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A MEDICO-LEGAL TREATISE ON MALPRACTICE AND MEDICAL
EVIDENCE.—A REVIEW.*

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[Communicated for the Boston Medical and Surgical Journal.]

FONBLANQUE, a distinguished English barrister, and Paris, an equally distinguished physician, united their forces and professions in a work on Medical Jurisprudence, and the product of the connection was an excellent treatise on that important subject. It sometimes reminds us of the tessellated piece of mosaic of Burke, with here a bit of black stone, and there a bit of white; but it loses not an atom of interest in the admixture, or the variety. We are reminded here of an edition of Blackstone's Commentaries, with notes by an American barrister named *White*, and to which the above quotation from Burke was with great felicity applied by a brother limb of the law. But let this pass.

We have just read a new American work on Medical Jurisprudence, the literary history of which reminded us of the co-partnership of Paris and Fonblanque. Dr. Elwell, the author of the volume before us, having studied and practised medicine for several years, turned over a new leaf, and studied and practised law for as long a time, and now presents us with the product of the two professions, united by a Siamese form of attachment, which makes it as easy to work for and with one, as for and with the other. The design in this work, it will be seen, is novel, and it is excellently well accomplished. If it do not sustain the old adage that two of a trade can never agree, it certainly does prove that two of the most diverse callings may act in perfect harmony, and for the equal benefit of both.

* A Medico-Legal Treatise on Malpractice and Medical Evidence, comprising the Elements of Medical Jurisprudence. By JOHN J. ELWELL, M.D., Member of the Cleveland Bar. "A doctor who knows nothing of law, and a lawyer who knows nothing of medicine, are deficient in essential requisites of their respective professions."—DAVID PAUL BROWN. New York: John S. Voorhies, No. 20 Nassau St. Cleveland, Ohio: Alfred Elwell & Co., 1860.

Dr. Elwell's work is divided into forty-two chapters, fifteen of which, or 232 pages, of 582, are devoted to malpractice. This, perhaps, is the most important part of the work. It treats of malpractice in all its varieties—with highly interesting illustrations in adjudicated cases, drawn from the very best sources in the books of both Europe and America. The arrangement of the various subjects treated is excellent; and the references to the highest authorities will enable the reader to consult them with perfect ease. In this part of the work the author has furnished abundant proof of careful, honest study, and the best evidence of the value of his work.

Following Malpractice, are several chapters on Evidence, its principles and application. We have in this department the same assurance of the fidelity of the author as in the preceding. To the physician these chapters are of special value. In no department of professional duty does he meet with so many and so grave embarrassments, so much often to regret, or to be mortified about, as in that which connects him with the administration of the criminal law; and grateful must he be to him who has done so much to make these evils less. Dr. Elwell has labored to make clear to the medical man this very obscure subject. He knows what the medical man most needs in preparation for his public duties. His two professions have taught him what these duties are, and what is required in their performance.

The next subject is Insanity. In treating this we are very glad to find so much thought and space devoted to Moral Insanity, so called to distinguish it from the intellectual. We do not quite agree with Dr. E. in regard to this very interesting subject; but are willing to confess that we have not met with any discussion of it which has appeared more free from prejudice.

The next, and closing, chapters are on Poisons, Infanticide, Wounds, Rape, Coroner's Offices and Inquests.

Criminal Abortion has a distinct place in this work, and quotations are made from Dr. H. R. Storer's valuable contributions to this subject. Especially valuable are his statistics, which show how wide spread is this crime; and physicians know how frequent is criminal abortion in this State of Massachusetts, and in this city of Boston.

Mrs. A. called on Dr. — for some uterine trouble, and expressed a strong will to have children. "Have you ever been pregnant?" "Yes, twice. It happened soon after I was married, several years ago, and I had abortions produced, because it was very inconvenient for me to have a family so soon after marriage. For years have I wished to have children and have failed. I am nearly 40, and the time will soon have gone by for me to have them. Mrs. —, my friend, does not mean to have children, and has miscarried several years in succession. Her health is perfect, and her abortions give her no trouble." From this history

it would seem that Mrs. — thinks it a sort of moral duty to get rid of the fœtus as soon as she knows she is pregnant. She has no desire for, or interest in, children, and would not know what to do with them. If she must conceive, she says she has a perfect right to get rid of the product of conception.

A case is in mind in which abortion was produced by the pregnant woman herself. She was quite young—16 or 17—had been married three months, had twice missed the catamenia, and, from this and other signs, believed herself pregnant. This was wholly unexpected to her. It surprised her, and she was determined not to submit to it. Various means were resorted to. Among others, and the last, was spurred rye. She got a quarter of a pound of the powder, and literally eat it all, and this rapidly. Violent and steady pain occurred in the abdomen, with swelling and soreness. Intermitting bearing-down pains at length came on, with hæmorrhage, and we were sent for. Things were found as above described, and the ovum partly out of the womb. It was soon expelled, and comparative ease followed. After very serious and dangerous illness the patient recovered. In this case the abortion was not the result of *specific* action of ergot. The womb was called into morbid action in consequence of the universal disease produced by the spurred rye. The woman was poisoned by it, and it was entirely through the constitutional disturbance produced, that the expulsion of the ovum took place. We have no *specifics* for producing abortion. Death frequently follows instrumental abortion, and when this is not its consequence, we have often produced diseased conditions which are never recovered from.

But why multiply instances? What is the remedy of so much evil? It has been looked for in law. But, as is shown in a late number of this JOURNAL, without effect. And why this? Because it is impossible to obtain witnesses of the commission of the crime. If the woman gets well, she will never criminate herself. But if she dies? The law cannot reach such a death. The woman goes alone to the abortionist's house, and there the operation is done. She goes home, is seized with flooding, inflammation, and dies. Suppose the agent is suspected, and the suspicion leads to his arrest. The government can do nothing. The plea is "not guilty," and who is in court, or who can be found to gainsay it? We have talked with a late attorney for the County of Suffolk. He said he had never gained a conviction. Cases had occurred which promised success, but had entirely failed. We have heard of a case which promised better. The woman went with a friend—the abortion was procured, and the woman died. A person was suspected of the crime, was arrested—but he *married the friend*. She was the only witness, but her competency, as such, was destroyed by the coverture. The above is given as reported, and is one of the most extraordinary cases in the history of our criminal abortion. It shows more strongly than any other how useless is law in such an application,

It were ludicrous, this mode of escaping the law, were there not so much that is immeasurably sad and terrible connected with it. Here was a double killing of mother and child; and most likely under an assurance that one party at least would be safe.

An instance is in my memory, somewhat like the above, at least as showing how ineffectual is law here. A woman who had suddenly disappeared from her place of residence was traced to Boston, and to the house of an abortionist in very large business, now dead. She was next traced to Cambridgeport, where she became suddenly ill. She died soon after giving birth to a child of a few months from conception. There was an autopsy, and peritoneal inflammation, extensive and strongly marked, was found. She was brought to Boston and buried in the cemetery on the Neck. A stranger, wearing a white hat, was in the graveyard at the burial, and was carefully observed by the undertaker and his assistants. Persons who had learned the whereabouts of the woman—her friends—came to Boston to examine the body for identification. The grave was opened, *but the body was gone*. The stranger with the *white hat* was described to these friends, but circumstances arose which put an end to further investigation. We see in such cases as these where is the real difficulty in their legal investigation. There is no such interest in the discoveries of the law, as there is sympathy for the dead, and this sympathy exists in the hearts and minds of the nearest and dearest friends. They want to learn what has become of the missing, and if dead and buried, where? Their errand is to the grave, and with its revelations the scrutiny ends. And is not all this too natural not to be even sympathized with, out of the circle in which the death and the crime have occurred? Brutuses are not in the roll of the latest civilization, and a father would shrink from the bench were a son on trial for his life. And so do friends of the betrayed or voluntary criminal from those who destroy, or who have destroyed, the evidence of her guilt.

Many, many cases are in memory of women who have produced abortion on themselves. Many, many of these have suffered long afterwards, and many have had disease and permanent invalidism follow, making their lives most miserable. A question occurs, shall the physician attend such cases, either in their acute or chronic stages? This question is alluded to because it has been raised; not that we raise it. The answer is at hand. We must always minister to disease. Sydenham settled this case for himself and for his profession long ago. He was asked if one is obliged to attend cases of syphilis—or whether such attendance did not tend to encourage vice. Sydenham's answer, if memory serves, was that the paramount duty of the physician was to cure disease under whatever forms or circumstances produced—that this duty involved the investigation, the study of all diseases; to cure and to prevent after-morbid consequences, as in the instance of syphilis. **We are for the most part obliged to act as the indications of these**

cases of abortion suggest, for it is rare with us to get confession of what we believe has been done, and has made the case what it is. But the confession is sometimes volunteered, and especially when chronic disease, the consequence of procured abortion, comes before us for relief. And if made, how often is it with circumstances which, if they do not palliate the wrong done, in our own apprehension of it; show under what almost irresistible motives it has been accomplished. Among these are the memories of mature labors, the subsequent illnesses and dangers, the inability to nurse and the consequent disease and death of children, the want of means to support a family. In such cases as these have we not mental conditions which to the sufferer present reasons for acting which are not controllable, or in which responsibility almost ceases? Take, then, into account also, the mental and physical attendants on pregnancy, especially early pregnancy—the signs, or, more correctly, the diseases of that state, and we may understand at least what are the difficulties of enduring such state, and the strength of that temptation to have done, or to do, what will end them. And last, but not least, the deep, deep sense of shame with which pregnancy and mature childbirth are regarded by the unmarried. No one but the physician can understand what are the mental states of such persons—how nearly they approach to, if they do not reach, that of insanity. Every sort of motive—appeals are made to his deepest feelings, money is offered, considerations of character pressed with almost irresistible eloquence, ruin here and hereafter, tears, entreaties, everything is said and done which can be addressed to him, and he resists it all. He states the dangers of the process to destroy pregnancy, the criminal character of the act, the weight of the law. The applicant is not convinced. She leaves him, and either finds some other agent, or accomplishes the object herself.

In what is here said of circumstances which may explain, but hardly palliate the voluntary abortion, our reference in part is to married women who have already suffered gravely during pregnancy, and more especially during delivery, so that to die would be gain, if death offered the only means of preventing such protracted, such intolerable suffering. Resort to abortion in such cases is, as far as we are acquainted with instances, exceedingly rare, and they have been revealed to us in order to explain existing chronic diseased conditions, assist their investigation, and to guide the treatment.

There are cases in which premature labor may be induced to save mother and child. We refer to instances in which there is so much deformity and consequent diminution in the pelvis as will prevent the mature foetus passing. In such cases, labor may be induced at the seventh month, with good chance of preserving the life of both foetus and mother. If so much deformity exists that a

seventh month child cannot pass, then labor should be induced earlier. All writers agree that the mother must partake with the child in the dangers of both premature and mature delivery—in other words, the fœtus, or unborn child, is to be sacrificed only when the safety of the mother without question demands it. If it is fully ascertained that the fœtus is already dead, that mode of delivery which will best secure the parent's safety should be adopted.

There is one other contingency under which abortion or premature delivery may be induced, viz., the presence of such diseases or conditions of pregnancy as, if allowed to continue, may prove fatal; and for the cure of which the best means have been faithfully tried, and in vain. Thus, vomiting in the early or late months may be so constant and so severe as to threaten life. This may be good reason for forced delivery.

We believe we have stated all the contingencies which may justify abortion or premature delivery.

THE PHYSICIAN IN COURT.

The physician may be in court as a witness, as plaintiff, and as defendant. Under whatever circumstances, it is one of the most disagreeable calls he may ever be required to make. Let us look at him there as a witness—as an expert.

Is he obliged to go? Yes.

How is his presence there required? By summons.

He cannot resist it? No. Should he fail to obey the summons, this would be contempt—a malicious act—and punishable by fine or imprisonment, or both.

If very inconvenient to him to go at the moment, may he delay attendance? This depends on circumstances. We had, between one and two o'clock, one summer's day, just driven to our door, and was getting out of our carriage, when, at that moment, a person stepped up with a paper in his hand, which proved to be a summons requiring our immediate attendance at the Supreme Court. This was peremptory enough. So off we went, whip in hand, to court. The cause was an amicable one, between the heirs of a large estate, one of whom had been born after the death of his father, and the question related to the legitimate length of pregnancy. I asked for a copy of Hargrave and Butler on Coke on Littleton, for in it is an opinion of William Hunter on this important subject, and a higher authority does not exist. The book was brought, the opinion found, read, and our humble testimony given in its support, and our office in court, for that time at least, was accomplished, and we have no doubt that the posthumous young gentleman got his share of his father's property. For ourselves, and our office, we got seven-and-sixpence, and four cents for travel, it being a presumption, or a fiction of law—it was clearly the last—that the travel from our

door-step at or near the corner of Tremont and Court Streets, was a measured mile from the Court House in Court Square—a mile which we got over much under 2.40.

The physician is called into court as a witness in the most important causes—causes in which life, or honor, or property are at stake, and in the determination of which he is to be an important agent. In the performance of his office his own character takes, or has, a deep interest. As an expert, he is understood to be thoroughly acquainted with the most important portion of the subject matter before the court; and on his skill or ability to present his knowledge on questions involved, may the result of the trial depend.

What now are the facts in such a history which makes the office so peculiarly embarrassing to the medical man?

In the first place, these come out of his personal, intellectual, moral and physical endowments—of his knowledge, his moral power, and his manner.

Who are his audience? Twelve men—the jury.

Why this number? In early England, the jury was composed of all the freemen, having a certain money qualification, in any place in which a court was sitting; a majority of twelve of these decided any cause in hearing. But why twelve now? The oldest vestige of this change is found under Henry II., in the Constitutions of Clarendon, so named because they were made in a parliament held in a small English village of that name, in 1164, and in Northampton in 1174. Civil as well as criminal contests were now to be decided by twelve respectable men of the neighborhood, and from this time the trial by jury has remained unaltered in England, and in America, to which the English colonists brought it, the unanimous vote of the twelve only giving a valid decision, which was the verdict—*true word*. Thus were the people and their affairs, when in controversy, tried by their peers. In the House of Lords, however, matters were managed differently. The lords being peerless, could only be tried by themselves, and so each lord votes. But a majority of twelve votes is necessary to a valid condemnation. The right of peremptory challenge differs in the jury of twelve, and that of all the lords. The accused may challenge twelve of the former body. In the last, thirty-five, or one less than three times the number required for conviction in the jury of twelve.

Henry killed, or had killed, Thomas à Becket. B. had already provoked the king's displeasure in 1163, the year before that of the celebrated Clarendon constitution; and to this he swore he would never assent, on account of some provisions concerning the clergy. Becket at last assented to it. Then followed much more to irritate Henry; until at length he commissioned four men to kill him, which they did. May we not pardon this act of terrible violence, in the memory and enjoyment of the blessings which have come out of the final settlement of the trial by jury?

We said the jury is the proper audience of the witness. To it is he specially to address himself. He is to look at them; and if he have any perspicacity, he will see what is the force of what he is saying—whether he is understood; at the least he will see if he have so aroused the attention of his hearers as to secure its continuance; nay more, increase it by what follows. Here are twelve men to decide whether a murder has been committed, and whether by the accused. It were desirable that they were all equally capable of instruction by the professional witness—the expert. This is not to be expected. The jury are chosen by ballot, a great number of names being in the box. Inequality in ability cannot be avoided; and it is not to be desired that all be equally capable. Of twelve men taken at large, some one, two or more may understand sufficiently well for all practical purposes, what the witness says; and a larger number may see in the manner of the witness, that he is honest and sincere in what he says. They may feel the moral, if they do not comprehend much of the intellectual; especially may they be in a state to be usefully influenced by what those most taught by the evidence, the counsel, may communicate to them in his pleading. This perhaps is all that is reasonably to be looked for from the jury, and is it not enough?

It has been suggested that it were better to choose the jury from the professions. Physicians are exempt by law. Lawyers are so from their relation to the administration of the laws. And so are ministers, presidents and faculties of universities, heads of incorporate academies, &c. It may seem singular that the best instructed persons in any community are exempt. But is it not well and wise that it is so? Suppose for a moment that it were not so, and that physicians, ministers, and college men, formed a part or most of the jury. Is it at all probable that a verdict would ever be rendered—that such men would ever agree? You might starve them out, but it is seriously to be questioned if more than one would not be found in every jury who would have to complain of the incorrigible obstinacy of all the others. The jury, as at present provided for, is the most important of all social institutions. It makes safe, life—honor—property. In its simplicity is its beauty and power, and who does not venerate him who gave to it its present simple, its wise, its whole life and agency? Is it not, of human institutions, the most perfect in its operation, and most to be honored and valued for its wide and important benefits?

But however important is the function of the jury, and especially its agency in its relation to testimony, the witness is not the only, or the final portion in the apparatus of a civil or criminal prosecution. In a work lying before us is the following, which has a bearing on this point:—

“In every case, the last impression of a jury will be the decisive one. The charge, by which, after the termination of the debates, the presiding judge, versed in the law, seeks to guide the deliberations of the jury, and aid their untaught

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judgment, may contribute, indeed, to remove this and the deficiencies remarked below, but the force of it is very inconsistent with the object of jury trials; for it makes him, in most cases, master of the judgment. One may generally foretell, in England, the verdict of the jury from the charge of the judge."

How far this may be the case in America, we do not know. But that it does not always happen that the judge's charge determines the verdict, an instance may be given where it signally failed. A judge of a supreme court, now dead, made of his charge an argument for one party, and with the earnestness and eloquence of a very liberally-fed advocate. The jury's verdict was for the other side. A chief justice, meeting his associate the next day, having seen a report of the action in the morning papers, looking at him with the tail of his eye, said to him, "Brother, I see you lost your cause yesterday."

In a capital trial, after the evidence was all in, Mr. Justice —, of the U. S. Supreme Court, said to the U. S. Attorney, "perhaps the counsel for the accused will let the case go to the jury without argument." After consultation between the counsel, the attorney reported to the court that he agreed to what the judge had suggested. As he arose to address the jury, that body also rose. Judge — begged them to resume their seats, and proceeded at first with the evidence, and then with the argument. It was the most touching scene we have ever, in a long life, witnessed. It is rare, we think, that the offices of advocate and judge are by consent, and in a capital trial, confided to the court; and never have we listened to an argument more eloquent. When the judge had taken his seat, the foreman took the sense of his brethren of the jury as to their verdict. It was unanimous for acquittal. And for once the spectators were allowed, without check, to express the pleasure with which the announcement was received.

[To be continued.]

TREATMENT OF NEURALGIA BY SUBCUTANEOUS INJECTION.

BY A. RUPPNER, M.D., BOSTON.

[Continued from page 222.]

CASE III.—*Neuralgia of the Superior and Inferior Maxillary Nerves, or the second and third divisions of the Trifacial. Injection at different points; relief.*

MRS. —, of Boston, aged 59 years, married, mother of seven children, of nervous temperament; has suffered from neuralgia for about eight years. The pain is confined to the right side of the head and face, principally to the upper and lower jaw.

What degree of excitability the nerves of sensation of the face may reach, was here most fully illustrated. Would that I were able to describe in adequate terms the indescribable sufferings of my patient; not that I find delight in the recital of a, seemingly, too highly-colored tale; no! but to do thereby inadequate justice and