the decision of juries in such cases. They ought to have proof of a former disease of mind, a disease existing before the act was committed, and which made the person accused incapable of knowing, at the time he did the act, that it was a wrong act for him to do. This was the rule by which he would direct them to be governed. Did this unfortunate gentleman know that it was wrong b strike the Queen on the forehead? There was no doubt that he was very eccentric in his conduct, but did that eccentricity disable him from judging whether it was right or wrong to strike the Queen? Was eccentricity to excuse a man from any crime he might afterwards commit? The prisoner was proved to havebeen perfectly aware of what he had done immediately afterwards; and in the interview which he had since had with one of the medical gentlemen, he admitted that he knew perfectly well What he had done, and ascribed his conduct to some momentary uncontrollable impulse. The law did not acknowledge such an impulse; if the person was aware that it was a wrong act he was about to commit, he was answerable for the consequences. A man might say that he picked a pocket from an uncontrollable impulse; and in that case the law would have an uncontrollable impulse to punish him for it."

The issue in such a case is very clear: Did the prisoner know what he was doing and that his act was a wrong one for him to do? The decision is to be left to

the jury. On what evidence are they to decide? On the general evidence connected with the crime, aided, if necessary, by expert evidence on the special subject of insanity. In the case (a) of Reg. v. Dart, who was tried for having thrown her child into the Serpentine with intent to drown, the counsel for the prosecution suggested that scientific evidence as to the prisoner's state of mind should be forthcoming. His Lordship, Mr Justice Brett, said that it was a mistake to suppose that, in order to satisfy a jury of insanity, scientific evidence must be adduced. If the evidence of facts were such as to indicate an unsound state of mind that was quite enough.

It will be manifest that if scientific or expert evidence be given, such evidence will be limited to definite particulars. Either it will consist of facts regarding previous bodily and mental manifestations, and the mental phenomena exhibited by the prisoner at the time; or it will consist of replies to questions regarding the principles or details of some particular form of insanity that may be set up as a defence. In the case of R. v. Taylor, tried at Leede in 1888, Mr Justice Day said (b) experts were not to be asked their opinion on subjects which it was the function of the jury to decide. He was not laying this ruling down with

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(a) 14 Cox, 143.

(b) See Hack Tuke: Dictionary of Psychological Medicine, Vol. ii, p. 953.

reference to that case, or with reference especially to questions of sanity. He laid it down in all cases in which scientific or expert witnesses could be called to give evidence as to their opinion. He said it was not for doctors to give verdicts. The witness could describe the prisoner's conversation and his manner, and the jury would decide as to his sanity. He could not allow their functions to be delegated to professional witnesses.

The position of an expert witness, therefore, in such cases, is very much that laid down in the Macnaughton case. The historical position of this case, taken from Archbold (a), is as follows, and relates to the previous uncertainty regarding both law and procedure. To make the history and criticism of the law complete it is necessary to state the position and give the questions and answers in detail.

"Considerable uncertainty has been shown by the judges as to the application or acceptance of Hale's rules. In R. v. Arnold, 16 St. Tr. 695, 764, and R. v. Earl Ferrers, 19 St. Tr. 885, it was ruled that a man could not be acquitted on the ground of insanity unless he was totally deprived of understanding and memory, and did not know what he is doing any more than an infant or a brute or wild beast. In R. v. Hadfield, 27 St. Tr. 1281,

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(a) Pleading, Evidence and Practice in Criminal Cases, 24th edn., p. 12.

the test accepted was, if a man is completely deranged so that he knows not what he does, if he is lost to all sense so that he cannot distinguish good from evil, and cannot judge of the consequences of his actions, then he cannot be guilty of crime, because the will, which to a certain extent is the essence of every crime, is wanting. In R. v. Bellingham, Collinson, Lun. 636, add., and R. v. Bowler, Id. 673; 1 Russ. Cr. (7th ed.) 64, 65, the test applied was whether, when the act was done, the prisoner was capable of distinguishing right from wrong or was under the influence of any delusion which rendered his mind insensible of the nature of his act. Cf. R. v. Parker, Coll. Lun. 477. And in R. v. Oxford, 4 St. Tr., (N.S.) 497; 9 C. & P. 525. the ruling was in substance the same. In R. v. Offord, 5 C. & P. 168, it was ruled, that, to excuse a man from punishment upon the ground of insanity it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature. The rule now generally adopted is based on the answers of the Judges to the House of Lords given in consequence of Macnaughton's case, 4 St. Tr. (N.S.), 847; 10 Cl. & F. 200; 8 Eng. Rep. 718. Tindal, C.J. at the trial directed the jury: "If upon balancing the evidence in your minds you should think the prisoner a person capable of distinguishing right from wrong, with respect to the act of which he stands charged, he is then a responsi-

ble agent." This involves the proposition that if there be a partial degree of reason, a competent use of it sufficient to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, then he will be responsible for his actions. See R. v. Higginson. 1 C. & K. 129. On this direction the jury returned a verdict of not guilty. In consequence of the direction and verdict a discussion took place in the House of Lords, and a series of questions was propounded to, and answered by the judges, in relation to the law respecting alleged crimes committed by persons afflicted with insane delusions. Below are given the questions asked of the judges and the answers of all except Maule, J., who gave on his own account a more qualified answer.

Question 1.- "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or 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?"

Answer.- "Assuming that your Lordships inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects in-

sane, we are of opinion, that, notwithstanding the party 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, 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 expression we understand your Lordships to mean the law of the land." (4 St. Tr., (N.S.) 930). The words italicized appear to have a special reference to the cases of Hadfield, Bellingham, and Macnaughton.

Question 2.- "What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder for example) and insanity is set up as a defence?"

Question 3.- "In what terms ought the questions to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

Answers.- To the second and third questions:- "That 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 defence on the ground of insanity it must be clearly proved, that at the time of committing the act the party accused was labouring under such a defective of

reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been whether the accused, at the time of doing the act, knew the different between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he was charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course, we think, is correct, accompanied ~~by~~ with such observations and explanations as the circumstances of each particular case may require."

4 St. Tr. (N.S.) 931. The words italicized appear to distinguish between the physical character and legal aspect of the act done. See Mayne, Ind. Cr. Law (ed. 1896) p. 378.

Question 4.- "If a person, under an insane delusion, as to the existing facts, commits an offence in consequence thereof, is he thereby excused?"

Answer.- "The answer must of course depend on the nature of the delusion; but making the same assumption as we did before, that he labours 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 fact 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 away his life, and he kills that man, as he supposes in self defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."
4 St. Tr. (N.S.) 932. See R. v. Townley, 3 F. & F. 839.

Question 5.- "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind

at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law or whether he was labouring under any and what delusion at the time."

Answer.- "We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right." 4 St. Tr. (N.S.) 932."

It may be instructive to compare the law in other countries on this subject. Alison said, speaking of Scots law, that "to amount to a complete bar to punishment, the insanity, either at the time of committing the crime, or of the trial, must have been of such a kind as entirely deprived the accused of reason as applied to the act in question, and the knowledge that he was doing wrong in committing it." (a)

(a) Criminal Law of Scotland, p. 645.

In the Cape of Good Hope, where Roman-Dutch law holds, the Chief Justice (in R. v. Hay, 1899), after considering an argument dealing also with English and United States law, stated the law thus:

(1) Where the defence of insanity is interposed in a criminal trial the capacity to distinguish between right and wrong is not the sole test of responsibility in all cases.

(2) In the absence of legislation to the contrary courts of law are bound to recognize the existence of a form of mental disease which prevents the sufferer from controlling his conduct and choosing between right and wrong, though he may have the mental capacity to distinguish between right and wrong.

(3) The defence of insanity is established if it be proved that the accused had by reason of such mental disease lost the power of will to control his conduct in reference to the particular act charged as an offence.

(4) The capacity of the accused to control his own conduct must be presumed till the contrary is proved.

The Queensland Code, 1899, founded on a consideration of English, Continental and American legislation, says:- "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental dis-

ease or natural mental infirmity as to deprive him of capacity to understand what he is doing or <u>of capacity to control his actions</u>, or of capacity to know that he ought not to do the act or make the omission."

It would appear then that the law is that what has to be determined by the evidence is a prisoner's state of mind with reference to the particular act with which he is charged - Did he know that the act was one which he ought not to do and that it was contrary to the law of the land? If he did know, he is punishable. It would appear further that there is difference of opinion on the subject as to whether a prisoner is excused if deprived, by disease, of the power to control his conduct. This is set forth in Archbold (a): "Sir James Stephen was of opinion (2 Hist. Cr. Law, 186) that Macnaughton's case admitted, as a further exemption, the proposition 'that a person should not be punished for any act when he is deprived by disease of the power of controlling his conduct, unless the absence of control has been caused by his own default.' So far as this admits the medical theory of uncontrollable impulse, it conflicts with the following cases: R. v. Stokes, 3 C. & K. 185, Rolfe, B.: R. v. Barton, 3 Cox, 275, Parke, B.: R. v. Burton, 3 F. & F. 772, Wightman, J.: R. v. Dove (1884) Bramwell, B.: 3 Steph. Hist. Cr. Law, 429: Wood-Renton, Lunacy, 900; and with

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(a) Pleading, Evidence, and Practice in Criminal Cases, p. 15.

the opinions of the judges appointed to report on the Draft Code of 1878; but it is supported as a legal pro-

proposition by dicta of Denman, C.J., in R. v. ~~Duncan~~, Oxford, 9 C & P. 525; and Lawrence, J., in R. v. Duncan, Wood-Renton, Lunacy, 901, 908; and see Tuke, Dict. Psych. Med., vol. i, p. 314; Journal of Mental Science, vol. 43, p. 420; Mercier, Criminal Responsibility (ed. 1906), p. 167: Taylor, Medical Jurisprudence (5th ed.): Parl. Pap. 1908, c. 4202: and Brown's case (1907) 9 Fraser (Just. Sc.) 67, 76."

Some famous judges (a) have given ex cathedra pronouncements on the subject. In giving evidence before the Select Committee on the homicide bill, Lord Justice Blackburn said: "We cannot fail to see that there are cases where the person is clearly not responsible, and yet knew right from wrong." The Lord Chief Justice of England, in criticising Stephen's plan of codifying the law of insanity, said that he had "been always strongly of opinion that, as the pathology of insanity abundantly establishes, there are forms of mental disease in which, though the patient is quite aware he is about to do wrong, the will becomes overpowered by the force of irresistible impulse; the power of self-control, when destroyed or suspended by mental disease, becomes, I think, an essential element of responsibility."

The power to abstain from doing a wrong act will be judged by the jury in exactly the same manner as they

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(a) On this see Edward C. Mann: Manual of Psychological Medicine, 1883, p. 302 et seq.

judge the other requirement, knowledge that the act was wrong; and the medical testimony will be part of the evidence they have to consider. It is not correct to say that this question is the one on which lawyers take the one side and physicians the other. It would be more accurate to say that it is a question on which the physicians cannot agree. Casper, whose word carries much weight in matters of medical jurisprudence, says (a): "There is no such peculiar species of insanity as is termed homicidal insanity, homicidal monomania, and forensic medicine neither can nor ought to recognise any such." On the other hand, numerous medical witnesses will testify generally to the existence of such a "disease" as homicidal insanity, and will give evidence about homicidal impulse." Clouston says (a): "Homicidal impulse is often spoken of by lawyers, publicists, and ignorant persons as if it were a thing that did not really exist, but has been set up by the doctors to enable real criminals to escape justice. Here is a letter from a former patient of mine, M.V., a medical man of truthfulness and great benevolence of character, written to me when he was convalescent, exhibiting vividly homicidal impulse:- ". . . But when in a train I was afraid I should jump out of the window, and when I saw one in motion I felt I must jump under it. I was afraid, when

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(a) Forensic Medicine, The New Sydenham Society, Vol. iv, p. 337.

(b) Mental Diseases, 4th edn., p. 349.

applying nitrate of silver to the throats of my patients, that I should push it down. I was terrified to apply the midwifery forceps, lest I should not be able to resist the impulsees I have to drive them up through the patient's body. When opening abscesses I felt as if I must push the knife in as far as possible. When I sat down at my table I used to have horrible impulses to cut my children's throats with the carving knife. At the sight of pins I had a feeling as if some had got into my throat, and I could not divest myself for some time of this feeling. I had other strange feelings which I can hardly describe. Whenever I saw a knife, razor, gun &c., I was afraid I should do harm by a sudden impulse, the will having hardly the power to resist. I took opium several times from no deliberate intention but by a sudden impulse that I could not resist when I was working with it in the surgery, but I vomited it. My brain feels quite dead, with no feeling in the scalp; my eyes seem as if something were dragging at the optic nerve continually. In the left I have a most unplesant feeling to bear, and I cannot see distinctly with it. There appears to be something floating in front all the time, like a dark shade. I should say I am, and have been, suffering from homicidal monomania and moral insanity, and have been since June last, although a part of the time doing my practice and living with my family. I thought I could shake it off, but such was unfortunately not the case."

"Now," adds Clouston (a), "this is either a tissue of lies, or the thing 'homicidal impulse' exists." But so does sexual impulse, and the impulse to steal; nevertheless the law punishes the thief and the ravisher. Many people, however, accept such evidence as this letter furnishes, as proof of an irresistible impulse to homicide, for yielding to which a man is not responsible and therefore not punishable. But the whole letter shows the presence, not of irresistible impulses, but of strong homicidal impulses successfully resisted; and the one impulse that was on one occasion yielded to was the cause of an attempted crime which, by law and human sentiment, is considered to be a different one from murder.* The value of this letter would have been very greatly increased if it had contained a statement of the feelings or considerations that had such an influence with the writer as to keep him from performing the acts which he knew, intellectually, would be legally wrong for him to do out which he had such abnormally strong impulses to do. Such a statement might have thrown a flood of light on the subjects of threats and punishments and responsibility.

So much on the general subject of homicidal impulse.

(a) Ibid, p. 351.

* It has to be noted that Clouston here writes about "homicidal impulse" not an "irresistible impulse." The two things may be widely different, but few people distinguish between them. It does not appear from the context that Clouston makes a distinction.

As to a trial, What medical facts can be deposed to in order to show that any particular criminal act done by a particular prisoner was the outcome of an irresistible impulse? This the question a medical witness must ask himself. In the majority of cases the only proof adduced of irresistible impulse is the fact that the impulse was not resisted, a "proof" that may be applicable in the case of every crime committed, whether the criminal has transgressed once or seventy times seven.

It must be allowed that the medical evidence in such cases is often unsatisfactory. This arises necessarily from the legal position. Nowadays in many instances the only possible defence to save a man's neck is the plea of irresistible impulse or some form of insanity; and a man's family history is ransacked to the third and fourth remove, directly and laterally, in order to find whether there was not some "hereditary tendency," whatever that may mean since care is taken not to define it, some person who did things his neighbour did not approve of, some crankiness or peculiarity in the prisoner or his forbears, some history of "fits" in the family which turn out to be fits of temper, some story of "convulsions" even if these are liable on cross-examination to be found to be due to nothing but teething - otherwise known as bad feeding. Then when these "facts" are accumulated, some physician is summoned, and few care to refuse, to answer questions that will give a scientific aspect to the evidence that goes to the jury -

evidence that generally has no bearing on the legal point at issue.

Then when the jury finds the prisoner guilty of a murder of the foulest description, with evidence to show that it was deliberately planned and deliberately and in the sanest manner carried out, hysterical writers in the press, on the ground that it has not been made perfectly clear to them that the prisoner was sane, seeing that he once perhaps did something that amused somebody, demand the exercise of the Royal Prerogative. In the first place, the onus of proof of insanity did not lie on the ~~defence~~ prosecution; and unless the proof of insanity were complete to the satisfaction of the jury, the prisoner was of legal necessity sane. In the second place, the Royal Prerogative, which is merely the law as it refers to the King, is hedged about with safeguards just as any other branch of legal administration is. Of pardon it is said (a) that this high prerogative the King is intrusted with upon a special confidence that he will spare those only whose case (could it have been foreseen) the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case.

Reference has been made to the opinions of Lord Bramwell and other judges with regard to the restraining power of threats on the actors and on others. The

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(a) See Shower, Vol. i, p. 284.

truth of their views is often confirmed. In cases of general mania, where the patient appears uncontrolled and uncontrollable, a threat followed by prompt action will often induce such self-restraint as will strike the physician with surprise. Again, to many people the sole proof of uncontrollable impulse is the presence of an uncontrolled impulse. But some one may say that the fact of repeated acts say of murder without motive shows uncontrollable impulse, whereas a single murder for which there is a motive proves sanity and responsibility. Does the fact that a man, when he was under no necessity to steal, stole a hundred articles on twenty different occasions, glorying in defying the law and enjoying, even more than the hunter, the excitement of being chased by the police, prove that he acted from an irresistible impulse and is therefore unpunishable; while the man who forged his one cheque to take him out of his one difficulty is assumed on this account to be sane and responsible and is therefore sentenced to several years' imprisonment?

That there are cases of irresistible impulse as well as of moral insanity, or rather of moral imbecility, may be granted: but physicians need not go out of their way and look for trouble not only by testifying to the existence of such but also by insisting that the particular case under consideration is such a case and that their simple assertion of the fact should be accepted by the jury as sufficient evidence, however insecure the

grounds of it may prove to be on cross-examination.

A good basis for medico-legal critical study of the subject would be furnished by cases such as Trousseau records (a). Clinical medicine is obviously a better field in which to gather the facts than the criminal courts are. The records there supply all the ~~necessary~~ facts necessary for discussion regarding knowledge of acts and the power to abstain from doing them. Perhaps one question is not dealt with - the place and power of threats delivered while an attack is on or remembered, consciously or unconsciously, as part of the mental stock in trade of life. It is often if not commonly stated that the will is suspended during sleep and that persons perform acts that they would never think of doing while awake. This may be so in some; but there are people in whom the moral or legal sense is as strong in dreams as it is during waking hours.

The position of law and medicine is fairly clear. The constantly recurring conflict in the law courts is not a conflict between law and medicine, but an introduction of side issues in order to obscure the issue, mystify the jury, and give food for popular criticism as a preliminary to a demand for respite, remission, or pardon. The remedy may be looked for in two directions: (1) In the establishment of a medical commission to bring in a report on the particular prisoner. This,

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(a) Clinical Medicine, New Sydenham Society, Vol. i, Lecture ii, p. 19. et seq.

although urged in some medical quarters, would almost certainly be a remedy of very doubtful value. The point to be determined is not one of medical fact but one of law, and it is undesirable that one witness or one class of witnesses should be established as judge and jury. The genius of English law is opposed to such a proceeding. Judges, juries and citizens generally, distruct, or disallow doctors' verdicts in matters of law (see above, p. 259). Sir Harry Bundey, one of the most careful and conscientious judges of recent times, from an extensive experience of criminal practice said:- "Speaking for myself, I would not occupy the judgment-seat for a day if I were called upon to decide alone upon the guilt or innocence of an alleged murderer. I hope the time is far distant when trial by Jury in criminal cases will be abolished." A medical witness should be glad to know that he also is still legally in a position of non-responsibility in similar circumstances, should be thankful that it is not his word or opinion that decides whether the prisoner is "sane or insane," "responsible or irresponsible," "capable to plead or not," "cognisant of moral or legal wrong or not," "suffering from defect of mind or merely malingering." He ought to feel relieved that his duty is done and his responsibility is ended when he has answered the questions put to him in examination and cross-examination and has left the jury to do their duty which is to give a true verdict according to the evidence. (2) In the abolition of cap-

ital punishment. It is the consideration of "taking a life" that is at the bottom of most of the agitation for remission of the capital sentences: "possible insanity" is used as the only possible plea by those interested in the murderer. Those who agitate, however, have not the courage of their convictions: they wish to retain capital punishment on the statute book as a deterrent, but they desire that the threatened punishment should never be applied in any individual case - unless, perhaps, the culprit is some outsider, or foreigner, or person who has no friends and therefore no political power or influence. That the same amount of consideration is not always meted out to foreigner as to friend will be evident from the following quotation from the "Perth News" of 16th March, 1905. "In the course of his review of a case in which two Malays were charged with the wilful murder of a Japanese on the pearling schooner Redbill, of Onslow, Mr Justice Burnside, from the Criminal Court Bench, on Wednesday expressed surprise that no medical evidence was forthcoming as to the effects of the wounds on the murdered man. The Crown Solicitor said that no medical evidence was available, and that he had to submit the case as it came to him. Later on the jury added to its verdict a rider expressing the opinion that the fact that there was no medical evidence brought before the Court was a standing disgrace to the administration of justice in the State. His Honor remarked that he would not ~~would~~ say that he did not entirely agree with the jury, but he hoped such

an occasion would not occur again. If ithad been a case of one white man stabbing another they would never have heard the last of it in that Court. The working of justice in these out-of-the-way places wanted looking after, and if this was not soon done he should have something to say that those concerned would not like."*

In America the law with reference to the plea of insanity has undergone a somewhat remarkable development. "The Supreme Court of Washington (a) says in the homicide case of States vs. Clark that the plea of insanity is sustained if the jury entertain a reasonable doubt as to sanity. The jury in this case were instructed that every man is presumed to be sane and to intend the natural and usual consequences of his own acts - that is, the law presumes the man to be sane until the contrary is shown. The burden of proving insanity as a defence to crime is upon the defendant to establish by a preponderance of the evidence. The presumption of

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* It must not be assumed that the administration of justice in the Commonwealth is lax. On the contrary there is probably no country in the world where it is characterised by so much conscientiousness, impartiality and care, regardless of difficulties of distance. Recently, at the request of the Crown Law office, I undertook a mission - involving a journey of 400 miles by steamer and about 900 miles by motor car, through all sorts of country with and without roads - to exhume the body of a blackfellow himself a terror to many people and a quondam murderer, and give evidence at a coroner's inquest (which was followed by Supreme Court proceedings) regarding the cause of death in which three white men, one a Government officer, were supposed to be concerned, wilfully or through a mistake of judgment. And this is only one example out of a great many similar cases in which I have been personally concerned as witness and investigator.

(a) Medicine, 1904, p. 556.

sanity must prevail. The ruling asked for by the defence (that the State must prove sanity) has been sustained by the Supreme Court of the United States, and in Florida, Illinois, Indiana, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, New York, Tennesse, Vermont and Wisconsin. The Supreme Courts of Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, and Utah hold that insanity is an affirmatice defence and must be established by a preponderance of the evidence. And this is the rule that prevails in England. In the States of Oregon and Louisana the defendant is required by statute to prove insanity beyond a reasonable doubt. The Supreme Court of Washington held that the rule adopted in the States last named was the one which they would adopt."

Suicide.

Closely connected with this matter of Insanity and Crime is the subject of Suicide. Formerly, as a result of this crime, the convict forfeited all his goods and chattels, real and personal, which he had in his own right, or jointly with his wife. In addition, partly by law and partly by custom, his body was subjected to ignominy - it was usually buried in a public cross-road with a stake driven through it. The Marquis Beccaria a professor philosophy and writer on law about

a century and a half ago, opposed the punishment usually inflicted in cases of felo de se on the principle that the felon escapes, and the injury falls on his innocent family; and he wisely argued that the consideration of such punishment will not prevent the crime, because he who can calmly renounce the pleasures of existence, who is so weary of life as to brave the idea of eternal misery, will never be influenced by the more distant and less powerful considerations of family and children. There is no doubt that the influence of this writer was very great and that to it we owe the abolition of forfeitures.

Not every self-killing is criminal, or to be punished in the same way as self-murder; for where the understanding is defective, the act may admit of distinction, and even excuse. It has to be noted that the law is more lenient to the suicide than to the murderer. It seems to recognise that a condition of mind that would not excuse from murder would excuse in the case of suicide. Lord Hale says (a): "If an idiot, or an infant under 14 years of age, or a lunatic during his lunacy, or one distracted or losing his memory through sickness, grief, infirmity, or other accident kill himself, it is not felony, nor can he be said to commit murder upon himself; such an one, therefore can incur no forfeiture."

The Rubric of the Church of England still directs

(a) 1 Hale, 30.

that the Order for the Burial of the Dead "is not to be used for any who have laid violent hands upon themselves." Since the word "feloniously" is omitted some, if not many, of the clergy deny the "burial service" in the case of lunatics who have killed themselves; but, as a legal writer says "It is more consonant with the dictates of humanity to imply the adverb in such cases." If the deceased should not be found to have been insane, then no clergyman has any choice; he must refuse to read the burial service while the ecclesiastical law remains as it is now.

But the law, the criminal law, is becoming milder, more reasonable as knowledge increases, especially in the matter of suicide. In New South Wales the verdict of felo de se is abolished by statute; and elsewhere all forfeitures and ignominious burial are abolished either by statute or by custom. Where the verdict of felo de se is not abolished, it is still the duty of a jury to find whether the deceased was sane or not as a preliminary to a proper legal description in the inquisition.

Dreaming and Intoxication.

There are other mental states closely connected with Insanity which cast some light on certain aspects of that interesting and important study. The commonest are dreaming and intoxication. Dreaming has been called a normal temporary insanity. Viewed from another stand-point, insanity is a dream put into action. Be-

sides the difference that insanity is longer continued than a dream, there is another distinguishing character. In madness, as in ordinary intoxication, the shutting out of external sansation, the closing of the gateways of knowledge, is less complete than in dreams, hence madness in one sense is more rational than dreams, so far as the images are concerned. In all three conditions, insanity, dreaming, and intoxication, the internal sensations do not correspond with the external things as they do in ordinary healthy waking hours; and in dreams the correspondence is least, and therefore the extent of aberration is the greatest. Hence it is that, since dreaming is probably continuous and universal in sleep, every one is more or less insane at the moment of awaking; and hence also it will appear that acts are of the same nature whether done in sleep - which includes somnambulism and the hypnotic state - or in intoxication or during insanity; and the same legal tests as to responsibility are applicable to all such acts, with, in intoxication and other drug states, the further test question "Was the state entered into wilfully?"

Drunkenness and Drug Effects.

The law in respect to drunkenness and drug effects is as follows: (1) the doctrine of criminal responsibility in case of drunkenness due to alcohol is equally applicable to mental or bodily conditions caused by the drinking of narcotics or non-alcoholic stimulants, or

exciting drugs, or their hypodermic injection. (2) At one time voluntary drunkenness was not considered as any excuse or palliative whatsoever for any sort of crime. This is now changed. (3) In an indictment for murder, intoxication may be pleaded to show the act was not premeditated. This has been held to apply to attempt to commit suicide. But there are contrary rulings. (4) Where intention is an essential part of the crime, intoxication may be pleaded to show incapacity of forming any intention - cf. Macnaughton (4). (5) Drunkenness and consequent delusions may assist a defence of provocation or self-defence. (6) Involuntary intoxication (e.g. from administration by mistake of his physician or by design of his enemies) excuses from all responsibility. (7) A man will not be liable to be punished for any crime perpetrated under the influence of insanity which is habitual and fixed, though caused by frequent intoxication, and originally contracted by his own act. (8) While drunkenness is no excuse, delirium tremens caused by drinking, if it produces such a degree of madness, although only temporary, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility for any act committed by him while under its influence. This doctrine was extended in one case to temporary derangement occasioned by drink.

"The doctrine of criminal responsibility in case of drunkenness due to alcohol is equally applicable to

mental or bodily conditions caused by the drinking of narcotics or non-alcoholic stimulants, or exciting drugs, or their hypodermic injection. 1 Hale, 32." (a)

The Inebriates Act, 1898, to a certain extent fills up a gap in the legislation dealing with drunkards. A habitual drunkard is "a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs." This would appear to apply to alcohol, but not to narcotics. Elsewhere similar acts apply to the use of alcoholic liquors or intoxicating or narcotic drugs. The act does not appear to accept the view that drunkenness falling short of insanity is a defence on a charge of crime, but gives the courts latitude in the treatment of crimes directly or indirectly due to drunkenness, by permitting the reformative sentence as an alternative to the ordinary punishment for a crime. Where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, committed when under the influence of drink, and allows himself, or is found by the jury, to be a habitual drunkard, the court may, in addition to or in substitution for any other sentence, order that he be detained in any State inebriate reformatory, or in any

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(a) Archbold: Pleading, Evidence, and Practice in Criminal Cases, 24th edn. p. 18.

certified inebriate reformatory, the managers of which are willing to receive him.

In connection with the law regarding drunkenness as stated above, medical evidence may be specially required under paragraphs (6), (7) and (8). In all other cases mentioned, the evidence of physicians would probably be on the same footing as the evidence of ordinary witnesses. Should a question arise as to the definition of drunkenness or a man's condition when the plea of drunkenness is raised, the court will decide the matter, not the witnesses. One definition is referred to below.* In another case Judge Dewey of the Central Municipal Court of Boston fell back upon the Century Dictionary definition, "Drunk - intoxicated, inebriated; overcome, stupefied or frenzied by alcoholic liquor; used chiefly in the predicate." The "ratio" between "drunkenness" as a crime and "drunkenness" as a plea in extenuation of a crime is to be noted.

Physicians are expected to be prepared to give evidence on the mental conditions due to the administration of various drugs. Some of these, e.g., the effects of opium and haschish, are well known and have a place in general literature. In certain circumstances, however, a drug may vary in its action - opium instead of acting as a hypnotic may give rise to prolonged sleeplessness with concurrent abnormal mental conditions. Haschish

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* Page .

is said to exhibit variations according to the race of the consumer. Belladonna, applied to the breasts after confinement gave rise to delirium and symptoms of acute insanity, in a case recorded by Dr. R. Abrahams. (a)

Not a few of the uncommon or less well known drugs may and often do give rise to delirium and other symptoms almost indistinguishable from insanity; commoner drugs like caffeine and camphor not infrequently have a similar effect. The greatest difficulty arises, however, in the case of a drug like quinine which may give rise to the symptoms of delirium which are often natural in the fever which it is meant to cure, or in the case of bromides which may produce or aggravate the symptoms of delirium and general insanity in those to whom they are administered as a cure for those very conditions.

In a case in an English court (b) a lady pleaded guilty to theft. Her counsel stated that she was in no want of money, and asked that she should be treated leniently on the ground that the theft was due to the effects of the excessive use of morphine - of which she had consumed ninety-six grains in one week. The magistrate suspended judgment, upon the defendant giving security to appear for sentence when required. This case standing alone might lead one to hesitate about giving evidence that morphia has been knwon to produce such a mental condition. A good deal of light, however, is cast upon this subject by a case in which a lady took daily thirty-one

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(a) Journal of the American Medical Association, July 21, 1898.
(b) Journal of the American Medical Association, December, 11, 1897.

grains by hypodermic injection. As she became broken of the habit her thieving propensities became less, and finally ceased when she was cured.

Dr. Villeneuve (a) in reporting a case in which irresponsibility for theft was pleaded on account of interrupted morphinism dating back some years, said the accused was not insane and never had been. Some statements in this communication are worthy of remark. The author says "morphine addiction rapidly reaches the point where the victim commits indelicate actions without comprehending the importance of what he has done. There exists at an advanced period of the habit a rare diminuition of will and power, which ceases to revolt against certain vicious and criminal tendencies. In the case of prolonged morphine intoxication, when the tissues are so saturated with the drug as to alter the cerebral functions, when it has caused consequent intellectual weakness and diminuition of the moral sense, responsibility should be lessened. When a crime is an act of a morphine user forced there by the deprivation of the drug, it should be regarded as a pathological impulse, and no criminal responsibility should attach. The delirium of morphine should wholly absolve from responsibility."

If by morphine delirium is meant insanity produced by the continued use of the drug, then the law recognises

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(a) "Montreal Medical Journal, October, 1899.

this as a defence of irresponsibility. But what is a "pathological impulse?" Is a woman who steals a loaf for her hungry child the subject of it? Or does the swindling company promoter who defrauds and impoverishes hundreds of people, suffer from it? The existence of the effect of a drug is an excuse. The want of the drug does not appear to be an excuse for acts done in consequence of such want - unless the man is actually insane.

Mental States in Certain Bodily Conditions.

Abnormal conditions of mind, other than insanity and drunkenness, require to be considered in this connection. Some time ago, when asked, in connection with a civil law suit, what abnormal mental conditions, if any, might exist in malaria, I was struck with the small amount of information on the subject of mental conditions in diseases that is to be found in standard text-books. Books on special subjects sometimes contain information of value. Dr. Walter Fuche says (a): "When there is a predisposition to mental disease, any bodily illness may cause it to break out. It is sufficient to point out that severe mental disturbance of a peculiar character is frequent in typhoid fever, pneumonia, influenza, variola, articular rheumatism, and intermittent fever; and those patients are most liable to it who are weakened from any other cause, particularly in excess of

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(a) Bulstrode: The Prevention of Disease, 1902, p. 599.

alcohol. The convalescent stage of infective diseases also requires care. Syphilis in this connection must also be briefly mentioned. Disease of the thyroid gland, of the suprarenals, and of the liver, may all be causes of mental disease, and thorough treatment of the mental disease, and thorough treatment of the original disease will prevent many a psychosis. Disease of the organs of special sense requires very careful treatment, more especially catarrh of the middle ear, which is so common, and causes subjective noises that give rise to hallucinations. Certain drugs must be used with great caution, such as atropine, morphone, quinine and salicylic acid. Iodine, bromide and arsenic will in some cases, especially in alcoholics and those suffering from diabetes, produce mental and nervous disturbances, which may even pass into severe delirium. Many a delirium apparently due to fever is due to a drug. We should therefore begin with very small doses and discontinue these drugs as soon as possible."

Sometimes one finds good illustrations in general literature. These are particularly valuable because they are not meant to fit in with any particular medical theory, and because the writers have no inducement to state the facts otherwise than as they really happened. Lord Wolseley says (a) regarding his own experience of malaria: "May my worst enemy never know so bad a time,

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(a) Life of a Soldier, 1903, Vol. ii, p. 307.

mentally and bodily, as I had then. For six days there are no entries in my diary. During that well-nigh sleepless period I often felt as if I must go mad, for my thoughts apparently flew with electric rapidity and without reason from one subject to millions of others. I dictated to myself over and over again a letter to Mr Cardwell, in which I resigned by appointment, and expressed my deep sorrow at being obliged to do so. In the worst night of my waking fever, I remember well how my puzzled brain tried repeatedly to work out a quadratic equation which no amount of transposition would enable me to solve. Existence in the narrow borderland which intervenes between sanity and insanity in such cases is always a fearful experience. I ought to know every natural feature in that parched and waterless region, so often in life has my fever-stricken and waking mind wandered over it, and so often have I seen other men fall struggling upon its not burning sands never to rise again. But there is nothing loathsome or disgusting in the horrors which overtake the merely fever-worried brain. You may in excited moments suspect those about you of trying to kill you, of some great conspiracy against your body, but the snakes and horrors which haunt the poor, abject creature in delirium tremens, and whose loathsome appearance terrifies him, do not vex the merely fever-racked man."

These facts would be pertinent if a question had

arisen regarding selling a commission or some other similar business transaction, and even in a charge of murder. In a report of an outbreak of malaria on a vessel arriving in South Australia in February, 1904, the statement appeared:- "The men who fell victims to the fever became mentally affected before death, and considerable difficulty was experienced in handling the poor fellows. They fancied their shipmates were strangers, who had bonrded the vessel, and they also had the idea that ghosts were moving about the vessel."

Statements of mental states in various other diseases are to be found scattered throughout medical and general literature. On the subject of "Mental Phases of Tuberculosis" there is an interesting critical and instructive article by Dr. Harriet C. B. Alexander (a) which deals with what may be called "concomitance" between insanity and phthisis. There is noted a want of fixity of purpose, a laziness as regards intellectual exertion, occasional unaccountable little attacks of excitement, unprovoked paroxysms of irritability and passion in a subdued form. The influence of phthisis on many forms of insanity is to introduce the element of suspicion not formerly present. On one occasion I operated by request of the Surgical Staff of a hospital on a man for extensive suppurative tubercular disease of both testicles and pubes. Some time afterwards he

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(a) Medicine, 1898, p. 384.

developed an intense suspicion of his wife and other relatives, and had to be sent to the Asylum.

In some cases it is not easy to distinguish between the delirium of some diseases and insanity. Mercier says (a): "It is only when we trace the grandest aberration of mind and conduct from the normal, that we shall be able to account for and explain the more exaggerated and striking cases of insanity; and attention must be paid quite as much to the initial and intermediate stages as to the fully developed malady. Hence, although no one would think of placing in a lunatic asylum a person suffering from the delirium of fever, yet the different mode of treatment, the pronounced bodily malady, and the directly assignable causation, must not blind us to the substantial identity of ordinary febrile delirium and ordinary non-febrile delirium. As if to emphasize this doctrine and clinch the matter, it occasionally happens that the delirium of fever occurs in an unusually intense and exaggerated form, while the bodily symptoms are but slightly pronounced. In such cases the fever may be overlooked, and the prominence of the disorder of mind and conduct may be such as to necessitate, or at least excuse, the despatch of the patient to an asylum; and cases are occasionally admitted to these institutions as cases of lunacy, which turn out to be merely exaggerations of febrile delirium. I have seen

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(a) Sanity and Insanity, 1890, p. 203.

cases, of apparently ordinary mania, which turned out to be cases of typhoid fever, of typhus, small-pox, and scarlet fever, with unusually prominent delirium."

The task of distinguishing between insanity and symptomatic delirium is sometimes very arduous. In some cases, for example, a physician may have great difficulty in making up his mind whether he is dealing with puerperal septicaemia with delirium, or with puerperal insanity.

Delirium is not, of course, the only form of mental aberration to be found in disease. Dr. George G. Groff of Porto Rico says (a): "I think every American on the Island had dengue in August 1899. It is like a severe attack of grip. For about six weeks I was prostrated with this disease. It produces melancholia so marked that many of the Americans had to be guarded. Sufferers from dengue in Australia have told me their experiences confirming this.

Heart disease is not infrequently a cause of aberration of mind. In functional affections, melancholia is most common; in valvular disease, I believe mania is oftener seen.

The relations of insanity and Graves's Disease are dealt with in detail in an article by Dr. Arthur W. Rogers (b).

(a) Medicine, 1905, p. 40.

(b) Medicine, 1904, p. 204.

Loss of Sleep, if long continued, will give rise to delirium, sometimes of a severe nature and ending in death. A very careful investigation into the bodily and mental conditions of enforced wakefulness is recorded by Dr. J. A. Gilbert (a).

The mental effects due to excessive cold are sometimes indistinguishable from the symptoome of alcoholic intoxication, while at other times they resemble many of the appearances of insanity.

There is a report (b) on two trials for murder at the Manchester Assizes before Mr Justice Channell. A young woman, Holt, was indicted for the murder of her new-born child. The prisoner was confined on a Sunday, and when first seen by a doctor on the following Tuesday pointed, in answer to a question, to the top of a wardrobe, where the body of an infant was found, covered with marks inflicted with scissors. The defence was insanity. The judge said he could see nothing in the case that would lead to a verdict of manslaughter. As to irresponsibility, there had been no evidence of insanity in the ordinary sense. The existence of no less than seventy-seven wounds on the body of the infant indicated that in all probability at the time they were inflicted the prisoner was in a condition of frenzy,

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(a) American Medicine, September 13, 1902.

(b) Journal of Mental Science, October, 1900.

and if the jury thought she was in such a condition they might come to the conclusion that she had not any sound judgment and knowledge of what she was doing. In accordance with this ruling the jury returned a verdict of guilty, but insane.

The other case, which was tried next day, was one of wife murder. Fifteen years previously the man had been committed to an asylum, in which he was detained for four years. There had been frequent quarrels between him and the deceased, and some violence. On the night of the homicide the prisoner opened the door and let his son in, and told him that he had killed his mother. The son went for assistance, and on his return found the door blocked, and the prisoner threatened the incomers, and threw hot water on one of them. The woman was found dead, with marks of violence. When arrested, the prisoner said he would tell the trouble to the magistrates. A physician who was summoned said the prisoner looked dazed and said, "I did it." No signs of intoxication were noted in the prisoner at the time of the homicide. The physician to the prison had noticed nothing wrong with the prisoner's mind, except excitement and garrulousness. The physician who had charge of him while he was at the asylum testified that at the time he had numerous delusions and hallucinations, and he was further of the opinion that injuries so extensive as those found on the deceased had been caused by a man in frenzy. The judge here asked the witness

to define the word frenzy, which he did by saying that he meant the "effects of ungovernable passion." The prisoner in his evidence said that on the day of the homicide he had had four pints of beer; his wife became very abusive and said "it only wanted a bit of paper to get him back to the asylum." She then wentto kick him with her clogs and pull his face about with her hands, and she seamed to be about to get hold of the poker and tongs, which she had used before to strike him with, when all of a sudden the feeling came across him which he could not resist, and he got hold of the crowbar and hit her with it. It was dusk at the time, and though he kept striking around him with the crowbar, he did not know he was striking his wife. When he found that this was the case, he fell down and shouted out, "O, my ! O dear ! What have I done?" Upon cross-examination, he said that the crowbar was in the coal-hole, and he could not say why he did not give this account at the inquest. The judge said that even admitting the provocation, if the prisoner went out of the room for the crowbar, it was murder and not manslaughter. The verdict of "guilty, but recommended to mercy," resulted.

The journal is caustically, if not sarcastically, critical. It says that in one case the learned judge had no objection to the use of the word "frenzy;" he did not define what was meant by the word, but it was sufficient to exonerate the crime: in the other case the word was found to possess no such virtue, and the prisoner

was convicted in spite of his frenzy: that as possible reasons for the peculiar ruling upon thw word frenzy, it is stated that the young woman was good looking; she was dejected; she cried and trembled in the dock; while the man seemed to be an uninteresting person, and in his case dry law took its course. It is hard he should not have had the benefit of his "frenzy."

Now, criticism of this kind, in a journal of this sort, shows a want of knowledge of medical fact no less than a want of appreciation of the criminal law and a disregard of the principles of freedom of the press. Not only are thesymptoms of real "frenzy" well recognised, but in medical writings they have neen carefully differentiated from those of spurious frenzy which is often set up as a defence in murder. Further the occurrence of "frenzy" in the parturient is well recognised; and frenzy is accepted by courts as evidence of legal non-responsibility. On this there is a maxim in law, furiosi nulla voluntas est (a); and in respect to punishment of the frenzied there is another, furiosus furore solum punitur (b). The evidence of the physician in the case of wife-murder excluded entirely the presence of real "frenzy;" and the prisoner's own evidence showed that the deed was done, as is often the case, under provocation and in a passion, but with con-

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(a) Broom: Legal Maxims, 7th edition, p. 256.

(b) 4 Blackstone; 24. See also p.307, below.

sciousness and memory of it.

Epilepsy is not infrequently pleaded as the ground of non-responsibility in capital charges, chiefly on account of the difficulty in proving that the prisoner did not suffer from it. When real insanity or real epilepsy is present, it is usually not difficult to prove its presence. Sometimes, however, in malingering cases, proof of sanity is not easy; out it may be rendered more easy if a circumstantial account of attacks or seizures has been given of the occurrence by the prisoner and the witnesses. It will probably then be found that the accounts will not fit with any known form or manifestation of insanity or epilepsy. Some days after being committed for trial for what was proved to be a cold-blooded, vindictive and deliberate murder by shooting, and before arraignment, a prisoner was stated to be insane - extensive loss of memory being the evidence adduced by his solicitor. The chief medical officer of the Asylum was called to give evidence for the defence. He said that the prisoner's loss of memory was evidence of insanity. The following is the account of the evidence as published:-

"His Honour.- Do you mean to tell me that you consider yourself justified in concluding that he was mad because he said he did not recollect? Witness.- Yes. His whole statement seemed compatible with what is called the post-epileptic state. His Honour.- Very well: I will take your answer, but I thought it my duty to cau-

tion you. Witness.- From what I have heard and seen I consider that the prisoner had a very unsound, nervous heredity; that he has a history of injuries to the head, which on the top of his heredity would be much more pronounced in their effect than if he came of sound stock. I am also of opinion that when he committed this act he did not know the different between right and wrong. His Honour.- You can't say that. That is for the jury to decide. Witness.- In my opinion he is permanently in such a state of mind that at ano time does he know the difference between right and wrong. Cross-examination by the Crown Solicitor - "My interview with the prisoner occupied about half an hour, and I had not seen or known hi m before. I cannot say whether his professed loss of memory was in pursuance of malingering. I did not form the opinion that he was malingering, but I am not prepared to say now that he was not. I am inclined to think that he was not feigning madness. By His Honour.- If he were all my opinion would go for nothing.

On examining the man on behalf of the Crown, I found that his powers of general observation were normal. His "loss of memory", however, prevented him from being able to tell the time shown by a watch. He "did not remember." On this and on a variety of other tests, I reported that I was of opinion that he was shamming, insanity. After sentence, and when he knew the law was

to take its course, his memory became completely restored.

Sexual perversion is used in some instances as a plea in defence; and undoubtedly such perversion is often a cause of crime. The law, however, has rarely regarded this as an excuse for crime, unless the evidence has satisfied the jury that all sense of wrong doing, or all power of control, was lost. The fact that a person gratifies his lust is no proof that the impulse was uncontrollable, even if the lust was abnormal. And why should a person not be bound to control, or be assisted to control by legal threats, an abnormal as well as a normal lust?

Moral Insanity and Motives.- The subject of moral insanity has already been referred to; and Baron Bramwell's remarks regarding it have been quoted. Those remarks refer principally to the view of moral insanity as a condition in which the agent is supposed to be unable to resist an overwhelming impulse, in other words, a state of impulsive mania. More commonly, however, among scientific writers on insanity, moral insanity is a name given to a condition in which the agent is regarded as devoid of all moral and immoral impulses, in the condition in which some people depict an Australian black, morally insensible, while his intellectual faculties remain quite clear and normal.*

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* Moral Insanity. "This form of mental derangement has been described as consisting in a morbid perversion of the feelings, affections, and active powers, without any

But an Australian blackfellow, though presumed to be ignorant of vice and justice and devoid of all true moral relations, as we may understand such, is not looked upon as irresponsible for crime. On the contrary he is treated, and behaves, as a white fellow. He has a good intellectual knowledge of what is forbidden and punishable, and a pretty accurate notion of the consequences of his action. He knows he will be punished if he is found drunk; but he takes his punishment as he takes his drink, like a whitefellow. He knows further that if he should tell the name of the whitefellow who supplied the drink, that particular source of supply will be cut off; so he has sufficient motive to enable him to resist all temptation to become an informer.

It is difficult to see, not why threats and punishment should not be inflicted on the morally insane, but why they should be withheld, seeing that it is those cases where they are really most effective in preventing crime. "Moral insanity-i.e., disorder of the moral rather than of the mental powers - when a man's intellectual faculties are sound and he knows quite well what he is doing, but his moral sense is affected or diseased,

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any illusion or erroneous conviction impressed upon the understanding: it sometimes co-exists with an apparently unimpaired state of the intellectual faculties."
J. C. Prichard: A Treatise on Insanity, 1835, p. 12.
Prichard appears to have been the first to use the term "Moral Insanity."

is not yet accepted as falling within the rules in Macnaughton's case (R. v. Haynes, F. & F. 666; R. v. Law, 2 F. & F. 836; R. v. Burton, 3 F. & F. 772)" (a).

Reference has been made to "motive." This is another word which lawyers juggle with and jurors become mystified about. It is often not only tacitly assumed but openly stated that if no motive can be discovered for a man's crime, this is strong presumption of his innocence. Such a mode of pleading assumes not merely that people never act without sufficient motive, but also that other people are always capable of discovering the motive. This is contrary to fact. Lord Chesterfield, speaking of motives in general, said (b): "I believe those are the oftenest mistaken, who ascribe our actions to the most seemingly obvious motives . . . That Caesar was murdered by twenty-three conspirators I make no doubt; but I very much doubt, that their love of liberty, and of their country, was their sole, or even principal motive; and I dare say that, if the truth were known, we should find that many other motives at least occurred, even in the great Brutus himself; such as pride, envy, personal pique and disappointment." The Roman Emperor in the Legend put to death ten learned Israelites to avenge the sale of Joseph by his brethren; and doubtless many

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(a) Archbold: Pleading, Evidence and Practice, 24th edn., p. 15.

(b) Bradshaw: Lord Chesterfield's Letters, 1893, Vol. i, p. 104.

many people thought he was actuated by most admirable motives. A king of another country might have put to death ten other Israelites on the ground that the brethren sold Joseph too cheaply; and no doubt some one would have been found to defend the validity of his motive. Several illustrations are quoted by Havelock Ellis (a) of the apparently insignificant motives that were sufficient to induce various sorts of people to perpetrate murders.

"Hence," says Mr Leslie Stephen (b), "arise some difficult questions." "Sir James Fitzjames Stephen insists, in agreement with Bentham, and especially with James Mill, that the criminal law is concered with "intentions," not with "motives." All manner of ambiguities result from neglecting this consideration. The question for the lawyer is, Did the prisoner mean to kill? - not, What were his motives for killing? The motives may, in a sense, have been good; as, for examplem when a persecutor acts from a sincere desire to save souls. But the motive makes no difference to the sufferer. I am burnt equally, whether I am burnt from the best of motives or the worst. A rebel is equally mischievous whether he is at bottom a patriot or an enemy of society. The legislator cannot excuse a man be-

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(a) The Criminal, 1890, p. 131.

(b) The Life of Sir James Fitzjames Stephen, 2nd edition, p. 424.

cause he was rather misguided than malignant. It is easy to claim good motives for many classes of criminal conduct, and impossible to test the truth of the excuse. We cannot judge motives with certainty. The court can be sure that a man was killed; it can be sure that the killing was not accidental; but it may be impossible to prove that the killer had not really admirable motives. Elsewhere he says (a): "Law properly means a command enforced by a 'sanction.' The command is given by a 'sovereign,' who has power to reward or punish, and is made effectual by annexing consequences, painful or pleasurable, to given lines of conduct. The law says, 'Thou shalt not commit murder;' and 'shalt not' means 'if you commit murder you shall be hanged.' Nothing can be simpler or more obviously in accordance with common sense. Abolish the gaoler and the hangman and your criminal law becomes empty words. Moreover, the congeniality of this statement to the individualist point of view is obvious. Consider men as a multitude of independent units, and the problem occurs, How can they be bound into wholes? What must be the principle of cohesion? Obviously some motive must be supplied which will operate upon all men alike. Practically that means a threat in the last resort of physical punishment. The bond, then, which keeps us together in any tolerable order is ultimately the fear of force. Re-

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(a) The Life of Sir James Fitzjames Stephen, 2nd edition, p. 317.

sist, and you will be crushed. The existence, therefore, of such a sanction is essential to every society; or, as it may be otherwise phrased, society depends upon coercion."

Sanity and Capability to Plead.

If a prisoner who is committed for trial be found insane, the Secretary of State may remove him, on certification, and order him to be detained as a criminal lunatic until he is remitted to prison or discharged. He is not taken before the court.

If a prisoner, when charged with a crime and asked to plead, stands persistently mute, the court must direct that a jury be forthwith impannelled and sworn to try the issue "whether he is mute of malice or by the visitation of God." Witnesses may be called on his behalf and his counsel may address the jury. The prisoner must be present if his insanity is in trial. He cannot be removed from the court for any reason. If the finding should be "mute of malice" the court may order a plea of not guilty to be entered, and the case will proceed.

Should the prisoner be found mute by the visitation of God, but sane and intelligent, as in the case of a deaf mute or even a person who is so deaf that he cannot hear the indictment read, the court will endeavour by signs or an interpreter or otherwise to make him understand the charge and to reply. If this be found impracc-

ticable, a plea of not guilty is entered and the trial proceeds.

If it be submitted that the prisoner is unfit to plead by reason of insanity, a jury is impannelled to try the issue "Whether he be sane or not," at the date of arraignment - not at any previous time. The onus of proof lies on the prisoner's counsel if the jury was impannelled at his instance (a); otherwise it is on the prosecution (b). The jury may form their own opinion on the prisoner's state of mind from his demeanour before them, without any evidence being given on the subject; but it is usual to call evidence. If he be not found insane, another jury is impannelled and the trial proceeds. Should he be found insane, the finding is recorded, and the prisoner "is to be kept in strict custody until His Majesty's pleasure shall be known."

It must be observed that the issue is not the same in the question of mental condition (a) when the deed was done; (b) as to understanding the proceedings on arraignment; (c) as to fitness for undergoing punishment after conviction. These three matters are often confused, much to the injury of medical evidence and the misunderstanding of the law. A man may have been insane and therefore legally irresponsible when he did the deed, and still be able to plead. On the other

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(a) R. v. Turton, 6 Cox, C. C. 385.

(b) R. v. Davies, 6 Cox, C. C. 326.

hand he may have been quite sane at the commission of the deed and be utterly unable to plead. The instances that occur not infrequently show that there is no constant or necessary connection between the two. The plea of insanity may be urged, in order to stay the law's progress, at various stages. "Though a man be sane when he commits a capital crime, yet if he becomes non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment, if after judgment, he shall not be ordered for execution; if after such order, it shall not be carried out: for furiosus solo furore punitur; and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings."(a)

There are two things to be taken into account in considering the question of insanity in a criminal: (1) the duration of any particular form of insanity: (2) the bearing of the particular mental defect on the particular issue that is being tried. The acknowledged capacity of some lunatics to give evidence in a court shows that the law recognises varieties and degrees of intelligence among lunatics just as it does among the sane. These things are often being confused by people who would not dare to enunciate the grounds of their conclusions, which really are two assumptions (1) insane as to one matter, insane as to all matters: (2) insane once, insane always - even retrospectively.

In the "Lancet" of July 23rd, 1904, there is an in-

(a) 1 Hale, 34.

teresting article on the case of Rex. v. Breeze, in which the prisoner was found to be sane enough to plead and in which a plea of guilty was received and the prisoner was condemned to death. On this case an American critic says "This is one of the vagaries of the insanity defence. It appears from the proceedings that there was a doubt that the prisoner was in a condition to plead; this being settled affirmatively the plea was accepted. At the same time the medical officer was of the opinion that the crime was committed while the prisoner was insane. Evidently the rule of law as to ability to plead requires a less quantum of insanity than to acquit for crime. A more correct procedure would be to refuse the plea, where the judge is in doubt, and then place the prisoner on trial for the crime."

The critic, though failing to see that it is not a question of the relative "amount" of insanity, is right in his reference to procedure. The usual and almost invariable procedure is to enter a plea of Not Guilty in all cases of murder, or to go on with the trial even if the prisoner should plead Guilty. To do otherwise is dangerous. Surely a man may be a liar without being a murderer. Casper (a) records a case of a woman who pleaded guilty to the intentional murder of her new-born child, and was sentenced to eight years' penal servi-

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(a) Forensic Medicine, The New Sydenham Society, Vol. iii, p. 390.

tude. After completing two years and nine months of her sentence it was found that she had never been pregnant at all.

Insanity after Sentence.

According to our legal procedure a man may be found, after sentence, to have been insane and irresponsible when he did the deed. On the other hand, although sane when the act was committed, he may be found to be labouring under such a disease of the mind as unfits him to remain with sane criminals and requires his removal to different surroundings in a lunatic asylum. The English law takes cognizance of both conditions, just as it takes cognizance of the fact that a man sentenced to hard labour may be, or may become, unfit to undertake it.

Capability of Managing One's Affairs.

In a decision (a) by the Court of Appeals of New York State the following opinion was given: "A person may be of weak mind and by reason thereof easily influenced or dominated by others, so that in the judgment of men he ought not to be allowed to manage his own affairs, but he would not necessarily be of unsound mind. The Courts of Chancery in England and in this State re-

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(a) Boston Medical and Surgical Journal, June 18, 1903.

garded unsoundness of mind as meaning a mental incapacity, and under the provisions of our present Status unsoundness of mind must amount to that; that it is regarded as an equivalent to a condition of lunacy.

This raises the question, What is meant by "unsoundness of mind?" This expression was used by Lord Eldon to designate a state of mind not exactly idiotic and not lunatic with delusions, but a condition of intellect occupying a place between the two extremes, and unfitting the person for the government of himself and his affairs. In a case, however, in which an inquiry is made regarding a person's capability the evidence would relate solely to the case in question, and the person's condition with reference to his business.

Mental derangement, once proved, or admitted, to have existed at any particular period, is presumed to have continued; and consequently the party who alleges a lucid interval or recovery must establish his allegation. A case occurred recently in South Australia in which a gentleman who had been committed to an Asylum fifteen years previously as hopelessly incurable applied to the court to be reinstated in the management of his large estates. The court on enquiry found him capable. Such a case tends to make one very guarded in making a prognosis or fixing any time limit beyond which recovery is hopeless. In this case, however, syphilis of the brain, which undoubtedly existed and caused "diabetes," was probably to a large extent the cause of the original lunacy, and when I examined him on behalf of counsel for

the relatives there were still physical evidences of the former disease.

In another case, which I have recorded, (a) a man, the subject of syphilis of the brain which produced glycosuria, recovered when he was treated for the original malady, and regained his power of transacting business. Under treatment for "diabetes" he had become an pretty much imbecile.

This subject of capability of managing one's affairs is closely allied with the question of the value of a lunatic's testimony in law courts. The "Medical News" of March 16, 1901, criticises the statement that a witness need not be excluded from giving testimony because he is insane on some one subject. It dissents from this, and refers to the fact that the views regarding partial insanity have changed very much in the last twenty-five years. The old doctrine of a monomaniac or partial dementia, in which one faculty of the mind can be in abeyance or distorted without involving the remainder is one not now generally accepted. While the insane person may have a correct perception of outward events, this description of them may be warped or distorted by his delusions. In paranoia, which is generally regarded by the laity as a partial form of insanity, all the relations of the individual with his fellow men are distorted by his delusions. If the court casts

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(a) Edinburgh Hospital Reports, Vol. 3, p.398.

out the testimony of those whose moral character and past reputation show them guilty of wilful misrepresentation, it should be equally chary of accepting testimony from those whose mental characteristics have proven them incapable of perceiving facts as they are."

The assumption that one faculty of the mind cannot be in abeyance or distorted without involving the remainder may be true. But as in the case of a bodily ailment the question will then be "What bearing has the defect on the subject at issue?" A man may walk and walk well, even if he has a paralysis of the arm. On the other hand weakness of the limb may be merely part of a weakness affecting the whole body. It would be absurd to call a man a lunatic on account of some passing peculiarity which marks him off as different from some of his fellows or from his former self, and then to argue that because he is lunatic on this point he is consequently more or less lunatic on all. The critic's objection, that a lunatic's evidence may be more or less warped, applies to the evidence of every sane person.

Testamentary Capacity.

There may be difficulties of a physical nature connected with will-making even where the mind is quite clear. A London correspondent of the "Medical News" of March 10, 1900, describes a case of will making under difficulties. A stroke of paralysis had made a woman unable to speak or write. Her physician wrote down

names of her relatives on a series of cards, and the various items of her extensive properties on a second series. The card containing a description of a piece of property was then laid before her, and she selected from the others a card with the relatives' names and the two were placed together. This was continued until all the items were associated with the names of the persons whom she wished to have them. From these "instructions" a will was drawn up and read to the testator, who modded assent to each item and signed the whole by making her mark. The will was contested, but the judge stated that the method used had not only been skilful but perfectly fair, and admitted the will to probate.

Where mental disease exists, or weakness of mind of such a character that the testator may be unduly influenced, then the question of capacity arises. The grounds on which a will may be "upset" are not the presence of delusions or mental disease, but the influence exerted by these, if present, on the act of the testator. A very comprehensive ruling was given on this by an American judge (a) in a Pittsburg case in which it was submitted that the testatrix had made a will unfavourable to her daughter who had devotedly nursed her, on account of the daughter's long continued and anxious attempt to restrain the mother in the gratification of a

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(a) Quarterly Journal of Inebrity, April, 1900.

morbid appetite for morphine. The judge said: "The exercise of testamentary power presupposes that the testator shall understand the nature of the act and its effects, shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect, and with a view to the latter object that no disorder of the mind shall poison his affection, his sense of right, or prevent the exercise of natural affections; that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made. This gives us a measure of the degrees of mental powers which should be insisted upon. If the human instincts and affections, or the moral sense, become perverted by mental disease, if insane suspicion or aversion takes the place of natural affection, if reason and judgment are lost and the mind becomes a prey to insane delusions calculated to lead to a testamentary disposition due only to their baneful influence, it is obvious that the testamentary power fails and that a will made under such circumstances ought not to stand."

The law and practice in England are similar. "In contemplation of law the expression "sound mind" does not mean a perfectly-balanced mind. The question of mental soundness is one of degree. In considering it large allowance must be made for the difference of individual character; but in every case the highest degree of mental

soundness is required in order to constitute capacity to make a testamentary disposition, inasmuch as the act involves a larger and a wider survey of facts and things than is required in the other transactions of life." Broughton v. Knight, 42 L.J., P. 25; L.R. 3 P. 64; 28 L.T. 562.

At a trial, where the question was raised as to the testamentary capacity of a testator, it was proved that at one period of his lifetime he had been confined in a lunatic asylum, and that at the time of making his will he was subject to certain fixed delusions. These delusions, however, could not be connected with any of the dispositions in the will. The judge left it to the jury to say whether, at the time of making his will the testator was capable of having such a knowledge and an appreciation of facts, and was so far master of his intentions and free from delusions, as to be able to have a will of his own in the disposition of his property and to act upon it. It was held that there was no mis-direction. Banks v. Goodfellow, 39 L.J., Q.B. 237.

A good deal of litigation regarding wills might be avoided if a medical man, not necessarily an expert - the family physician by preference - either witnessed the signature or simply were present when others signed as witnesses. In either case it would be well for the physician to give a certificate as to the testator's mental condition at the time of signing the will.

Certifying Lunatics.

A pauper lunatic may be certified for committment to an asylum on account of his wandering at large without proper control, or being a nuisance or dangerous to society; and an ordinary person, not a pauper, may be certified for the purpose of general control on account of being more or less dangerous or difficult to manage, or because he may be more conveniently and effectively treated in a public or private asylum. The physician's task here is altogether different from what it is in criminal or civil proceedings. He has not to examine the patient in order to give evidence concerning his mental condition in relation to a particular act, say of killing, or pleading, or making a will, but in order to estimate whether his conduct and condition are such as to necessitate or warrant his detention and treatment in an Asylum. The law gives very large powers to one or two physicians in respect to the curtailing of the civil and social rights of an individual; and too much caution cannot be exercised in respect to the manner in which such powers are exercised. On the other hand while care is demanded on the part of the physician, protection should likewise be afforded him in carrying out what is a most responsible duty.

Too much care cannot be exercised by a physician in setting forth in the certificate the statements, and their source, on which he founds his opinion. He should see that the certificate he gives shows sufficient reason to the authorities of an Asylum for detaining the

person certified. Not infrequently statements are accepted as proving "delusions" which are really, although possibly almost incredibly, matters of fact and capable of being verified. Too many certificates set forth no symptoms whatsoever of insanity or unsoundness of mind even although such may undoubtedly be present. This lack of care appears to be very widespread throughout the profession; ~~but~~ *and* it may give rise to very serious consequences to various parties concerned. When on a Lunacy Commission about three years ago, when a question arose regarding worthless or invalid certificates on which inmates had been detained, I asked an Inspector General of Asylums, who had a very large English and Australian experience, the following questions and received the following replies regarding medical certifying of lunatics:- Q.- Is the medical profession beginning to understand more the legal aspects of detention? A.- I wish I could say that I did think so. Q.- You think there is room for improvement in their appreciation of the legal obligations in certifying? A.- Perfectly correct. They do not know much about it. Q.- You think that in sending people to the asylum they think more about the medical treatment than of depriving a person of his legal rights? A.- Yes.

The risks to which a physician is exposed are often illustrated in reports of cases. It will be found, however, that many of the difficulties in which physicians find themselves are attributable to the want of

sufficient care and of business habits in filling in certificates. A physician may, in all good conscience, certify and may be proceeded against not merely on the issue of the patient's insanity, but on the ground that some part of the certificate, apparently not essential, was untrue in fact.

The lesson from such cases is that a physician cannot be too careful in certifying. In fact it becomes a serious question whether one physician should by himself undertake to certify: and in some cases physicians have refused to certify unless an agreement has been entered upon to indemnify them in case an action should be brought against them. This is rendered necessary from the protean forms insanity takes, and also the fleetingness and apparent uncertainty of the malady. A man may be mad beyond doubt to-night and may be certified accordingly; to-morrow morning he may be as rational as the second physician himself is who calls to fill in the second necessary certificate. This I have seen on several occasions. Again one physician at a single visit may diagnose insanity and others may be quite unable to trace any abnormal condition mental condition after constant and continued watching.

Conclusions.

With respect to the legal aspects of insanity the law is fairly clear; and while a few points admit of doubt the majority are definitely settled.

Sir James Fitzjames Stephen says[a]: "It appears to me that the line which ought to be drawn between the departments of law and medicine in this matter is theoretically, and ought to be in practice, perfectly clear. The question 'What are the mental elements of responsibility?' is, and must be, a legal question. It cannot be anything else, for the meaning of responsibility is liability to punishment; and if Criminal law does not determine who are to be punished under given circumstances, it determines nothing. I believe that by the existing law of England those elements (so far as madness is concerned) are knowledge that an act is wrong, and power to abstain from doing it; and I think it is the province of the judges to declare and explain this to the Jury. I think it is the province of the medical men to state for the information of the Court such facts as experience has taught them bearing upon the question whether any given form of madness affects, and in what manner and to what extent it affects, either of those elements of responsibility, and I see no reason why, under the law as it stands, this division of labour should not be carried out."

It cannot be said that the medical aspects are as satisfactory as the legal aspects. In order to reach a better understanding on this greatly disputed and vastly important subject, physicians should realise what is required of them. A physician can say that Spiritus Rectificatus of the British Pharmacopoeia con-

(a) A History of the Criminal Law of England, Vol. ij, p. 182.

tains 90 parts by volume of ethyl hydroxide; but he cannot say what percentage of self-control will be lost in any British subject by the administration to him of 10 ounces of the spirit in any given circumstances. Unfortunately he too often tries to do so without any data for his opinions. A physician may see a patient in delirium tremens or mania, but he cannot say what amount of self-control such a one is capable of exercising until he has tested him. Again, he may see a man brought up as a lunatic in court and may fail to gauge the amount of self-control he is exercising in simulating sanity, until he is found insane by the bench, when he breaks forth into the most irresponsible and painfully unrestrained and irrational language. Further, he should remember that in sleep, intoxication, and insanity, the senses may be affected in a different order in different persons, and not always in the same order even in the same person. It is this fact that helps to give rise to so many varieties of "insanity;" and even in the symptoms of what may be termed the most marked forms we must be prepared to meet with irregularity in appearances.

Finally no physician should feel any degree of confidence in expressing an opinion on insanity unless he has had considerable experience in, and has devoted a large amount of attention, to psychology, i.e. to the nature and action of the mind in a normal healthy con-

dition. Mercier says (a): "In order to know anything about insanity it is necessary to know something first about sanity, and in order to know anything about the disordered mind it is necessary to know something about the mind in health." Again, as to insanity he says (b): "With respect to this malady the great majority of medical men are themselves in the position of laymen. They have not studied it. It was not included in their examinations; it was a thing outside their curriculum - a thing apart, having little community of nature or similarity of character with the subjects of their professional studies."

(a) Sanity and Insanity, 1890, p. xvii.

(b) Ibid, p. xii.

C H A P T E R XV.

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I N S U R A N C E .

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C H A P T E R XV.

I N S U R A N C E .

Insurance, in law, is a contract by which one party, for an agreed consideration (which is proportioned to the risk involved) undertakes to compensate the other for loss on a specified thing from specified causes.

The points where law and medicine meet here are (1) the risk involved; (2) the loss; (3) the specified causes. The first has reference to the medical condition of a candidate for life insurance; the second, to the medical condition of the victim of an accident; the third, to the cause of death or disablement.

THE RISK INVOLVED.

When a physician examines a candidate for life insurance he asks the prescribed questions and writes down the answers, makes a physical examination, enters an account of what he finds, and gives an opinion regarding the rejection, or the unconditional or conditional acceptance of the "life." This opinion is subject to the revision of the company's referee. The physician who examines the candidate acts in the double capacity of medical examiner and agent for the company; and he will be regarded in law as an agent unless it be proved that he was in collusion with the insured to defraud the company.

The examiner should record the answers exactly as given by the applicant. If he should advise the applicant what to say, or if the answer he writes down should differ from the applicant's statement, or omit any part of it, the courts have held that the company will be bound by the examiner's record. The scope of the examiner's duties is thus set forth in a decision in an American case (a). The Court said: "The object of a physical examination of a person proposing to insure his life in an insurance company, by a competent physician, is to ascertain whether he is labouring under, or is subject to, any disease or defect which may have a tendency to shorten life. The inquiry involves an examination not only into the present state of the various organs and functions of the body, but into the tendency of these organs and functions to take on diseases as affected by habits of mind as well as of body, temperament, tendency to diseases from hereditary causes, and the occupation and condition in life of the subject. Of two persons of the same age and present bodily health, the one may present a risk entirely safe and proper to be taken, the other improper and unsafe to be taken. It is impossible to affix limits to the subjects into which it is not only proper, but necessary, for an examining physician to inquire, in order to arrive at a conclusion upon which he can safely advise the acceptance or rejection of a risk. Whether I am right or wrong in

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(a) Valton v. National Fund Life Assurance Co., 1 Keyes, 23.

these views, I entertain no doubt that in many cases a knowledge of the pecuniary circumstances of a person desiring to be insured is material to the risk, as affecting in some degree the life; and they are a legitimate subject for the inquiring physician or surgeon. The inquiry may not be material in every case, but the surgeon alone can tell whether it was or was not so in a given case. It is therefore competent to ask him whether he made the inquiry, and what response was given, and how far he deemed such answer material in deciding to advise the taking of the risk. In such cases the very point of inquiry is, whether the pecuniary circumstances were deemed by him material, and whether he would have advised the acceptance of the risk if it had not appeared that the person desiring to be insured was a man of means."

The duty of the physician is important from the point of view of warranty in law, a subject regarding which there has been much legal dispute. If he, or any agent, should fail in his duty towards the company, the company will be held liable for his negligence. An illiterate person, blind of one eye, signed, at the request of an agent of an insurance company, an application for a policy on a form which stated that he had no physical infirmity. The policy agreed to pay £250 for (inter alia) the loss of one eye and £500 for total blindness. The insured lost his remaining eye by an accident. It was held that the knowledge of the agent

that the insured was blind of one eye affected the Company, that the policy was good, and the insured could recover as for total blindness. (a)

The question of professional secrecy has been raised in connection with this subject, and some life insurance companies have made a proviso in the contract that the proposer shall waive the provisions of any existing State code which prohibit a physician from stating in answers anything that was communicated to him by the patient. Legally this is only reasonable. The revisers of the New York statute on this subject stated in a note that the law was to enable a patient to disclose his physical condition and history to the physician so as to benefit by his advice without fear of publicity, and that the privilege was solely for the patient's protection and was not intended to keep secret anything that he was willing should be made public. It has also been decided that if a beneficiary takes advantage of the information possessed by an attending physician, it cannot subsequently be urged by the bemeficiary that such information is privileged. These things it will be noted apply only to civil actions in Wich the private medical attendant is called as a witness: the examining physician is not the medical attendant of the applicant, but is an agent whose knowledge is placed at

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(a) Bawden v. London, Edinburgh, and Glasgow Insurance Co., C. A. (1892) 2 Q. B., 534.

the service of his principal.

REJECTION: The American courts have decided that an informal examination at an agent's solicitation, whether based or not on a proposer's written application, if not completed on account of the proposer's physical condition, or family or personal history, is a "rejection" within themeaning of the question in the application.

Some important cases have been decided in the courts with reference to risk. An insurance company refused to pay a policy on the ground that the person insured had stated in his application that he was never intoxicated, but had been frequently seen in that condition. The court stated that there were three degrees of intoxication: In the first degree the ideas are uncommonly vivacious, but the individual perfectly retains the consciousness of his external condition, and in fact may be said to be in complete possession of his senses. In the second degree the man has still the use of his senses, though they are remarkably enfeebled; but he is entirely beside himself, memory and judgment having abandoned him. In the last stage a man not only loses the possession of his reason, but his senses are so enfeebled that he is no longer conscious of his external relations. In the case in hand the judge ruled that the evidence failed to show that the man had ever passed into the last stage, and hence he could not have been fully intoxicated.

In the case of life insurance of children the risks to the companies are becoming greater, owing to the difficulty in detecting instances of child murder by starvation. The "Lancet" of March 16, 1901, contains an editorial article on a case at Bristol. The child's life had been insured for twenty-five pounds, and it was the desire of the father, as well as the stepmother, to destroy the child's life in such a way that detection would be impossible. For this they chose starvation and exposure to cold. At the time the case was discovered the condition of the child was very low, but fortunately his life was saved by proper treatment. He had been exposed in a room in which there was no fire for a considerable time, and this combined with deficient nourishment, had reduced him to a very low state. In commenting upon the case a medical journal says (a) that the system of child insurance which prevails in England directly fosters this character of crime, and it is thought that many children are disposed of in this way. Detection is practically impossible. A medical man who is summoned finds a poorly nourished child, or one suffering from pneumonia, a condition very likely to terminate one of these cases. Being assured that the cause of death is "natural" he issues a death certificate, and that is the end of the matter. It is not the duty of the medical man to act as a detective; the whole difficulty is in relation to child insurance.

The insurance of children is almost the last remnant of the practice of insuring a life without the insured's consent, a practice not very common now. Sometimes a creditor desires to insure the life of his debtor, and the question has arisen whether he can do so without the consent of the assured. There are some obiter dicta to the effect that he can; but no case has been decided in which a court held that such a procedure is legal. Numerous policies have been taken out on the lives of eminent people, almost certainly without their consent. The objection to such insurance is the element of temptation to crime and the subjecting of a person to risk without his knowledge or consent. A study of this subject tkes one back to the custom of insurance of "Queen's leases."

It will be observed that in much of the risk the examining physician has no part, e.g., in reference to statements about former diseases and present habits, which he merely records. In such matters as syphilis and heart disease, considered as risks, each company has its own rules and its own medical referees. The chief responsibility of an examing physician is connected with the physical examination.

In cases where death from natural causes occurs soon after insurance the company is in some instances constrained, if not to throw the blame on the examiner, at least to make inquiry in case there had been any false statement recorded or any part of the examination

conducted without sufficient care. Miss A.B., a female warder at a lunatic asylum, insured her life on 11th April, 1900. In August of the same year I received a letter from the insurance company saying she had died on the 8th of July from cancer of the stomach, and asking, since she had been under my care in hospital, what the duration of the illness was and when the first grave symptoms manifested themselves. The reply was to the following effect:- She consulted me first on the 25th April of that year for persistent pain and uneasiness in the region of the stomach, accompanied by anaemia. After a very careful medical examination, I failed to find any obvious cause; and I thereupon made a searching gynecological examination. This cast no further light on the complaint. Thinking that the circumstances of her occupation, which she detailed to me, might have something to do with her condition, I agreed to her proposal that she should take a holiday. I saw her again on the 9th of May. Though she was somewhat improved in general condition she still suffered from the old complaint; nor could I obtain any more definite information than that it appeared to be a gastralgia due to anaemia. I did not see her again privately. On the 27th of June she was admitted to the Adelaide Hospital. Her appearance was so changed that I had some difficulty in recognising her until she reminded me of her symptoms. Her whole aspect betokened cancer; and an examination of the abdomen showed a definite hard swelling in the region of the stomach. Her relatives asked me the nature of

the disease and said if it were incurable they would like to remove her. This they did on the 5th of July. The tumour was a rapidly growing one, and the disease in this case was the most rapidly progressive I have ever seen. At the time of my previous examinations I could find no trace whatever of any such disease. The company's representatives were satisfied that there had been no dereliction of duty on the part of their own medical examiner; and the case furnishes an instance of how quickly disease may manifest itself and end fatally, soon after insurance. From an investigation of several cases, I am led to believe that women have sometimes a premonition of impending disease, and insure their lives in consequence.

This case raises the question of the extent of examination necessary when a woman applies for insurance. Some examiners insist on a complete medical and gynecological examination in the case of every woman who is a candidate; and considering the additional risks consequent on child-bearing and the relatively small number of women who insure, an examiner can scarcely err in making his examination too complete.

THE LOSS.

This question arises in connection with accident (including sickness) policies. In cases tried in court, the jury or judge will assess the damages on the general and the medical evidence. Insurance com-

panies often endeavour to settle claim, as soon after the accident as possible, by payment of a "lump sum" in lieu of so much per week, for total or partial disablement. This, of course, if in their interest. In such cases the private medical attendant may be called on by the patient to advise as to the compensation, the company making their estimate from their own medical inspector's report.

In some cases the courts have been called upon to decide the meaning to be given in terms referring to disability. The Court of Appeals of Colorado interpreted the words "totally disabled and confined to the house," as meaning merely incapacitated for his work or business and a complete and enforced withdrawl from business or work, not a state of absolute helplessness and constant restraint within doors (a). The Supreme Court of Minnesota, in the case of Monahan v. The Columbian Knights in construing in a by-law the words "totally and permanently disabled by reason of accident or disease from following any occupation whatever," said that it was not necessary that a member shall be disabled to the extent that he has not sufficient power to follow some easy occupation or to perform some slight service. The words "following any occupation" mean something more than the doing of one or more acts per-

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(a) Mutual Benefit Association v. Nancarrow.

taining thereto. They involve the idea of continuity, and involve also the doing of all those things which are an essential part of the work or business in which a party is engaged.

On one point the private medical attendant should be particularly careful, viz., the prognosis given to his patient. In many instances a patient will appear to recover completely, and after some months, or even some years, will show sequelae of disease that will incapacitate him partially or wholly from work. I saw a number of such cases in returned soldiers who suffered from enteric fever or rheumatic fever in the South African war. In one instance an officer developed ataxic paraplegia more than two years after apparently complete recovery from enteric fever. One of my patients in civil life was an exact counter-part of this case. Similar after effects are not uncommon in other diseases, e.g. in injury to the spine caused by railway accidents; and a physician should always be guarded in his prognosis, since after a settlement or a compromise of the claim, there is no possibility of reopening the case.

THE SPECIFIED CAUSES.

Dr. Kemper (a) reports his experience in making a claim against a company which had insured him against

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(a) "Philadelphia Medical Journal," February 15, 1902, p. 328.

septic poisoning. He was attending a surgical operation and accidentally infected his ear, which was the seat of an eczematous eruption. When the claim was presented a polite letter was returned stating that the policy did not cover diseases of any kind. This led to an investigation of the clauses in accident policies which are issued to physicians covering septic poisoning. One company issues policies, but restricts the septic poisoning to such cases as do not result from the physician's own carelessness. Another regards the indemnity as payable only when the septic poison has been received as a result of an infection of a wound received in an operation. A study of the adjudicated claims and of the terms of the various policies leads the writer to the conclusion that the term "septic poisoning" in an accident policy is simply put in for the purpose of securing policy holders, but with no idea of paying any claims which may arise under this clause. In most cases it is so artfully worded that there is no difficulty in the insurance company avoiding payment of the claim.

This is not law. The law was stated in another American case (a) A strong healthy man, after wearing a pair of new shoes for about a week, suffered from an abrasion of the skin, which received reasonable atten-

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(a) Medicine, 1898, p. 880.

tion but led to the man's death from blood poisoning in about three weeks. The point to be decided was whether the death was produced by "bodily injuries effected by external violent and accidental means," as this language would be used in an accident insurance policy. The United States Circuit Court of Appeals holds that it was, thus affirming the judgment of the court below in the case of the Western Commercial Traveller's Association v. Smith. On the question of whether the abrasion of the skin of the toe was the natural and probable consequence of wearing new shoes, it says that "it must be condeded that new shoes are not ordinarily worn with the design of causing abrasion of the skin of the feet; that an abrasion of the skin is certainly not the probable consequence of the use of new shoes, for it cannot be said to follow such use more frequently that it fails to follow it; and that neither can such an abrasion be said to be the natural consequence of wearing such shoes - the consequence which ordinarily follows or which might be reasonably anticipated."

The following extract (a) shows how the law is interpreted in England: "In a case under the Workmen's Compensation Act at Kidderminster the county court judge has held that anthrax infection is an accident" within the meaning of the Act and that the widow of a workman who

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(a) Lancet, of August 1st, 1903, p. 334.

died from anthrax acquired when sorting Persian wool for his employers is consequently entitled to compensation at their hands. The matter is of considerable interest to workmen and employers and probably the Court of Appeal will be called upon for a final decision upon it. The section of the Act gives to the workman compensation for "personal injury by accident arising out of, and in the course of, his employment." It has been held that whether the injury is due to an "accident" or not is a question of mixed fact and law and consequently the Court of Appeal will review the finding of a county court judge on the subject, although it may not be willing to disturb it. In a recorded case an "accident" has been spoken of as something "fortuitous or unforeseen," and it has also been said that "in its ordinary sense the word accident necessarily involves casualty, violence, or vis major." In the case mentioned it was decided that a woman who sustained internal injury through lifting a succession of heavy boxes was not injured by an"accident." The county court judge at Kiddminster held that some corce caused the anthrax bacilli from the wool to float in the air and to impinge on the deceased and that this circumstance constituted the infection an accident.

In the "Medical Record" of December 9, 1899, it is stated that man died in Vermont in consequence of perforation of the intestines by sharp fragments of some indigestible material swallowed with the food. He was

the holder of an accident policy insuring him according to the usual formula against "bodily injury sustained through external violence and accidental means." The company refused to pay on the ground that the cause of the man's death was not an accident, but the court decided that death was accidental within the meaning of the policy. In New York State it has been decided that the taking of poison by mistake is not an accident; in a similar case in Illinois the courts have ruled to exactly the opposite effect.

These cases show how the law has changed, or how decisions, founded on the same legal principle, have varied in conformity with advances on medical knowledge. Lord Hale (a) doubted whether voluntarily and maliciously infecting a person of the plague and so causing his death would be murder. He said "infection is God's arrow" Medical science in showing how disease is communicable from one person to another has demonstrated that "inoculation" of a disease like plague may be as much a demonstrable cause of death as a dagger wound on the chest; and the law now holds accordingly. (See Chapter XI). It has been held that a shock to the nerves of an employee caused by fright sustained in the discharge of his duty, and incapacitating him from employment, is an "accident" within the meaning of a policy

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(a) 1 Hale, 432.

issued by a railway company to such employee(a).

In estimating damages it has been held that a physician under his accident policy, could recover for loss of time and that he could show the amount that he was earning at the time and was accustomed to earn during the particular portion of the year when the incapacity occurred (b).

The liability of an employer for exposure of an employe to special infection was the subject of litigation in the case of Nickel v. The Columbia Paper Stock Company (c). The Kansas Court of Appeal confirmed a judgment obtained by an employe who was made ill by sorting some rags which had been obtained from a hospital. It was shown that in the sack which came from the hospital there was cotton saturated with blood, medicines and wound secretions, and there were pieces of decaying flesh. By reason of the exposure to this infection she was made ill, and brought suit against the defendant company.

The court in commenting upon the case said that the company should have exercised care to protect the health of the employe; that the employee took the ordinary risks of the occupation, which at best were not incon-

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(a) See above, p. 209, (c).

(b) Louisville and Nashville Railway Company v. Reynolds: "Journal of the American Medical Association," March 7, 1903.

(c) "Journal of the American Medical Association," July 19, 1902.

siderable; but that the company was culpable in putting on her work-table a bundle of poisonous waste matter gathered from a place where such poisonous material might reasonably be expected to be found. The exceptional character of the occurrence was enough to demonstrate that she should not be required to assume the risk. If the foul and poisonous material was collected by agents for whose acts the company was responsible, then it should answer for the consequences. If the material was collected without the company's knowledge or authority, then common prudence would have dictated an inspection thereof, before handing it over for assortment. If the possibility was such that an injury as happened was likely to inevitably follow, then it was the company's duty to have warned this employee of the danger, or to have taken precautions against such consequences."

In a case like this, medical evidence might be called to estimate the special risk to which workers in "unhealthy trades" are exposed. This subject is discussed in the chapter on Survivorship.

The connection between injury and tuberculosis has formed a subject of medical investigation by Weir (a) and has also been in evidence in the law courts. H. A. Hare (b) under the title "Acute Tubercular Infection;

(a) "British Medical Journal," May 23, 1903.

(b) "Journal of the American Medical Association," ~~of~~ March 18, 1899.

its Diagnosis from Pneumonia and Typhoid Fever," writes that he was recently called to a case in which a man well advanced in years was thrown from the platform of a moving street-car and struck on his side. Within a few days he developed symptoms of pulmonary consolidation, became actively delirious and almost uncontrollable. A few days later he died, and the post-mortem showed a pneumonia due to tubercular infection, arising from a low grade of chronis tubercular disease. This latter had been caused by the occupation of the man, that of a knife-grinder. In this instance the injury broke down the barrier afforded by Nature to protect the lung from general infection; it being removed, the bacillus became an active element in the cause of death. His family sued the railroad company, whose defence was that as the disease was tuberculosis, and not ordinary pneumonia, the accident was not responsible for the pulmonary disease which caused death. It was testified however, that he might have lived for years without illness, if the accident had not converted the chronic state into an acute one. The verdict was given for the plaintiff. The subject has also been discussed by Dr. G. Blumer in the "Albany Medical Annals" for November, 1899. While the law as a matter of principle, does not take account of remote cause, it nevertheless seems to lean to "the plaintiff's side" where injury or death takes place from tuberculosis lighted up by injury.

There has been a good deal of discussion, especially in America, regarding the physical examination of

the plaintiff in damages suits. In one case the Supreme Court of North Dakota held that the trial court had the power to make or enforce an order for the examination of the plaintiff, and that it was an abuse of discretion to refuse to require the party suing to submit herself to the examination of physicians under such reasonable restriction as the court should prescribe. The party suing in a personal injury case, by the commencement of her action, impliedly consents to the doing of that measure of justice which she exacts. She cannot claim damages for injuries which she conceals from the reasonable inspection of witnesses, when such inspection is necessary to equip them to testify on trial concerning such injuries. If a party sued must make his defence against the chosen expert opinions of the party suing without the opportunity of testing the variety of the basis of such opinions, he may be placed at a disadvantage such as the law cannot and does not sanction.

In civil suits it is the law that the plaintiff must submit to reasonable examination or be non-suited. The court will see that both parties are allowed the means of getting justice. By the English law, the plaintiff will receive no compensation during the time that he refuses to be examined. Further, a decision of the House of Lords (a) has settled the law that the plaintiff has

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(a) "Lancet," November 25, 1911, p. 1505.

no inherent right to demand that an examination by a medical practitioner on behalf of the defendent in a Workman's Compensation claim shall take place in the presence of the plaintiff's own physician. Besides, it has been held that the plaintiff, should occasion require, shall submit to examination by the defendant's medical representative at any reasonable time and without previous notice. The right of the defendant to the means of finding whether the plaintiff is really injured and not merely malingering must be recognised.

Sometimes "Medical etiquette" is urged against the examination of a plaintiff by the defendant's representative alone. Medical etiquette, however, was established actually or ostensibly for the good of the patient. An ordinary consultation is held with a view to examine the patient and diagnose his disease from the point of view of prospective treatment; in compensation cases, on the other hand, the object of the examination is to find out the state of health in the interest of the defendant; and this may be done without consulting with the plaintiff's physician should such a course be deemed advisable, just as similar examinations are made in other circumstances. In certifying a lunatic the rights of the person examined are conserved by the law, which compels the medical practitioner to examine him "separately ~~and apart~~ from any other medical practitioner." If there ever was any objection to such a course from the stand-point of "medical ethics" not even an echo of it now survives.

In connection further with this subject of compensation, it has been held (a) that a plaintiff must submit to an operation for cure or amelioration provided that there is a reasonable prospect of the operation being without undue risk; and, in case he should decline, he will be non-suited. The reasonableness of this is not infrequently manifest. Recently I examined a workman who, as the result of an injury, had a scar on the front of the terminal phalanx of his right index finger. When he attempted to work with a hammer the finger gave him pain. I discovered that he had been drawing pay and compensation for some months from three different sources, amounting to much more than his ordinary wages. Within a few days he went to hospital for operation.

Sometimes difficulties are encountered in attempting to prove injury. In a Scottish case, in 1896, the plaintiff, a surgeon, was insured against blood poisoning resulting from accident which was "capable of direct proof." It appeared that he cut his finger while operating on a patient, in four days his finger became inflamed, and shortly after that the sore assumed the characteristics of a primary syphilitic sore. At a later date secondary symptoms were apparent. The place of inoculation was the wound. This much was proved by the surgeon in an action brought upon the policy. He

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(a) Warncken v. Richard Moreland and Sons, (1909), 1 K.B. 184; 25 T.L.R., 129; 2 B.W. C.C., 359.

stated in his evidence that when he first operated he had no suspicion that the patient had syphilis but that since, and from reasons apart from his own condition, he was now of opinion that she was suffering from the complaint at that time. He refused to disclose the patient's name, alleging that to do would be to commit a breach of etiquette and he did not examine (i.e., call as a witness) another medical mwn who, he said, had previously attended the patient and knew that she had suffered from syphilis. It was decided that the plaintiff had failed to prove that the patient was in a condition to inoculate him.

On this the "Lancet" says (a) - "Had he been able to refuse ro disclose the patient's name on the ground of privilege it is possible that the court would have been satisfied by his own statement to the effect that he had acquired the disease in the manner described." It is not impossible, however, that the present procedure and rules ofevidence in court would have been found sufficient to meet the requirements of this case.

SUICIDE: Suicide is the act of designedly destroying one's own life, the person being of years of discretion and of sound mind. This is an important subject in connection with the loss sustained by insurance companies; and is variously dealt with by the Companies

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(a) Lancet, November 26, 1904, p. 1514.

in their policies. Some omit all reference to it; some specify that if the insured is so far insane as not to be responsible they will not be liable, though in some cases they pay the reserve value of their policy; some provide that self-destruction, whether sane or insane, within one, two, or three years excludes from all benefit. Theoretically it is most unsatisfactory to insert such a provision as the following: "Provided always....that if the Assured shall, whether sane or insane, die by his own hands within one year....then, and in any such case, this policy shall be void." A man may die from opening a boil in his arm by his own hand, or he may shoot himself accidentally, or stab himself in defending his life. In none of these cases will the law find him a felon of himself. So a man may hang himself while insane, or leap over a cliff while under a delusion. In neither case does the law say he was a felon. "The intent and the act must both concur to constitute the crime;" and the intention did not go with the deed any more than it did in the previous cases. And yet an insurance company contracts itself not to pay in the second case. One wonders if it considers itself not liable in the first cases; or whether the law will not hold it liable in all these instances. Medically, morally, and by common law the insurance policy of the "insane" man who dies by his own hand should be valid. The killing is as much unintentional as it is in the accidental taking of poison.

In Victoria in 1891, it was held that the condition in a policy that a person "will not die by his own act" only applies to cases of self-destruction voluntarily and wilfully done, with knowledge and intention (a).

It has been held in England (b) that the condition avoiding a policy in the event of the assured dying by his own hand applies to all cases of self-destruction, and it is immaterial that at the time of committing the act the assured was of unsound mine.

An application for a policy of life insurance with the defendant company, which was expressed to be part of the contract, contained the following clause: "I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract" Within the period of a year from the date of the policy the assured committed suicide during a fit of insanity. It was held (c) that the clause as to suicide operated as a limitation of the defendant's liability, and afforded a defence to the action.

The following American criticism (d) will show the

(a) Ballantyne v. The Mutual Life Insurance Company of New York, 17 V.L.R., 520.

(b) White v. British Empire Mutual Life Assurance Co., 38 L.J., Ch. 53; L.R. 7 Eq. 394; 19 L.T. 306; 17 W.R. 26.

(c) Ellinger v. Mutual Life Insurance Co. of New York, 73 L.J.K.B. 546 (1904).

(d) Medicine, 1903, p. 88.

unsatisfactory state of the law on this subject. In "American Medicine" of December 27, 1902, there is editorial reference to a recent decision of the United States Court of Appeals sustaining a lower court in the ruling that a clause "self-destruction, sane or insane, within ~~one~~ one year from the date of issuance of the policy is a risk not assumed by the society." This contract was not limited to wilful or intentional suicide, but included self-destruction, sane or insane. The upper court in commenting upon the ruling said: "If the assured caused his own death, while sane or insane, that is the end of any right to recover, and there can be no looking into the condition of the mind of the deceased when he committed the fatal act. The case might be different if the replication had stated that his death was due to an accidental cause, if, for example, he had taken a poisonous draught mistaking it for water, or walked through a window mistaking it for a door. Then it would fall within the rule established by a number of cases, which holds that accidental or unintentional self-destruction is not within a condition forfeiting the policy for suicide.

The above ruling is directly contrary to the Illinois law, which has held that the self-killing by a person while insane was not suicide. The term suicide was held to imply a voluntary act, and in effect that self-destruction while insane was in a sense accidental, in that the proximate cause of the taking of life was out

of control of the individual. This seems like sound reasoning, and yet it does not take into account the contractual relation of a policy. If the insurance company chooses to limit its liability by a simple clause which is easily understood, such as that above quoted, there can be no reason why the court should not sustain it. In insuring a man's house against fire the company assumes no liability against storms or explosions, and in the common form of accident insurance there is the clause limiting the liability of the company to injuries from violent, external and accidental means. If the dictum of the Illinois court is sustained, we question whether it would not be possible to recover under an accident policy for self-destruction, if it would be shown that the self-destruction occurred while the person was insane, and was brought about by violence. All of the acts of the insane might be considered in a certain sense accidental. The ruling of the United States Court seems to apply more correctly sound legal principle, and it is certainly in accord with a wise public policy.

One might put the position thus: If a man, in self-defence, should shoot himself accidentally would this be dying by his own hand? The reply would certainly be "No, because it is not a mere physical instrument that is contemplated, but a mental intention." But if the matter of mental intention be brought in to qualify

or interpret the action, how can insanity of a kind that abolishes all intention be excluded as an excuse for the death and a plea for the validity of the policy? To exclude it is to juggle with words; unless "insane" be taken to mean "insane but in such a state as still to be conscious of the legal nature of his selfdestroying act."

C H A P T E R XVI.

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THE PHYSICIAN'S LEGAL PRIVILEGES AND RESPONSIBILITIES.

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C H A P T E R XVI.

THE PHYSICIAN'S LEGAL PRIVILEGES AND RESPONSIBILITIES.

The subject of the privileges and responsibilities of the physician does not belong to the science of medical jurisprudence as such, but so many questions fall to be considered regarding his legal relation to operations, suits of malpractice and such like, that it becomes necessary to examine the whole subject in some detail.

Medical Acts in various countries confer certain privileges on the physician, in return for which they impose on him certain obligations towards the State. A physician is exempt from jury service; he is privileged to occupy certain positions in the State and State service to the exclusion of other people, his certificates of health, disease, and death are accepted by the State and corporate bodies; and he is entitled to recover his professional fees at law, unless debarred from doing so by a by-law ~~or regulation~~ of his College. He is also, by law, entitled to certain legal presumptions in his favour which long ~~usage~~ usage has accorded him as necessary for his protection in view of the peculiar conditions in which his duties have to be carried out. For example, in all suits for divorce, where the respondent and co-respondent sustain the relation of patient and physician, respectively, the court will not

infer carnal intercourse, except upon the strictest proof (a); and, indeed in all cases where an attempt is made to prove criminal connection, by inference from acts of familiarity between the parties, the court will take into consideration, and make allowance for the relation existing between them.

With reference to his public duties, it has been already pointed out hat he is liable to be called on to give evidence in public courts. For doing this he is entitled to fees at a special rate. While carrying out those duties within the law he is protected; e.g., no action will lie against him for any necessary act done to fulfil an order to make a post-mortem examination. On the other hand, he is not protected if he should do anything contrary to the law. For example, on one occasion a physician examined a woman by order of a coroner. The coroner had no legal authority to make such an order, and the physician had no protection in carrying it out. Again, an examination by medical men in pursuance of a magistrate's order, of the person of a woman in custody charged with concealment of the birth of her child, was held to constitute an assault on the part of the justice who gave the order and the two doctors who carried it out. Mr Justice Lopes said (b) "The de-

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(a) Dunham v. Dunham, 5 L. R. 139.

(b) Agnew v. Jobson, 13 Cox, C. C. 625.

fendants had acted extremely foolishly and the damages might be such as to show in unequiveal terms that neither magistrates, nor policemen, nor medical men may infringe upon their rightsof any person." Making a woman strip naked, under the pretence that the defendant, a medical man, cannot otherwise judge of her illness, is, if he himself takes off her clothes, an assault (a). Further, it may be a physician's duty to vaccinate persons, but if he should do so aginst their will or against the wish of the responsible parents, he will be guilty of an assault.

It is no excuse for a physician that he did not know the law. The rule that ignorance of the law shall not excuse a man or relieve him from the penal consequences of his crime is usually spoken of as arising from a presumption that every person knows the law. Justice Maul said: "There is no presumotion in this country that every person knows the law; it would be contrary to common sense and reason if it were so."

In criminal cases the maxim as to ignoratio facti applies when a man, intending to do a lawful act, does that which is unlawful. In this case there is not that conjunction between the deed and the will which is necessary to form a criminal act; but, in order that he may stand excused, there must be an ignorance or mistake

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(a) R. v. Rosinski, 1 M.C.C. 19.

of fact, and not an error in point of law (a).

It may be well to refer in detail to some recent cevelopments in connection with the physician's legal relations.

In the British Isles any person possessing certain University or other specified qualification is entitled to have his name placed on the Register of the General Medical Council on payment of the prescribed fees. This applies to women as well as men; but licensing bodies are not compelled by law to grant licences to women. A person's name may be struck off the Register through default to intimate change of address, or by his having ceased to practise. If any registered medical practitioner be convicted of felony, or after due inquiry by the General Council be judged guilty of infamous conduct in any professional respect, the General Council may order his name to be erased from the Register. It has been held (b) that the Medical Council is constituted the sole judge of whether a medical practitioner has been guilty of infamous conduct in a professional respect, and that the Court will not interfere where the Council has found anyone guilty, after due inquiry. It has been decided (c) that a medical man is guilty of in-

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(a) Broom: Legal Maxims, 7th edn., p. 216.

(b) Ex parte La Mert. 4 B. & S. 582.

(c) Allingham v. General Medical Council (1894), 1 Q. B. 750.

famous conduct in a professional respect within s. 29 of the Medical Act, 1858, if in the pursuit of his profession he has done something in regard to it which would reasonably be considered as disgraceful or dishonourable by his professional bretheren of good repute and competency. A person's name may be restroed to the Register by the General Council on application and on cause being shown.

Every colonial legislature has power to make its own registration laws; but any person who has been duly registered under the Medical Act is entitled to be registered in any British colony on proof of registration and payment of certain fees.

In the United States of America registration has become a difficult question on account of the number of "diploma mills" which supply all kinds of qualifications to all sorts of persons, who on the strength of these, demand registration.

In the British Isles if a practitioner has been convicted of felony or infamous conduct in a professional sense he is not entitled to be restored to his former privileges even although he has purged his offence by undergoing punishment. This seems to be a peculiar provision with respect to medical practitioners; for felony, for example, does not disqualify a man for sitting in the Commons or Lords, or as a voter, if he has served his sentence or has been pardoned (a). In the State of New

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(a) Anson, The Law and Custom of the Constitution, Vol. 1, pp. 80, 205, 116.

York (a) felony it has been held a bar to future practice. In 1878 Dr. Benj. W. Hawkar, a legally qualified practitioner of the State of New York, was convicted of felony, having performed a criminal abortion, and was sentenced to prison for ten years. At the expiration of his sentence he attempted to resume practice, with the result that the Medical Society of the County of New York brought suit against him for a violation of the State laws. His counsel argued that an enforcement of the law making it illegal to practice medicine after the conviction of a felony was unjust, and in effect adds a new punishment for the crime. The contention of the people was that they had a right to demand good character as one of the qualifications for the practice of medicine. In the trial a verdict of "guilty" was handed down and a fine imposed. Carried to the Appellate Court the verdict was set aside, all but one judge concurring in the opinion. The case was then taken to the United States Supreme Court, where the Appellate Court decision was reversed and the verdict of conviction in the trial court sustained.

In some of the States non-registered persons are forbidden to practise. Hence it is that efforts have been made to define at common law and by statute law such terms as medical practice, practitioner, doctor,

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(a) Medicine, 1899, p. 438.

physician, surgeon. In Kentucky a judge, in passing sentence on an osteopath for the illegal practice of medicine, gave the following succinct yet comprehensive definition: "Any person who for compensation professes to apply any science which relates to the prevention, cure, or alleviation of the diseases of the human body is practising medicine within the meaning of the statute."

Statutory definitions of medical practice have not proved very successful. The code of Georgia contains the following: "For the purpose of this chapter the words 'practice medicine' shall mean to suggest, recommend, prescribe, or direct, for the use of any person, any drug, medicine, appliance, apparatus, or other agency, whether material or not material for the cure, relief, or palliation of any ailment or disease of the mind or body, or of the cure or relief of any wound, fracture, or other bodily injury or deformity, after having received, or with the intent of receiving thereof, either directly or indirectly, any bonus, gift, or compensation.

In an editorial comment on a case decided under this Act an American journal says (a): "There is a well defined idea in the minds of juries and judges, and of the public in general, as to what constitutes the

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(a) Medicine, 1901, p. 216.

practice of medicine, and a simple statute to the effect that only those who are qualified shall be allowed to practice medicine would probably be much more easily enforced than one which is encumbered with a long definition, and that that is as difficult to construe as that which we have just quoted. There is no necessity for the definition, but it has been put into the successive medical practice acts since the first tentative efforts in this direction included such a definition. The great difficulty that has been experienced in dealing with the Christian scientists has been due to this effort to define the practice of medicine. We presume that no rational person would argue for a moment that the procedures advocated by the Christian scientists could be construed into practising medicine. To be sure, one of our Illinois courts did go so far in a decision, holding a divine healer guilty of practising medicine, as to state that the laying on of hands, which he practised, came within the definitions of the medical code. The judge distinctly stated that had he not resorted to this procedure he would have held that he was not practising medicine."

Another aspect of the subject has been exhibited by a trial of a parent for criminal neglect by calling in a faith healer alone. The question was: Did this constitute sufficient "medical attendance." Judge Haight, for the Court of Appeals of New York, defined "medical attendance" as attendance by an authorized medical prac-

titioner. He said(a): "The legislature first limits the right to practise medicine to those who have been licensed and registered, or have received a diploma from some incorporated college conferring upon them the degree of doctor of medicine; and then the following year it enacts the provision of the penal code under consideration, in which it requires the procurement of medical attendance under the circumstances to which we have called attention. We think, therefore, that the medical attendance required by the code is the authorized medical attendance prescribed by the statute and this view is strengthened by the fact that the third subdivision of this section of the code requires nurses to report certain conditions of infants under two weeks of age "to a legall qualified practitioner of medicine of the city, town, or place where such child is being cared for," thus particularly specifying the kind of practitioner recognised by the statute as a medical attendant. Sitting as a court of law for the purpose of construing and determining the meaning of statutes, we have nothing to do with variances in religious belief, and have no power to determine which is correct. We place no limitations upon the power of the mind over the body, the power of faith to dispel disease, or the power of the Supreme Ceing to heal the sick. We merely declare the law as given us by the legislature. We find no error on the part of the trial court that called for a reversal."

(a) Medical News, October 24, 1903, p. 796.

It will be observed that the practical difficulty arises from a desire, on the one hand, to define the work of irregular persons as medical practice in order to stop them from practising; and a wish, on the other hand, to exclude it from the definition of medical practice in cases where the law compels people to provide medical attendance for children and others.

The unsatisfactory state of the law in the States may be gathered from the following (a): Arthur N. Taylor, LL.B., in the "New York Medical Journal" of January 28, 1899, in a series of articles on the law in its relations to physicians, gives a synopsis of the legal decisions bearing upon the terms, doctor, physician, and surgeon. "The meaning of the term doctor, or physician and surgeon, as used in the law, is not confined to any particular school or schools, but is considered in the broad sense of one who professes the art of healing. Justice Daly said: 'The legal signification of the term doctor if simply a practitioner of physic. The system pursued by the practitioner is immaterial. The law has nothing to do with the merits of particular systems. Their relative merits must become the subject of inquiry when the skill or ability of a practitioner in any given case is to be passed upon as a matter of fact.'

(a) Medicine, March 1899, p. 261.

"The Supreme Court of Wisconsin, thirty years later, following the reasoning of this decision, held that a statute providing for the organization of a county medical society included as well the organization of homeopathists as of any other school.

"The question of whether one who "practises bone-setting, and reducing sprains, swellings, and contractions of the sinews, by friction and fomentation," is a practitioner of medicine and surgery, was considered in the Supreme Court of Massachusetts in 1835. While such a practice does not amount to a general exercise of the functions of the science of either medicine or surgery, it forms an important part of the practice of surgery and renders the practitioner amenable to the laws affecting the physician and surgeon; also one who gave electric treatment was held to be engaged in the practice of medicine and surgery. The court said: "It is quite unnecessary, we think, that in order to practice medicine within the meaning of the statute the practitioner should give internal remedies. The services of the clairvoyant are within the meaning of the term "Medical or surgical services."

"The law of Illinois in force in 1887 provided that "no person shall practice medicine in any of its branches in this State without the qualifications required by this Act." The question arose whether or not this included midwifery. The court was of the opinion that obstetrics was an important department of medicine, and

that it was included within the terms of the statute.

"The Supreme Court of Nebraska, in an opinion rendered in 1894, held that a Christian Scientist, in the exercise of his practice, came within the statute which provides that any person shall be considered as practising medicine "who shall operate on, profess to heal, or prescribe for, or otherwise treat any physical or mental ailment of another."

"In a more recent case, arising in Rhode Island, the court held that the term "practice of medicine" as used in their statutes must be understood in the ordinary or popular sense of determining the physical condition of the patient and treating his disease or injury by ordinary or material remedies, and that it could not be construed to include in its meaning the treatment of the Christian Scientists, which takes account neither of physical symptoms and conditions of the patient nor of the application of remedial substances.

"While several of these decisions were based upon the wording of particular statutes, it may be laid down as a general rule that the term doctor, physician, and surgeon, or practitioner of medicine and surgery, as legally used, is broad enough to include all those who profess and practise the art of healing in its several branches.

"It is interesting to note how far words may depart from their original meaning. "Doctor" originally was

applied to a teacher, and at the present time the University degrees recognise no other use of the word. Quoting from one of the decisions cited above, Justice Daly says: "The legal signification of the term doctor is simply a practitioner of physic." It will be with regret that the doctors of law and divinity thus see their titles ruthlessly swept away, or if they retain them are perforce carried into the ranks of the medical profession."

With reference to etymology and the desirability of having a generic term for all engaged in the study or practiceof medicine in all its branches, it may be stated that on December 12th, 1904, the New York Society of Medical Jurisprudence unanimously resolved that in all literature of the Society the title of physician should henceforth be employed instead of "doctor."

In Kentucky, which is looked upon as possessing an excellent medical act, the question of depriving a physician of his licence was before the Court of Appeals. In the case of Matthews v. Murphy (a) the court held that the licence to practise medicine is a "right" or "estate." It seems that the State Board of Health had taken away the licence to practise because of unprofessional conduct likely to deceive or defraud the public. The court examined by what right the State Board of Health assumes to measure an individual's professional

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(a) Medicine, 1901, p. 914.

conduct. Referring to the medical practice act, one section of which provides that the Board may refuse to issue a certificate to practise medicine to any individual guilty of grossly unprofessional conduct of a character likely to deceive or defraud the public, the court remarks: The statute does not prescribe the manner in which a physician may regulate his conduct. It does not advise him in advance what act or acts may be in violation of its provisions. He is not told what is lawful or unlawful. He might commit an act which he regarded as entirely proper, which neither violated moral law nor involved turpitude; still such acts might in the opinion of the State Board of Health amount to unprofessional conduct. The physician who committed the act of which complaint was made could not know at the time the act was done what standard would be erected by the board by which its effect was to be determined. The legislature in effect has attempted to commit to the State Board of Health the right, after a physician has done some act, to determine what its effect is to be, and if in its judgment he should be deprived of the right to practise his profession, it can inflict punishment upon him by revoking his licence. For these reasons the court holds that the statute, so far as it attempts to confer upon the State Board the right to revoke a physician's licence for unprofessional conduct is invalid.

A medical journal commenting on this says (a): "One with any knowledge of constitutional law cannot but approve the decision of the court. To admit as a principle of law that a governing body may constitute a tribunal to pass arbitrary judgment upon the donduct of another, based solely upon its own judgment as to what is proper under the circumstances, will certainly never be received as good law in our States. At the same time it seems intolerable that licence of the State should be invoked to shield practices that are little less than criminal."

In this connection it is interesting to note that many practices that are sometimes and in some places condemned as unprofessional are survivals of old usages that have been abandoned and forgotten in the country of their origin. Many people, no doubt, when they see an advertisement in a colonial newspaper expressing gratitude to the physicians and nurses, think this is a recent reprehensible piece of advertising quackery. In the "Spectator" of 3rd August, 1711, the following occurs: "It is usual for those who receive benefit by such famous operators, to publish an advertisement, that others may reap the same advantage." When one goes farther back in history, one finds that this custom is older than the science of medicine itself, and was in

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(a) Medicine, 1901, p. 915.

fact, the foundation of medical art, which, be it noted, was antecedent to medical science. In Babylon, laws were passed compelling people to carry their sick into the streets and public places, and inquire of all passers-by whether any of them had ever suffered from or had ever see any such disease as the sick person laboured under, and what was done to remove it. In Ancient Greece likewise, when any one recovered from a disease he put a record of it on a tablet and fixed this on one of the temples for the public benefit. In this way some of the temples, particularly those of Cos, Cnidos, and Rhodes came to be associated with the healing art, and their records were available for physicians and medical historians. This was the origin of Greek medicine.

It is unnecessary to speak further on the difficulties connected with this subject of Medical Acts except to give a page from ancient history showing that all the difficulties now encountered have existed since the earliest attempts to restrict medical practise, and that legislation cuts more than one way both for the physician and the public.

Legislation in the reign of Henry VIII for the control of medical practice gives a curious insight into the condition of affairs at that time. In 1511, "on account of the great injury to the faculty and the grievous hurt and destruction of many of the king's liege people by irregular practitioners of all sorts, professions and trades," an act was passed forbidding any one to prac-

tise in London and seven miles round unless he was approved and admitted by the Bishop of London or the Dean of St. Paul's assisted by four doctors of physic; in the rest of the country, practitioners had to be admitted by the Bishop of the diocese. As a result of this it was found that many people who were really skilful and who attended the poor for mere xharity were prosecuted by practitioners "who would not themselves attend the poor and who would take great sums of money and do little." For this reason in 1542 an act was passed allowing all persons having a knowledge of the nature of herbs, roots, and waters or the operation of the same to use and minister to any outward sore, uncome, wound, apostemations, outward swelling or disease, any herb or herbs, ointments, baths, pultess, and complaisters, or drinks for the stone, strangury or agues. The legislature of the day thought that many of the practitioners of the day were so unskilled in their art, that it was better it should be thrown open, even at the risk of admitting quacks at the portal.

It will be observed that the Kentucky court depreated the putting into the hands of a Board of Health the power of saying what was unprofessional conduct and dealing with a physician accordingly. Such a power in the hands of any Local Board, especially of professional men, unversed in the principles and practice of law, would be most dangerous.

In America the subject of consultation with "irregulars" has been the occasion of a long and bitter controversy between the American Medical Association and the Medical Society of New York, consequent on and subsequent to the latter Society in 1882 adopting the official policy of consulting with irregulars in emergency cases, leaving it to the practitioner to decide what constitutes an emergency. In "Medicine," ~~October~~ 1900, p. 835, the position is set forth thus: "In emergency cases, consultations with irregulars are deemed permissible for reasons of humanity, by both sides of the controversy. One of them bases its action on a written code of ethics, and the other believes the written code to be unnecessary for its guidance. This seems to be the matter of controversy, and the exact issue, as is stated by Dr. Jacobi, is further supported by the "Journal of the American Medical Association," which prints in connection with the article an extract from the code of ethics of the association. In this it is stated that the code of ethics is not to be interpreted as excluding from professional fellowship on the ground of differences in doctrine or belief, and there is nothing in the code of ethics that interferes with the exercise of the most perfect liberty of individual opinion and practice. It merely holds that the assumption of a name indicating to the public a sectarian or exclusive basis of practice constitutes a withdrawal from the medical profession proper. Consultation with

irregulars is itself enjoined wherever there is press-need of professional services. This interminable controversy, which has dragged its weary way through a score of years, is found upon actual analysis to consist of a distinction about a difference, and it would seem that it were about time to drop the whole matter."

In England the subject has been discussed mainly in connection with homoeopathists who are on the Medical Register of practitioners. In the case of alleged misconduct of an eminent physician who consulted with a homoeopathist attending a famous English statesman, the medical conscience would seem to have been soothed when it was explained that the homoeopathist was a legally qualified physician.

In one State of Australia the controversy was extended beyond the question of consulting with homoeopaths. It was debated whether a regular practitioner should be boycotted professionally who consulted with another regular practitioner who consulted with a homoeopathist who was legally qualified. The situation was discussed by a Medical Association. The discussion showed, what such discussions not infrequently show, that other considerations than medical ethics, or any kind of ethics, formed the basis of some medical practitioners' conduct.

There has been observed a tendency in many places to make "unprofessional conduct" mean anything that is objected to by a section or association of the profession

or even a local professional society or club, and to treat every one who does not regulate his conduct and practice according to their ideas as deserving to be ignored or even actively ostracised. One of the greatest men of medical genius of the nineteenth century was Sir Benjamin Ward Richardson. He was an investigator in nearly every department of medicine, physiology and toxicology, and did perhaps a great variety of original work than any man of his time. He was also a great man socially as well as professionally, a man whom Society and all learned societies, both British and Foreign, delighted to honour. Yet for a time he was under a cloud. He began to write and lecture against the indiscriminate use of alcohol, and what was the result? These are his own words (a): "For my own part I remember nothing like the mischief that befell me in 1869 when I made the first sortie. Before then my lecture-rooms had been filled by medical men, who liked to see new experiments and to listen to what might now be styled 'post-graduate courses.' Afterwards the rooms were simply vacant. From the outside world the sick sought me: I never sought them, never jockeyed anybody, doctor or patient - and life was on the crest of the wave. The charm ceased so soon as I declared for the principle of abstinence, and nothing could have been more disastrous. In a city in which I had once given a demonstration on chloral, a

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(a) Sir B. Ward Richardson; Vita Medica, p. 377.

grand supper was spread for me; an eminent medical citizen was in the chair, and i was toasted with highest honours by one of the liveliest assemblies I have ever seen. A few months later - it was by accident - I happened to be present at an important ceremony in the same city, meeting the same men; but I was marked, like Higginbottom, with the sin of belief in thr ancient faith, and was known by only one friend. The others kept at that cold distance from me at which I had seen him placed, and I do not hesitate to say that his conduct gave me comfort and resolution. I had done none of them a shadow of wrong, and I had left them all in peace and happiness; but I had let nature lead me, and was no longer one of them. Such has been the effect of my altered views for many a long year; it was no more than might have been expected, and no more than has had to be gently tolerated."

The words of John Stuart Mill are perhaps more applicable to present-day conditions than to those that existed when they were written. He says: "The present civilisation tends so strongly to make the power of persons acting in masses the only substantial power in society, that there was never more necessity for surrounding individual independence of thought, speech, and conduct with the most powerful defences." When such powers come to be used against the interests of individual effort then comes the reign of oppression; for oppression is oppression whether it be imposed by bludgeons, votes

or opinions. Lord Bramwell has enunciated the law on this subject strongly and unequivocally. He says (a): "The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as is that ofhis body. The public has an interest in the way in which a man disposes of his industry and his capital; and if two or more persons conspire by threats, intimidation, or molestation to deter or influence him in the way in which he should employ his industry, his talents or his capital, they are guilty of a criminal offence."

Contracts.

A contract is "an agreement between two or more parties for the doing or not doing of some specified thing" - an interchange of legal rights by agreement; an engagement between two or more persons by a promise on either side. Where a contract is by speciality it is more properly known as a covenant. Where a contract is not by speciality it is called a parol or simple contract, and, although named parol it may be either in writing or by word of mouth. Some contracts, however, are deemed so important that a verbal promise alone is not sufficient to substantiate them in law;

(a) Charles Fairfield: A Memoir of Lord Bramwell, 1898, pp. 29, 30.

e.g. where a man undertakes to answer for the debt or default of another; where any contract or sale is made of lands and tenements; whether there is any agreement that is not to be performed within a year from its making; and where there is the revival of a debt which would be otherwise barred by lapse of time, or the confirmation of one contracted during infancy. Where the terms are set forth openly and avowedly at the time of making an agreement, the contract is termed express. But there is a large class of contracts in which the terms are implied. "If I employ a person to transact any business for me, or to perform any work, the law implies that I promise to pay him so much as his labour deserves; if I take up wares from a tradesman, without any agreement for price, a promise that I will pay him the value; if I undertake any office, employment, or duty, an engagement that I will perform it with integrity. Thus a common carrier always implicitly undertakes to be answerable for the goods he carries; a farrier, to shoe a horse without laming him; a tailor or other workman, that he will perform his business in a workmanlike manner; though if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general understanding; and the matter turns, in that wase, on the express or special agreement which may be made between us. And there is also one species of implied contract which runs through and is annexed to all other

contracts, conditions and covenants, viz, that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of personal property (where not in actual possession) do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them; which indeedis the method taken by the civil law, it having referred the greatest part of the duties and rights of which it treats, to the head of obligations ex contractu and quasi ex contractu. But it is to be observed, that where there is an express promise, the law does not raise an implied one, in reference to the same matter; for the maxim is, expressum facit cessare tacitum. Moreover, where there is a contract by deed, even an express parol promise to the same effect, and upon the same subject, has no force; for the contract by speciality merges or extinguishes that by parol.

A promise by parol or simple contract only is not binding in law unless made upon a consideration, - some compensation, or quid pro quo; and as a general rule the the adequacy of the consideration is a question that the law will not entertain, provided the consideration had some value at the time of the promise. In wery case in which either the consideration or the promise is illegal,- whether as contrary to the express provisions of law or against its policy, - or where it is of an immoral or fraudulent character, the contract is utterly void. A

contract made under duress may be avoided by the person whose free will has been restrained; though he has also a choice, if he thinks fit, to insist upon it as a binding transaction. A person not under the guidance of reason, whether from insanity, idiocy, or even inebrity, appears to be absolutely incapable, while that condition lasts, of entering into a valid contract, though it would seem that he is chargeable for necessaries, in like manner as an infant, suitable to his station in life, and supplied to him without fraudulent intention. Performance of a promise will be excused whenever the promise had failed on his part to perform the consideration.

The contract may be made by the parties in person, i.e. the principals, or by persons authorised to act for them, i.e. agents. An agent may be constituted either expressly or by implication of law arising from the circumstances in which the parties are placed. The appointment, when express, may in general be made by word of mouth, though there are exceptions to this. The agent may either be general, as when he acts for the principal generally or in some particular capacity; or he may be special, as when he is authorised to transact only the particular matter. "So far as concerns the rights of strangers who deal with one who is known to them as the general agent of the principal, without notice of any particular restriction placed on his powers, he shall be presumed to have authority for what he does,

provided it fall within the limits ordinarily belonging to the kind of employment which he exercises; and this even though in fact he may be violating the direction privately given in the particular case by his employer: but the power of a special agent, i.e. one employed in a single transaction, is strictly bounded by the authority he has actually received; so that a stranger who deals with him has no right to consider his acts as binding on the employer, if it should turn out that the instructions of the latter have been violated. But where that which is done by an agent (of any description) is without sufficient authority, it is always capable of being made good by the subsequent assent of the principal: and the effect, in such event, is exactly the same as if full power had been originally given; the maxim of law on this subject being, that every ratification is retrospective, or, as it is sometimes expressed, omnis ratrihabito retro trahitur, et mandato aequipartur.

As regards the contracts: "Any sanctity which a contract may possess, it possesses by virtue of its reasonableness:" "A very slight consideration will induce the court to refuse to enforce a contract on the ground that it is against public policy:" "Freedom of trade is of more importance than freedom of contract, and wherever therefore it can be shown that a contract interferes with freedom of trade the courts will interfere with freedom of contract.#

These statements as set forth in English text-books

and elsewhere will give one a general idea of the relations that physicians will bear towards people as partners, assistants or principals, patients or Members of Friendly Societies, with whom they establish contracts whether expressed or implied.

The general business relations of partners to each other do not fall to be considered here. As regards their relations towards patients, it may be mentioned that if a patient has contracted specially with one partner or stipulated for the attendance of a particular member of the firm, the contract must be adhered to; the firm cannot claim otherwise. Partners are bound by simple contracts within the scope of their profession whether the contract be in the name of the firm or of one partner; but one partner cannot bind another after notice that he will not be bound. All the partners are liable for wrongful act or negligence by one of them while engaged in partnership business, but not for illegal or malicious acts unless ratified. It appears that it is not illegal for a qualified practitioner to enter into partnership with an unqualified one.

Bonds not to Practise.

As stated above, a contract against freedom of trade or public policy will not be enforced; it is void. A contract, however, operating merely in partial restraint, will be valid, provided it is not unreasonable and is made on a good consideration. A general stip-

ulation to a principal by an assistant not to practise his profession is void although the time may be limited. In a case where a surgeon-dentist contracted not t practise in London or any town in England or Scotaldn where his employers or he on their account might have been practising before the expiry of his service, the restriction was held to be unreasonable on the ground that it went much beyond what the protection of any interests of the employers could reasonably require, and put into their hands the power of preventing him from practising anywhere.

In the case Hulen v. Earel, the Supreme Court of Oklahoma decided that an agreement not to practise medicine"in the vicinity" could not be enforced since it imposed no limitation ("Journal of the American Medical Association," Nov. 28, 1903).

When the condition is forfeited, only the actual damage can be recovered, not the whole stipulated penalty.

Contracts with Patients.

If a physician should undertake to attend or should attend a patient this implies a contract. To every such contract there are two parties. A physician, except by statute law in some places, is not bound to enter into such a contract - he is not under any obligation to attend any one; but, having agreed to attend, he is bound by certain terms.

In the case of Lathrop v. Flood, in the Supreme Court of California, 63 Pacific, 1007, the defendant, a physician, was employed to attend the plaintiff during her first confinement. He assumed charge of the case, visiting the plaintiff at intervals until he deemed it proper to employ instruments to aid in the delivery. The plaintiff at this point shrank back and screamed compelling the defendant to let go the instruments. The defendant threatened the plaintiff that if she did not quit screaming he would quit the case, and in the failure of a second and third attempt to use the instruments be abruptly left the house. This was at midnight, and it was an hour or more before another physician could be obtained, after which the plaintiff was safely delivered with the use of instruments.

The court remarks in the opinion: "It does not appear that the defendant's treatment of the case up to the abandonment of it was either negligent or unskilful. It does not appear that undue physical injuries were inflicted by his treatment, either upon the mother or the child. If either suffered in this respect it is demonstrated that the actuating cause was the conduct of the patient in moving and shrinking while the instruments were actually inserted."

The law as laid down by the court was that a physician might elect whether or not he will give his services, but having accepted his employment and entered upon the discharge of his duties he is bound to devote to his patients his best skill and attention; and to

abandon his case only under one or two conditions: (1) Where the contract is terminated by the employer, which termination may be made immediate; (2) Where it is terminated by the physician, when it can only be done after due notice and an ample opportunity afforded to secure the employment of other medical attendance.

It is not necessary that these "contracts" should be in writing or that the terms should be accurately defined. In Doyle v. Ewars the Supreme Court of South Dakota has decided on the character of the contract made with a physician in a manner that is of general interest, because of the frequency with which verbal contracts of this character are entered into and a non-specific amount charged for professional services. A physician brought suit against an administrator to recover for personal services, stating that he had informed the patient that his charge for an operation would be from $200 to $400. The court held that the contract was not too vague and indefinite upon which to base a cause of action, but was a valid contract for the sum of $200 at least, and that the value of the services up to $400 could be proven."

Further a contract made by an agent will be held binding. A. told B. to call a certain physician C. B. could not find him but sent another, who on arrival was told by A. that the trouble was all over now. The Supreme Court of Missouri, in Bartlett v. Sparkman, 1888, held that B., who would have had to make a journey

of 14 miles for orders if he had not called C., had acted within his agency.

The following case is of interest (a): "According to the 'Journal of the American Medical Association' of March 17, 1900, a physician who had been suffering from a sore on his face, which he himself could not cure, called on another doctor of whom he had heard. The latter, a specialist, termed the affection lupus, or "lupus cancer." A contract was entered into, that in the event of a cure the physician should give the specialist a certificate of his skill and proficiency, or $5000 in cash. A cure was effected, and the specialist had recourse to the law to enforce the contract. A trial resulted in a judgment for the defendant and against the specialist, the judge holding that the $5000 which the specialist testified was to be paid if the certificate was not given was a penalty, and therefore not recoverable. The Supreme Court of Pennsylvania holds that this construction of the contract is not valid, and not based on a true relation of the contracting parties. The Supreme Court holds that the defendant was a member of the medical profession, knowing what his trouble was, and presuming to know what would be a proper charge for the services; hence the Supreme Court says it cannot approve of the view which holds that the $5000 was a penalty. It is to be regarded as

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(a) Medicine, 1900, p. 526.

an alternative mode of payment agreed upon by the parties capable of intelligently entering into a contract. It accordingly reversed the judgment and placed the suit back for retrial, and ordered the court to instruct the jury that if the specialist's testimony is to be believed, then the defendant must pay the amount agreed upon."

Malpractice.

Blackstone says (a): "Injuries, affecting a man's health, are where by any unwholesome practices of another a man sustains any apparent damage in his vigour or constitution. As by selling him bad provisions, or wine; by the exercise of a noisome trade, which infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary. For it hath been solemnly resolved that mala praxis is a great misdemeanour and offence at common law, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction."

The business of the physician is to prolong life and relieve suffering. This is sometimes forgotten, especially by those who think that the main business is

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(a) 3 Blackstone, 122.

to make a diagnosis, even at the risk of doing harm to, if not of killing the patient in the process. Again, it may be questioned whether a physician has any right to persist in injecting strychnine and belladonna and keeping up artificial respiration in patients who are moribund from phthisis or cancer, and who plead to be allowed to die according to nature, not secundum artem, and object on being brought back to life day after day merely to endure additional suffering in the interests of "science."

Let it be assumed that the physician should prolong life and relieve suffering. The law will presume that what has been done has been rightly done; and when charges of malpractice are made they are founded upon gross want of skill, or gross neglect, on the part of the practitioner. The English Criminal Law on the subject was enunciated long ago by Lord Hale (a), and is as follows: "If a physician gives a person a potion without any intent of doing him bodily hurt, but with an intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, this is no homicide, and the like of a chirurgeon, 3 E. 3. Coron. 163. And I hold their opinion to be erroneous, that think, if he be no licensed chirurgeon or physician, that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and

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(a) 1 Hale, 430.

chirurgeons; and therefore if they be not licensed according to the statute of 3 H. 8 cap. 11 or 14 H. 8 cap. 5. they are subject to the penalties in the statute, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter."

The English law makes no difference between a registered physician and an ordinary person. Hale says (a): "This doctrine, therefore, that if any dies under the hand of an unlicensed physician, it is a felony, is apochryphal, and fitted, I fear, to gratify and flatter doctors and licentiates in physic, tho it may, as I said, have its use to make people cautious and wary, how they take upon them too much in this dangerous employment."

In applying the law as to what constitutes proper skill or care, regard must be had to the fact that judicial decisions are the product each of its own particular time and require to be studied with reference to it. On the general question Broom says (b): "It may be laid down, as a true proposition, that, although bare negligence unproductive of damage to another will not give a right of action, negligence causing damage will do so; negligence being defined to be "the omission to do something which a reasonable man, guided upon those

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(a) 1 Hale, 430.

(b) Legal Maxims, 7th edn., p. 282.

considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do;" negligence, moreover, not being "absolute or intrinsic," but "always relative to some circumstances of time, place, or person," imposing a duty to take care."

A civil action for damages may be brought against a physician for malpractices, and many points of interest arise in connection therewith. In giving judgment in an Ontario case (a) of malpractice in the treatment of an ankle, the Honourable Chief Justice Falconbridge said that malpractice (mala praxis) is bad or unskilful practice by a physician or surgeon whereby the healthy of the patient is endangered. Negligent malpractice means gross negligence and lack of the attention which the situation of the patient requires; as, if a physician while in a state of intoxication should administer improper medicines. What was charged in this case was ignorant malpractice, namely, a course of treatment which was calculated to do injury, which has done harm, and which a well educated and scientific surgeon ought to know was not proper in the case.

In 1697 the Court of King's Bench (Temp. Chief Justice Holt) resolved in Dr. Groenfelt's case "that mala praxis is a great misdemeanour and offence of common law (whether it be for curiosity or experiments, or by

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(a) Medicine, 1902, p. 703.

neglect) because it breaks the trust which the party had placed in the physician, tending directly to his destruction. The burthen of proof is upon the plaintiff in an action of this character, who should show that there was want of care, skill, and diligence."

The general role and skill required of a medical man was summed up by Chief Justice Erle (a): "A medical man was certainly not answerable merely because some other physician might have shown greater skill and knowledge: but he was bound to have that degree of skill which could not be defined, but which in the opinion of the jury was a competent degree of skill and knowledge. What that was, the jury was to judge. It was not enough to make the defendant liable that some medical man of far greater experience, or ability might have used a greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to lead to bad results."

Chief Justice Tindal, in charging a jury said (b): "What you will have to say is this: Whether you are satisfied that the injury sustained is attributable to the want of a reasonable and proper degree of care and skill in the defendant's treatment. Every person who enters into a learned profession undertakes to bring to it a

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(a) Rich v. Pierpont, 1862, 3, F. and F. p. 40.

(b) Lamphier v. Phupos, 1838, 8 C. and P. p. 479.

reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest degree of skill. There may be persons who have higher educations and greater advantages than he has, but he undertakes to bring a fair and competent degree of skill; and you will say whether in his case an injury was occasioned by the want of such skill in the defendant. It has been held in some American cases that the locality in which a medical man practices is to be taken into account, that a man practising in a small village, or rural district, is not to be expected to exercise the high degree of skill of one having the opportunities afforded by a large city, and that he is bound to exercise the average degree of skill possessed by the profession in such localities generally. I should hesitate to lay down the law in that way. All men practising in a given locality might be equally ignorant and behind the times, and regard must be had of the present advanced state of the profession and to the easy means of communication with the large centres of education and science. For instance, Port Perry (the place in which this action had its origin) is a two hours(journey from a city with a quarter of a million inhabitants, with three medical colleges, and numerous hospitals."

In reference to this case it must be pointed out

that in an American case (a) in which the one witness for the plaintiff was a homoeopathic physician, the court announced the following as a rule of law: "In an action for malpractice, a physician or surgeon is entitled to have his treatment of his patient tested by the rules and principles of the school of medicine to which be belongs."

On the general question of proof, Broom says (b): "The onus of proving negligence lies upon the party who alleges it; and, to establish a case to be left to the jury, he must prove the negligence charged affirmatively, by adding reasonable evidence of it. As a rule, the mere proof that an accident has happened, the cause of which is unknown, is not evidence of negligence."

The nature of the evidence required in malpractice suits is well illustrated in the case of Folkard v. Bowman in 1903 (c). The defendant treated plaintiff for fracture of both bones of the leg the result being shortening of an inch and a half or two inches by overlapping. After eighteen months of invalidism the plaintiff was operated on in the Sydney Hospital. The Chief Justice of New South Wales, who tried the issue, asked counsel for the plaintiff at the close of his case, what

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(a) Medicine, 1899, p. 528.

(b) Legal Maxims, 7th edn., p. 246.

(c) Medicine, 1904, p. 73.

was the evidence of malpractice. Counsel said there was ample evidence to show that the fracture was of such a nature that there was nothing to prevent the bones from being set end to end, and that the evidence went to show that the only way in which a medical man could be absolved from neglect was by showing that there was a large amount of swelling, bruises, contusions, or lacerations of muscles, but that these did not obtain in this case.

The Chief Justice in taking the case from the jury said that he was loth to withdraw a case of the kind, but he could see no evidence whatever of any negligence or wrongful act. All that had been dealt with had been mere generalities, and no witness had stated that the treatment of the plaintiff by the defendant was wrong in any respect. The case could not be decided on the mere conjecture that there had been some act of omission or actual malpractice. As far as there was any evidence, nobody could tell how this shortening of the limb was caused. It was a scientific matter, and the evidence was as consistent with the absence of negligence as with negligence. The plaintiff was bound to establish his case to the satisfaction of the jury, and he could not see what act of negligence was relied upon. All the medical witnesses called stated their inability to give positive evidence on the point at issue without knowing what the actual condition of things was at the time and shortly after the accident.

No one could tell this with the exception of the plaintiff himself, and his knowledge was admittedly imperfect. The jury could not return a verdict for the plaintiff unless they would point to some particular act of neglect on the part of the defendant or some malpractice, but there was no such evidence, and the plaintiff having brought no positive evidence on the point must fail.

This same principle is illustrated by a case in America. The Supreme Court of California in the malpractice case of Bailey v. Kreutzmann (a) held that the follcwing instruction was defective: "The defendant in this action is not charged by the plaintiff with any lack of general skill or competency as a physician and surgeon. This amounts to an admission, and you are bound to hold accordingly that the defendant was possessed of that ordinary medical and surgical knowledge and skill which the law requires him to possess; there being no degree other than that of ordinary knowledge and skill recognised by law as a standard or applicable as a measure of knowledge and skill in such cases."

Damages are usually classified as (1) nominal, sometimes called "farthing damages," in which a trifling sum is awarded where there is a breach of duty by a physician or an interference with a patient's right but where no serious loss is proved; (2) substantial or com-

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(a) Medicine, 1904, p. 398.

pensatory damages, where the amount given is an equivalent for actual loss or injury; (3) exemplary or punitive damages, where the amount awarded exceeds the loss and is awarded as punishment against the physician.

The following case illustrates punitive damages (a). The facts are given from the evidence of the child's grandmother. "Dr. --- was the attending physician. He was standing at the foot of the bed and received the child from its mother. Before receiving the child from beneath the bedclothes, he tied one cord or ligature, and then removed the cover, tied the second ligature, and cut the umbilical cord, when the child was by Dr. --- handed to the witness, who wrapped it in a blanket and sat by the stone trying to quiet it. When the first ligature was tied the child cried out like it was hurt, and continued to cry for about an hour. The doctor then took the child in his lap and examined it, and said that the string had slipped off the navel cord. He asked for another string, which I gave him. I had given him one at his request before the child was born; both were common wrapping twine. Mrs C. --- assisted Dr. ---, and he tied a string on the navel cord and returned the child to me, and I washed and dressed it and cared for it until morning. The child had spells of crying through the night; all the dressing that was

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(a) Medicine, 1899, 965.

done next day was changing the diaper, and that was done by me. When washing the child next morning I found a string hanging down, and taking hold of it I found that it was tied to the child's penis; it was part of the same cord gave to Dr. --- the night before. I had charge of the child at night. When Dr. --- came in I showed him what he had done, and he said it was probably owing to Mrs C. --- being excited and holding up the wrong thing for him to tie. There was but one string around the navel cord when I dressed the child. There was string tied after the child was dressed; no one had the child before it was dressed but Dr. --- and myself."
Upon the trial of the case the jury fixed the damages at five thousand five hundred dollars.

The following paragraph which is headed "A Tragical Mistake" is taken from "Medicine," August 1899, page 670. "The Montreal press reports one of the most painful professional misadventures that has come under our observation for years. It is stated that a woman had accidentally wounded an eye with a pen-knife. The eye was sightless. A sympathetic trouble began to show itself in its fellow, and removal of the injured eye was decided upon. Through a mischance, after the anaesthetic was given, the surgeon removed the sound eye, and now vision is totally gone. This is not the first instance of this kind that is to be found in medical literature. It emphasises the necessity of guarding against such a blunder. An eminent ophthalmic surgeon

of our acquaintance was invariably in the habit of marking, at the time of the examination, with an indelible pencil on the forehead of the patient above the eye to be operated upon. While such a practice seems superfluous in many cases, yet the rare occurrence of such a fearful accident shows that nothing that would prevent it should be omitted."

In connection with these two cases the question arises as to whether the physicians were habitually careless, or whether such "accidents" might happen to operators habitually careful. Any one who has had much experience in the dissecting room knows how common it is for students, after the "subject" is turned, to start dissecting the wrong limb. Clinical students have observed that it is not uncommon for a physician to handle the "wrong" limb when the patient has turned over on his face in bed and sometimes the malingerer has been detected through a similar procedure. Surgeons have stretched the wrong sciatic nerve when the subject has been placed face down on the operating table - and in some instances a cure has resulted from the treatment. I know a famous British oculist who is "haunted with the horror" of taking out the wrong eye, and is never satisfied until he has re-examined the sound eye at the conclusion of an operation. In fact, the most careful operators in the cases mentioned are prone to forget the changed relations of eyes and limbs on the bed or couch; and unless special precautions are taken to insure that the right organ shall be operated on, acci-

dents will happen with men even if they are habitually more than usually careful. For obvious reasons these facts are not often produced in evidence for the defence in suits for malpractice.

An interesting case (a) was decided in the Ohio Court. A leading ophthalmic surgeon was consulted for an injury to the eye. He stated his opinion that it should at once be removed to prevent the danger of losing the sight of the other eye. The mother of the injured youth begged to have something done for the relief of the pain. The surgeon, good-naturedly yielding, prescribed an anodyne, and at each subsequent visit renewed his warning as to the well eye. In a few weeks the other eye became dim, and the patient was taken to a hospital, where another surgeon enucleated the injured eye, but not in time to save its fellow. The judge decided that the surgeon was liable for failing to do that which he himself said was necessary for the protection of the patient's sight, and the jury assessed the damages at the sum of fifteen thousand dollars.

The criticism made on this is "It is difficult to see the justice of the foregoing decision, but it doubtless would have turned upon the evidence as to what the surgeon said, and the force with which the importance of enucleation was stated to the mother and patient.

(a) Medicine, 1901, p. 174.

How far ought a surgeon to go in expostulating or urging a patient to a certain procedure that he declines to take? It is clearly impossible for a surgeon to force a patient to submit to operation, be it never so urgent, but he always has the alternative of immediately retiring from the case as soon as his directions are not obeyed. Clearly this is what the surgeon in the above case should have done."

The conditions in which the retiring has to be done must be remembered, especially in view of the case recorded above, page 379 . Further, it must not be forgotten that it requires the same strength to dissolve as to create an obligation; but if one party to a contract refuses to carry out his part of the agreement the contract is thereby annulled.

In several places a question has been raised as to the amount of skill expected of a specialist compared with a general practitoner. In the case of Baker v. Hancock (a) the Appellate Court of Indiana held that the skill required by a specialist is greater than that which must be possessed by a general practitioner. It says that aphysician is such whenever he acquires sufficient learning to be trusted with a licence to practise medicine and it is legally practised. As to when a physician becomes a specialist, the court holds that is a question of fact. The party may, or may not, have

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(a) Medicine, 1902, p. 879.

qualified himself as a specialist. Whether he had done so was a matter within his own knowledge, and primarily for his own determination. Having arrived at the conclusion that he possessed such qualification, it still remained with him whether he would hold himself out and receive and treat patients on the basis of it. When he determines to do this, and does it, it then becomes his duty to exercise that degree of skill which he represented himself as possessing. To relieve one practising medicine under such circumstances of responsibility commensurate with the pretension by which patients are secured and compensation fixed, would be to give ignorant practitioners licence to defraud and to place innocent patients at their mercy."

Such a decision no doubt is agreeable to common reason; but its application may sometimes lead to issues that lend themselves to criticism. For example (a): The "Milwaukee Journal" for June, 1899, gives an account of a case recently decided in Germany, which has excited not a little indignant comment in the German medical press. It is stated that it is a reflection of the ability of the general practitioner, and that it will tend to the employment of specialists, and they urge that practitioners in general protest against the decision of the court. A child, fifteen months old,

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(a) Medicine, 1899, p. 704.

required an extension bandage for a fractured hip, and the family physician called in an associate to apply it. The family physician inspected the bandage on the following and fourth days after its application. On the latter occasion he noticed evidences of undue compression and altered the Bandage, but the local process developed into gangrene and required amputation, and the family practitioner was sued for damages. He was acquitted on the ground that a mere general practitioner could not be expected to understand the technique of bandaging."

It has to be noted that this decision merely shifts the usually accepted line of distinction downwards, taking away from the general practitioner and adding to the scope of the specialist; the court deciding as to what the particular work of each should be. It is interesting to note that in America among professional men themselves this tendency is becoming strongly marked. Professor Raymond Custer Turck of Chicago in a paper read before the Chicago Academy of Medicine says (a): "The presentation of this paper before the Academy tonight is directly the result of a criticism, by an eminent Chicago surgeon, of my work and that of my associates in teaching operative surgery and gynecology to the general profession." The criticism was in effect that "it is wrong to give to the general practitioner a

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(a) Medicine, 1903, p. 264.

knowledge of major surgery; that he, as a rule, has had no great advantage in primary surgical training, no sufficient amount of clinical instruction, and above all, after having received a more or less superficial course in surgery has no opportunity to carry forward the constant study, experimentation, and intense application along the lines of pathology, operative technique, and physical dexterity, all so essential to the safe operator in the major field - in a word, that a little knowledge is a dangerous thing. On the whole, I am heartily in accord with my critic; the subject has caused me much thought and some anxiety during the course of five years' experience in post-graduate operative teaching. I believe that, in general, institutions indiscriminately teaching major surgery to the profession at large do more harm, in the long run, than good. The criticism focused my own ideas on the subject, hence I am presenting this paper, first to make clear my position on the question, and secondly, to provoke discussion and to obtain the views and advice of the Academy of Medicine."

It will be evident from the dictum of the Appellate Court of Indiana that a specialist is expected to have and exercise greater skill than a general practitioner. It follows from this that his remuneration should be greater; and the law recognises this. The court will determine what is a reasonable remuneration for such greater skill, apart from any question of the

financial or social standing of the patient (a).

Fees.

Some points of interest have arisen in connection with the subject of consultant's fees. The "Chicago Medical Recorder" for May, 1899, reports a case that was recently decided in Tacoma in McKone v. Cole (b), it being an action at law to collect a consultation fee of $20. The defence was that the plaintiff never employed Dr. McKone, but that the latter was called in, without consulting him, by his family physician, Dr. Stratton, who was attending him for an attack of appendicitis at the time, and for this reason the attending physician was responsible for the bill. The court held that in serious cases a patient is not competent to judge of his own condition, and that the attending physician need not always inform the patient of his intention to call counsel, as the excitement pending such a consultation might be prejudicial to the patient's chance of recovery. A verdict was entered for the plaintiff.

A case which on superficial examination seems to differ from this in law is reported in the "Boston Medical and Surgical Journal" of October 26, 1899. (c)

(a) See p. 255.

(b) Medicine, 1899, p. 615.

(c) Medicine, 1899, p. 1056.

The bill of the two homoeopathic physicians, $70 for the attending physician and $175 for the consultant, who made six visits in a case of fractured elbow, was disputed by the patient. The treatment resulted in a stiff-elbow joint, and a counter-claim was interposed for $500 for malpractice. In the trial court the full amount of the bill was awarded the physicians. The case was then taken to the court of pleas, in which the decision of the lower cort was reversed. In sending the case back for retrial, the Supreme Court says: "There was no justification by custom or otherwise in the plaintiff's employment of the consultant without a frank and full statement of the situation to the patient, and his wishes concerning the professional persons to be brought in should have been ascertained. There cannot be properly applied to the facts shown here any custom multiplying ordinary professional charges five or ten times under the shield of a layman's ignorance, because it is subversive of justice that charges should be so largely increased by a custom not made known at all to the patient."

These two cases, on a more careful examination, may not be found to differ as regards law, seeing that in the first it was held justifiable to call in a consultant without authority on the ground that the patient'scondition was such that he could not judge for himself and that he would have been made worse by attempting to do so.

Several points have been decided regarding fees. The Supreme Court of Alabama in a case for recovery of fees held (a) that the trial court erred in admitting testimony as to the value of the patient's estate over the objection of the defendant. For this it reversed a judgment recovered for medical service and remanded the case for trial. The court said that the inquiry was as to the value of the professional services rendered by the plaintiff, and that the amount or value of the patient's estate could throw no legitimate light upon the case or aid in its elucidation. According to the evidence in the trial court there was no recognised usage shown which governed professional charges with reference to the financial condition of the person for whom such services were rendered. The cure or amelioation of diseases is as important to a poor man as to a rich man, and, prima facie at least, the services rendered to one are as valuable as the same services rendered to the other.

The editor remarks: "One portion of the decision is worth quoting specifically, where the court says a usage may be "so long established and so universally acted upon as to have ripened into a custom of such character that it might be considered that these services were rendered and accepted in contemplation of it." The above would imply that such custom might be

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(a) Medicine, 1900, p. 349.

established and be prowen in a case. The court does not say that if an attempt has been made to show this that it would have been sustained, but it does say that the absence of an attempt to show it was sufficient to exclude testinony as to the value of the patient's estate as not having a direct bearing upon the contractual relation."

This criticism contains the gist of the principle applicable in all such cases. In many places a custom still lingers of the patient, whatever his means, giving a physician what he can afford to pay or what he thinks a sufficient fee without any account having been rendered. The Code of Hammumabi which dates from about B.C. 2250, and which most probably codifies a still more ancient law, contains numerous provisions showing that lives, like hired services and property, were estimated at different values, and that fees were regulated accordingly. For curing by an operation an abscess under the same conditions, the doctor received according to the condition of his patient - if a gentleman ten shekels of silver; if a son of a plebean, five; if a gentleman's servant, two. Similarly for curing a shattered limb or diseased bowel, the fees were five, three and two shekels. For malpractice in the case of operation with a lancet whereby a gentleman died, or by opening an abscess whereby he lost his eye, the doctor had his hands cut off: if the patient were the slave of a poor man the doctor gave slave for slave if he died; if he lost his eye he gave half his price.

Judged by the large proportion of contract law in it, which is unique in ancient codes, this Code of Hammurabi's indicates a very advanced stage of civilisation. The same principle of differential value for services, as also for damages, may be traced through all primitive law down into modern times. The limitation of private revenge ad libitum to "an eye for an eye and a tooth for a tooth" was a great development. Later on there was still an advance; but in very advanced civilisations, in settling the damages to be awarded or the penalty to be inflicted, the law and the judges still took as their guide the measure of vengeance likely to be executed by an agrrieved person in the circumstances of the case, as a proper measure of the degree of punishment. The motive of the transgressor had little weight with them, if it was considered at all.

The liability of a third party to pay a physician's bill has formed the subject of some dispute and probably much loss to practitioners. Tne English statute governing these cases has been copied in most States of the Union (a); it provides: "That no action shall be brought whereby to charge the defendant bound in special promise to answer for the debt, default, or misscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum of note thereof shall be in writing and signed by the party to be charged

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(a) Medicine, 1903, p. 76.

therewith, or some other person thereunto by him lawfully authorized."

Circumstances may be such that the promise of a third party is valid even if it is not in writing. The language used in a verbal constraet is controlling. If a patient comes to a physician accompanied by a third party to gain him credit, and the third person should say to the physician, "If he does not pay you, I will," such a promise is void. If he should say, "Give him the treatment; I will be your paymaster," or, "I will see you paid," this is an understanding for himself; he, in fact, assumes the debt, and no contract in writing is necessary. If thepromise is collateral to the transaction, then a written memorandum is necessary, but if the promisor makes himself primarily liable, then it need not be in writing.

It will be seen from the foregoing that the construction that the courts put upon the words by which a contract against a third party is sought to be enforced is variable. Thus the words, "I will see you paid," have been held by one court to be a primary undertaking by the promisor, while another court holds that identically the same words are collateral and come within the statute which compels such undertakings to be in writing."

Responsibility for the Acts of Assistants.

The general principle of a master's responsibility for the acts of his servant is thus laid down by Black-

stone (Vol. 1, p. 429). "As for those things which a servant may do on behalf of his master, they all seem to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied: nam qui facit per alium, facit per se." On the other hand, the law holds that a master is not generally responsible for the wilful as distinguished from the negligent acts of the servant, when not done by his command, although while in his service. Blackstone concludes: "We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in a servant, but can never be a gainer; he may frequently be answerable for his servant's misbehaving, but can never shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same - that the wrong done by a servant is looked upon in law as the wrong of the master himself; and it is a standing maxim that no man shall be allowed to make any advantage of his own wrong."

Malpractice suits by charity patients are far from uncommon. A very broad view of the relation of charity patients to the institution has been taken in some courts, viz., to the effect that whether part payment is made or no payment at all, the payment of damages would be a diversion of a trust fund from the purpose for which it was designed. It has beenheld that the trustees having selected trustworthy agents in the administration

of a charity have no further liability or responsibility to the patients. In nearly all cases wheresuits have been brought against the medical officers of a charity for malpractice, the defence has been based on the merits of the treatment and not on the officers' legal relations to a charity.

In the case of Ward v. St. Vincent's Hospital (a) the question of "paying patients" in a charitable hospital arose. Miss Ward took a private room in the hospital for $25 a week and paid $3 a day additional for the services of a skilled nurse. The nurse let a hot water bottle burn the patient's leg. The lower court decided on the principles stated above but the Appeal Court reversed the decision holding that the hospital, although in part a charitable institution, had also a department for pay patients. It appeared that the hospital, contrary to agreement, instead of supplying a skilled, fully trained nurse, substituted one who had only nine months of the two years' training. At the second trial the jury disagreed.

A later decision of the United States Circuit Court of Appeals lays down the law differently(b). "To the court it seems intolerable that a distinction should be made between paying and non-paying patients; the one

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(a) Medicine, 1900, p. 702.

(b) Medicine, 1901, p. 1055.

should be entitled to protection from gross negligence as well as the other. When a hospital is organized entirely for charitable purposes, and its income is devoted to the succour of the sick and wounded, it is not necessarily implied that persons cannot avail themselves of the charity, and at the same time make proper compensation. If they do, however, avail themselves of a charitable institution, they must themselves assume the risk of the negligence of the servamts in administering the charity, if it can be shown that the benefactor has used due carwein the selection of those servants. "It would be intolerable that a good Samaritan, who takes to his home a wounded stranger for surgical care, should be held personally liable for the negligence of his servant in caring for that stranger. Were the heart and means of that Samaritan so large that he was able to provide not only for one wounded man, but should establish a hospital to care for a thousand, it would be no less intolerable that he should be held liable for the negligence of his servants in caring for one of those wounded men." The court cannot perceive that the position of the hospital in this case differed from the one supposed. The persons whose money established it are good Samaritans; the purity of their aims may not justify their torts or wrongful acts, but if a suffering man avails himself of their charity, he must take the risk of malpractice if their charitable agents have been carefully selected."

A case occurred in England. A voluntary associa-

tion for the supply of nurses supplied a nurse to attend at a surgical operation performed by a medical man, making a charge for the services of the nurse which was payable to the association. In the course of the operation the nurse negligently applied to the patient a hot-water bottle so hot that it caused injury to the patient by burning By the rules of the association, the nurses, who were paid a fixed salary, were appointed and discharged by the house committee in consultation with the superintendent. Any nurse infringing the rules was liable to dismissal without notice. Each nurse was responsible to the superintendent, and was to conform to her instructions in all matters pertaining to work and conduct. Only such cases were to be undertaken as were attended by a medical man, whose instructions the nurse was to follow implicitly. Held, in an action against the members of the house committee to recover damages for the injury done to the patient, that, upon the true construction of the contract between the association and the patient, the association did not undertake to nurse the patient, but merely to supply the patient with a competent, qualified nurse, and that the nurse when engaged in nursing the patient passed under the control of the medical man and the relation of master and servant did not exist between the association and the nurse for the purpose of the nursing of the patient so as to make the association liable for the negligence of the nurse. Hall v. Lees, 73 L.J.

K.B. 819.

Although the law in France is Roman law, not English, the following case (a) of suicide in a private asylum is of interest. "The patient was a young woman affected with suicidal mania, who had been placed by her parents in a private institution for the insane. The girl, while in the care of the nurse, asked to retire to the closet. As soon as she had entered she locked the door, which she was able to do by the aid of a bolt on the inside. The nurse attempted to gain admission, but did not succeed, and when help was obtained and the door broken in, it was found that thepatient had suicided by suspending herself with a band of cloth to the fastening of the window. An action was brought by the parents claiming neglect on the part of the physician. In the trial it was claimed that the father of the unfortunate patient had called the attention of the physician to the danger of just such an attempt made in the manner in which it occurred, to which the physician responded carelessly that there were other means which the patient would probably choose. Judgment was returned for the entire sum demanded - ten thousand francs."

In another French case it was shown that, in spite of all reasonable precaution of the part of a keeper of

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(a) Medicine, 1900, p. 613.

a private asylum, a lady patient committed suicide; and the authorities were absolved from blame (a).

Mr Montagu Williams records a peculiar case. A man prosecuted the medical officer of a lunatic asylum for not having prevented him from throwing himself out of a window. This man had been confined for suicidal mania, and although every precaution was taken he managed to jump from a window. He was injured severely but not fatally. Strange to say, the terrible shock to his system, and the acute sufferings he underwent, cured his mental disorder; and he became perfectly sane. One of the first uses he made of his restored reason was to bring an action for negligence against the officer. The case did not go to the jury, since the plaintiff was non-suited on a legal technicality.

Many instances have occurred in which suits have been brought or threatened against physicians or hospital authorities for sponges or instruments left in the body after operations; but few have been decided. The following case (b) sets forth the law in England. The action brought by a patient against Miss May Thorne for alleged negligence, whereby a mattress sponge was left in the patient's abdomen at the conclusion of an operation performed by the defendant, was brought to a conclu-

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(a) "Journal de Medicine," May 20, 1900.

(b) "Lancet," August 6, 1904, p. 419.

sion and resulted in a verdict for the plaintiff for £25 damages.

The directions of the learned judge to the jury, the questions left to the latter by him, the damages which were awarded, and the manner in which the finding was delivered are features in the case which are of general interest from a medico-legal point of view, as the danger of such an occurrence taking place is one to which all surgeons are liable. Mr Justice Bruce told the jury that the point which they had to consider was whether the defendant had been guilty of a want of reasonable care. Skill and care are difficult things and there was no suggestion of want of skill in this case. The jury had already heard from Mr H. F. Dickens, K.C., the summary of the law of negligence as applied to medical matters by Chief Justice Erle in Rich v. Pierpont, who in summing up the case before him said that the action charged the medical man "with a breach of his legal duty by reason of inattention and negligence and want of proper care and skill" and instructed the jury that if they were of opinion that if there had been a "culpable want of attention and care" the medical man would be liable. It was in this judgment that it was laid down that a medical man was not answerable merely because some other practitioner might have shown greater skill and knowledge but that he was bound to have a "competent degree" of both, and that it was not enough in order to make the defendant liable, to show that he might have used a greater degree of skill, or even that

he might reasonably have employed a higher degree of care. "The question was whether there had been a want of reasonable care and skill to such an extent as to lead to the bad result." In other words, the law in such cases has always been understood to be that the medical man is expected to exercise a reasonable amount of skill and a reasonable amount of care, but that he is not to be held liable to his patient if he did not exercise both or either in the highest conceivable degree, the question what may constitute reasonable skill and reasonable care being for the jury.

In dealing with the facts in the case before him Mr Justice Bruce dwelt upon the circumstance that although the mistake in counting the sponges was that of the nurse, the counting of the nurse had not been checked before and after the operation by the surgeon, and the absence of this possible precaution evidently weighed withhhis lordship. The questions left by him to the jury were as follows: (1) Was the defendant guilty of a want of due and reasonable care in regard to the counting or superintending the counting of the sponges? (2) Was the nurse employed by the defendant to assist during the operation? (3) Was the nurse guilty of negligence in counting the sponges? (4) Was the counting of the sponges a vital part of the operation the defendant undertook to perform or to see performed? (5) Was the nurse under the control of the defendant during the operation. With regard to the second and fifth questions

it may be observed that they point to a possible liability of the surgeon for the acts of the nurse apart from the performance of his own duties, a liability which has not, so far as we are ware, ever been established. As however, the first and fourth questions were answered in the affirmative, the second and fifth became superfluous. Mr Justice Bruce undoubtedly thought that the surgeon ought to make sure for himself, whenever it was reasonably possible for him to do so, not by inquiry but as a matter of personal knowledge, that nothing was left in the patient's body that should be removed before closing the wound, and he guided the jury to an expression of this view in their verdict. The jury considered their verdict for two hours and on their return the court answered all the above questions in the affirmative, adding to their reply to the first a rider that in their opinion the operation was very skilfully performed. With regard to the damages they assessed them at one farthing, a sum which the judge pointed out was inconsistent with answers which attributed negligence to the defendant, and he accordingly declined to accept it from them. The jury reconsidered the matter and raised the amount to £25 only. This may be taken to show that they considered that the supervision by the counting by the surgeon was a practical precaution the absence of which was to be regretted, but that they did not hold it to be one so imperatively called for or

so indicated by custom that its omission would justify the exaction of a heavy penalty. The verdict, in short, showed careful and sympathetic consideration of the case and intelligent appreciation of the difficulty of eliminating all error, combined with the hardship of imposing the responsibility even for an avoidable mistake upon the surgeon.

Cases of foreign bodies accidentally left in the abdominal cavity are by no means uncommon, and occur with even the most careful and experienced operators. In "Progressive Medicine" for June, 1899, there is an article on the subject with records of a number of substances so found. In the "Medical Record" for November, 1900, Dr. Carl Beck gives an account of various articles that have been left and how they have worked their way out. Probably every surgeon has had cases brought under his notice; but, equally probably, few surgeons would care to publish all he knows on the subject, or to volunteer to say in the witness box how common such occurrences are.

Responsibility in Surgical Operations.

The following quotation (a) gives a summary of the law relating to the responsibility of various parties whose acts, directly or indirectly, knowingly or unknow-

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(a) Lancet, December 12, 1908, p. 1784.

ingly, intentionally or unintentionally, may have contributed to the death of a patient -

"The United States Circuit Court, in New York, had a case where an employee sustained one of the simplest and least complicated forms of dislocation at the shoulder-joint, but the patient died from the effects of the chloroform administered for its reduction. The company which employed the patient was not held liable for the death, the jury having found that the accident and injury (dislocation caused by the accident) had nothing to do with causing or producing the death, but that the subsequent unnecessary administration of chloroform caused it. The court held that the surgeons and attendants in a hospital are not immune from the charge of being the third person causing death, and not immune from the charge of causing the death of the patient therein by their own independent and wrongful act, even if connected with the necessary operation. If they are, then they may experiment with and on every patient and unnecessarily give dangerous drugs and unnecessarily perform dangerous operations, and if such drugs and operations, so unnecessarily given or performed, kill, and are the sole cause of death, then the person whose negligence caused a slight injury, requiring some slight operation, must answer for the consequences of such experiments and operations and respond in damages for the death on the ground that their negligent act set the surgeons and attendants in motion or gave

them an opportunity to experiment with death-dealing instrumentalities. In legal contemplation, negligent parties must be responsible for injury, necessary medical treatment, or surgical operations, and mere errors of the physicians and surgeons in doing necessary things, as all these are natural and probable results, happenings; that the court knows of no holdings that unnecessary treatment with dangerous drugs, which the jury found this was, is either the natural or probable consequence of injury."

This may seem to many members of the profession to be recent expansion of the law or even a new departure. That it is not so, however, will appear from a research into what the law has been "time out of memory." Hale says (a): "But if the wound or hurt be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicines the party dies, if it can clearly appear, that this medicine, and not the wound, was the cause of death, it seems it is not homicide, but then that must appear clearly and certainly to be so."

Stephen (b) appears to look more to development of the law in the other direction, the culpability of the original assailant, when he says: "A person is deemed to

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(a) 1 Hale, 428.

(b) A Digest of the Criminal Law, 3rd edn., p. 153.

have committed homicide, although his act is not the immediate or not the sole cause of death in the following cases - If he inflicts a bodily injury on another which causes surgical or medix l treatment, which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith, and with common knowledge and skill, but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith, or was so employed without common knowledge or skill."

This matter of responsibility of surgeons acquires a vital importance in criminal cases in which surgical operations have been undertaken with more or less care and consideration as to their necessity, and have not only resulted in, but have actually caused, the death of the patient and have been proved to have been the sole cause.

It has been stated above in connection with the criminal law that no distinction is made between regular practitioners and the laity in the matter of responsibility for death caused by gross carelessness. The civil law, however, will not hold a chemist and probably any unregistered practitioner liable for damages for malpractice. The "Philadelphia Medical Journal" of December 16, 1899, mentions an opinion handed down by Justice MacLean of New York. It is stated that a person receiving emergency treatment from a druggist

cannot recover should the treatment be followed by untoward results. The case in point was that of Ferdinand Roth, a butcher, against the drug firm of Arneman and Behrens. The allegation was that Roth had gone to the drug store of this firm to have a cut on his thumb treated, and that the clerk had bandaged the wound and given the plaintiff a small bottle of carbolic acid, with directions to keep the dressing wet with the application. It was alleged as a result of this treatment that inflammation and blood poisoning supervened necessitating the amputation of the thumb. The defence moved for a dismissal, on the ground that druggists were not permitted by laws of the State to practise medicine or surgery, that the plaintiff should have gone to a qualified practitioner for treatment, and if any action at law could be taken, it could only be against the drug clerk. The court took the same view and dismissed the case, as already stated.

This reminds one of the old Mahomedan decision regarding the man who went for treatment to a veterinary surgeon, and lost his eye in consequence. The court found he had no case, since had the man himself not been an ass he would never have gone to a horse doctor.

C H A P T E R XVII.

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PROFESSIONAL PRIVILEGE.

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PROFESSIONAL PRIVILEGE.

In England, "there is no privilege entitling a medical practitioner to refuse to give in evidence statements made to him by a patient, however confidential the communication may be." (Wilson v. Rastall, 4 T.R. 753; 2 R.R. 715; Duchess of Kingston's case, 20 St. Tr. 565). The law is thus set forth by Sir James Fitzjames Stephen(a): "Medical men may be compelled to disclose communications made to them in professional confidence." This, it will beobserved, refers to compulsion in a court of law, the compulsion being the act of the court, not of counsel, A medical witness is not allowed to volunteer information regarding his patient, either in court or outside the court. Secrecy is an essential condition of the contract between the physician and his employer, and breach of this secrecy affords ground for an action for damages.

It has been already stated that English law recognises no privilege as between patient and physician. In certain of the American States, however, statutes have been enacted establishing privilege on much the same lines as in France. The Utah statute reads: There are particular relations in which it is the policy of the law to encourage confidence and to preserve it violate, therefore a person cannot be examined as a witness in the following cases.... (4) a physician or

(a) A Digest of the Law of Evidence, 4th. edn., p. 122.

surgeon cannot without the consent of his patient be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

The Supreme Court says in Munz v. the Salt Lake City Railroad Company that it is the policy of the law to keep inviolate the secrets of those who are in charge of physicians. Whether the statute is a wise or unwise enactment is not for the courts to decide. It is their province to give it such a reasonable interpretation as will give effect to the legislative will. Its evident purpose is to prevent a physician from disposing information obtained in the sick room, whether from the statements of the patient or from observations by himself. It is not material how the physician is called to the patient. In general, whenever such an examination is made, it is the presumption that the relation of the physician and patient exists, and that the information is obtained forthe purpose of enabling the physician to prescribe or act for the patient (a).

Reference has been made above* to difficulties connected with the subject of privilege. These difficulties appear in an acute form in connection withsome decisions in the French Courts; and it is becoming more and more clear that privileged communications are in the main detrimental to public policy, and especially harmful to physicians, in that professional privilege

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(a) Journal of the American Medical Association, January 24th, 1903.

* Pages 187, 188.

encroaches upon their common law rights, and in many cases encourages vexatious and costly suits for damages. The following case (a) is an illustration of this. A physician in Marseilles, who for 20 years had been the official examiner of insane persons, signed a certificate authorising the restraint of a man suffering from acute homicidal mania. This certificate was given at the solicitation of the wife of the patient only after thorough investigation, personal examination, and consultation with another physician of good repute. The patient was committed to an institution, from which he escaped in a few days, he in the meantime having become quite rational. He immediately secured certificates from two physicians that he was of sound mind. Armed with these documents he entered suit for divorce on the plea of conspiracy and unlawful restraint. The sole defence of the wife at the trial rested on the testimony of the official examiner, who, with the knowledge that he ought not to reveal the facts, thought that he would be held harmless as the opinion was rendered as part of an official certificate, and as this paper had passed through so many hands that its contents had become a matter of general knowledge. The evidence of good faith on the part of the wife resulted in failure of the divorce proceedings, and then the husband turned upon the physician and sued him for $4000 for a viola-

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(a) Boston Medical and Surgical Journal, June 18th, 1903.

tion of the Penal Code in revealing a medical secret. At the first trial of this claim, before the civil tribunal, the physician was fully exonerated, the court holding that he had merely defended himself, and that his action in relation to the plaintiff was in the interest of public order. It held that when his character had been assailed by the plaintiff, he was justified in revealing the facts. The higher court reversed this judgment, the decision being that the strict letter of the law must be enforced; while the physician's motives were unquestionably honourable, he must be held delinquent.

An English case, in which a physician refused to state the nature of a patient's illness, is reported in the "Lancet" of May 5th, 1900, p. 1292. The action was a civil one in which the wife's adultery was a plea for relief from maintenance by her husband. Dr. Hunter in court refused to state what illness his patient was suffering from, and gave his reasons in detail. They were:- "Firstly, that it would be a breach of professional secrecy, which conscientiously I hold to be inviolable. Secondly, that it would be an infringement of my graduation oath - which I am prepared to read if the magistrates wish it - an oath which, as a graduate of a Scottish university, I took not to divulge anything in connection with my patients. Thirdly, that the infringement of this oath might render me liable to pains and penalties at the hands of the General Medical Council,

which Council might disqualify me from further practice. Fourthly, that to answer this question might render me subject to an action at law by the defendant in this case. Fifthly, that no high legal decision has ever been given as to the power of magistrates to demand or to extort answers to questions of professional secrecy in a civil court. Sixthly, that in the case of Kitson v. Playfair Justice Hawkins in his summing up said words to this effect: That he could understand a case - especially a civil case - where a doctor was quite justified in refusing to divulge questions of professional secrecy. Seventhly, that to answer such questions would give solicitors and magistrates unlimited power to drag from medical witnesses questions of professional secrecy and confidence, and that herefore it is probable that people might suffer serious illness rather than call in medical advice so long as the possibility exists of these questions being made public in open court. Eighthly, that - with the greatest possible respect to your worships and the magisterial bench in general - this is a point which ought to be decided by the highest legal court."

The bench, on consideration said they were not prepared to order Dr. Hunter to answer the question, as they were of opinion that he had offered a just excuse for refusing. They were willing, however, to allow an appeal on the point.

The "Lancet" remarks, "The counsel who represented Dr. Hunter's patient laid stress upon the graduation

oath. But every medical man is not a graduate of a Scottish or of any other university, and although theoretically the Hippocratic oath is binding yet it has no legal force."

As a matter of fact, neither the graduation oath of a Scottish University nor the Hippocratic oath, has much, if anything, to do with the subject. The usual graduation oath is as follows: "Ego Doctoratus in Arte Medica titulo jam donandus, sancte coram Deo cordium scrutatore, spondeo, me in omni grati animi officio erga Universitatem Academicam.....extremum vitae halitum perseveraturum. Tum porro Artem Medicam caute, caste, probeque, exercitaturum, et quoad potero, omnia ad aegrotorum corporum salutem conducentia cum fide procuraturum. Quae, denique, inter medendum visa vel audita sileri conveniat, non sine gravi causa vulgaturum. Ita praesens spondenti adsit Numen.

The following is a translation by a classical scholar who, not knowing for what purpose a translation was desired, cannot be accused of bias:- "I, presently to be presented with the title of Doctorship in the Medical Art, do solemnly promise before God the Searcher of hearts that I will persevere to the last grasp of my life in the kindly feelings of a grateful mind towards the Academic University. Then further (I promise) that I will practice the Medical Art with care, purity and uprighteousness, and as far as I am able will give due attention to all things which may be helpful in the

healing of diseased bodies. Finally, that I will not without a serious reason divulge those things which as seen or heard in the course of my practice it is proper to keep secret. So may the presence of the Divinity be with me the promiser."

The portion of the Hippocratic oath dealing with the subject is as follows:- "Into whatever houses I enter, I will go into them for the benefit of the sick.... Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret." (Adams's Translation).

From these two oaths it will be evidenced that what is required of the practitioner is that he should not be a busy-body, going about and telling what he has no business to tell. One oath clearly implies that there are circumstances in which it may be necessary to speak, and the other leaves room for circumstances in which it may be necessary to tell what was seen or heard.

Difficulties have arisen in connection with another aspect of the subject. This is illustrated in a French case (a). The court of appeals of Toulouse in 1900 allowed a remarkable though a very reasonable exception to this rule, hitherto so strictly observed.

(a) Lancet, October 13th, 1900.

The court gave judgment in a case involving the disposition of some property. One of the witnesses summoned was the medical attendant of the deceased, who was also his personal friend. The counsel of the other side objected to the testimony of this witness as being a violation of professional secrecy. In opposition to this contention the court decided to admit the evidence as good, arguing that it contained two classes of facts, one of which had been obtained by the medical man in the capacity of friend, and which, therefore, had nothing to do with professional secrecy; the other, which concerned the complaint of the deceased, was a matter of public knowledge, for every one in the district knew he had died of heart disease, while the explanation furnished by the medical man with regard to the latter class of facts was necessary to allow him to justify certain matters as to which sundry witnesses had brought charges against him. This judgment provoked some criticism, as it is stated that it would be impossible to draw a distinction between communications made to the medical man as a personal friend and those made as a medical attendant, they often standing in both relations to their patients. It is also criticised on the ground that because a patient's ailment is universally known, the medical attendant need not observe secrecy. The latter observation of secrecy has even been carried so far as to punish some men for making statements of the ailments of their patients when such matters have become common

property by publication in the daily papers.

The following extract from the Journal of the American Medical Association, July 12, 1902, shows how the law of privilege works. The Court of Appeals of New York holds that Section 834 of the New York Code of Civil Procedure, by which a person authorised to practise physic or surgery is not allowed to disclose personal knowledge which he acquired by attending a patient in a professional capacity, is only operative when three elements must coincide: (1) The relation of physician and patient must exist; (2) the information must be acquired while attending the patient; (3) the information must be necessary to enable the physician to act as a medical attendant. In the case that led to the decision under consideration, an objection was raised to the physician testifying on the ground that the communication was privileged. The circumstances were that the physician was at the scene of the accident when the ambulance arrived, that he gave such necessary aid as was required, and accompanied the patient to the hospital in the ambulance. After this, while acting as surgeon for the railroad company, he visited the patient in the hospital and had a conversation with him relative to his injuries. The court held that the circumstances set forth in this case were not sufficient to raise the question of the relation of physician and patient, nor were the communications to be regarded as privileged. In speaking of the circumstances which led to the acci-

dent, such information would only be privileged if it was shown that it was necessary in the treatment of a case.

In this case the physician's conduct was very reprehensible, and was severely criticised in the medical magazines. He was in the employment of a New York railway company and saw the plaintiff, a boy, immediately after an accident involving the company. The physician volunteered his services and attended the boy temporarily, and later, several days after the accident, saw him again at the hospital, to which he had been taken for further treatment. The physician then drew from the plaintiff certain facts regarding the accident, which the railway company at the trial attempted to introduce as testimony.

In the lower court the physician's testimony regarding the boy's statements was not admitted, and his conduct was characterised by the judge as unauthorised and impertinent. The "Boston Medical and Surgical Journal" said: "The pity of the situation is that there are physicians, many of them presumably repitable, who are willing to offer testimony gained in such a manner for partisan reasons. The ruling of the court encourages the belief that they will not permit imposition under the guise of professional services, and on the other hand is a warning against the loose and unprofessional methods of certain men who pose as unprejudiced expert witnesses." It has to be noted that by a strict

interpretation of the law by the Upper Court the evidence of this physician had to be admitted.

It is gratifying to see the view that the judges and the profession take of the subject, although the law is unsatisfactory. It is doubtful if even a prisoner would be similarly treated in a country where there is no medical privilege.

This matter of a prisoner's rights and ~~no~~ medical privilege has arisen in this State. A prisoner was accused of indecent assault and the question arose, "Had he gonorrhoea?" Every prisoner on admission to the gaol must be medically examined. There is no instruction as to the object of the examination; but it is assumed to be (1) for the purpose of ascertaining whether he is fit for gaol discipline or requires medical attention; (2) to make sure that he is not a source of infection to others. I was at the time Surgeon to the Gaol, and I was asked in the witness-box whether the prisoner was suffering from gonorrhoea, and counsel for the defence took no objection to the question.

In all cases in which a prisoner's physical condition is likely to be a matter of evidence in court, I think it is a good rule to be particularly careful to ask the prisoner nothing beyond what is absolutely necessary for his own treatment or the safety of other prisoners. If this information is demanded in court and is allowed by the judge to be given, one is bound to disclose it, but the medical witness has no information beyond this

that can be used to the disadvantage of the prisoner.

A physician, whether he be the family doctor or the Medical Officer of a public gaol, is not a detective, nor a police constable. Even if he were a constable, no prisoner or suspected person could be treated by him after the fashion related above. The law is very jealous of the liberty of the individual, and judges are strict in admitting as evidence information given or confessions made by a prisoner, and are sometimes very severe in their displeasure when officers exceed their duty. Mr Justice Erle said (a): "By the law of this country, no person ought to be made to criminate himself, and no police officer has any right, until there is clear proof of a crime having been committed, to put searching questions to a person for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence, a police officer is justified, after a proper caution, in putting to a suspected person interrogatories with a view to ascertaining whether nor not there are fair and reasonable grounds for apprehending him."

I have said above that a physician is not a detective nor a police constable. A good many years ago Ogston wrote (b): "Now I need scarcely say that the medi-

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(a) R. v. Berriman, 6 Cox, 389.

(b) Lectures on Medical Jurisprudence, 1878, p. 30.

cal man is deserting his true place in society when, leaving his duty of attending the sick, he seeks to usurp the place of the public prosecutor, by urging on, or taking a part uninvited in a criminal prosecution, or in the collection of evidence. All that he is called on to do when he has become cognisant of crime in his professional capacity, and where he would be in danger of being held as a socius criminis by concealing what he knows of it, is at once to intimate his suspicions or information to the nearest relatives of his patient, or, failing them, to the nearest magistrate, with whom it would properly rest to give information to the authorities, by whom his evidence would be sought for officially if wanted."

The subject has been discussed very fully, and with a judicial acumen that is rarely seen, by Dr. Williamson in the "Edinburgh Medical Journal," December, 1908, under the title "The Law as it affects some Medical and Medico-Ethical Problems." That this subject has much more than a mere theoretical interest for practitioners I can abundantly testify from the numerous questions put to me regarding concrete cases.

The necessity for some restriction in the statute laws has become generally recognised. Dr. Cheever has an article on the subject in the "Boston Medical and Surgical Journal," March 20th, 1902. He proposes: "That the law should recognise the rights of the patients, the duties of the medical man, and also justice

to the community. The statute of New York should be modified in so far as it should be considered unprofessional for a physician to divulge anything concerning a patient unless (1) with the patient's consent; (2) to defend himself when accused; (3) to expose crime; (4) in all other cases such professional confidence shall be classed as privileged communications. It shall be left to the physician to say when it is his duty to reveal such facts, and if he conscientiously declines, he should be protected. If it should be required that such facts be brought out, they should only be before the judge in private, and no such revelations should be made public." The introduction of the word "unprofessional" makes the proposed cure worse than the disease.

The force of what is said in Chapter 11 regarding statutory alteration of the common law will be apparent from a perusal of the numerous difficulties and hardships that have arisen in connection with the administration of statutes conferring privilege as to communications. It cannot be said that the administration of the common law, under which there is no medical privilege, has proved grievous as regards publicity. "It may be worth while to observe," says Sir Frederick Pollock, "that the publicity of the court is one thing and the indiscriminate publication of reports is another; the distinction is rather easy to forget."