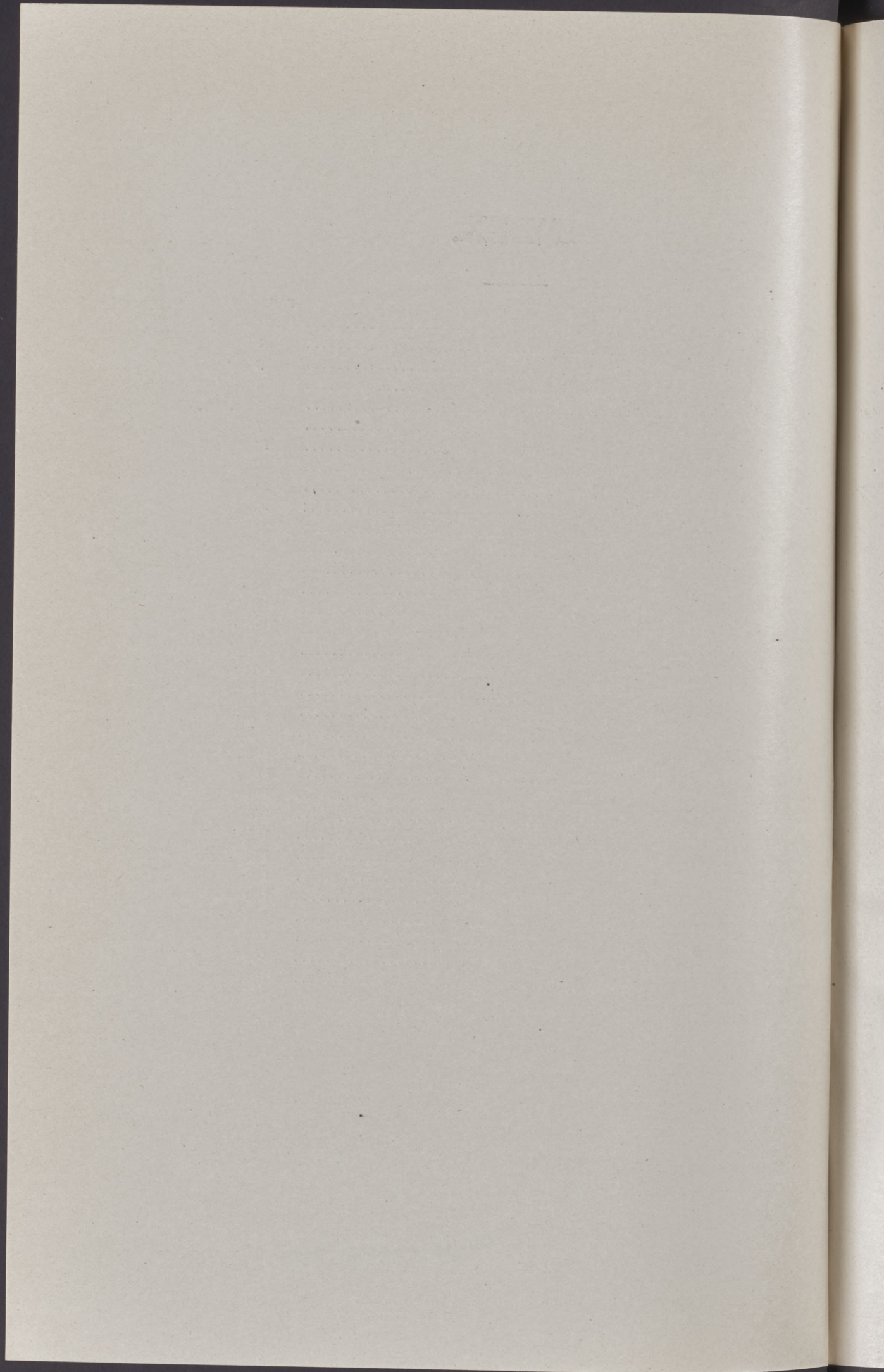


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New Jersey Supreme Court.

STATE BOARD OF MEDICAL EXAMINERS
OF NEW JERSEY,

Plaintiff,

vs.

HAL A. CURTIS,

Defendant.

NOTICE OF APPEAL.

To Howard A. Reynolds, Attorney of Defendant:

Take notice that the plaintiff, State Board of Medical Examiners of New Jersey, appeals to the Court of 10
Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Supreme Court affirmed the judgment of the District Court of the City of New Brunswick when such judgment should have been reversed.
2. The Supreme Court affirmed the judgment of the District Court of the City of New Brunswick upon the ground that under an act entitled "An act to amend an act entitled 'An act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to 20
punish persons violating the provisions thereof,' approved May twenty-second, one thousand eight hundred and ninety-four," which amendment was approved April twelfth, one thousand nine hundred and fifteen, the defendant was entitled to a trial by jury.

3. The Supreme Court affirmed the judgment of the District Court of the City of New Brunswick upon the ground that in proceedings instituted in district courts under an act entitled "An act to amend an act entitled

(I*)

‘An act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof,’ approved May twenty-second, one thousand eight hundred and ninety-four,” which amendment was approved April twelfth, one thousand nine hundred and fifteen, the provisions of section 149 of an act entitled “An act concerning district courts (Revision of one thousand eight hundred and ninety-eight),” approved June fourteenth, one thousand eight hundred and ninety-eight, and the acts amendatory thereof and supplemental thereof (District Court Act so called), should be applied.

10 4. The Supreme Court affirmed the judgment of the District Court of the City of New Brunswick upon the ground that the procedure provided for in an act entitled “An act to amend an act entitled ‘An act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof,’ approved May twenty-second, one thousand eight hundred and ninety-four,” which amendment was approved April twelfth, one thousand nine hundred and fifteen, was not summary.

5. The Supreme Court affirmed the judgment of the District Court of the City of New Brunswick upon the ground that the evidence presented disputed facts sufficient to raise a question of fact to be determined by the jury, whereas the evidence raised no material disputed questions of fact, and the verdict should have been directed for the plaintiff.

30 6. The Supreme Court affirmed the judgment of the District Court of the City of New Brunswick upon the ground that review of proceedings instituted in district courts under an act entitled “An act to amend an act entitled ‘An act to amend an act entitled “An act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof,” approved May twenty-second, one thousand eight hundred and ninety-four,’ ” ap-

proved April twelfth, one thousand nine hundred and fifteen, should be by certiorari and not by appeal.

7. The judgment of the Supreme Court was in other respects erroneous and illegal.

THOMAS F. MCCRAN,
Attorney-General of New Jersey,
Attorney of Plaintiff-Appellant.

NEW JERSEY SUPREME COURT.

STATE BOARD OF MEDICAL EX-	} On Appeal from the 10 Judgment of the Dis- trict Court of the City of New Brunswick.
AMINERS OF NEW JERSEY,	
<i>Plaintiff,</i>	
<i>vs.</i>	
HAL A. CURTIS,	}
<i>Defendant,</i>	

STATE OF THE CASE.

Thomas F. McCran, Attorney-General, Attorney for Plaintiff.

Howard A. Reynolds, Attorney for Defendant. 20

STATE OF NEW JERSEY, } ss.
COUNTY OF CAMDEN.

Alexander MacAlister, being duly sworn according to law, on his oath says that he is a member of the State Board of Medical Examiners of New Jersey, and that deponent is informed and believes that during the months of August and September, A. D. nineteen hundred and nineteen, at the City of New Brunswick, in the county of Middlesex and State of New Jersey, one Hal A. Curtis, of the City of New Brunswick, in the county of Middlesex and State of New Jersey, did violate section ten of an act of the Legislature of the State of New Jersey entitled "An act to regulate the 30

practice of medicine and surgery, to license physicians and surgeons and to punish persons violating the provisions thereof," approved May twenty-second, one thousand eight hundred and ninety-four, as said section ten was amended by act approved April twelfth, one thousand nine hundred and fifteen, in the following respect, to wit: that the said Hal A. Curtis, at the time and place aforesaid, did commence and continue the practice of medicine and surgery without first having

10 obtained and filed a license for such practice issued by the State Board of Medical Examiners of New Jersey, as provided for under the provisions of said act, and without being licensed for such practice in the State of New Jersey in any other way or manner, in that the said Hal A. Curtis, at the time and place aforesaid, did hold himself out as being able to diagnose, treat, operate and prescribe for human diseases, pains and physical conditions, the names of which are unknown to deponent, and did at the time and place aforesaid, treat

20 and prescribe for the same by means of a medicine, the ingredients of which are unknown to deponent, all of which is contrary to and in violation of said section ten of said act and against the form of said statute.

Deponent therefore says that the said Hal A. Curtis has incurred the penalty of two hundred dollars prescribed by section ten of the act above mentioned, as such section was amended as aforesaid, for the aforesaid violation, and prays that the said Hal A. Curtis may be apprehended and dealt with according to law.

Sworn and subscribed before me this 20th day of September, A.D. nineteen hundred and nineteen.

HOWARD E. TRUAX,
Deputy County Clerk.

Middlesex County, ss.—The State of New Jersey to
and Constable of the County of Middlesex,
[SEAL.] or to the Sergeant-at-Arms of the District
Court of the City of New Brunswick.

WHEREAS, Proof has been made before me under 10
oath that during the months of August and September,
A. D. nineteen hundred and nineteen, at the City of
New Brunswick, in the County of Middlesex and State
of New Jersey, one Hal A. Curtis, of the City of New
Brunswick, in the County of Middlesex and State of
New Jersey, did violate the tenth section of an act of
the Legislature of the State of New Jersey entitled "An
act to regulate the practice of medicine and surgery, to
license physicians and surgeons and to punish persons
violating the provisions thereof," approved May twenty- 20
second, one thousand eight hundred and ninety-four,
as said section ten was amended by act approved April
twelfth, one thousand nine hundred and fifteen, in that
the said Hal A. Curtis, at the time and place aforesaid,
did commence and continue the practice of medicine
and surgery without first having obtained and filed a
license for such practice, issued by the State Board of
Medical Examiners of New Jersey, as provided for
under the provisions of said act, and without being
licensed for such practice in the State of New Jersey 30
in any other manner or way, in that the said defendant,
at the time and place aforesaid, did hold himself out as
being able to diagnose, treat, operate and prescribe for
human diseases, pains and physical conditions, the
names of which are unknown, and did, at the time and
place aforesaid, treat and prescribe for the same by
means of medicine, the ingredients of which are un-
known, all of which is contrary to and in violation of

said section ten of said act and against the form of said statute.

You are hereby commanded to take the body of the said Hal A. Curtis so that you have him forthwith before the District Court of the City of New Brunswick at the Court House in said City of New Brunswick, in the County of Middlesex and State of New Jersey, to answer unto the State Board of Medical Examiners of New Jersey, who sue for one penalty of **10** two hundred dollars for the aforesaid violation, and that the said defendant may be dealt with according to law.

RAYMOND J. STAFFORD,
Clerk.

Witness, Freeman Woodbridge, Esquire, Judge of the District Court of the City of New Brunswick, this twenty-third day of September, A. D. nineteen hundred and nineteen.

20

No. 10794.

IN THE DISTRICT COURT OF THE CITY OF NEW BRUNSWICK.

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX, } *ss.*

30	STATE BOARD OF MEDICAL EXAMINERS OF NEW JERSEY,	}	In action upon complaint. DEMAND.
	<i>Plaintiff,</i>		
	<i>vs.</i>		
	HAL A. CURTIS,		
	<i>Defendant.</i>		

Attorney of Plaintiff, Thomas McCran; Howard A. Reynolds, Attorney of Defendant.

A warrant was issued in the above-stated cause September 23d, A. D. 1919, returnable forthwith.

I served the within warrant by having the body of the defendant delivered to the District Court as within I am commanded.

JOHN J. HARKINS,
*Sergeant-at-Arms of the District
Court of the City of New Bruns-
wick.*

10

September 23d, A. D. 1919. The defendant, on his appearance before the Clerk, pleaded not guilty, and deposited \$400.00 cash in lieu of bond to secure payment of penalty and for his appearance in Court October 13th.

October 10th. Defendant filed demand for jury.

October 13th. This cause adjourned until October 20th, without waiver of any rights of either party. October 20th, adjourned until October 27th.

October 24th. Venire issued and given to John J. 20
Harkins to serve. October 27th, the sergeant-at-arms returned the venire with a jury of twelve men. The case was then adjourned until November 3d, to November 10th, to November 17th.

November 17th. This cause was called at ten o'clock in the forenoon.

Plaintiff appeared by Grover C. Richman and Alfred S. March, attorneys.

Defendant appeared with Charles T. Cowenhoven and Howard A. Reynolds, attorneys.

30

John J. Harkins returned the venire with the following named persons to serve as jurors: Patrick Byrnes, Andrew Zahn, Jr., George Williamson, William McGovern, Frank Auten, John Wiegel, Joseph Dowdell, George Parent, Frank Holden, John Gourley and Jacob Hoagland.

George Ziegler was sworn as official stenographer.

Attorneys for the defendant objected to the form of complaint. Objection overruled.

The plaintiff's attorney objected to a trial by jury. The Court overruled the objection.

The jury being satisfactory, they were duly sworn according to law.

Frank Golden, Michael Sweeney, Rodney Vose, Richard Vose, Dr. Herbert Nafey, Norman M. Fournery, George C. Bedford, Rose Malouf and Helen Voorhees were sworn and gave testimony on the part of the plaintiff.

- 10 Ernest Little was sworn but was withdrawn without giving testimony.

Plaintiff offered in evidence two bottles marked *Ex. P-1* and *Ex. P-2*.

Plaintiff rests.

Hal A. Curtis was sworn and gave testimony on the part of the defendant.

Defendant rests.

The plaintiff's attorney then moved for a directed verdict. Motion denied.

- 20 After hearing argument by the respective attorneys, and a charge by the Court, the jury retired in favor of John J. Harkins, the sergeant-at-arms, after he had been duly sworn to attend them. Subsequently, they returned and announced they found the defendant not guilty. Judgment for the said defendant is thereupon rendered.

Plaintiff's costs—

Warrant, \$2.35.

Mileage, \$0.10.

Listing, \$1.50.

- 30 Witnesses' fee, \$5.00.

Defendant's costs—

Jury "not sworn," \$6.75.

Jury sworn, \$11.75.

December 1st, 1919, plaintiff filed notice on appeal.

I, Raymond J. Stafford, Clerk of the District Court of the City of New Brunswick, do hereby certify that the above is a true and correct transcript of the docket in the above cause.

[L. s.]

RAYMOND J. STAFFORD,
Clerk.

NEW BRUNSWICK DISTRICT COURT.

STATE BOARD OF MEDICAL EXAMINERS
OF NEW JERSEY,

Plaintiff,

vs.

HAL A. CURTIS,

Defendant.

Transcript of stenographer's notes of evidence in the 10
above-entitled cause, taken before Hon. Freeman Wood-
bridge, District Court Judge, and a jury, at the Middle-
sex County Court House, in the city of New Brunswick,
New Jersey, on the seventeenth day of November, A. D.
1919, at 10:45 A. M.

Appearances—Grover C. Richman, Esq., representing
Thomas F. McCran, Esq., Attorney-General; Alfred
S. March, Esq., representing Middlesex County Medical
Association; Charles T. Cowenhoven, Esq.; Howard
A. Reynolds, Esq., representing the defendant. 20

Mr. Reynolds—I make objection to the complaint
filed in this section, and I move to dismiss the complaint
on the ground that it does not set up a legal ground or
cause of action. In the demand for a jury presentation
was made that the defendant did not waive or expressly
reserve the right to object to the complaint upon the
very ground that I have now stated. The basis of my
objection to the complaint is this:—

The Court—It was understood, I think, without dis- 30
pute, that all adjournments were subject to all objec-
tions which might have been made on the first day.

Mr. Richman—That is correct.

Mr. Reynolds—If your Honor will follow the com-
plaint as filed, the Attorney-General's office seems to
have followed out the terms of the Act of 1915 prescrib-
ing what characterize the practice of medicine and sur-
gery in the State of New Jersey, and certain acts were

there set forth in the complaint, and I claim, therefore, that the complaint does not set out a full, just and legal cause of action.

The Court—In what respects?

Mr. Reynolds—The law of 1880, which is the primary law regulating the practice of medicine and surgery, which is still existing, provides that every person practicing medicine and surgery in the State of New Jersey, for a fee, or for a gain or reward shall
10 receive a diploma from a medical college or a medical society. In 1894 the law was amended so that the qualification was a license from the State Board of Medical Examiners. That continued until the law of 1915. The law of 1915, under which this complaint is drawn, specifies in new terms what constitutes the practice of medicine and surgery. My contention that the law of 1880 is still existent, that it has not been repealed, that it has not been amended directly or by implication, and that being so, and it is necessary to set forth in the
20 complaint that the defendant—assuming that the act set forth in the complaint were true—would do this for gain or for fee or for reward. And therefore I say there has been no compliance with the act and, therefore, the complaint is insufficient.

It is recognized that in a penal action every essential fact must be set forth in the complaint. Now, the third section of the Act of 1880—mind you, this act has never been repealed, it is still there on the statute books—provides that if a person is not licensed under the act
30 they cannot recover for any fees for services rendered. That third section is still there. The first section is still there. The second section has been amended, so far as the misdemeanor part of it is concerned. Now, what are we going to do with the Act of 1880?

The Court—This is not a proceeding for a misdemeanor. This is a proceeding for a penalty.

Mr. Reynolds—I understand that. It made it unlawful under the Act of 1880 for anyone to practice for

gain or reward, to practice medicine and surgery. And beyond that—that was the declaration of the act. The second section of the act made it a misdemeanor. The third section of the act provided no fees could be recovered in case of services, where that qualification did not exist. As I say, the Act of 1894 changed the qualification. The Act of 1915 defined what the practice of medicine and surgery consisted of. Under the Act of 1880 there was no declaration, there was no definition, there was no determination of what constituted the practice of medicine. They have amplified the Act of 1880 in the subsequent Act of 1915. But the fact is, the point as to gain, fee, or reward still abides. Now, if your Honor will turn to the Compiled Statutes you will see there the Act of 1880 still remains there. There has been no repeal of it. If there has been no repeal of it, it could only be overcome by amendment. Now, has it been amended? I say it has not been amended in that particular, and not having been amended in that particular it still stands, and the complaint must set forth, under the Act of 1880—or any violation here must be accompanied by a statement of the act that whatever was done was done for gain, fee, or reward.

The Court—I should not think that would be the purpose of the Act of 1915. In the first place, as I remember the Act of 1915, it was an act intended to cover the whole subject matter. Is that correct?

Mr. Richman—A revision.

The Court—A revision of the whole subject matter and, therefore, it would repeal by implication, under the decisions, all former acts or statutes. I should be very much surprised—I am not saying it is not so—I would be very much surprised to find that the illegal practice of medicine in New Jersey nowadays depended upon the matter of reward, fee, or gain. I think that the act is rather police regulation directed to the general health, and I do not believe that I can go out and practice medicine and diagnose the cases, purely from philanthropic

motives, no matter how good they are, and render my services gratuitously. I should not think that is so. What have you to say about the proposition?

Mr. Richman—I think your Honor is correct in the matter. The Act of 1915 is the law with respect to the practice of medicine to-day. That is the law which is alleged in the complaint, and not only the section referred to, but the language of the definition as specified in the act itself is recited in the complaint. There is
10 no mention in the law of 1915 of any reward or fee to be collected by the defendant. It merely says, in the language of the statute, "Diagnose, treat, or prescribe." It may be gratuitously.

The Court—It may be from the very best of motives.

Mr. Richman—Yes. In other words, under the Act of 1915, that feature of the Act of 1880 has been omitted, left out, and it being the later enactment, of course, by implication, it repeals.

The Court—Am I right in supposing that the Act of
20 1915 was a revision of the whole subject matter, or was it an amendment of separate sections?

Mr. Richman—The Act of 1915 was an amendment to the law of 1894, which was a revision of the subject matter.

The Court—The law of 1894 was a revision of the whole subject matter?

Mr. Richman—That is as I understand it.

The Court—I will overrule the objection.

Mr. Reynolds—Prays exception.

30 The Court—Exception will be noted. It is not necessary to note exceptions, but you can note an exception.

Exception allowed. Sealed accordingly.

Judge.

Mr. Reynolds—A demand for jury has been filed in this action and I now ask that the jury be returned to try the action.

Mr. Richman—*The State objects to a jury* in this case on the ground that the defendant is not entitled to a jury

in a proceeding under this statute. The act itself provides that—Section 10 provides: “Such process shall state what provision of law was alleged to have been violated by the defendant or defendants, and on the return of such process, or at any time to which the trial shall be adjourned, the said court shall proceed in a summary manner to hear testimony and to determine judgment in the matter without the filing of any pleading for the plaintiff for the recovery of such penalty as—

The Court—Not to interrupt you, has not the Supreme Court decided that they are entitled to a jury, in a recent case? 10

Mr. Richman—I do not think so. The Supreme Court has decided in the construction of that character of the statutory provisions, namely, where the statute provides that the trial shall be had in a summary manner, our court has held, in a long line of decisions, that that means without a trial by jury. Our Supreme Court in the case of—a very recent case—*State vs. Lakewood Market Company*, 84 *New Jersey Law*, page 20 512—

The Court—Is that the opinion by Justice Swayze?

Mr. Richman—That is the opinion by Justice Trenchard. That was the provision in the fish and game law and it is identical with the statute here; and there the Court, after citing a long line of cases, in which the question of trial by jury was raised, held that the defendant was not entitled to a trial by jury.

The Court—In that case they held he would have been entitled to a jury if he had asked for it? 30

Mr. Richman—No, sir. In 90 *New Jersey Law*, I do not remember the page, is a case which I think your Honor refers to. In that case there was no demand for the jury, there was no jury in the case, and the Court—I just do not remember who delivered the opinion—

The Court—Swayze, I think.

Mr. Richman—I think your Honor is correct. Without discussing the cases, where it held that trial by jury

is not permissible in summary proceedings, not even referring to them at all, merely says off-handed, it seems to me, that if a jury have been demanded he would have been entitled to it. Now, it seems to me that that certainly is not entitled to the same merit, even though it may be a later decision, as a case of the Supreme Court where the proposition has been squarely raised, been squarely discussed and squarely decided. Clearly if the term dictum should be applied to a case, 10 it should be applied in 90 *New Jersey Law*. It was not before the court. And how could the Court say, by mere dictum, that if a demand had been made the defendant would have been entitled to it, in face of the direct decision of the Supreme Court to the contrary? In 90 *New Jersey Law* that case was *State Board vs. Lowrie*.

Mr. Justice Parker in the case of *Parker Brothers, 20 Vroom*, page 600, in construing a similar clause in the act entitled "An act to prevent deception in the sale of 20 oleomargarine" (reading), held that the right of trial by jury does not exist; and after following somewhat the phraseology of Mr. Justice Depue in a former case, cites a number of cases in which that same proposition is held.

And then in a case of *State, Richard H. Shivers, Prosecutor, vs. William K. Newton, 16 Vroom*, page 469, which was a prosecution under the act to prevent adulteration, and regulating the sale of milk, Mr. Justice Reed, in passing upon the same question, held "the last 30 of the constitutional objections to the act is that it makes no provision for a trial by jury. The law has so frequently been stated to the effect that the enforcement of regulations of the kind included within the statute by summary proceedings before a magistrate alone, was not within the constitutional guaranty of trial by jury, that I think further remark would be improper."

Then we have the case of *State vs. Lakewood Market Company*, to which I have already referred in 84 *Law*,

page 512, in which Mr. Justice Trenchard delivers the opinion of the court and discusses it in full.

And then comes, in spite of, it seems to me, the settled law of the State of New Jersey that a trial by jury is not—the defendant is not entitled to a trial by jury where the act provides for a summary proceedings, I say in spite of that it seems to have become a settled law, we come to 90 Law, where a jury was not demanded, and where the issue was not raised in the trial of the case at all, and to quote merely off-handedly 10 says if a jury had been demanded he would have been entitled to it. It seems to me that is pure dictum and is not controlling upon this court in this case. Therefore I object to a jury in this case for three reasons:

1. The Legislature, in plain language, provided for and intended that the judge of the court should dispose of the case by using the term "summary."

2. Had the Legislature intended to confer the right of trial by jury they would have expressed this right in the act itself, in view of the numerous decisions of our 20 courts to the contrary.

3. The deprivation of a right of trial by jury is not in violation of Section 7 of Article I of the Constitution of the State of New Jersey of 1844.

It seems to me that to permit a jury in this case, where the Legislature has said to your Honor you shall try this case in a summary manner, is contrary to law and should not be allowed.

The Court—I think that the case of *Lowrie vs. the State Board of Dentistry*, 90 *New Jersey Law*, page 54, 30 is binding upon me. There the Supreme Court, in its decision, quite clearly distinguished between a proceeding that is strictly summary and one that is in the nature of a civil action. Although the statute in that case, as in this case, provided for the hearing in a summary manner, and also used the word "conviction," still the Supreme Court held in effect that that did not necessarily determine the character of the action, which was civil,

and which entitled the party demanding it to a jury trial if he had asked for it. In view of the discussion which Justice Swayze made in that case, I think the Supreme Court would be very much surprised if I should determine here in this case that what the Supreme Court said was not binding upon me because the question was not before them, and because it was dictum. I do not care to pass upon the question as to whether or not that was dictum. The Supreme Court have decided the
10 point. If it was not before them, that is a matter for the Court of Errors and Appeals to dispose of, not for a District Court. I overrule your objection and allow the jury to be sworn.

Mr. Richman—Prays exception.

The Court—Yes, certainly.

Exception allowed. Sealed accordingly.

Judge.

A jury being empanelled and found satisfactory, they
20 were sworn.

Mr. Richman—I understand it is admitted that the defendant, Hal A. Curtis, does not have a license to practice medicine within the State of New Jersey.

The Court—Is that admitted?

Mr. Cowenhoven—I do not think there is any objection. We do not pretend or claim we have any license to practice medicine, or ever practiced without a license.

The Court—It is admitted on the record, without
20 proof, that the defendant has no license to practice medicine in the State of New Jersey.

Mr. Richman opens the case for the plaintiff.

Mr. Cowenhoven—The defendant denies the allegation that he ever diagnosed, treated or prescribed for persons afflicted with ailments, or that he ever claimed to be a doctor, or held himself out as such, and he never practiced medicine in this county.

Frank Golden, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination, by Mr. Richman.

Q. Mr. Golden, where do you live?

A. New Brunswick.

Q. What is your local address?

A. 98 Welton street.

Q. What is your age?

A. Fifty-six.

10

Q. Did you ever visit the defendant, Hal A. Curtis, in this case?

A. Yes, sir.

Q. When?

A. Why, I went over to him, I think it is six or eight weeks ago.

Q. Do you remember what month?

A. I think it was in October; about the first of October, I think. Somewheres around there. I could not tell exactly just the time.

20

Q. You are certain about the time, are you?

A. No, sir; I am not exactly certain about the time. But about six weeks ago, I should imagine.

Q. Where did you go?

A. I went over to Highland Park, over where he had his tents, over there.

Q. And where was it in Highland Park?

A. Why, on the right hand side of Highland Park, over near the hotel, over there somewheres. I could not tell you just what street it is.

30

Q. Did you go in the tent?

A. Yes, sir.

Q. Who did you see?

A. Saw Mr. Curtis.

Mr. Reynolds—I will enter an objection here to this testimony. It appears from the testimony thus far of the witness as to time that he went there in October. The complaint in this action

was made on the twentieth of September; and no testimony of that character can be introduced in this case.

The Court—Being a civil proceeding I suppose the time is not necessarily essential, but you will have to lay the time before the commencement of your complaint, won't you?

Mr. Richman—I think the witness has sufficiently laid the time. He said about October the first.

10

The Court—But your complaint was made September 20th.

By the Court.

Q. Can you state whether or not it was before September 20th that you went there?

A. No. I could not. I could find out, though. I think it was around that time. I would not be certain about the time.

20

Mr. Richman—I think I am entitled to show anything that happened within the months of August and September. That is my complaint.

The Court—I think you must confine your testimony to matters that happened before the date of your complaint.

Mr. Richman—You mean the date that the complaint is sworn to?

30

The Court—Yes, the date the complaint was sworn to. Because it must necessarily have been based upon matters that happened before then. That was the commencement of the suit. If this man can state it was before September 20th. I do not think the date is exactly material.

By Mr. March.

Q. Do you remember what day it was?

A. I think it was on a Friday I went there.

Q. Do you remember when Primary Day was?

Q. Was it before Primary Day?

A. Yes.

Mr. Cowenhoven—When was Primary Day?

If the gentleman knows.

The Court—Objection overruled. He is trying to see what this man remembers about it.

Q. Was it prior to Primary Day?

A. Well, I could not really tell you. I think it was before Primary Day? I would not be certain about that now.

Q. You remember when Labor Day was, do you not?

A. Oh, yes.

Q. How soon after Labor Day was it?

A. Well, I can't tell you that.

Q. Was it one week, two weeks, or more?

A. Well, I imagine this was about six or seven weeks ago when I was there.

Q. Are you sure it was before Primary Day?

A. Yes, it was before Primary Day.

The Court—The fourth Tuesday of September was the twenty-third. Tuesdays were the second, ninth, sixteenth and twenty-third.

Q. If Primary Day was Tuesday, November twenty-third, was it the Friday before that?

A. I could not tell you really.

Q. But it was Primary Day on a Friday, is that right? 10

A. I think it was. Now, I ain't going to say positive whether it was or not.

Q. Are you sure of that time than stating it was about October the first when you first testified?

A. Well, I should imagine it was about six weeks ago. Six or seven weeks ago.

Q. But you are sure it was on a Friday and before Primary Day?

A. I know it was a Friday, sure. I won't be certain whether it was before Primary Day either. 20

By the Court.

Q. You have the date at home, haven't you?

A. I have.

Q. Can you go and get it and bring it here?

A. I think my wife knows what date it was.

The Court—Have you other witnesses?

Mr. March—Yes.

The Court—I think the objection is very important to straighten out at this time.

10 A. I think she will know what day of the month it was. I can't remember the dates of the month.

Mr. Richman—We will recall the witness later after he ascertains the fact.

The Court—You may go and ascertain the fact.

A. I will go and see. Probably she will know about it.

20 The Court—If you have any memorandum or anything that fixes the date in your mind you had better bring that along with you. Any paper or anything you put down.

Witness withdrawn.

Michael Sweeney, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination, by Mr. Richman.

Q. Mr. Sweeney, where do you live?

A. New Brunswick.

30 Q. Where in New Brunswick?

A. 52 Bishop street.

Q. What is your age?

A. Well, about 67 or '8.

Q. Did you ever visit the defendant, Mr. Curtis?

A. Did I ever visit him?

Q. Yes.

A. Yes. Once or twice.

Q. And when was that?

A. Oh, I don't know. I didn't think that I had to keep a date of it. When he was on Bishop Street.

Q. In New Brunswick?

A. Yes, sir. In the same block I lived in.

Q. Can you give us any idea when it was?

A. No. It is when he was there. I suppose you will know when it was.

Q. Was it in the summer?

A. Kind of getting on the fall.

Q. Was it before Primary Day?

10

A. Yes.

Q. How long before?

A. Can't tell you. I didn't know I had to keep a date of it.

By the Court.

Q. How do you know it was before Primary Day then?

A. Well, I know. Because it seemed to be a whole lot further off.

20

By Mr. Richman.

Q. How long before Primary Day do you think?

A. A week or six months, I don't know.

By the Court.

Q. Was it after Labor Day?

A. After Labor Day. Yes. No.

Q. It wasn't after Labor Day?

A. No. It was before Labor Day.

Q. It was before Labor Day?

30

A. Yes.

By Mr. Richman.

Q. Before Labor Day?

A. I think so.

Q. Can you say then whether it was in the month of August?

A. I can't tell you what month, but I think it was in September, around the first of August some time.

The Court—He says it was before Labor Day.

By the Court.

Q. Where did you visit him?

A. Where did I visit him?

Q. Yes.

A. Why, down where his camp was.

10 Q. And where is that?

A. On Bishop Street.

By Mr. Richman.

Q. How many times did you visit him?

A. Oh, I used to go down there maybe three or four times a day, just for walking around. I ain't doing nothing. I used to go down there for pleasure. I walked around them tents whenever I feel like it.

Q. Did you go in the tent?

20 A. Once.

Q. Did you see Mr. Curtis?

A. I did.

Mr. Cowenhoven—Is the date fixed; is the time fixed as yet?

The Court—Before Labor Day.

Mr. Cowenhoven—Interrogate the witness if he knows when Labor Day was. He says I think. His language is I think.

Mr. Richman—He said he was certain it was before Labor Day.

30

Mr. Cowenhoven—His language is that I think it was before Labor Day. Your Honor could find out if he knows when that day was.

The Court—I think what he says is competent about it. You can cross-examine him fully afterwards.

By Mr. Richman.

Q. You went to visit Mr. Curtis, did you?

A. Yes, visited him once or twice.

Mr. Cowenhoven—I object to the testimony of the witness being proceeded with, no date having been positively fixed as to when he visited the defendant.

The Court—Objection overruled.

Mr. Cowenhoven—Prays exception.

Exception allowed. Sealed accordingly. 10

Judge.

Q. Why did you go to visit him?

A. Why did I go?

Q. Yes.

A. I went to get some of his medicine.

Q. What happened after you got there?

A. Why, he sold me the medicine. I paid him for it, and I walked home.

Q. What did you tell him?

A. I told him that I had poor circulation of blood. 20

Q. What did he say?

A. Well, he said he would fix me up. His medicine, he thought his medicine would help me.

Q. Did he ask you how you felt?

Mr. Cowenhoven—I object.

The Court—Objection sustained. It is leading. Just state what he said.

A. Well, he didn't ask me, but I told him. I thought I had poor circulation of blood in my limbs from the knees down; that they were cold nights when I was 30 going to bed, pretty near as cold as ice, and his medicine has helped me.

Q. It has helped you?

A. It has helped me.

Q. Very much?

A. A whole lot.

Q. How much have you taken?

A. I took five dollars' worth.

Q. How much is that?

A. Six bottles.

By the Court.

Q. And does it contain directions on it as to how it shall be taken?

A. Well, there is some print on it. I forget.

By Mr. Richman.

10 Q. Was there any alcohol in it?

Mr. Cowenhoven—I object.

The Court—If he knows.

A. I don't know whether there was alcohol in it or not. I didn't see any, or didn't smell any, or taste any.

Q. Did it put some pep in you after you took it?

Mr. Cowenhoven—I object.

The Court—Objection sustained. That is leading.

A. I don't know what you mean.

20 Q. How often did he tell you to take the medicine?

Mr. Cowenhoven—I object.

The Court—Objection overruled.

Mr. Reynolds—I object.

The Court—Why?

Mr. Reynolds—He has not yet stated that he told him as to how he should take it. Your Honor tried to draw that out of him by asking him what directions were on the bottle, if any. There were no directions in it at all. Now, Mr. Richman asks him how many times did he tell

30

you to take it.
The Court—I suppose the better form of the question would be, what did he say to you, and then if the witness does not respond, you can ask him the leading question.

Mr. Reynolds—Understand, your Honor, this is their witness on direct testimony.

Mr. Richman—I will put the question in that form.

Q. What did he tell you to do with the medicine?

A. Well, he told me to take it. That is all he told me. Very little of anything he told me. He give me the medicine and I gave him his money.

Q. How often did you take it?

A. Three times a day.

Q. Why did you take it three times a day?

A. Well, because I thought that was sufficient.

Q. What?

A. Because I thought that was sufficient to take it 10 three times a day. That is about sufficient to take any medicine.

The Court—Now you can ask him, if you wish to bring out a matter you can ask him did he give you any directions as to the dose to be taken.

Mr. Reynolds—I object to that.

The Court—Objection overruled.

Mr. Reynolds—Prays exception.

Exception allowed—sealed accordingly. 20

Judge.

Q. Did he give you any directions as to how often the medicine should be taken?

A. Well, I guess he said three times a day.

Q. Did he say anything as to whether it would help you or not?

A. No.

Q. And you did take it three times a day?

A. Well, if I didn't forget it I would.

Q. When you didn't forget it you took it three times 30 a day, is that correct?

A. Sometimes I didn't take it three times a day.

Q. Was that because he told you to take it three times a day?

Mr. Reynolds—I object.

A. No.

The Court—Objection sustained. He has already answered it, I think, Mr. Richman. He

said I guess he told me to take it three times a day, and I took it that often when I didn't forget it.

Mr. Richman—I wanted to get from the witness as to whether he was certain what he told him.

A. What did you say?

Q. Are you certain what he told you to do with the medicine?

10 A. He told me to take it three times a day, but I didn't do it. Sometimes I done and sometimes I didn't.

Q. What else did he tell you to do?

A. Didn't tell me no more.

Q. Did he tell you what he would do, how it would help you or not?

A. No.

Q. How often did you visit him?

A. Well, sometimes six—I would go down on the grounds six nights in the week, but I only went to visit

20 him twice.

Q. When you say visit him, you mean go in his tent?

A. No. I never was in the tent but once.

Q. And that is when you got the medicine?

A. Yes.

Mr. Richman—Cross-examine.

Cross-examination, by Mr. Cowenhoven.

Q. Mr. Sweeney did you get a bottle of medicine?

A. Sir?

30 Q. Did you get a bottle from him?

A. A bottle?

Q. Yes, a bottle. What did he give you?

A. Why, I got a half a dozen of them.

Q. Was their a package around the bottle?

A. The brown paper around the bunch of them.

Q. Do you remember whether or not their were any directions?

A. Nothing but wrapped with a cord.

Q. Sir?

A. Nothing but wrapped with a cord, that is, around the bottles.

Q. And printed matter on the paper at all inside?

A. Well, there was directions printed on the bottles.

Q. Directions printed on the bottles?

A. I don't remember what it was.

Q. Now, you say that you guess that he told you to take it three times a day?

A. Yes, three times a day.

Q. What did he say when he told you that?

A. That is all he said.

10

Q. You remember now distinctly his telling you to take it three times a day?

A. Handed me the bottles and I gave him his money. He said take it three times a day.

Q. Did he speak anything about the directions being on the bottle also?

A. No.

Q. Did not. That is all, sir.

Mr. Richman—That is all.

20

Rodney Vose, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination, by Mr. March.

Q. Where do you live, Mr. Vose?

A. Why, I live in Spencer, New York.

Q. And what are you doing in New Jersey?

A. In college.

Q. And where you live in New Brunswick?

A. 78 College Avenue.

Q. What class are you in of Rutgers College?

A. Senior Class.

30

Q. Calling your attention to a particular time during the month of September, 1919, did you ever see the defendant, Hal Curtis?

A. Yes, I saw him twice.

Q. And where did you see him?

A. I saw him once on his platform and once in his office.

Q. And whereabouts, what city, Highland Park?

A. Up on George Street, or the continuation of Albany Street; I don't know what street it is. Up there in Highland Park.

By the Court.

10 Q. Over across the river?

A. Yes.

By Mr. March.

Q. When was the first date that you saw him?

A. Well, it was two days before college opened I came back from New York State, and I came by the way of Metuchen, and I passed by and stopped in and heard him. Heard his lectures.

Q. Do you remember when college opened?

20 A. No, but it is up there in the books. I can tell you when college opened if you looked up their register's office.

Q. Well, was it the early part of September or the later part?

A. The early part of September.

By the Court.

Q. Was it before the twentieth?

A. Oh, yes. I was back here the last of August.

30

By Mr. March.

Q. When next did you go to see him?

A. I went on Monday afternoon, and he wasn't there. It was about a week before the primaries. About the fifteenth of September. Monday.

Q. Monday afternoon, and you say he wasn't there. Did you see him after that?

A. Oh, yes; I saw him Monday night.

Q. You went back Monday night?

A. A man in there told me that he wasn't there. His business hours were after supper.

Q. He had regular office hours?

Mr. Cowenhoven—I object to what anybody told him.

The Court—Objection sustained.

Q. This man was in charge of his establishment?

A. There were two or three men in there, yes.

Q. How is it you came to go back at night?

A. His office hours started at night, the man said. 10

Q. From what hours?

The Court—Strike out what the man said.

By the Court.

Q. As the result of what you were told you went back there at night, didn't you?

A. Yes, sir.

By Mr. March.

Q. You went back there at night, didn't you? 20

A. Yes, sir.

Q. Who did you see?

A. Mr. Curtis.

Q. This gentleman here?

A. Yes, sir.

Q. Why did you go there?

A. To be treated.

Q. Well, did you get treated?

A. Well, I told him what was the matter with me, and he gave me— 30

Q. Do you mind telling the Court and jury just what you told him just what he told you?

A. Certainly. I went in and said, "How are you, Doctor?" and he asked me how I was; and then I said, "Well, I will tell you; I will let you tell me what is the matter with me. Do you see what I mean?" He said, "How are you, boys?" My twin brother was with me. He said, "How are you, boys?" I said,

"Doctor, I will let you tell me." I said, "I don't sleep any too well at night." That was the first thing I said. He asked me if my conscience bothered me, and I said no. He asked me if I had murdered someone, and I said I didn't think it was that. Then I said my stomach was a little off. He asked me if I had plenty of exercise. And I said, "Well, I walked about thirty miles a week going to the farm and back." He said, "A young fellow like you hadn't ought to be sick." Then I stood
10 there a couple of minutes with my brother. He said, "Well, I have this swamp root,' or what is it, sacred bark, I guess sacred bark here. I stood there, and he gave it to me, and I gave him a dollar. I gave him a five-dollar bill. He gave me change. And I walked out. Well, furthermore, I said, "Suppose this is all right, can I get some more?" He said, "Well, there is a doctor down the street here that is going—a druggist going to carry it for me." He said, "I have got to stay around a couple of days to answer a charge before the Medical
20 Board." And I went out.

Q. When you addressed him as doctor what did he say?

A. He didn't say anything.

Mr. Reynolds—Now, I move all this testimony be stricken out. Because the witness himself has identified the time subsequent to the charge made by the Medical Board.

The Court—On the contrary, he says in the first part of September.

30 Mr. Reynolds—Now he says when he went there he was told that he was going to stay around a little longer in order to answer the charge of the Medical Board. The complaint was made on the 20th of September, and by his own testimony admittedly this was after that date, so he must have been mistaken in his previous testimony.

The Court—I will let you cross-examine him on that subject. I am not going to strike it out in its present state, because the testimony happens to be contradictory.

By Mr. March.

Q. Well, did you take the medicine?

A. Part of it.

Q. What is this? (Handing witness bottle.)

A. That is the stuff.

10

Q. Is that the medicine that you purchased from him?

A. That is what is left of it; yes, sir.

Q. Did you go back there at all?

A. No, sir.

Q. Now, about the date—

The Court—Witness shown a bottle.

Mr. March—I would like that marked for identification.

Bottle marked P-1 for identification.

Q. Now, in reference to the date, what date did you state you were treated by Dr. Curtis? 20

A. I said the fifteenth.

Mr. Reynolds—I object to the designation of the defendant as “Doctor Curtis.”

Mr. March—He said he went in and said “hello, doctor.”

Mr. Reynolds—There is no testimony in this case—

Mr. March—I refer you to the record.

The Court—It is purely descriptive. I cannot direct counsel as to how they shall frame their questions. If they wish to call him Doctor Curtis they may do so. Objection overruled and exception allowed. 30

Exception allowed. Sealed accordingly.

Judge.

Q. Calling your attention to the particular time when you were treated by Doctor Curtis—or the so-called Doctor Curtis—what day was that again?

A. Monday, as I remember.

Q. What month?

A. September.

Q. What date of the month?

A. Fifteenth.

10 Mr. March—That is all. We offer that bottle.
The Court—Any objection to the bottle.
Mr. Cowenhoven—What bottle is it?
The Court—The one stands right there.

Cross-examination, by Mr. Cowenhoven.

Q. Is that the bottle he gave you?

A. Yes, sir.

By Mr. Reynolds.

Q. What shape was that bottle in when he gave it to
20 you?

A. It was full. It was wrapped around with a piece of paper, a piece of corrugated paper and in a card board box.

Q. Were there directions in it for the use of that preparation?

A. Yes. There were directions right on the bottle.

Q. You took it according to the directions on the bottle, did you?

A. Yes, sir. I didn't shake it up. It says shake well
30 before using, but I didn't shake it up.

Q. And you followed the directions as given there. Mr. Vose you are sure that Mr. Curtis said to you that he would be around a bit longer on account of the fact that the Medical Board had made complaint?

A. I said that.

Q. You said that?

A. I said that.

Q. And that was the day that you got this bottle was it?

A. It was.

Q. How do you reconcile that, if it appears that the complaint was made on the 20th of September, that you were there on the 15th of September?

A. How do I reconcile that?

By the Court.

Q. Yes. How do you know you were there on the 15th? Did you put it down anywhere?

A. No, I didn't. That is from my memory, that is all. 10

By Mr. Reynolds.

Q. Then you might be mistaken about that?

A. Well, I know I went there and got the bottle.

By the Court.

Q. On what day?

A. It was Monday. I couldn't tell you what Monday it was any more than it was the fifteenth. 20

By Mr. Reynolds.

Q. Why do you fix the fifteenth?

Q. Because I thought it was, and I think so yet.

Q. I know, but Mr. Curtis did say a complaint had been made against him at the time you got this bottle of medicine?

A. No. He said he had to wait for a charge.

Q. A charge that was made against him?

A. Said he would wait for a charge from the Medical Board. 30

Q. What would be the following Monday, do you know?

The Court—After the fifteenth?

Mr. Reynolds—Yes.

Q. The twenty-second, wouldn't it?

A. Yes, sure.

Q. Was it on the twenty-second of September that you were there?

A. I said the fifteenth.

Q. Now, I am asking you now whether it wasn't the twenty-second? You didn't put it down in any book, did you?

A. No.

Q. You made no memorandum of it?

A. No.

Q. But you do remember this conversation that you had with him about the Medical Board, is that right?

10 A. That is right.

Q. That was the only time that you were there?

A. No.

Q. When did you go there again?

A. I said I went there quite a while before when I came back to college. I didn't go in his tent. I went to hear his lecture, that is all.

Q. Then when you came back to college you came back two days before college opened, didn't you?

A. Yes.

20 Q. When did college open?

A. That was the date I told you I didn't know. I could find out from the office.

Q. Wasn't it on the third Tuesday in September?

A. I couldn't tell you.

Q. Did college open on Tuesday or Wednesday?

A. I don't know when college opened.

Q. Don't you know what day of the week it opened?

A. No.

30 Q. It usually opens on the same day in the week, doesn't it?

A. Maybe it does, but I don't happen to remember it.

Q. The sixteenth of September was on Tuesday and college didn't open in the week previous to that, did it?

A. I don't know. The best thing to do is to telephone up there, because why do you want me to say—

The Court—No. You are on the witness stand.

A. Why do you want me to say it opened some day when I don't know when it opened?

The Court—He is asking you what you know about it.

A. I don't know.

Q. I ask you whether college opened prior to the fifteenth of September?

A. And I say I don't know.

Q. You fixed the time that you first went over there as two days before college opened, is that right?

A. Yes.

Q. When you first went over there to hear these lectures? **10**

A. Yes.

Q. What was the next time after that that you went over? How long after?

A. Oh, it was a couple of weeks.

Q. And that was when you got the medicine, wasn't it?

A. That was.

By the Court.

20

Q. A couple of weeks after college opened?

A. If I remember correctly; yes, sir.

By Mr. Reynolds.

Q. That must have been a couple of weeks after college opened that you were over there?

A. Yes, sir.

Mr. Reynolds—That is all.

Re-direct examination, by Mr. March.

30

Q. Didn't you tell me it was before Primary Day when you went over there?

A. I told you I thought it was.

Q. You thought it was the week preceding?

A. That is what I thought; yes, sir.

Q. Is that the way you trace the date to the fifteenth?

A. That is the only way. I am trying to figure it out. I haven't it down anywhere.

By the Court.

Q. What is there about Primary Day that fixes it in your mind?

A. Primary Day?

Q. Yes. Do you vote in New Brunswick?

A. I am supposed to.

Q. Did you this year?

A. No, I didn't.

Q. Are you twenty-one?

10 A. Oh, yes.

Q. What was there to fix Primary Day in your mind this year, if you didn't vote?

A. Well, election day. I keep track of the days of the week.

Q. Well, what day does Primary Day come on in New Jersey, what day in the week?

A. It comes on Tuesday.

Q. But you didn't vote?

A. No.

20 Q. You were going to college on Primary Day, weren't you?

A. I couldn't tell you that. We had a couple of holidays we declared by ourselves, and I might have taken one then. Something like that, when they don't give one in the course I take; they don't say much if you take the day off.

Q. What course are you taking?

A. Agriculture.

Q. You didn't vote on Primary Day anyway?

80 A. No.

Q. Was there anything to fix it in your mind in New Jersey?

A. Primary Day, yes.

Q. You are a citizen of the State of New York, aren't you?

A. Yes.

Q. Isn't your home in Spencer, New York?

A. It is.

Q. Aren't you a citizen of the State of New York?

A. I don't think so, because I have only been there about three times since my home was there, and it has only been there a matter of months. Until that I lived in Newark, New Jersey, and before that in New York State, and before that in Massachusetts. So my home is in New Brunswick here. One home is.

The Court—All right.

Mr. March—That is all.

Bottle entered in evidence marked *Exhibit P-I*.

10

By Mr. Reynolds.

Q. Mr. Vose, when you went in the tent there, what did you see inside of that tent? What was inside of the tents?

A. Well, Mrs. Curtis, I believe it was Mrs. Curtis, was in there. It is the lady sitting back there. In the vestibule I saw—I could look through—I saw three people in there. There were three ladies; two fellows behind them; evidently a mother and her daughter behind them. And there were chairs and a bench there in the vestibule. When you went in, Mrs. Curtis, I believe it was, the lady who was in there with Dr. Curtis, there was kind of a little table there, and a couple of chairs; in the rear of the tent there was a big stack of bottles, pile of bottles.

20

Q. Is this, this bottle here that you got?

A. Yes. They were wrapped up in a paper carton, cardboard.

Q. Did you see any sign over the tent?

A. Any sign?

30

Q. Any sign of any kind? Any name on the tent, for instance?

A. I don't remember.

Q. Was there any name inside of the tent?

A. No. I couldn't see any name.

Q. There was really nothing there but these stacks of bottles, and a few chairs and a table?

A. That is all.

Mr. Reynolds—That is all.

By Mr. March.

Q. How long did it take before you were waited on the night you purchased the medicine and had Mr. Curtis treat you?

Mr. Reynolds—I object to that. That is unimportant, how long it took.

10 The Court—Objection overruled.

A. Between a half hour and forty-five minutes before I got in there.

Q. Was anybody ahead of you?

A. As I just said, there were three ladies ahead, and two fellows, and an elderly lady and a younger one.

Q. They went in in turn?

A. Yes, they went in before me. I had to wait.

Q. Did they go in a private consulting room?

A. Well, we waited in the vestibule, and then you
20 went in and talked with Dr. Curtis.

Q. Was the door shut when these people went in?

A. No; there wasn't a door there.

Q. But they went in and had a private consultation?

Mr. Reynolds—I object as leading.

The Court—Objection sustained. What did they do?

Q. Did they go in there?

A. They did.

Q. And did they see the doctor privately?

30 Mr. Reynolds—I object to that.

The Court—Just state what they did.

Mr. Cowenhoven—I object to that question.

The Court—Objection sustained. It is leading.

Q. You say they went in there?

A. They did.

Q. Was the doctor inside where they went?

A. He was, yes.

Q. And were you in there where the doctor and the person who went in there to see him was?

A. I wasn't in there while the people were in there. I was just outside.

Q. So they went in there privately?

A. Yes.

Mr. Reynolds—I object to that.

The Court—That is a conclusion. The jury may determine it.

Q. After one would go in there what would happen then? After one would go in and come out what would happen then? 10

A. They would come out with some medicine and someone else would go in there.

Q. In rotation?

Mr. Reynolds—I object.

Q. Did you go in when it was your turn?

A. I did, yes.

Q. Just like in a barber shop, is that right?

A. Yes. 20

Q. Or a doctor's office?

Mr. Cowenhoven—I object.

A. That is right.

Q. Or a lawyer's office?

The Court—They are all conclusions. Strike them all out.

Mr. March—That is all.

By the Court.

Q. Do you know what took place between the doctor and these persons who went in there when they went in? 30

A. No. I wasn't listening to what he said.

Richard Vose, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. March.

Q. Where do you live?

A. Spencer, New York.

Q. Are you the twin brother of the former witness?

A. I am.

Q. And live with him at the same place?

A. Same place.

Q. Whereabouts?

A. 78 College Avenue. Same city.

Q. Calling your attention to a particular time, you heard your brother referring to his visit to Dr. Curtis. Were you with him?

10 A. I was.

Q. What took place?

The Court—When was it?

Q. In the first place, when was it?

A. It was on a Monday evening about three weeks before this summons to this first trial. Three to four weeks.

Q. Had you been there before?

A. Before when?

Q. Before this particular Monday evening?

20 A. That was the first time I had been there.

Q. And you went with your brother?

A. I went with him.

Q. State just what took place.

A. Went up there Monday afternoon and there were two young men around there. My brother asked him when the doctor would be in. He said he will be in this evening, he has office hours this evening, is what he said, about seven o'clock. So we went up there again that evening about seven o'clock, or a little after, and he
30 had a tent up there at that time in which he received people. This tent had sort of a runway in which there were benches and chairs and so forth, and when we got in there there were somebody talking with Mr. Curtis, out of sight; there were two young men and two women there waiting, which meant that we had to wait our turn. It was about a half to three-quarters of an hour before we actually got to see Doctor Curtis.

Q. Well, you saw him, didn't you? Did you go in with your brother?

A. I went in with him.

Q. What did your brother say to Doctor Curtis, and what did Doctor Curtis say to him, if anything?

A. As soon as Doctor Curtis had dismissed these two people he had, he said, good evening, how are you; and my brother said that is what I want you to tell me, doctor. He said I don't sleep very well. Mr. Curtis looked at him and he said that might come from a number of things. He said it might be your conscience. And he asked him if he had murdered somebody. And he said no. And then my brother said, I also have headaches; and Doctor Curtis said do you get plenty of exercise. He said yes he did. And then he looked at him again and he said, why, a young fellow like you hadn't ought to be sick. And then he spoke to me, he looked to me and said, is this my brother here. And I said, well, I am not sick. So he didn't say anything to me. Then he said, why the only thing I have here would be my Sacred Bark, he said, it will build up your stomach, build up your nerves, and build you up in general. He said all right, and took a bottle and wrapped it up and charged him a dollar for it. Then at that time he said—he asked him if he could get any more, and he said, yes, there is a druggist down there handling it in case he was gone. He said, good night, and that was all.

Q. What month did you say this was?

A. This what?

Q. That you went over there?

A. When was it?

Q. What month was it?

A. I can't recall the month exactly. I don't have any particular reason, I had no exact date.

Q. Was it last May, or was it June?

A. It was during the last of September or the first of October.

Q. You are not certain, is that right?

A. Not certain of the exact date.

By the Court.

Q. What day did college open this year?

A. As far as I can remember it was the thirteenth of September.

Q. How long was it after college opened?

A. That we went up there?

Q. Yes.

A. A week or so.

Q. A week or so after college opened. Were you
10 there when Mr. Curtis said, I have got to answer a call
of the State Board of Medical Examiners, or a sum-
mons of the State Board of Medical Examiners, did
you hear him say that?

Mr. March—That is not it. He said some-
thing about a complaint of the Medical Society.
We are going to contend that he did not allude
then to this formal complaint, but some com-
plaints of the Medical Society as to his practic-
ing. He was on Livingstone Avenue and other
20 places.

The Court—Strike out my question.

Q. Were you there when Mr. Curtis said something
about a complaint of the Medical Society?

A. I was.

Q. What were the words that he used at that time?

A. My brother asked him where he could procure
some more. He said I won't be here long, I should have
been away now, but there is some complaint of the
Medical Board, was his answer. He didn't say anything
30 definite what the complaint was, or he knew what it
was, but he simply said there was some complaint.

By Mr. March.

Q. Did you ever see the bottle before, referring to
Exhibit P-1?

A. Yes, I have seen that before.

Q. Where did you see it?

A. In my brother's hands.

Q. Did you see your brother get a bottle of medicine there that night?

A. Saw him get a bottle that looked like that. Same thing.

Mr. March—Cross-examine.

Cross-examination, by Mr. Cowenhoven.

Q. When did you leave home to come to college this last time?

A. I left home on Saturday night.

16

Q. What month?

A. September.

Q. What part of the month?

A. About the middle of the month.

Q. Fifteenth?

A. I said I thought it was before the fifteenth. About the thirteenth I thought. I said I thought college opened about the thirteenth and then I must have left about the eleventh.

Q. Now, you say you left home about the eleventh? 20

A. I said I left home, and it took me about a day to come here. I said college opened about the thirteenth, as far as I can remember, and I left about two days before that. In fact, I came here on Saturday night, and college opened either Tuesday or Wednesday.

Q. Now, how long after you reached New Brunswick was it that you went to this Mr. Curtis' tent?

A. I thought it was about a week or so.

Q. You cannot tell then two weeks positively, either a week or two weeks, is that right?

30

A. That is right.

Q. That is as near as you can come to it now, to the best of your recollection?

A. That is right.

Q. You do not know whether it was on the twentieth or the thirtieth of September, can you, nor the intervening dates?

A. No.

Herbert Nafey, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination, by Mr. March.

Q. Where do you reside, Doctor Nafey?

A. 133 Benner Street, Highland Park.

Q. You are a practicing physician of the State of New Jersey?

A. I am.

10 Q. Duly licensed?

A. I am.

Q. What school or college did you attend?

A. Rutgers College, Academic Course; University of Pennsylvania, Course in Medicine.

Q. You were associated with the late Doctor Donohue?

A. I was.

Q. How long have you been practicing in Highland Park?

20 A. I was in Highland Park for almost two years before the outbreak of the war, and then, enlisting, went over-seas for twenty-two months, and have been back since April, and been practicing since April at the present time.

Q. You were a practicing physician in the service of the United States Army during the war?

A. I was.

Q. Are you a member of the Middlesex County Medical Society?

30 A. I am.

Q. Are you on any special committee of that society?

A. I am.

Q. What particular committee?

A. A committee appointed to investigate this subject.

Q. What subject?

A. Subject of the practice of Hal A. Curtis, practice of medicine in New Brunswick.

Q. What are the main functions of that particular committee, not in reference to this case, but in reference to any case of this character?

Mr. Cowenhoven—I object.

The Court—Objection sustained.

Q. What is the object of the committee?

A. The object of that committee—

Mr. Cowenhoven—I object to that.

The Court—Objection sustained.

Q. In reference to this particular case, what did you do as a member of that committee, if anything?

A. On learning—it having been reported at one of the society meetings that there was a man—

10

Mr. Cowenhoven—I object to what was reported.

The Court—Objection sustained.

A. As a member of that committee I was one of those who investigated for the county society the reported practice of medicine of this man in New Brunswick.

The Court—And as a result of that investigation what did you do?

Q. What did you do now?

A. I went, when Hal A. Curtis established in Highland Park—previous to that time I reported this practice to—

20

The Court—Strike that out.

By the Court.

Q. What did you do?

A. I wrote a letter to the State Board of Medical Examiners—

The Court—Strike that out.

Mr. March—I see no harm. Here he is a member of a committee of a medical society. No harm in his testifying—I do not see what is improper about his report to his superiors. Reporting it to the State Board and also the County Medical Society. That was his duty, and it is proper in this case to show that there was nothing personal on the part of the witness. He is merely following out one of his duties.

30

The Court—That is not the point. The character or motives of the witness have not been attacked in any way and are not attacked now at all. He simply testifies here as a citizen. You qualified him as a physician, for some reason, and that was not objected to. What he did in reporting what he found would be hearsay testimony entirely.

10

Mr. March—He has not stated what he said. He merely states the fact that he reported. He does not go into conversation.

The Court—That is objected to also.

Mr. Cowenhoven—In consequence of what he reported, what did he do.

A. As a member of that committee or as a witness here?

The Court—In either capacity.

A. I wrote a letter to the State Board of Medical Examiners saying that there was—

20

Mr. Cowenhoven—I object.

The Court—Objection sustained.

Mr. March—Prays exception.

Exception allowed. Sealed accordingly.

Judge.

By Mr. March.

Q. What did you do, other than writing letters or reporting; what did you do personally in reference to this individual, Dr. Hal Curtis?

30

A. I visited his office.

Q. And when?

A. September 18th, at 3:30.

Q. What day of the week was it? What year, first?

A. 1919.

Q. What day of the week?

A. I think Tuesday. I am not sure.

Q. Was anyone with you?

A. Yes.

Q. Who?

A. Doctor Forney.

Q. Did you see the doctor, Dr. Curtis?

A. I did.

Q. And where was he?

A. In his office.

Q. Whereabouts?

A. On Raritan Avenue, Highland Park.

Q. What did you say to him first? Was anyone else there?

10

A. Dr. Forney.

Q. Anyone else other than Doctor Forney, you and Doctor Curtis?

A. No one else in his private consulting room.

Q. Was anyone else waiting in his outer room?

A. There was.

Q. How many?

Mr. Cowenhoven—I object.

The Court—Objection overruled. Why is it objectionable?

20

Mr. Cowenhoven—What difference does it make whether or not there were many persons in that room or not? They might be visitors there. Who were they or what were they, Mr. March?

Mr. March—We may call them to corroborate this witness. It is perfectly proper.

The Court—I will admit it.

Exception allowed. Sealed accordingly.

30

Judge.

Q. Were there any others in the outer office?

A. There were.

Q. How many?

A. Two in the outer office and three women and a child outside, standing outside of the door waiting to come in.

The Court—Strike out “waiting to come in.”

Q. When you first went in there were these people waiting in the outer office, any of them?

A. No. They came in while we were there.

Q. You did not have to wait to see them, did you?

A. We did.

Q. Was someone in his private office ahead of you?

A. There was.

Q. Did you go in your turn?

10 Mr. Cowenhoven—I object. Instead of saying waiting his turn, when did he go in.

The Court—Yes. When did you go in.

A. As soon as the preceding person came out.

Q. Did Doctor Forney go in with you?

A. Doctor Forney did.

Q. Tell just what took place when you and Doctor Forney were present in Doctor Curtis' private office, just what took place?

20 A. Mr. Curtis met us, shook hands with Doctor Forney and at the same time looked at me and said, good afternoon, gentlemen, how are you?

Q. What did you first say to him?

A. I didn't say anything.

The Court—Let him state.

30 A. And Doctor Forney said I have a slight cold, but I have come here with Mr. Nafey to see you—no, that is wrong. He didn't say with Mr. Nafey. He said, I have come here to consult you with my friend about himself. And with that Mr. Curtis turned to me and said, have a seat, gentlemen, have seats. He sat down and so did Doctor Forney and myself. And then he asked me what my trouble was. I said I had a pain in my stomach. He said, Oh, yes. And he said how long have you had that. I said, well, I have had that for off and on for a long time. Had it when I was in the army. He said, Oh, yes, that is interesting. You have too much acid in your stomach. I said, is that so. He said, yes. And he said, do you feel pretty good otherwise. I said, yes, I feel fairly good. He said, are you

a little constipated sometimes. I said yes. Do you take cathartics sometimes? I said, yes. He said well, he said, the trouble with you is that your pneumogastric nerve is not working right. Food that ought to digest in your stomach, does not digest in your stomach. He said, it digests in your large intestine, and it ought to digest above there, and it is the pneumogastric nerve that controls that. I was a little bit interested in that so I questioned him, out of interest to myself, to find out just how this action of the pneumogastric nerve carried 10 on. And then he informed me that I ought not to take any meat because meat would rot my stomach, if I did. He said I ought not to eat any vinegar, because that was acid, and I already had too much acid in there. He told me I ought not to take any sugar, because sugar would turn into acid as soon as I put it into my stomach, which was also interesting. I said, well, doctor, I said, I have vomited once or twice. He said, hah, he said, that is more serious. He said, you have got a gastric ulcer. I was a little bit surprised at that so I questioned him 20 along those lines.

By the Court.

Q. Would those things have been symptoms of a gastric ulcer?

A. The pain is the only thing that would have been—the pain and vomiting, yes, are symptoms of gastric ulcer.

Q. There are lots of people who have pain and vomiting who do not have gastric ulcers?

30

A. Do not have gastric ulcers.

By Mr. March.

Q. Go on.

A. I said, that is all very interesting, doctor, but what I have got to find out from you is what you can do for me. I said, you told me what my trouble is, now I want to know what you can do for me. He said, well, he

said, we have this medicine here that we call Sacred Bark, he said, that is just the thing you need, he said, it will build up that pneumogastric nerve of yours that is not working, and he said, it will build you up generally. Now, he said, besides that, he said, I want you to take some baking soda before your meals; you know baking soda is for the acid, he said. And you have got too much acid. And he picked up a box of baking soda off the table, picked up a teaspoon, picked up a glass and
10 took a teaspoonful of baking soda out of the box and said, I want you to take this much baking soda three times a day before meals, showed me the glass, how much water to put in it, showed me how much baking soda to put in the spoon, and told me how to take it. He said, after meals I want you to take a dessert spoon full of this medicine three times a day about an hour after your meals.

By the Court.

20 Q. Referring to the Sacred Bark?

A. The Sacred Bark medicine. I asked him if I should come back. He said, yes, he said, I expect to be here for about another week. And he said, of course, you won't expect to get a great deal of results from one bottle of this medicine, but we are selling six bottles for five dollars, and when this is gone you come back and, he said, this one bottle that you are taking now will apply on the cost of the other six. We will let that go in as the other six and four more and you will have
30 the other fifth bottle. I said, thank you, doctor, how much do I owe you. He said, one dollar. I handed him one dollar and he handed me the bottle of medicine and I went out.

By Mr. March.

Q. Have you the bottle with you?

A. I have.

Q. Will you produce it?

(Witness produces bottle.)

Q. What have you done with that bottle since that date?

A. I opened it to give some of it to Professor Little at Rutgers College.

Q. This gentleman here?

A. That gentleman there, to make an analysis.

Q. You gave it to him personally?

A. I did.

Q. What did you put it in when you gave it to him, 10
another bottle? What you gave to him?

A. I gave him this bottle.

Q. And he handed it back to you?

A. He did.

Q. When?

A. This morning.

Q. And when did you give it to him?

A. I gave it to him Tuesday of last week.

Q. Interrogating you as a practicing physician, what
does Sacred Bark mean? 20

A. Sacred Bark, I think, is not mentioned in the pharmacopœia of the United States. But in Merck's Catalogue the pharmaceutical house of Merck & Company, sacred bark is cascara sagrada.

Q. Which is more for the bowels?

A. It is a mild purgative.

Q. What is it usually called?

A. Cascara.

By the Court.

30

Q. And is sacred bark another name for cascara?

A. Given by Merck's. I think not officially. That
is the Merck's pharmaceutical house name for cascara.

Q. Cascara is a well-known—

A. Cascara is a well-known purgative medicine.

Q. Commonly used?

A. Yes.

By Mr. March.

Q. Also, interrogating you as a practicing physician, anyone who has an ulcer of the stomach or cancer of the stomach would vomit, would they not?

Mr. Cowenhoven—I object to it.

The Court—Objection sustained. He is not called as an expert, is he?

Mr. March—That is why we qualified him for both purposes.

10 The Court—What is the ground for the objection, Judge, on reflection?

Mr. Cowenhoven—Perfectly immaterial here as to what the effect of that medicine is. He is charged with practicing medicine; he gives a certain kind of medicine. Whether that is beneficial or otherwise is not the question. The question is does he practice medicine. Whether he diagnoses and treats. He gives him this medicine. He does not tell him what is in it or
20 anything about it. He says this sacred bark is called cascara. Now, he wants to know what the effect of that cascara would be.

The Court—There was no objection to that. You did not make any objection to all those questions.

Question repeated by stenographer.

Mr. Cowenhoven—It is immaterial in the issue in this case. He is charged here with practicing medicine. Not matter whether the medicine was efficacious or not is not the question. Did he
30 give him medicine? That is all the question is; did he give him medicine? Now, whether or not it was poison, or whether it was not, is not the question.

The Court—That is not the question. Objection overruled.

Mr. Cowenhoven—Prays exception.

Mr. Reynolds—I make another objection here.

The question is irrelevant and incompetent because it would not apply unless the witness had previously testified that he actually had ulcers or cancer of the stomach. In other words, if the witness went there and told the defendant that he had ulcers of the stomach, when he did not have ulcers of the stomach, and he took this medicine as a remedy for that, when he did not have it, then the question I claim is incompetent because it was upon a condition which did not exist. I, therefore, say that that question that was last asked of the witness must be predicated by another question, and that is, did you have ulcers or cancer of the stomach. 10

The Court—Objection overruled.

Mr. Reynolds—Prays exception.

Exception allowed. Sealed accordingly.

Judge.

The Court—Exception will be allowed. It is very material as to whether or not the defendant undertook to diagnose a case. That is a part of the practice of medicine under all the decisions, as I understand it. This man goes to him and says I have a pain in the stomach and vomiting, and describes certain other symptoms. It does not matter whether he was there as a detective or whether he was there as a patient. Now, he supplies testimony, this witness does, which the other witnesses have not, because he says—I am not saying that it is so, that will be for the jury to determine—but he says that he then said you have ulcers of the stomach. In other words, he predicated a diagnosis upon subjective symptoms which were described to him by the witness. If that be true, under all the decisions was not that the very distinction that is drawn in the decisions as to what constitutes a practice of medi- 20 30

cine, and what does not constitute a practice of medicine? Objection overruled.

Mr. Cowenhoven—Assuming that all to be true, what your Honor has said, the mere fact, if you determine that to be diagnosing the case—

The Court—I am not determining it.

Mr. Cowenhoven—Practicing medicine is one thing, but what the effect of that medicine is, it seems to me is perfectly immaterial and irrelevant.

10

The Court—He did not ask him what the effect of the medicine would be at all that I have heard.

Mr. March—I asked him in reference to what Sacred Bark, what it meant, and the object in asking it was simply to show that this man gave these people cascara and labled it Sacred Bark.

The Court—Objection overruled. Question allowed. Answer the question.

20

Exception allowed. Sealed accordingly.

Judge.

Question repeated by stenographer.

A. At some stage during the course of their disease.

Q. An interrogating you further as a practicing physician, did Doctor Curtis make any test to ascertain as to whether you had acid?

A. He did not.

Q. Except to interrogate you?

30

A. That is all.

Q. How are tests usually made to ascertain whether the patient has acid or not in their symptoms?

Mr. Cowenhoven—I object to that.

The Court—Objection sustained. That is not material.

Q. Did you take any of the medicine?

A. I did not.

Mr. March—That is all.

By the Court.

Q. Could you tell what it was by the smell of it after you got it?

A. No.

Q. You could not necessarily?

A. No, sir.

Mr. March—That is all, Doctor Nafey.

By the Court.

Q. What was the name of the nerve you said he spoke 10
of?

A. The pneumogastric nerve.

Q. Is there such a nerve in the stomach?

A. There is.

Q. Would the symptoms that were described—that you described to him—indicate a difficulty with the pneumogastric nerve?

A. No, sir.

Q. They would not.

A. No, sir. 20

Q. So the symptoms that you have described as having would not apply to the pneumogastric nerve at all?

A. No, sir.

Q. What is the pneumogastric nerve, doctor?

A. The pneumogastric nerve is one of the twelve cranial nerves which control the movement of the stomach and intestinal tract beginning at the esophagus and going all the way through to the lower valve.

Q. And if it has any pain—

A. The pain produced in those cases is due to the 30
sympathetic nervous system, and not to any of the twelve cranial nerves.

Q. The pneumogastric nerve might be out of order and yet a man's stomach not be out of order?

A. Yes. The pneumogastric nerve possibly could be diseased and still his stomach not be upset.

Q. And vice versa?

A. Yes, sir.

Q. Every time a person has a stomach ache, or irregularity of the alimentary canal and digestive tracts, right straight through from the throat, say, to the large intestine, that does not necessarily mean that the pneumogastric nerve is out of order?

A. It does not.

The Court—Go ahead.

Cross-examination, by Mr. Cowenhoven.

10 Q. Doctor, where is your office?

A. 133 Benner Street, Highland Park.

Q. How long have you been practicing there?

A. Since October 1st, 1915, except the time I was abroad.

Q. When did you first learn of Mr. Curtis' arrival in the city of New Brunswick?

A. This summer.

Q. What part of the summer?

A. I can't tell you. I don't know.

20 Q. Why not?

A. I don't remember.

Q. You do not remember?

A. No.

Q. Were you not apprised of the fact that some man by the name of Curtis had come here in the city of New Brunswick and was dealing out medicine to people, through public advertisements and by sale?

A. I was.

Q. How long was it before, can you fix a date when
30 you first heard it?

A. No.

Q. That was in direct conflict with your business, was it not? The fact of his coming here and dealing out medicines was in direct conflict with your business, your profession?

A. No.

Q. It was not? It was in accord with it? If it was not in opposition to it, was it in accord with it?

A. No.

Q. What was it then?

A. I never gave it a thought.

Q. Well, think of it now?

A. Will you state your question again, please?

Mr. March—I object on the ground it is immaterial.

The Court—Cross-examination. He is trying to show the motive of the witness.

Mr. March—Unless he intends to show motive. Is that the object? 10

The Court—Apparently.

Mr. March—Is that the object of it, Judge?

Mr. Cowenhoven—I am not bound to disclose my motive.

The Court—Objection overruled.

Question repeated by stenographer.

A. It is not.

Q. So then notwithstanding that you heard that this man came here and was selling medicine, it did not make any impression upon your mind to such an extent as to call the attention of the Medical Society to it, did it? 20

A. Yes.

Q. When was that done?

A. I don't know.

Q. Why not?

A. I don't remember.

Q. Who called the attention of the Medical Society to it?

A. It was reported at one of the meetings. 30

Q. Who by?

A. I don't know. I don't remember.

Q. How do you know?

A. I was there.

Q. Then why can't you tell who reported it?

A. Because there were about twenty-five members of the society.

Q. And you can't tell me, now, who it was told you about this man Curtis?

A. It was reported at the society meeting.

Q. By whom?

A. I don't know. I don't remember.

Q. You were present?

A. Yes, sir.

Q. And the report was that this man Curtis was here selling this medicine?

10 A. Yes.

Q. The name of the reporter does not occur to you now?

A. No.

Q. Thereupon was the action appointing you on a committee to investigate this matter?

A. Yes.

Q. That same night or day, or whatever it was?

A. During that meeting.

Q. Well, was that in the morning, or the afternoon,
20 or night?

A. That was night.

Q. On whose motion was that done?

A. I don't know. I don't remember.

Q. You were appointed by the chairman?

A. What is that?

Q. Were you appointed by the chairman?

A. I was.

Q. Was there a written resolution to that effect?

A. There was.

Q. Have you it there?
30

A. No.

Q. Can you learn the date?

A. I don't know that I can.

Q. Why not? Aren't the minutes of your proceedings kept?

A. I suppose they are.

Q. Don't you know that they are?

A. They are reported at every meeting.

Q. Then, they are kept, aren't they?

A. Yes.

Q. Then, you don't suppose anything about it. You know they are; isn't that so?

A. Yes.

Q. How soon after that meeting—or was there a discussion there that night as to what should be done?

A. There was.

Q. Were you directed what to do?

A. No.

16

Q. Had no instructions?

A. No.

Q. I will ask you, now, can you give, from memory, what you understood was to be your duty in the investigation of this matter?

A. This committee was appointed to investigate the matter. That is all was done that night.

Q. To investigate this matter of his selling the bottles of medicine?

A. Yes.

20

Q. How soon after you, and Dr. Forney, was it?

A. Yes, sir.

Q. How soon after, doctor, that you acted upon that resolution?

A. I can't tell you exactly. Within a week or ten days.

Q. It was reported that this man was here selling these medicines, out in a public manner, in a tent; all the details connected with it, was it?

A. Yes.

30

Q. Then, you say, now, you waited a week?

A. I did what?

Q. Waited a week before taking any action?

A. About that time.

Q. Didn't you think—wasn't the object of having this committee appointed to see whether or not this man was selling this medicine, and if it was deleterious to the public health, which was your primary object to

preserve, that you should wait a whole week before taking any action in the matter?

A. No.

Adjourned until 1:30 P. M.

Afternoon Session, 1:30 P. M.

Herbert Nafey (resumed).

Cross-examination (continued), by Mr. Cowenhoven.

10 Q. Why not? Why did you wait a whole week?

A. I could not see that there was any hurry.

Q. Not in any hurry to stop the sale of a medicine by a man whom you were satisfied was not a licensee of the Medical Society and was spreading throughout the community an article which he pretended to be for the use and benefit of mankind?

A. I think I said about a week after that appointment. I don't think I said definitely a week.

Q. And you didn't think that was too long a time to stop the sale of this deleterious matter?

20 A. I don't think so.

Q. Sir?

A. No.

Q. You would not wait a week if a person was sick to prescribe for him as a physician?

A. Oh, no.

Q. Why would you wait for a week when this medicine was being foisted upon the public to stop it?

A. Because I was in no hurry.

Q. No hurry to stop the sale of that medicine?

30 A. No.

Q. That is your only answer to that?

A. Yes.

Q. Now, Doctor, that complaint was made on the twentieth of September, wasn't it?

A. What complaint?

Q. The complaint that was made by the Medical Society?

A. I don't know when the complaint was made.

Q. Do you remember when the resolution authorizing you to proceed to investigate was made?

A. I do not.

By the Court.

Q. Have you the complaint there?

A. No, sir.

The Court—Have the attorneys the complaint?

Mr. March—I have a copy of it.

10

By Mr. Cowenhoven.

Q. How long before the complaint was made did you know of existence of Mr. Curtis here in the city of New Brunswick selling this medicine?

A. Oh, I have a vague recollection of having heard he had been here all summer.

Q. All summer?

A. Yes.

Q. And you never felt it your duty, knowing that he was not a member of the medical fraternity, to call the attention of the authorities to that fact? 20

A. No.

Q. Where was he selling these medicines when you first heard it?

A. In New Brunswick.

Q. What part of New Brunswick?

A. I don't know.

Q. In the city of New Brunswick?

A. Oh, yes.

Q. In more than one part? 30

A. I don't know.

Q. And that was so for about six weeks then before he came over to Highland Park?

A. I have not the faintest idea.

Q. Well, you had heard of him for six weeks before?

A. Yes, but I don't know that.

Q. You had heard he had been selling this medicine for six weeks before in the city of New Brunswick?

A. Yes.

Q. The very moment he struck Highland Park—you live in Highland Park?

A. Yes.

Q. And you practice in Highland Park?

A. Yes.

Q. And the very moment that he came over in Highland Park and opened up his medicines that interfered somewhat undoubtedly with your practice, did it not?

A. No, I don't think so.

Q. Then it was you thought it was time you made a complaint, as soon as he landed in the sacred soil of Highland Park, isn't that so?

A. I have not said so.

Q. I ask you to say whether you did or not?

A. No.

Q. Why didn't you, when he was for six weeks selling this medicine in New Jersey, why did you wait until he struck your jurisdiction?

A. I didn't.

Q. You didn't?

A. No.

Q. I understood you to say you heard it for six weeks before?

A. Yes. I didn't say six weeks.

Q. Sir?

A. I didn't mention six weeks.

Q. You didn't mention it?

A. No.

Q. I understand you to say six weeks?

A. I said all summer.

Q. Where did I get six weeks from?

A. I didn't say six weeks.

The Court—I think you said six weeks, Judge, and the witness said yes, or assented to it.

A. Then I will withdraw that assent. I don't know how many weeks.

Q. Wasn't it the fact now, Doctor—be frank to tell me—was it not the reason that he came over to Highland Park and opened up his tent there and sold his medicines, that that interfered undoubtedly with your practice?

A. No.

Q. And then it was you thought it was time to bring it to the attention of the Society?

10

A. Not at all. I had taken the matter up before he came to Highland Park.

Q. How long before?

A. I don't know.

Q. Is not your memory good?

A. No, not particularly on that point.

Q. On that point?

A. On those points.

Q. It is on every other point, isn't it?

A. Except dates. I am not particularly good on 20 dates.

Q. Isn't it strange that you could not tell me who it was that offered that resolution, and when it was offered, and what the resolution was?

A. A general discussion in the Society.

Q. A general discussion?

A. Yes.

Q. That is within the last two months, isn't it?

A. No.

Q. Within the last three months?

30

A. Possibly. Barely within the last three months. But I think—

Q. And within three months you cannot recollect, and yet your memory is good, as to when that resolution was made and what was the purpose and what was said and done, and you say your memory is good?

A. It is pretty good.

Q. Is it just as effective in your mind now as the conversation which you allege to have taken place between you and Mr. Curtis?

A. Will you say that again? I didn't quite understand it.

Question repeated by stenographer.

A. No.

Q. Why?

A. Because I wrote this all down that I took after

10 Mr. Curtis, and I didn't write anything down—

Q. Produce that memorandum.

A. Mr. March will give it to you. Here you are.

Q. When was that memorandum made?

A. Within twenty minutes after the conversation.

Q. Where?

A. In my office.

Q. With whom?

A. Dr. Forney and myself.

Q. Then you wrote that down?

20 A. I did.

Q. Let me read that memorandum? I mean to say let me hear it. You read it.

A. "On September 18th, 1919, between 3:30 and 4:00 P. M., I visited the office of Dr. Hal A. Curtis, Raritan Avenue, Highland Park, County of Middlesex, New Jersey, in company with Dr. N. N. Forney, of Milltown, New Jersey.

30 "I was taken into the tent used by Mr. Curtis for his private consultation room, when we were greeted by him and asked how we were. He addressed Dr. Forney, who stated that he had a slight cold, but turning to me told Mr. Curtis that I had come to consult him in reference to stomach trouble. He asked me what my trouble was, and I told him that since joining the army I had been troubled, almost continuously, with severe pain in the stomach. I told him that I belched a good deal of gas and he asked me if I was troubled also by constipation. I told him I was and he inquired if I

found it necessary to take cathartics. I answered in the affirmative. He then proceeded to tell me that I had too much acid in my stomach. I asked him if that would cause the pain from which I suffered and he answered yes. I then told him that occasionally I vomited. He said 'Ah, that is a more serious condition. You probably have an ulcer of the stomach, and it is necessary for me to treat you in such a way that we can reduce the acid in your stomach. This medicine which we sell called Sacred Bark is a nerve stimulant and upbuilds 10 the whole body. I think you need building up generally.' He said, 'you know the nerve which controls the stomach and digestion is called the pneumogastric nerve, and that regulates digestion all through the intestines.' I then said, 'It is all right to tell me what my trouble is but I wish to know what you can do for me. I am badly run down, I can't sleep and I can't enjoy my meals, and no one I have been to has helped me, so I want to know what you can do for me.' He asked me if I had been to any of his evening meetings and I told him no. He 20 then asked me if I was a resident of the town and I said no. He said, 'Oh that is too bad.' He then said that it would be necessary for me to refrain from eating any meat, taking any vinegar or eating sugar, because meat would rot into my stomach, owing to the acid, and become a poison, that vinegar was an acid, and that sugar would turn to an acid in my stomach. Also that I should take an even teaspoonful of baking soda in a large glass of water after each meal, showing me, at the same time, a box of ordinary baking soda, and a 30 small teaspoon which was to be used as a model for my measure. He then said that before each meal I should take one tablespoonful of his Sacred Bark Compound. He said that I probably would not see much change in my condition with the one bottle, but that I could have six bottles for \$5.00, or by taking one bottle and paying \$1.00 now I would be able to get more later. I asked him if it would be necessary for me to come back and he

said yes, he would like to see me again the latter part of next week, since he would be here until the last of next week." That is the evidence, sir.

Q. Will you let me have that, if you please?

A. Yes, sir.

Q. Now, Doctor, then you wrote this down immediately within twenty minutes after you—

A. After I left his office.

Q. Did you and Dr. Forney make it out together?

10 A. Oh, yes.

Q. Now, isn't it as a matter of fact, Doctor, didn't you say to him just exactly what you claim that he said to you, and did he not say to you, "I do not know; I do not know whether there can be ulcers in the stomach or not"?

A. Oh, no.

The Court—Let the Judge finish his question.

Q. You said, "Might it be cancer"? do you remember saying that?

20 A. Oh, no.

Q. You said nothing of that kind?

A. No.

Q. Simply the ulcer of the stomach?

A. I didn't mention ulcer of the stomach.

Q. Did he mention it?

A. He did.

Q. Not you?

A. Not me.

Q. You are perfectly positive?

30 A. Oh, I am absolutely positive.

Q. Did he not say to you, Doctor, "I cannot tell you, I cannot tell what ails you"?

A. Ah, no.

Q. Did he not say your troubles may be attributable to indigestion?

A. No.

Q. Nothing of that kind?

A. Nothing of that kind.

Q. Never said a word of that kind?

A. Not a word.

Q. And then the language which he used you say is here?

A. It is there.

Q. You say this conversation occurred where?

A. In the tent of Mr. Curtis.

Q. You said in his private office?

A. I said in his private consultation room, I think.

Q. What do you mean by that?

A. I mean this separate room in this canvas tent **10**
where he takes his patients to consult them.

Q. Did you ever see him take any patients in there?

A. I saw one come out of there, and I suppose he went in.

Q. How do you know he was a patient?

A. I stood and watched him come out.

Q. Suppose you did see him going in or out, how do you know he was a patient?

A. I don't know.

Q. You don't know whether he was a private patient **20**
or not?

A. It was his private patient.

Q. You say there was a room in which he took his private patients. Now, I ask you how you know he took his private patients in there?

A. I saw one come out.

Q. You saw a person come out?

A. Yes.

Q. Will you swear that was a patient?

A. No.

Q. How can you say it was a patient's private room? **30**

A. I can't.

Q. Then you were wrong about that, weren't you?

A. Yes.

Q. Yes, exactly. That little room, what is in that room?

A. I don't know what is in it now.

Q. Well, a table, was there? Not now, but when you were there?

A. When I was there there were three chairs and a table that I remember.

Q. Do you remember whether there were other little private apartments for the actors or the exhibitors there?

A. Not in that room.

Q. But outside of that?

A. Yes.

Q. There were rooms for the actors who were engaged in the reception?

10 A. I don't know.

Q. You don't know anything about that. Now then when you went in there on that occasion what was your object in going? You and Doctor Forney?

A. To see whether this man was practicing medicine.

Q. And you proposed to find out how?

A. By being a patient.

Q. By being a patient?

A. Yes.

Q. Was that by telling him your actual condition?

20 A. What is that? I said from what I told him.

Q. No. Did you go there to tell him that—or to find out as a patient, is that what you mean?

A. Yes.

Q. And you were really, you went to him in the capacity of a patient, did you?

A. Yes.

Q. Did you have that pain in the stomach?

A. Not then.

Q. Did you tell him the truth then?

30 A. Yes.

Q. Why, you said you didn't—did you tell him you had a pain?

A. Yes.

Q. Didn't you say just a moment ago you didn't have a pain?

A. I didn't have it then. He was asking me when I had it. I have had a pain in the stomach.

Q. Didn't you tell him you had a pain then?

A. No.

Q. How long did you tell him you had a pain?

A. I didn't mention any time.

Q. You told him you just had a pain?

A. No. I said I had a pain in my stomach.

Q. You gave him to understand that you had the pain then, didn't you?

A. Oh, well, that is up to him to interpret that. I said, doctor —

Q. Is not that what you intended to convey to him? 10

Mr. March—The witness did not say anything of the kind.

The Court—He is asking him on cross-examination.

Mr. March—He is pretending to predicate it upon the facts of the case.

Question repeated by stenographer.

Q. Did you not mean to convey to Mr. Curtis at the time when you went there to find out whether he would prescribe medicine to a patient, and you went there as a patient, as you say, that at that period of time you had a pain in your stomach? 20

A. He wanted to so interpret it that way. I said, doctor—

Q. I don't ask you his interpretation. I ask you if you didn't intend to convey the impression?

A. I told him just what I said on that paper and I have told you his answer.

Q. Why don't you be frank and tell me whether you intended to convey that impression, or that you had had a pain, some other pain? 30

A. I didn't care to tell him that.

Q. Why not?

A. I wanted him to ask me when I had a pain?

Q. You told him that you had a pain?

A. Surely.

Q. Talking then present with him?

A. Yes.

Q. Now, be frank and tell me did you not intend to convey to him the impression that you had the pain at that time and you wanted to know if he could give you anything to relieve it?

A. Well, I say I told him the facts as I have said there, and he could interpret them as he saw fit.

Q. Is that the only answer that you—

A. Yes. That is my answer.

Q. You say now that is your only motive?

10 A. That is my answer.

Q. Will you swear that you did not intend to convey to his mind the impression that you were then suffering with a pain?

A. No.

Q. Did you want him to prescribe for a pain you were going to have in the future?

A. I didn't care when he prescribed.

Q. Or in the past?

A. I didn't care. He is the doctor.

20 Q. Yes, he was the doctor for your then present condition as a patient that you swear that you went there for?

A. It is up to him to find out when I had the pain, isn't it?

Q. Don't ask me. You went there as a patient. However, that is all the answer you will give?

A. That is all.

Q. Don't you know that you told him an untruth when you told him you had a pain in your stomach?

30 A. No, I didn't tell him an untruth.

Q. Did you have a pain at that time?

A. I have had many a pain in my stomach.

Q. Did you have a pain at that time?

A. No.

Q. Then when you told him you had a pain and meant to convey to him that you had the pain at that moment you told him an untruth, didn't you?

A. By that inference?

Q. And as a matter of fact?

A. Oh, no.

Q. Why not?

A. Because I didn't. That is the reason.

Q. In the remote future, a month hence, or a month before you meant to convey that you had a pain and you wanted some present treatment for that pain that was gone?

A. I didn't want treatment. I wanted to see if he would give it.

10

Q. Do you want the jury to understand that is so?

A. I beg pardon?

Q. Do you want the jury to understand that you were complaining of a pain you had a month or a week or ten days before when you went there as a patient?

A. I wasn't complaining of any pain.

Q. Do you want the jury to understand that you complained of having a pain, or having a pain then in your stomach; that it was pain not at present, but at some time previous or some time in the future?

20

A. Yes.

Q. That was it?

A. Yes.

Q. That is what you mean. Then he was going to prescribe for something you had suffered from?

A. Yes. If he saw fit.

Q. Did you tell him anything further that you had?

A. I told him I had vomited.

Q. Had you?

A. Oh, yes.

30

Q. When?

A. Many times in my lifetime.

Q. And you wanted medicine from your infancy up?

A. I didn't want any medicine. I wanted to see if he would give me any.

Q. From your infancy up you told him you had vomited?

A. Yes.

Q. You wanted him then to prescribe for that?

A. Yes.

Q. You want the jury to believe that?

A. Yes.

Q. Anything else? What else did you tell him you had?

A. Everything is there.

Q. Just tell me something else you remember from your own memory now. You told him about the nerve
10 of the stomach, didn't you?

A. Oh, no; I never told him about any nerve in the stomach.

Q. Did he mention the pneumogastric nerve himself?

A. Yes.

Q. Didn't you say that to him?

A. Oh, no.

Q. You are very sure of that?

A. I am absolutely positive.

Q. Are you certain that you did not say to him that
20 that nerve had no effect upon the stomach?

A. Oh, no; I never mentioned such a fact.

Q. Did he say to you that it had?

A. Yes.

Q. Is there anything in this paper to show that? You took every word that was down there; show me what he said about the pneumogastric nerve?

A. You know the nerve that controls the stomach.

Q. The pneumogastric nerve I am talking about?

A. You know the nerve which controls the stomach
30 and digestion is called the pneumogastric nerve.

Q. Is there anything further about that?

A. In here?

Q. Yes?

A. And that regulates digestion through the intestines.

Q. That is what he said to you?

A. Oh, yes.

By the Court.

Q. Is that a true medical fact?

A. Only partially.

By Mr. Cowenhoven.

Q. Is it not a fact that you asked him that question, if it did not?

A. Oh, no; that is not a fact.

Q. Dr. Forney was with you right then and there?

A. Yes.

10

Q. Did you have any questions written out when you went there?

A. Not a word.

Q. Your idea was to entrap him, wasn't it, to saying something by which you could predicate a complaint that he was practicing medicine?

A. That was my purpose.

Q. It did not make any difference whether you told him the truth or whether you didn't, as to your own condition?

20

A. No.

Q. Don't you think it would have been just as well for you to have sent some person who was actually suffering from some complaint and have him try to prescribe or diagnose the case?

A. I am not interested in anybody else.

Q. You were not particularly interested in your own self to go there and attempt to entrap a man by a statement, the character of which he did not know; is that right?

30

Mr. March—I object. That is not a question.

The Court—Yes it is.

Q. Wasn't the motive of that thing, the motive of you and Dr. Forney—where does he practice?

A. Where?

Q. Where?

A. Milltown and New Brunswick.

Q. Do you know whether or not he had ever had a tent down there?

A. No.

Q. You didn't know he had ever been in Doctor Forney's neighborhood?

A. No; I didn't know it.

Q. Never heard of that at all?

A. No.

Q. When you and Dr. Forney went there for the purpose which you have mentioned, do you understand?

A. What did I mention?

10 Q. To see whether he was prescribing and diagnosing the cases?

A. Yes.

Q. Can you remember for what purpose you went there?

A. I wanted to see if you had the right idea, too.

Q. Now, when you went there, you two doctors were the persons who were interested in this matter, weren't you?

A. When we went there; oh, yes.

20 Q. Did you take anybody else with you?

A. No.

Q. Just went in yourselves?

A. Yes.

Q. Now then, doctor, you had heard of this man's treatment for a long time, hadn't you, as you have already stated, for some weeks before?

A. I heard he had been in town; yes.

Q. And you were a candidate for office over in Highland Park, were you not?

30 A. Yes.

Q. And did you cause to be published and circulated a letter to the voters of that community?

A. No; I didn't cause to be published.

Q. What then?

A. I mailed that. You will notice I never asked them to publish it.

Q. You mailed that to whom?

A. To the citizens of Highland Park?

Q. This letter was addressed, a personal letter to the citizens of the borough of Highland Park. Wasn't that signed by you?

A. Oh, yes.

Q. Then, it was written by you?

A. Yes; written by me, yes, and mailed by me.

Q. To whom?

A. To the citizens of Highland Park.

Q. Then, you did publish it, didn't you?

A. No; I didn't publish it. **10**

Q. Not in the newspapers, but you published it to the world?

A. To Highland Park.

Q. There is another little distinction that you and I make; a difference. You meant that the citizens should know that, didn't you?

A. What is that?

Q. Why aren't you frank and tell me? You meant the citizens should read that letter?

A. Yes. **20**

Q. Why in heavens wouldn't you publish it to the world by mailing it? Can't you publish a thing without mailing it; without putting it in the paper?

A. I don't know.

Q. Probably you had better study up a little on that.

A. All right.

The Court—I do not know as he is bound to know the technical use of the term "publish" as applied to the law of libel and slander. I think the general acceptation of publication to the ordinary person means publication in the newspaper. **30**

Mr. Cowenhoven—That is true, but here is a letter addressed to the people of Highland Park, signed by this gentleman.

Mr. March—Now, if your Honor please, he picks up the newspaper and then asks him if he ever published it.

The Court—I do not know as it is worth while to waste much time on philology.

Mr. Cowenhoven—That is true, but I only wanted to show the motive of this gentleman.

Mr. Richman—I think it is objectionable unless he can show that article has some bearing on this case.

10 The Court—Of course if he cannot show that article has no bearing on this case we will have to rule it out on your objection. But he is only leading up to that now. I do not know what the article contains at all.

Q. To this effect, "A Personal Letter to the Citizens of the Borough of Highland Park:

20 "One of the political parties of this Borough has seen fit to honor me with the nomination of Mayor of Highland Park. It has been called to my attention that the stand which I have taken in the Curtis affair is not understood by a large number of people of this community, the feeling being widespread that this matter is a personal one of my own." Is that right? "It is to correct this impression that I have authorized the publication of this open letter to the people of this community, stating the case according to the facts and standing ready to accept their verdict in judgment of my action." Now, when you say here that you had been told by a large number of persons that you had better not interfere, that they considered this a personal matter, was not that based upon the assertions of a number of
30 the citizens of Highland Park that they had taken the medicine or compound as prescribed by this man, and that you had injured yourself by it?

Mr. March—I object on the ground it is not proper cross-examination, and it is immaterial.

The Court—Objection sustained on that ground.

Mr. Cowenhoven—I ask an exception.

Exception allowed—sealed accordingly.

Judge.

The Court—What was the date of this letter?

Mr. Cowenhoven—This is October 27th.

The Court—You could cross-examine him up to the point of the complaint, or thereafter, for the purpose of showing his motives, which you have done, in making this complaint. If you are able to do it. You can always show the personal motive and you are allowed wide latitude on cross-examination in that matter, but you cannot show any motive that he had in making this visit to Mr. Curtis, by something that happened October 13th, because the visit was all over. 10

Mr. Cowenhoven—This is October 21st.

The Court—The date that you just read there.

Mr. Cowenhoven—But it would seem to me that this shows the motive, do you understand, the animus of the witness in publication of this letter, do you understand? We do not say we find any fault with the prosecution of a pretender, or a humbug or a quack. We glory in that. 20

The Court—You have gone into all that on cross-examination and tried to show by the cross-examination that he was actuated by personal motives. That was perfectly admissible on cross-examination for you to ask the man what motives he had in doing it. But anything that was published in print a month afterward cannot have any bearing on that. This relates to another matter. 30

Mr. Cowenhoven—Only in the further prosecution of it. I so understand it. But I am speaking that this indicates what his motive was at the time that he made the complaint. That is my idea. Not after the 27th, or on the 27th. But what was his motive at the time when he made this complaint, 20th of September.

The Court—All right. If you have anything that amounts to an admission by the witness

that he had a motive, that at the time he made the complaint—I have not seen that letter. If you have anything that amounts to an admission by the witness that at the time he made the complaint he was actuated by personal motives, that is another thing. You can show that, as far as you can, for the purpose of impeaching his credibility. Even supposing he was actuated by the worst motive, that would impeach his credibility—

10

Mr. Cowenhoven—His credibility.

The Court—But it would not change the facts in this case.

Mr. Cowenhoven—The question is if the facts are based upon testimony that is not truthful, or is not credible, or where the person who states the facts in his testimony is such as not to be entitled to belief, they would not be facts, would they?

20

The Court—No, certainly not. I am not stating what are the facts in this case. I say it would not change the facts in this case. I may see a murder that is committed by my worst enemy, and might have the very worst motives in making a complaint against him, but it would not exculpate him from the charge of murder because I made the complaint from base motives and because I wanted to see him punished, instead of from high motives of public policy and the detection of crime.

30

Mr. Cowenhoven—Absolutely not. But if you should testify that you saw a man kill another man, and the man was alive, your testimony would not be worth anything, would it?

The Court—No.

Mr. Cowenhoven—Just so if he testified some statement concerning this man, and it is not true, it would not be worth anything.

Mr. Richman—The witness on the stand is not the complainant in this case. The State Board is the complainant. There is no proof that the witness is the complainant.

Mr. Cowenhoven—No, but he is the instrument of the complainants.

The Court—Do not argue your case, Judge. I sustain the objection. Unless you can call his attention to something in the letter which will show that at the time he made the complaint he was actuated by some personal motive which would tend to affect his credibility. 10

Q. In your statement, Dr. Nafey, in the letter, "I have been told that as candidate for public office I should not have interfered in this matter."

Mr. March—There is no proof that what he is reading from the paper is the same letter that Dr. Nafey sent to the people of Highland Park.

Mr. Cowenhoven—He can deny it if he wants to. 20

The Court—He has already said, as I understand—

Mr. March—No, he does not say it is the same letter that is in the paper, and I object on the ground it is not proper cross-examination and it is immaterial, and I object to his reading from that letter in the *Home News*.

The Court—Objection sustained, unless Judge Cowenhoven can point out some particular passage in the letter that he wants. 30

Mr. Cowenhoven—Very well.

The Court—You can ask him if he said so and so and so in this letter.

Q. "I have been told that as candidate for public office I should not have interfered in this—"

Mr. March—I think it is improper to read that before the jury.

The Court—Objection sustained.

Mr. March—Because the letter is not in evidence. We have no objection to the letter, but there must be some limit to cross-examination.

The Court—Objection sustained. What passage in the letter do you wish to call his attention to?

Mr. Cowenhoven—Every time I attempt to read it he stops me.

10 The Court—He is stopping you from reading passages from a letter which says I am a candidate for public office in Highland Park. That does not make any difference in the case. Mr. March objects to it and his theory is right.

Mr. Cowenhoven—That is not the full sentence. That does not convey any meaning.

Mr. March—The trouble is you want to get it before the jury.

20 The Court—We do not care anything about that part. The jury I think can keep that out of their minds. The point is whether or not this is proper cross-examination, and so far Mr. March's objection is sustained.

Mr. Cowenhoven—Supposing I submit that to your honor.

The Court—Ask him did you say so and so at such a time in this letter.

Mr. Cowenhoven—That is the very thing I want.

30 Q. Did you say in the letter: "I have been told that as candidate for public office I should not have interfered in this matter"?

Mr. March—I object, on the ground it does not connect him with the—

The Court—It is understood it is about the Curtis matter. Let the judge finish his question.

Q. "I have been told that as candidate for public office I should not have interfered in this matter. I grant that if I were seeking election by fair means or

foul, it would have been better for me to have stood aside and disregarded the open violation of the State's legal statutes"; did you say that?

Mr. March—I object.

A. No, sir; not as I read it.

The Court—Objection sustained. And it is stricken out.

Mr. Cowenhoven—I make the offer to read that and show the motive of the—

Q. In that same statement that was made to Mr. 10
Curtis in his office on the occasion of your going there, did you say, "I am badly run down, I can't sleep, and I cannot enjoy my meals, and not one I have been to has helped me, so I want to know what you can do for me"; did you say that?

A. May I see that copy again?

Q. Yes, you can, it is right there.

A. Yes, if this is my copy.

Q. Is that true?

A. Yes.

Q. You went to him in good faith, then, to ask him for that, didn't you? 20

A. I thought you meant was it true that I said that.

Q. No. I ask you whether the statement that you made to him is true?

A. It had been; yes.

Q. Not had been. Was it true then?

A. No.

Q. Then, you told him an untruth, didn't you, to entrap him? 30

A. No.

Q. If it wasn't true it must have been false? Why not?

A. I didn't say when I had pains, and he didn't ask me.

Q. "I cannot sleep," when, next week, or when I propose to sleep?

A. That is for the doctor to solve.

Q. When you said to him "I can't sleep, I am run down and I cannot enjoy my meals," you were speaking of the then present time, were you not?

A. If he so interprets, that is for him.

Q. But were you not speaking of the then present time?

A. I have answered your question.

Q. Answer it again?

A. If the doctor so interprets.

10

Mr. March—I think he has answered.

Mr. Cowenhoven—Has he, if the Court please?

The Court—If that is his answer it may stand.

Mr. Cowenhoven—What is it?

The Court—If the doctor so interprets.

Mr. Cowenhoven—Do I understand your honor to rule I cannot ask the meaning of those words, "I can't sleep, I am all run down, I have been to others and they can do nothing for me, and I have come to you"—

20

The Court—He has already stated that was not true at the time. He said that because he was trying to find out whether Mr. Curtis was practicing medicine, and he went there as the representative of the Middlesex County Medical Society for that purpose. That these things had occurred to him before, but they were not present at that time, and it was for Mr. Curtis to decide whether or not they were present—

30

Mr. Cowenhoven—And yet when I asked him if that was—

The Court—Direct your questions to the witness.

Q. Then, you say you did not intend the doctor to feel, and to realize, and to think, that you were suffering as you then indicated?

A. Let him interpret it himself.

Q. Did he ask you whether you were a resident of the town?

A. Yes.

Q. What did you say?

A. No.

Q. And were you?

A. Did he say are you a resident of the town?

Highland Park is not a town?

Q. You knew what he meant?

A. No. I answered his question.

Q. You just said, no you were not a resident of the town, although you were a resident of Highland Park, 10 right across from the town?

A. Yes.

Q. That was just about as truthful as you used in the other part?

A. I meant that to be absolutely true.

Q. Now, doctor, you had heard, had you not, of the cures that this man's medicine already had made?

A. No, I can't say that.

Q. And the large practice he had?

A. I can't say that I had at that time. 20

Q. Never heard of it at all?

A. The cures?

Q. Not cures, but the sale of the medicine that he had?

A. Oh, yes, I had heard of the sale of his medicines.

Q. That certainly was an interference in your business to a certain extent?

A. Oh, no, not at all.

Mr. March—Haven't we covered that pretty well? 30

The Court—I think so.

Q. Now, doctor, do you know Mr. Lewis H. Hoagland?

A. Oh, yes.

Q. The druggist?

A. Yes.

Q. Did you, or under your direction was a letter written to him not to sell any of the medicines of Mr. Curtis?

Mr. March—I object.

Q. That it was unprofessional?

Mr. March—I object on the ground it is not proper cross-examination. If he wants to make him his witness, it is not the best evidence.

The Court—It may lay the foundation for contradiction. I do not know.

Q. Do you know of any such letter having been written?

10

Mr. March prays exception.

The Court—Yes. He is entitled to a time and place, however.

Exception allowed. Sealed accordingly.

Judge.

20

Q. Either before the complaint was made or shortly after the complaint was made, do you know whether or not the Medical Society of New Jersey or of Middlesex County directed a letter to be addressed to Lewis H. Hoagland stating it was unprofessional for him to sell those medicines?

A. Yes, it did.

Q. You did know that?

A. Yes.

Q. How long was that before the complaint?

A. I don't remember.

Q. And that letter was written without any knowledge on your part of what his medicines were, was it not?

30

A. Oh, yes.

Q. Now, doctor, when this man was arrested you made the complaint, didn't you, with Dr. MacKenzie?

Mr. Richman—The complaint speaks for itself.

The Court—Doctor MacAlister, Alex MacAlister.

Q. Were you with him when he made the complaint?

A. No.

Q. Were you with him when the arrest was made?

A. With Dr. MacAlister?

Q. No. With the constable?

A. Yes.

Q. Who was with you besides the officer, Mr. Harkins?

A. Dr. Forney.

Q. How did you come to go there? What was the object in going with the constable who had a warrant in his pocket for the man?

Mr. March—I object to this. Not cross-ex- 10
amination.

Mr. Cowhoven—It is to show the animus.

The Court—I will allow it.

Q. Why did you go there, you and Doctor Forney, with the constable to arrest this man?

A. Because I had been the one furnished the evidence.

Q. Well, but the evidence was all furnished and the complaint made and the warrant issued in the hands of the constable. Your object in going with the constable to see the man was arrested? 20

A. I told you.

Q. Because you made the complaint?

A. Yes. No, I didn't make the complaint.

Q. Because you gave the evidence?

A. Yes.

Q. Well, supposing you did, you did not have to give any after his arrest, did you?

A. I didn't know.

Q. What did you go there for? 30

A. Because I had given the evidence.

Q. Well, how could that be any reason for your going? Wasn't it for the purpose of seeing the man humiliated in the custody of the officer?

A. No. Because I wasn't there in the custody of the officer.

Q. Weren't you there at the arrest?

A. No, sir.

Q. Where were you?

A. I was sitting up on the corner of Fourth Avenue and Raritan Avenue.

Q. And where was he?

A. Down in Mr. Curtis' tent.

Q. How far?

A. A block and a half.

Q. You were there for the purpose of seeing that the
10 arrest was made?

A. Oh, no.

Q. What were you doing there?

A. Sitting in an automobile.

Q. Nothing to do? Nothing in connection with the
arrest at all?

A. No, I didn't have anything to do with the arrest.

Q. Just perchance? Do you want us to believe that?

A. I was in Dr. Forney's automobile.

Q. Well, you and Dr. Forney—didn't you know that
20 the arrest was going to take place at that time?

A. Yes.

Q. You knew the officer was going to make the arrest
at that time?

A. Yes.

Q. You and Forney were in an automobile along the
road in order to have Mr. Curtis locked up, to see him
arrested, didn't you?

A. No.

Q. What did you go there for then?

30 A. I told you just now.

Q. Because you had given the evidence?

A. Yes.

Q. Did you propose to give any more evidence there?

A. I didn't know whether I would have to or not.

Q. Wasn't it just as I said before, for the purpose of
humiliating that man?

A. Not at all.

Q. Have you any reasons for giving it?

A. No.

Mr. Cowenhoven—That is all.

Redirect examination, by Mr. March.

Q. This is the statement I believe you identified?

A. Yes, sir.

Mr. March—We offer that in evidence.

Mr. Cowenhoven—It is not in evidence.

Mr. March—We offer it in evidence.

Mr. Cowenhoven—I object to it.

10

The Court—You cannot offer it in evidence.

Mr. March—Prays exception.

Exception allowed. Sealed accordingly.

Judge.

Mr. March—That is all.

The Court—The doctor has testified as to the contents of the statement. Counsel cross-examined him and directed him to produce the statement and he produced it and read it. Judge 20 Cowenhoven, as cross-examiner, could have offered it in evidence if he wanted to, but he merely used it to refresh his recollection in regard to it. He did not use it. You cannot offer it in evidence.

Mr. March—We have not any complaint to make to the ruling of the Court.

By Mr. Cowenhoven.

Q. Did you see any sign in the office or anywhere 30 about the place of Doctor Curtis on his premises?

A. Do you mean those words, sir?

Q. Yes, doctor—

A. Not in his—

Q. Anywhere about the place?

A. No, sir.

Mr. Cowenhoven—That is all.

Norman Nes Forney, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination, by Mr. March.

Mr. March—That bottle Dr. Nafey testified to is in evidence.

The Court—It is not offered.

Mr. March—We offered that bottle that Dr. Nafey produced.

10 The Court—Any objection to it?

Mr. Reynolds—That is the complete package?

The Court—I do not know how complete it is. I never saw it before to-day. It is a package with a bottle inside of it, wrapped around in a cardboard carton and a circular. Go on with your examination now.

Q. You are a practicing physician in the County of Middlesex?

A. I am.

20 Q. Located where?

A. Milltown.

Q. What was your medical training?

A. I went to Jefferson College, in Philadelphia.

Q. What other medical training?

A. That was all.

Q. How long have you been practicing in Middlesex County?

A. Thirteen years.

30 Q. Are you a member of the Middlesex County Medical Society?

A. I am.

Q. Do you hold any office?

A. I am president.

Q. And as such what did you and Doctor Nafey do, if anything, in reference to this case?

A. Why, we investigated it for the State Board of Medical Examiners.

Q. Did you ever see Doctor Curtis?

A. I saw him twice.

Q. And what was the first time you saw him?

A. On September 18th.

Q. Of what year?

A. 1919.

Q. And was anyone with you?

A. Doctor Nafey was with me.

Q. And what time of the day was it?

A. 3:30 in the afternoon.

Q. And was that the day that Dr. Nafey has testified to?

10

A. That is the date.

Q. Just tell the Court and jury what took place on that afternoon, namely, September 18th, 1919?

A. Dr. Nafey and I went into Dr. Curtis' tent; we waited on the outside.

Q. Whereabouts was the tent?

A. It was on Raritan Avenue, Highland Park. I don't remember the name or number of the other street. Dr. Nafey and I went to Dr. Curtis' tent; we waited outside for a little while because there were people there inside of the tent, and we could not see him. We both went into his back room, his back tent, and he shook hands with me and asked me how I was. And I said I had a bad cold. I said I didn't come for myself, I came for this gentleman who was with me. And then he asked us to be seated, and Dr. Nafey described his symptoms, told him he had, ever since he had gotten out of the army, he complained of being tired and run down, and complained of belching of gas; and Dr. Curtis asked him if he was constipated, and he said, yes, at times. He asked him if it was necessary to use cathartics, and he said yes. Then he said, "You have too much acid in your stomach." He asked him if he had ever vomited, and Dr. Nafey said yes. And then he said, "Ah, that changes the case; you have an ulcer of your stomach." Then Mr. Curtis said he should not eat any meat; he should not take any vinegar and no sugar. He said that meat rotted in his stomach, and vinegar created acid, and since his stomach was too acid he did not want

20

30

to put any more in it, and that sugar turned into acid in his stomach.

By the Court.

Q. Would that all be pretty good as medical facts?

A. Some of it is, but some of it is not. Then Dr. Nafey said it was all right to tell him what the trouble was with him, but what could he do for him. And then he asked him if he had been to any of his lectures at night, and he said no. Then he said, "Well, we have a Sacred Bark compound here," and he said, "I want you to take a teaspoonful of baking soda in a large glass of water." He had the teaspoon and the baking soda and the glass there and explained it. And then he was to take a tablespoonful of Curtis' Sacred Bark Compound after meals three times a day. Then Dr. Nafey asked him if he wanted to see him again, and he said yes, he should come back, he thought he would be there until the last of next week. Then Doctor Nafey asked him how much he owed him, and he said \$1.00. Then we were ushered out.

By the Court.

Q. Was that the bottle?

A. This is the bottle.

Q. The one in the cardboard box?

A. Yes.

By Mr. March.

30 Q. Was there anyone else there at the time you were there?

A. Do you mean in the tent?

Q. Yes, other people?

A. We saw some in the back tent. There were two or three tents there. There was some lady in the back tent. I don't know who that was.

Q. Do you know what Sacred Bark means in the Medical World?

A. Sacred Bark is a synonym for cascara.

Q. If anyone takes cascara or Sacred Bark to any extent what would be the result?

Mr. Cowenhoven—I object.

The Court—Objection sustained. The point of this case is practicing without a license.

Q. How often did you say he said to take Sacred Bark?

A. Three times a day.

Q. Did he say before meals or after meals, or when? **16**

A. He said after meals.

Q. And how often—was it baking soda?

A. Yes, baking soda.

Q. How often was he to take that?

A. Three times a day, also before meals.

Q. Was there anything said as to what the result would be from taking those?

A. He said that would build his general system.

Mr. March—That is all, Doctor. Cross-examine.

20

Cross-examination, by Mr. Cowenhoven.

Q. You went over there in pursuance of the resolution that was passed by the Medical Society, did you?

A. Yes, sir.

Q. When?

A. I went there on September 18th.

Q. When was the resolution passed?

A. I don't remember when it was passed.

Q. Why not?

A. Well, I am not Secretary of the Society. I am President.

30

Q. When did you first hear of the resolution?

A. I don't remember when I heard the resolution. It is down in the minutes of the Society.

Q. You went over there on the 18th of September, didn't you?

A. Yes, sir.

Q. That is just hardly two months ago—September, October. November?

A. That is right.

Q. Do you tell me you can't remember now when you first heard of that resolution?

A. No, I don't remember when we first passed the resolution, at which meeting it was.

Q. About how long was it before you went over there that the resolution was passed? About how long? Was
10 it three months or six months or one week?

A. I don't remember how long it was.

Q. Is your memory good, Doctor?

A. My memory is very good.

Q. Doctors are required to have good memories for prescriptions and so forth. How is it you can't remember now such an important function? It was out of the ordinary of your business of attending to these things, wasn't it? This was out of the ordinary run of your business?

20 A. Yes.

Q. How is it that the fact was not impressed upon your mind? If I were called upon to fix it I would be very much—

A. The reason I remember the date was because it was on top of this bottle and because also I made a signed statement at the time.

Q. What?

A. It is because the date is on top of this bottle, because I remember the date, and also because I made a
30 signed statement at that time and sent it to the State Board of Medical Examiners.

Q. Now, Doctor, is not this the facts that the Medical Society had heard—by whom or through what means I do not know—of Mr. Curtis selling medicine around here; and the Medical Society believed that he was practicing medicine?

A. That is right.

Q. And was getting to the public a medicine for ailments?

A. Yes.

Q. And they deemed it their duty to interfere with that and see that the law was enforced, that was really the object?

A. That is true.

Q. Then there was a committee appointed and that was brought to the attention of the society. Now, I want to ask you how long before you started on your tour of investigation was it that that resolution was passed that that investigation should be made?

10

A. I don't remember, judge.

By the Court.

Q. He means was it a few days or was it a long time, doctor?

A. Well, I imagine it was some time before.

Q. Do you mean a week or ten days or two or three months?

A. I don't remember. It is down on the minutes, but it has passed out of my mind now because I didn't pay any particular attention to it at that time.

20

By Mr. Cowenhoven.

Q. Didn't you feel it your duty, the moment the resolution was passed, and this was an important matter, something important called to the attention of the society, that the investigation should be made at once?

A. The matter was reported to the State Board of Examiners along in the early summer, and by letter from me, and the State Board of Medical Examiners did not acknowledge it until sometime before we investigated.

30

Q. That is the only reason you can remember, you can't say whether it was a month or two months?

A. No, I can't remember.

Q. If you thought it was a matter of sufficient importance as the society did, don't you think you could say if it was within a week or two weeks or three weeks that you made this investigation?

A. I can't say, because I wrote to the State Board of Medical Examiners on two separate occasions during the early part of the summer.

Q. Had this man been down in your vicinity yet?

A. No.

Q. Mr. Curtis at that time?

A. No.

Q. He has been there, hasn't he?

A. No, he has not been in Milltown.

10 Q. Or near Milltown?

A. I am in Milltown.

Q. Hasn't he been near Milltown?

A. No, he has not been in Milltown.

Q. Not at Milltown, but in the immediate vicinity?

A. He has been in New Brunswick, he has been in Highland Park, he has been in South River. I don't know where he is now.

Q. That is not many leagues from Milltown, is it?

A. It is about as many as New Brunswick.

20 Q. About four miles, isn't it?

A. Something like that.

Q. Then he was really within your territory? You practice within that territory, don't you?

A. Well, he is not within my territory in New Brunswick any more than he is South River.

Q. I am speaking where you practice. I would not call you a practitioner in New Brunswick; I would call you a practitioner in Milltown?

A. Yes.

30 Q. You ought to be proud of Milltown, and Milltown ought to be proud of you?

A. We are.

Q. I say, doctor, he did practice at South River and New Brunswick?

A. Yes.

Q. All within a comparatively short distance of your bailiwick?

A. Yes.

Q. He then went over the river and it was the time he went over the river where Doctor Nafey lives that this investigation took place, wasn't it?

A. Yes.

Q. And for all the summer months previous to that time, notwithstanding the resolution of the Medical Society, whenever it was passed, no investigation was had?

A. Well, we wrote to the State Board of Medical Examiners regarding it.

10

Q. Yes, but that is not quite answering my question. Just read that question now.

Question repeated by stenographer.

A. It was up to the State Board of Medical Examiners to investigate.

Q. Any investigation on your part?

A. No.

Q. But as soon as he struck Doctor Nafey's then the investigation commenced, didn't it?

A. That is true.

20

Q. Of course, that was a mere matter of chance, wasn't it?

A. (No answer.)

Q. When you went to Mr. Curtis' place of business it was a large tent, wasn't it?

A. Yes.

Q. Did you know the fact that they had an exhibition at night and sold various articles?

A. I understood so; I had never been there.

Q. You have no personal knowledge of that fact?

30

A. No.

Q. Now, Doctor, when you went there in the afternoon of that day, did you wait long outside?

A. Why, I think we waited in the neighborhood of a half an hour, probably.

Q. A half an hour?

A. Something like that.

Q. And people were constantly going in and coming out?

A. I can't say that they were constantly going in and coming out.

Q. Not constantly but quite a number?

A. Yes, there were a few of them went in.

Q. When you went in you found the doctor sitting at a table?

A. No. He came to greet us, as we went in he came towards us.

Q. Had you ever had the pleasure of meeting him
10 before?

A. No, I never met him before.

Q. Then what occurred?

A. Then he shook hands with us and asked us to sit down.

Q. You shook hands with him?

A. Yes.

Q. And you were there to entrap him, but you greeted him cordially?

A. Yes.

Q. There was no dissembling there? You greeted
20 him cordially as a friend?

A. Yes, surely.

Q. You greeted him kindly and he greeted you?

A. Yes.

Q. And you went there for the purpose of entrapping him, didn't you?

A. I went to see if he was practicing medicine.

Q. And then you were to have him arrested if it was true. Now, then, Doctor, after the cordial greetings
30 between the three gentlemen, what was said?

A. Then he said to me, he said, "How are you?" and I said, "I am all right, but I have a cold"; I said, "This gentleman has come to see you."

Q. Did you have a cold?

A. Oh, yes, I had hay fever. I suffer very badly from that every year.

Q. Your personal appearance would hardly indicate that, would it?

A. Well, I go away every year; that is the reason; I happened to be home at just that particular time.

Q. Did you go there for treatment for that cold?

A. No.

Q. Then you merely told him you had a cold without any idea of his treating it?

A. Yes; I didn't expect it.

Q. You were not going to entrap him in anything he said to you?

A. No.

10

Q. You said you didn't come there for that purpose, but you had your friend?

A. Yes.

Q. Who was a doctor?

A. Yes.

Q. And you know of the Scriptural command, "Physician, heal thyself"; didn't it occur to you if this man was a doctor he might heal himself? That didn't occur to you, did it?

A. No.

20

Q. You told him you were his friend. Now, what was said?

A. Then he said—then Dr. Nafey said to him, "I have—I feel tired and run down for a long time, and I have a lot of belching of gas," and he said sometimes—then he said, "I am constipated." And then he said, "How are your bowels?" and he said—no, he asked him if it was necessary to use cathartics, and he said, "Yes, sometimes." And then said, "You have too much acid in your stomach." And then Dr. Nafey said, "Sometimes I vomit." And then he said, "You have an ulcer of your stomach."

30

Q. Now, Doctor, as a matter of fact, did not Dr. Nafey say that, he spoke of the nerve, the pneumogastric nerve himself, and not Mr. Curtis at all?

A. No. Mr. Curtis mentioned the pneumogastric nerve.

Q. Was that before he gave the medicine at all?

A. That was before he gave the medicine.

Q. He talked to him? As a general thing do doctors ever use proprietary medicines, you have heard of proprietary medicines?

A. Yes.

Q. Do doctors, as a matter of fact, ever use proprietary medicines at all?

A. I don't know what the other men do, but I don't.

Q. It is common practice for them to do it, isn't it, as, for instance, we will take jamaica ginger, for instance?

10 A. Yes.

Q. Quite in common use now, since prohibition. But they sometimes prescribe it, don't they?

A. Yes, sometimes.

Q. And castor oil is a common remedy, what children cry for, and they call castoria?

A. Yes.

Q. All those things are used. Now, if a man should go to a man who had a proprietary medicine and should ask him what his feelings were and say here, this bottle
20 will help you, it has helped others and will help you, would you call that prescribing or diagnosing?

A. Surely, he is prescribing.

Mr. March—That is for the jury to decide upon the evidence.

The Court—Yes. Are you trying to test this witness' knowledge or do you want his opinion as to what practicing medicine is?

Mr. Cowenhoven—This man is accused of practicing medicine and holding himself out as a
30 physician.

The Court—He did not hold himself out as a physician at all.

Mr. Cowenhoven—Yes, holding himself as being able to diagnose, to treat, prescribe, advise. That is the very language of the complaint.

Mr. March—But, if your honor please, it is not for Dr. Forney—

Mr. Cowenhoven—Am I not right?

The Court—Go on. What is your point?

Mr. Cowenhoven—My point was to answer your question. Now, my point is this: That it is alleged here that these two gentlemen went to the place of Mr. Curtis and they told their symptoms, and he inquired about them, and in the use by physicians of proprietary medicines they might say take such a medicine, I think it will do you good. That would not be holding himself out as a physician, or practicing as a physician. It would be something for the sale of that proprietary medicine. That is my point. We do not hesitate to say that we sold a proprietary medicine, and that we told the people that came there, it has done others good and it may do you good; but we never prescribed. And that is the very thought that I am trying to follow out with this gentleman. 10

The Court—I understand, but how can Dr. Forney's opinion—

Q. You would call that prescribing? 20

A. Surely.

Mr. March—I object to any questions along this line on the ground that we are not here to have Dr. Forney's opinion of the law. He has to put in the facts, and it is for the jury.

The Court—No question about that.

Mr. Cowenhoven—He is placed upon the witness stand as a physician and I am asking him whether or not they do not use, sometimes, proprietary medicines, and whether these questions would not be primary before they directed the use of this proprietary medicine. 30

The Court—He says he does not use proprietary medicine but some doctors do.

Mr. Cowenhoven—And we all know they do.

The Court—And then you asked him about Jamaica ginger and castor oil or castoria, and so on. Now, you are asking him if he regards the doing of a certain thing as prescribing, and he

answered that before objection was made. Now, what is your next question?

Q. My next question is this: In the event of a person accosting another one and telling him of some ailment that he had, that he would suggest trying the use of some proprietary medicine, for instance, of castor oil, who was not a physician, would you call that a diagnosing or prescribing for that person?

Mr. March—I object.

10

The Court—Objection sustained.

Mr. March—I put on this witness as a witness—

The Court—I am ruling in your favor.

Mr. March—I know it. I want to call his attention to the fact that I put this witness on the stand as a witness as to fact. I only asked him one question, which was objected to, and that is in reference to a medical treatment, which was objected to, and your objection was sustained. So he is only on the stand as a witness on the facts.

20

Mr. Cowenhoven—I am perfectly satisfied with the witness. I ask for an exception to that ruling.

The Court—Yes.

Exception allowed. Sealed accordingly.

Judge.

Q. When did he pay the money?

30

A. He paid the money after he received the medicine.

Q. Did he ask how he should take that medicine?

A. Yes, he asked how he should take it.

Q. Did Mr. Curtis say the directions are on the bottle?

A. He said that.

Q. He did say that?

A. Yes.

Q. Did you hear Dr. Nafey's testimony?

A. I heard it; yes, sir.

Q. Did Dr. Nafey say that he did not say the directions were on the bottle?

A. I think he said both.

Q. You are quite certain about that?

A. He told him to take it three times a day after meals—a tablespoonful.

Q. Did he not say the directions were on the bottle?

A. Yes, he told him the directions were on the bottle, too.

Q. Then Dr. Nafey was mistaken in that part, wasn't he? **10**

The Court—Objection sustained.

Q. Did he not after Dr. Nafey had given to Mr. Curtis the symptoms of his trouble, did Mr. Curtis not say to you I have here the Sacred Bark, it may build you up, it may do you good, and didn't he say well I will take a bottle anyhow, and he took the bottle and gave him the money for it and then asked him for the directions?

Mr. March—I object on the ground he has already stated— **20**

The Court—Objection overruled.

Question repeated by stenographer.

A. No. It will build you up.

Q. You are sure that he used the word "will"?

A. Absolutely.

Q. It will build you?

A. It will build you up.

Q. After he had told him his trouble?

A. Yes. **30**

Q. And you can't be mistaken about that?

A. No.

Q. You have got a good memory on that?

A. I made a signed statement.

Q. Did you sign that statement there?

A. No, I didn't sign that one. I made a statement of like language.

Q. Have you got that, too?

A. I don't have it with me. It may be there.

Mr. Cowenhoven—If you have that statement I would like to have it. Why do you keep it back?

Paper produced.

Q. Just look at your statement and see, sir.

The Court—The witness did not say that he needed any memorandum to refresh his recollection. You cannot compel a witness to turn to a memorandum if he does not need it.

10

Mr. Cowenhoven—He says the reason why because he made a memorandum.

The Court—That was on your call of producing it. Before there was no occasion for it.

A. There is nothing here about whether he would or not. Whether he may take it or will or what the words were. Here it is he said he would take it.

Q. Then there is nothing in this statement to say that it will build you up?

20

A. No. There is nothing in there.

Q. Then you were mistaken about that, are you?

A. Yes. It may be in Dr. Nafey's statement.

Mr. Cowenhoven—That is all, Doctor.

Redirect examination, by Mr. March.

Q. What do you mean that you are mistaken; do you mean to say what you have sworn to was not true?

A. No, no.

Q. What do you mean then?

30

The Court—That the statement it will build you up was in his statement, was in Dr. Forney's statement.

A. That is all. It may be in Dr. Nafey's statement, but the statement was made.

Q. You are satisfied that he so stated?

A. Absolutely.

Recross-examination, by Mr. Cowenhoven.

Q. If you wrote down exactly what took place, why would not it appear in this statement?

A. I didn't note down what took place in minute detail. I made a written statement. I remember that he said it will build you up.

Q. But how did you come to leave that out in your written account of what took place?

A. Well, there may be some other small details left out of the account also.

10

Q. We will determine whether that is small or not. How soon after this interview did you make this statement, that very afternoon?

A. Yes, we made it about twenty minutes afterwards.

Q. Then it was right fresh in your mind?

A. Yes.

Q. Don't you think, when you wanted him to say—you wanted him to say, to find out whether he would practice medicine, you take this medicine and it will build you up, didn't you, and you left out the word "will." Now, if he had said will, wouldn't you have put the will in?

20

A. Yes, but I didn't put that down. There are lots of things I didn't put down.

Q. That is one of the important things. How did you come to leave that out, doctor? That is all. If you can't explain it, that is all.

Ernest Little, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination, by Mr. March.

Q. What is your full name?

A. Ernest Little.

Q. Are you connected with Rutgers College?

A. Yes.

Q. In what capacity?

A. Assistant Professor of Chemistry.

Q. What is your address?

A. 21 Lufberry Street, New Brunswick.

Q. Where is Lufberry Street?

A. That is in the Government Tract.

Q. You are a chemist, are you?

A. Yes.

Q. What has been your preliminary education?

A. I have had five years' study of chemistry at the University of Rochester and two years at Columbia
10 University. I have three degrees.

Q. Do you teach chemistry in Rutgers College?

A. Yes.

Q. Were you handed anything by Doctor Nafey?

A. I was handed a bottle of Mr. Curtis' medicine.

Q. Is this the package?

A. This is the package.

Q. How do you identify it?

A. I identify it by the inscription on the top.

20 By the Court.

Q. Did you empty out the contents of that bottle?

A. No. It has not been emptied except as it was
needed for analysis.

Q. I mean did you empty it for that purpose?

A. Yes.

By Mr. March.

Q. What did your analysis show that that bottle contained, or that medicine contained, or fluid contained?

30 A. This bottle (indicating)?

Q. Yes, sir.

Mr. Cowenhoven—I object to that question.

The Court—How is it material?

Mr. Cowenhoven—How is that relevant or material or competent in this cause? He is charged with—

The Court—How is it competent, Mr. March?

Mr. March—We are going to prove that it is medicine. It is also an element in the case, it

strikes me—you take the object of the act is to protect the public, and we show what is in that bottle, it is medicine, it shows the harm that it does to the people that take it and it strikes us that it is an element in the case, and also the fact—

Mr. Cowenhoven—Is that fair to go before the jury?

The Court—Yes, he can argue his point, certainly. 10

Mr. March—Also the fact they call it Sacred Bark, and Sacred Bark—

The Court—I do not think it is very complimentary, this matter of excluding juries from the room. I think they are intelligent gentlemen, and I have never done it.

Mr. Cowenhoven—I did not ask for the exclusion.

Mr. March—The fact that it is called Sacred Bark, which is another name in the medical world for cascara, is an element we think in the case to show that there is an intention to defraud and to deceive the public by attempting to sell them something which they claim to be medicine, which they claim to have some medical properties, or which they claim has some sacred remedy, and that is why we consider it is an element in the case. 20

The Court—No. If he did not have a license to practice medicine, and had given them water sweetened with sugar and told them that that was a cure for appendicitis or pneumonia, for instance, don't you think it would be a violation of the statute? 30

Mr. March—I certainly do, and I think it would be more of a violation when he gives them drugs.

The Court—No. I cannot see it.

Mr. March—Especially a drug that they called Sacred Bark.

Mr. Cowenhoven—It is not fair to do this. It is purely illegal and wrong.

Mr. Richman—The complaint is that he did practice and prescribe for the same by means of medicine. We are entitled to show that is a medicine, under our complaint.

10

The Court—Is medicine used in the technical term in the statute in that respect? Does not it say he did practice medicine in the sense that he undertook to treat persons and cure them? Is not medicine used in the broader term in the sense of the practice of medicine? Suppose a man, for instance, I went to a doctor— and some schools believe in this—and I went to the doctor and he made an examination of me and diagnosed my case and said, but you don't need any medicine, what you need is to get out into the country, get behind a team of horses and go out in the fields where the fresh air is and pitch hay, you need more exercise, not athletic training, and plain country food, can be practicing medicine within the meaning of the statute, even though he did not give him any drug or compound?

20

Mr. Richman—I think that is true.

30

The Court—In other words, in order to show that a man practiced medicine have you got to show that he prescribed and gave medicine in a technical sense?

Mr. Richman—When we allege that he prescribed medicine, in the complaint, that is a part of our case. A mere diagnosis is practicing medicine.

The Court—I think so.

Mr. Richman—It does not take any one element, but all of the elements may enter into one case. That we allege in our complaint.

Mr. Cowenhoven—If he gave him a dose of castor oil, and it was perfectly proper, if he were not a doctor he was practicing medicine.

The Court—I do not see the word “medicine” in your complaint (reading),

Mr. Richman—Unless they admit that is the medicine which he sold, certainly we are entitled to show that it is.

The Court—I would tell the jury that that language there does not mean medicine in the technical sense. That the answer would be if he had given him distilled water in a bottle, colored with currant jelly, and said this is a valuable medicine, he would be violating the statute, wouldn't he? **10**

Mr. Richman—Yes, he would. But it seems to me that when we allege that he does a thing by the means of something else we are entitled to show what that means is.

The Court—You already have shown that it was cascara, that Sacred Bark was cascara. **20**

Mr. Richman—Our testimony shows that there is cascara in it, but there are other ingredients in that bottle.

The Court—I do not see the materiality of it, Mr. Richman.

Mr. Richman—I do not see how we can escape from it when it is in the complaint.

Mr. Cowenhoven—But it is not in the complaint. **30**

The Court—You claim that he diagnosed his case, don't you, as ulcers of the stomach, and gave him something—

Mr. Richman—He did for one patient, yes.

The Court—And gave him something to take.

Mr. Richman—You see we are dealing with a term “practice.” It does not necessarily mean one thing. It may mean others. It may mean

he diagnosed, it may mean he treats, it may mean he prescribes.

The Court—But you claim this was prescribing.

Mr. Richman—We claim this was prescribing a medicine.

The Court—How does it matter under the statute what he prescribed? Suppose he prescribed for bread pills, or sweetened water?

10

Mr. Cowenhoven—Sure.

Mr. Richman—Only insofar as the complaint itself says that he did prescribe by means of medicine.

20

The Court—By means of a medicine. I think that means by means of a medicine, that is, he gave him something to take. I think it is the broad rather than the narrow term, he gave him something to take, and, therefore, violated the statute. He diagnosed his case, as you say, as ulcers of the stomach and gave him something to take. Do you think he could escape by showing that it was not a medicine, that it was just sweetened water or bread pills?

30

Mr. Richman—No. I do not think he could because as I have said before he practices medicine if he merely diagnoses. I do not think that the State must be forced to one part of the dilemma, namely, the mere proof of diagnosis. We are entitled to go to the extent we can prove that he prescribed and what he prescribed.

Mr. Cowenhoven—Will your Honor hear me for a moment?

The Court—Certainly.

Mr. Cowenhoven—Here they propose to show by an analysis of this compound that it is deleterious, do you understand, that is the object. I say that they cannot do that, unless they have opened that door in the first place, and I will

show your Honor, as your Honor has already intimated, that it is clearly illegal testimony; but if they open the door that they want to show that that medicine is deleterious, we will prove by 1,000 witnesses that it has been absolutely beneficial.

Mr. Richman—He proved that.

Mr. Cowenhoven—Shall we open the door? But that is not the point. The point is, is he practicing medicine, whether he gave sugar and water or whether he gave castor oil, or whether he gave Sacred Bark. The question is did he prescribe, did he diagnose, and did he give medicine without any regard to its effect at all? Is not that so? **10**

The Court—I think so.

Mr. Cowenhoven—Undoubtedly. And I renew my objection. It must be so.

The Court—How do you think it is important? **20**

Mr. Richman—It is important in this way; we cannot be foreclosed upon mere proof of diagnosis. We are entitled to come in here and show what he prescribed.

The Court—You have shown that he prescribed—

Mr. Richman—We are entitled to show that the man prescribes medicine which the patient takes at his direction and at his prescription, and we are entitled to show what ingredients are in that medicine, it seems to me. That is the means whereby he practiced medicine in violation of this statute and we are certainly entitled to go to the full extent to show just what he did, namely, the delivery of that medicine to the patient and what it was. Absolutely. **30**

The Court—I think you are taking great risks with your case, if I should rule in your favor against Judge Cowenhoven's objection I think

10 you would be taking great risks with your case. Nevertheless, if you wish to trust it, in view of the fact that the complaint says "by means of a medicine the ingredients of which are unknown to your deponent," and you are trying these cases all the time, and if you insist that it is important, I will allow it to you and allow Judge Cowenhoven a very broad exception on it. Because I do not wish to preclude you on your case, but I think you are taking great risks on it. I do not think the medicine is used in that narrow sense in the statute at all.

Mr. Cowenhoven—I have got I don't know how many authorities, but I did not think that that matter would be urged, to show it was immaterial whether the medicine was beneficial or deleterious; the question was, did he practice medicine, decision after decision. I thought I had one right here.

20 The Court—There is no question about it. It is not necessary to show it was deleterious or otherwise. It might have been the very cure which the most expert physician in the world would use and yet he could not prescribe it unless he was a licensed physician under the statute. I will sustain the objection.

Mr. March—Prays exception.

The Court—Note an exception.

Exception allowed—sealed accordingly.

30

Judge.

George C. Bedford, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination, by Mr. March.

Q. Where do you live, officer?

A. 504 Magnolia Street, corner of Fifth Avenue.

Q. You are the Chief of Police of Highland Park?

A. Yes, sir.

Q. You you know Dr. Curtis?

A. I do; yes, sir.

Q. What relations, if any, did you have with him?

A. Mostly of business, and in a friendly way.

Q. What was the nature of your business relations?

A. I had charge of the grounds which he leased; I also, in connection with my office, had the right to issue permits for the showing of all kinds of performances 10 and things of that sort.

Q. Did you lease him the ground in Highland Park?

A. I did; yes, sir.

Q. And for how long was he there?

A. Four weeks and three days, if I remember correctly.

Q. And during what period was it; what four weeks was it?

A. I can't exactly tell, as I have no records, but it runs in my mind it was either the first or second week 20 in September. It was on a Thursday night when he gave his first performance and it was four days and three weeks exactly from the time—I mean, yes, four weeks and three days.

Q. It runs in your mind when?

A. It runs in my mind it was either the first or second week of September. It was on a Thursday night, at least.

Q. It might have been the first week in September, as far as you know? 30

A. Well, without looking at my records.

Mr. March—That is all.

Cross-examination, by Mr. Cowenhoven.

Q. It might have been the first, he says, and it might have been the second?

A. I tell you he—

Q. Answer the question?

A. What is that?

Q. You said it might have been the first week in September?

A. Might have been the first week or the second.

Q. You can't tell exactly you say when it was?

A. Without looking at my record.

Q. Have you got any record there?

A. Not here offhand.

Q. Were you told to bring your record here?

A. I was not told to; no, sir.

10 Q. You can't tell whether it was—when it was exactly; it might have been in the first week in September?

A. Yes.

Q. It might have been in the third week in September, might it not?

A. No, sir?

Q. Why not?

A. Because it was either the first or second week; it was around the eleventh.

20 Q. Didn't you say it might have been in the third week in September?

A. I said the first or second week.

The Court—How is it all material?

Mr. Cowenhoven—I suppose the date of the complaint, that is, of the twentieth of September. That is the materiality of it.

Mr. March—On the question of the date, that is all.

Q. Do you know anything about it at all? You have an impression in your mind?

30 A. All I know I leased him the ground.

Q. How do you know it was not in the fourth week in September?

A. He was to come on Monday and didn't come until Thursday.

Q. Might he come the following Monday, then?

A. No. It was either the first or second week in September.

Q. How can you say it was not the fourth week in September?

The Court—You are wasting a great deal of time.

A. Because I know he was there four weeks and three days. I signed the receipts.

Redirect examination, by Mr. March.

Q. Did you get any medicine from the doctor?

A. I believe there is some around the house, yes.

Q. Did you buy it?

A. No. It was given to me, what I had. My folks 10
bought some of it, I believe.

Q. You didn't go there for treatment?

A. No, sir; just merely on business to collect rents.

Recross-examination, by Mr. Cowenhoven.

Q. You didn't take any medicine, did you? You are perfectly well?

A. Fairly so, yes.

Rose Malouf, a witness produced on behalf of the 20
plaintiff, being duly sworn according to law, on her
oath saith:

Direct examination, by Mr. March.

Q. Where do you live?

A. New Brunswick.

Q. Whereabouts?

A. 141 Albany Street.

Q. Do you know Doctor Curtis?

A. I do.

Q. Did you ever go to him for treatment, or secure 30
any of his medicines?

A. Yes, I got some of his medicine.

Q. Whereabouts did you go to him, in New Bruns-
wick or Highland Park or where?

A. On Livingstone Avenue.

Q. And about when was this?

A. Sometime during July.

Q. Of 1919?

A. Yes, 1919.

Q. What did he say to you, if anything?

Mr. Reynolds—I object to this.

The Court—Why?

Mr. Reynolds—For the simple reason that there must be a limit to the time of this action. First the time is set for August and September. We are not going to spread this over the period of a decade or a generation. She says she was there in July. I say it is outside of the complain and therefore cannot be offered.

10

The Court—Objection overruled. Time is not essential, not in a civil case.

Mr. Reynolds—It is a penal action.

The Court—It is material. I will allow it.

Mr. Reynolds—Prays exception.

The Court—Note an exception.

Exception allowed. Sealed accordingly.

Judge.

20 Q. What did he say to you, if anything?

A. Why, I went up there with my mother and he asked me what was the matter with me and I told him. And he wanted to know if I had any proof. And I said yes. And so the first time that I went there I didn't take any medicine, but the second time I went up I took a dose of medicine right there.

Q. He gave it to you?

A. Yes.

30 By the Court.

Q. What did you tell him?

A. Well, I told him what was the matter with me.

By Mr. March.

Q. Did he prescribe for you then?

A. Yes.

Q. He gave you medicine?

A. Yes.

Q. What did he do when he gave you the medicine?

A. Why he didn't say anything.

Q. Did he say anything as to what effect it would have on you?

A. No, not that I can remember.

Q. Didn't it have any effect on you?

A. It did. It did me a lot of good.

Q. Did you pay him for the medicine?

A. No.

Q. Did he ask you for any pay?

10

A. He didn't.

Q. Did you ask him if you owed him anything?

A. I don't remember.

Q. How many doses of his medicine did you take?

A. Only about one dose.

Q. And you are cured entirely of your trouble in that one dose?

A. Yes.

Cross-examination, by Mr. Cowenhoven.

20

Q. And you have continued well ever since?

A. Yes, I am fine. I gained several pounds.

Q. If you get sick you will take it again, won't you?

A. You bet I will.

Helen Voorhees, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath saith:

Direct examination, by Mr. March.

Q. Where do you live?

30

A. 154 Delevan Street.

Q. You are the wife of—

A. Mr. John Voorhees.

Q. Do you know Dr. Hal Curtis?

A. Yes, sir.

Q. When did you first see him?

A. When he was on Livingstone Avenue.

Q. Did you go to see him?

A. Well, I used to go there every night to hear what he had to say.

Q. Did you ever buy any of his medicine?

A. No.

Q. Did you ever go there to consult with him?

A. I took my boy there.

Q. When?

A. About the last of June.

Q. And what was the trouble with your boy?

10 A. He had sore eyes.

D. Did you show them to the doctor?

A. No. I just told him—

Q. Well, you took your boy with you, did you not?

A. Yes.

Mr. Reynolds—I make the same objection that I did heretofore, the witness testified this was in June. The complaint alleges a violation in August and September. I therefore say that—

20 The Court—I think you are getting a little remote. I think there must be some limit, Mr. March.

Mr. Reynolds—The evidence is incompetent because it does not contemplate the time set forth in the question.

Mr. March—We will withdraw the witness.

Mr. Reynolds—Does that apply to the other witness? All right.

The Court—I do not think that the other witness—

30

By Mr. Cowenhoven.

Q. Did you ever go there in September?

A. No, sir.

Q. Or August?

A. No, sir.

Mr. March—We rest.

Mr. Cowenhoven—It was our intention to move for a direction of a verdict.

The Court—Do you rest your case now?

Mr. Cowenhoven—No, sir. I was going to ask for a motion to direct a verdict.

The Court—You cannot ask for a motion to direct a verdict until you rest your case.

Mr. Cowenhoven—I said I was about to, but I have not asked for it yet. It was about to remark, I was about to ask for a direction of verdict, resting my case, do you understand, but under the circumstances we feel that Mr. Curtis 10 should have the opportunity of going upon the witness stand and declaring to this Court and this jury his defense; and our defense is a complete and absolute denial that we ever, under any circumstances, diagnosed, prescribed, treated, or in any manner in the language as indicated by the statute and as charged in the indictment. We will show you that this gentleman has traveled all over the United States of America, in every State nearly there is a law similar to our own. 20 That he has sold his compound or his medicine—

Mr. March—Has that any bearing?

The Court—Not the slightest in the world.

You will not be permitted to show that, Judge.

Mr. Cowenhoven opens the case for the defendant.

DEFENDANT'S CASE.

Hal A. Curtis, the defendant being duly sworn according to law, on his oath saith:

30

Direct examination, by Mr. Cowenhoven.

Q. Where do you live, sir?

A. Glenville, California.

Q. And how long have you lived there, Mr. Curtis?

A. Since the San Francisco fire.

Q. And what is your business?

A. I am salesman.

Q. Salesman of what?

A. Of medicine.

Q. Have you carried on your business in the City of New Brunswick, in the County of Middlesex and State of New Jersey?

A. I have.

Q. When did you come here this last period?

A. I have a card there stating the date. Right on the back.

Mr. March—I object to the use of the card.

10

The Court—Is it necessary to use the card to refresh your recollection?

A. Yes.

The Court—You may use it.

A. Because I marked it all down before I left this morning.

Q. Did you make this memorandum at the time, doctor?

A. No. I just made that this morning from my books.

20

Q. About when did you come?

A. In June.

By Mr. Cowenhoven.

Q. And where did you open up your business, sir?

A. On Livingstone Avenue.

Q. In what manner?

A. By giving entertainments.

Q. Did you have a store?

A. Open air entertainment. I had a store in a tent

30

and sold my goods from the platform.

Q. And what did you sell?

A. I sold medicine.

Q. And what was it called?

A. Sacred Bark Compound and also a liniment and a salve and a soap.

Q. Anything else?

A. No. I had that line, a regular line of remedies, as we term it, household remedies.

Q. What did you do in connection with the sale of the medicine?

A. Just what do you mean?

Q. Well, did you have an exhibition?

A. Yes. I gave an entertainment.

Q. What was the exhibition, and what was the purpose of it?

A. Muscular exhibition, muscular and athletic, and I give physical culture exhibitions or instructions, as we term them.

10

Q. What was the object of the exhibition?

A. To attract the attention of the people and make known the remedies that I was selling.

Q. Was there a platform in the tent?

A. No. The platform was outside of the tent.

Q. What was the platform used for?

A. Giving the entertainments. It was open air, right out in the open air.

Q. Were the people assembled outside?

A. They assembled outside and stood.

20

Q. Did you make any announcements from that platform?

A. Oh, yes. Continually.

Q. What were they? As to the fact of what you were there for and who you were and what you were doing and what you intended to do?

Mr. March—I object.

The Court—All objectionable and absolutely immaterial. The doctor's general character, or general character of his business, is not affected at all. The question to be met in this case is whether or not he ever prescribed or diagnosed cases for these witnesses who have testified.

30

Mr. Cowenhoven—There is also a very important question that he held himself out as a doctor and was able to treat and diagnose cases.

Q. Now, my question is, did you ever hold yourself out on that platform and acknowledge or claim that you were a doctor?

The Court—That is perfectly proper.

A. I never did, and more than that I repeatedly, night after night, told from the platform that I was not a doctor, that I was not practicing medicine, that I was not prescribing. And farther, if you will allow me to say it at this time, I never, after the first night, attempted to sell medicine either privately or publicly. Never said to anyone, take this medicine, it will be a benefit to you. My first night on Livingstone Avenue I put out seven bottles of the sacred bark compound. After putting them out I announced to the public that never again while in this community would I offer, or rather attempt to sell any of this medicine. I said that seven bottles would establish my reputation and the reputation of the medicine in this community, and that the seven bottles would sell me seven thousand. I kept my word in every way. Since that time never have I told a man that this medicine would be a benefit to him, never have I induced anyone to sell it, never have I handed it to him and said, take that medicine and it will be a benefit to you.

Q. And, as a matter of fact, after that announcement that you never would attempt to sell anything—

A. Never attempt but offer it; give them the opportunity every night, and that is all that I ever claimed is, I will give you an opportunity of getting this remedy now. If you wish to know more about it ask the people who are using it. They are getting well.

Q. Now, doctor, you have said that was the announcement made by you that you were not a doctor, upon the public platform?

A. Continuously.

Q. Night after night?

A. Night after night.

Q. Now then, did you ever privately say to any person that came to you to purchase one of these bottles

of medicine, the Sacred Bark, or the salve, or whatever it may have been, that it would cure them, or it would benefit them?

A. Never.

Q. What did you say?

A. I said to them I am putting this out among the people; ask the people who are using it, see what they say. Some people that have talked to me since I have been here have been benefited by the use of this remedy, and it may be a benefit to you. I put out seven bottles the first night. It was never necessary for me to attempt to put out any more because I knew what that would do. 10

Q. Did you ever urge?

A. Never urged.

Q. Solicit them to buy in any manner, form or shape whatever?

A. Never have; no, sir.

Q. And you continued your business from June up until the present time? 20

A. Up until the present time.

Q. Until this complaint was made?

A. Until Saturday night. Night before last.

Q. State whether that medicine is for sale in drug stores in the city of New Brunswick?

A. It is in the city of New Brunswick and in the city of New York.

Q. Doctor, have you any cards or letters or anything that bears your business?

A. That is my letterhead.

Q. As a physician or as a doctor or anything else? 30

Mr. March—I object.

The Court—Objection sustained.

Mr. Cowenhoven—I want to show by this witness that he never held himself out to be a doctor; that the letters that he writes, his letterheads, are plain H. A. Curtis, without any mark or word signifying that he was a doctor, show-

ing that he never held himself out, in corroboration, as a doctor.

The Court—It is purely negative testimony.

There is no proof or claim that he has ever held himself out to be a doctor. You do not have to meet that at all. Suppose you brought letterheads here with his name printed on them, or with my name on them as attorney and counsellor-at-law. Would that show that I had never held myself out to be a doctor?

Mr. Cowenhoven—Certainly. If you had a paper with Doctor Woodbridge on you would hold yourself out as a doctor. I say this is merely corroboration—

The Court—I think you did not hear me. I sustain the objection.

Mr. Cowenhoven—I ask an exception.

Exception allowed. Sealed accordingly.

20

Judge.

Q. Now, Mr. Curtis, taking the testimony of Drs. Nafey and Forney. Do you remember the occasion of their visit at your place?

A. Very vividly.

Q. Do you remember when it was? Was it around the time they stated?

A. I didn't know the date. However they mentioned the date to-day. But I remember the occurrence very, very well, because I happened to know Doctor Nafey.

30 So I remember the occurrence of his calling.

By the Court.

Q. Did you know him at the time when he came in?

A. I did.

By Mr. Cowenhoven.

Q. Just state to the Court and jury what took place there, sir?

By the Court.

Q. Did you know it was Dr. Nafey when he came?

A. I did.

Q. Did you know that the other man with him was a doctor?

A. I did not. I did not know who the other man was.

By Mr. Cowenhoven.

Q. Go right on and state what occurred, sir, in your own way?

10

A. They came into my tent, which is an open tent that I have back of my platform, where my performers congregate to go on and to give the show, and the back part of it is the store room, I have the remedies stacked up there in cartons and packages; and they came in and I greeted them, how do you do. I shook hands with both of them. I said, how are you, how are you, have seats. They sat down in chairs and I sit on the edge of the table. I remember particularly I set like this and I listened to Dr. Nafey telling me that he had been overseas, that he had been in the army, that he was troubled with a stomach trouble, and that the doctors in the army—I sat on the edge of the table. He and Dr. Forney set in the chairs. And he told me his story and I listened to his story, with something of a smile on my face, perhaps; and after he had finished his story he said to me, what do you suppose that pain is? I said, I don't know, that might be a number of things. He said, do you think it is an ulcer of the stomach. I said, I don't know. It might be an ulcer of the stomach. It might be a nervous condition. It might be indigestion. I don't know. Those were my words. I don't know. Then he mentioned something else about constipation and wanted to know if the stomach trouble would have any bearing on that. I said, I don't know. It might possibly, if your food don't digest properly, it might possibly have some bearing on the constipation. And after he had asked me a number of

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these questions and I refused to answer him point blank on any of them, then he said, well, what I want is something to cure me, give me a bottle of the medicine anyhow. I had the Sacred Bark lying on the table nearby as I do. He said, give me a bottle of your Sacred Bark. I gave it to him. He said, how much is it? I said, one dollar. He said, how would you advise me to take it? I said, the directions are on the bottle.

Q. Are the directions on the bottle?

- 10 A. The directions are on every bottle, and that is what I said to Dr. Nafey. And he talked along a little bit again and asked me the question again how would you instruct me to use this. I said, the directions are on the bottle. I did not tell Dr. Nafey to take a tablespoonful before each meal. I did not give Dr. Nafey any verbal information as to how to take that remedy, regardless of what Dr. Nafey or anyone else may say, I did not.

Q. Did you say it would build him up?

- 20 A. No, sir.

Q. And make him well, or that it would cure him?

A. No, sir. I never told anyone that.

Q. When did he give you the money?

A. It was unnecessary.

Q. When did he give you the money, before you gave him the bottle or after?

- 30 A. When I gave him the bottle of medicine—and even at that I didn't hand it to him. I laid it on the table like that, and he was sitting right by the side of the table, and he gave me the money, picked up the medicine and went away. Those are the facts, judge, if you want to know. That is the facts.

By the Court.

Q. Mr. Curtis, what about the bicarbonate of soda?

A. I hadn't heard of that before until Dr. Nafey mentioned it to-day.

By Mr. Cowenhoven.

Q. Did you give him any bicarbonate of soda?

A. I did not.

Q. Or tell him to take any bicarbonate of soda?

A. I do not remember telling Dr. Nafey. That is the first I heard of bicarbonate of soda in connection with Dr. Nafey.

Q. Now, sir, will you tell me, have you a distinct recollection now of what occurred?

A. I have a distinct recollection of Dr. Nafey and 10
someone else coming with him. I did not know Dr. Forney.

Q. Was it the gentleman who came with him; was it the gentleman who was here?

A. Yes. I have seen him since. In fact they brought an automobile over with the officers to bring me over here for fear, of course, probably, that I would get away if they didn't have it there.

Q. About how long were you in the city of New Brunswick carrying on your business? 20

A. I was here sixteen weeks before going over to Highland Park.

Q. During those sixteen weeks did you have any difficulty or any complaint made against you whatever?

A. Not only during those sixteen weeks I did not, excepting that I was told that there was an effort made by the doctors to stop the sale of the remedy. I had no trouble.

Q. Nobody troubled you at all for these sixteen weeks in New Brunswick? 30

A. Not only those sixteen weeks but of the year and a half before that I have been in the State of New Jersey.

Q. From here you went where?

A. From here I went to South River or rather from New Brunswick—from Highland Park I went to South River.

Q. But from New Brunswick you went where?

A. From New Brunswick I went to Highland Park.

Q. And what month were you there? What were you doing?

A. September. I was there in September. Just what date I went over there I don't know.

Q. Where were you at the time of the arrest?

A. In Highland Park.

Q. For the sixteen weeks that you were in New Brunswick no arrest, and as soon as you went to Highland Park there was the arrest?

A. There was the arrest.

Q. Had you been in Milltown?

A. No.

Q. South River?

A. No. Not then.

Q. Well, how long after did you go to South River?

A. I went from Highland Park to South River.

Q. When was that about?

A. Just six weeks ago to-day. No, I guess it is only five weeks ago to-day, because I was just three weeks in South River. Maybe it is six. Now, I don't know whether it is six or five, but it was on Monday.

Q. As a matter of fact, did you, to Dr. Forney or to Dr. Nafey in the presence of Dr. Forney, or to any other person to whom you ever sold a bottle of this compound, state that it would be—it was a curative element?

Mr. March—He has already testified.

A. I did not to them nor ever to anyone else. And more than that I said from the platform nightly that medicine does not cure. Nature is the only thing that can cure. And the only thing that I have studied is nature.

By the Court.

Q. When Dr. Nafey came there you said you knew him. Did you suspect the object of his visit?

A. I did. And for that reason I was very careful what I might possibly say, because sometimes I was

afraid that I might say something that was not just exactly right, and I knew the move that was being made, and Dr. Nafey was pointed out to me by a lady that was on the grounds when he came on the grounds, but she didn't mention the fact that the doctor with him was Doctor Forney. She did mention the fact that it was Dr. Nafey. So it might have been that I was a little more guarded in my talk to Dr. Nafey and what I said to him than what I would have been otherwise.

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By Mr. Cowenhoven.

Q. You knew his object, didn't you, in coming there?

A. I did. I felt that I did. However, I thought I was at perfect liberty to sell a bottle of medicine just the same as I would you had you ever come.

Q. Do you remember saying anything about the pneumogastric nerve, or who did say that, or was anything said about it?

A. I did not. I said that his trouble might, when he asked me, is that an ulcer of the stomach, or I don't know his exact words, he might have said is that an indication of an ulcer of the stomach, and I said it might be, or it might be indigestion, or it might be a nerve condition. I don't know. That is the way I finished it. I said I don't know. 20

Q. Did you attempt to diagnose the case at all?

A. I have never attempted to diagnose because it is out of my line. I am selling medicine. And I only offer, I only attempt to sell my first night in any community. After that I never again even attempt to sell. I leave the medicine to speak for itself and the people who use it, and never after the first night in any community do I attempt to sell either privately or publicly. I offer it for sale each night. 30

Q. And since that announcement was made by you at the sale, have you sold any bottles of that medicine?

A. I said the first night I was here that seven bottles I put out would sell me seven thousand.

Q. Did it?

A. I generally keep my word.

Q. Well, did it?

A. I have kept my word.

Mr. March—I object.

The Court—Objection sustained. Not material.

Q. Did you sell the medicine afterward?

The Court—He said he did not.

10 A. Oh, I sold it afterward. I offered it for sale, but never again do I attempt—

Q. Did you sell it?

A. Oh, yes. Oh, my, yes.

Q. Little or much?

A. Little or much? The trains are bringing it in now.

Q. Answer the question.

A. Lots of it. Lots of it. And as a result of my work here.

Mr. Cowenhoven—That is all.

20

Cross-examination, by Mr. March.

Q. You say you knew Dr. Nafey; did you?

A. Yes, sir.

Q. And who was the lady who informed you it was Dr. Nafey?

A. I can't tell you.

Q. Is she here to-day?

A. I do not know.

30 Q. She came up to you and said what; informed you it was Dr. Nafey?

A. Yes. She said that gentleman out there—one of those gentlemen out there is Dr. Nafey?

Q. And you were very careful when you talked with Dr. Nafey, were you?

A. I was just as careful with him as I am with anyone else.

Q. Why should you be careful? What is there about your business that requires you being so careful?

A. Because I realized that he was there for the purpose of getting me to say something that might be termed practicing or diagnosing.

Q. Do you differentiate between laying a bottle down on the table and taking a dollar, or handing it to a man and taking a dollar?

A. Oh, no; I am selling my medicine.

Q. Why did you accentuate that you only laid it on the table and didn't hand it to him?

A. Because I was asked just exactly what took place **10** at that time in my open tent.

Q. And you also differentiate between whether you gave them directions how to take the medicine or whether you told them that the directions were on the bottle?

A. I certainly did.

Q. You considered it a rather dangerous business you were in, did you not?

A. I considered that I had—I would not tell him how to take the medicine. He is a doctor. The probabilities are that he can read the English language. **20**

Q. Was there any harm in telling him that he should take it so often? What is the difference in telling him he should take it so often or telling him that he should read it on the bottle?

A. I don't think there is any harm at all. I don't believe there is.

Q. But you were playing safe, weren't you doctor?

A. You bet I was.

Q. You were trying to keep within the law?

A. I don't know just where these little points, technical points, come in, and I am simply a salesman. **30**

Q. You were trying to keep within the law, were you, doctor?

A. I make a point to always keep within the law.

Q. Why didn't you refuse to see Nafey altogether, if you knew it was Nafey?

A. I refuse to see no one. People come there to buy my medicine continually and I give them the medicine.

Q. You say you were extra careful with Nafey. Were you?

A. I made that remark.

Q. You said so, did you not?

A. I made that statement; yes, sir.

Q. Were you just as careful with the student that testified to-day?

A. Just exactly.

Q. Why did you say that you were extra careful
10 with Nafey?

A. I made the statement.

Q. What did you mean when you said that?

A. I meant that I knew that Dr. Nafey was looking to see if I would make some slip. And when he asked me the questions that he did, as I tell you, I was extra careful in what kind of an answer I made him. You will remember the student, I was just as careful with him. I am careful with everybody, although I made no exception of the student. I said to him that a man of
20 your age should not be sick.

Q. Now, you say that you didn't have any soda there at all, baking soda, or any other kind of soda there that day?

A. I said nothing about whether I had any there or whether I didn't.

Q. Did you have any? Can you look at me and say whether you had any baking soda there that day?

A. I can look at you and say whether I had any baking soda there that day.

Q. Did you or didn't you?
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A. I had a package of baking soda.

Q. Did you say anything to Dr. Nafey in reference to baking soda?

A. I did not.

Q. What did you have the baking soda there for, doctor?

A. Well, my wife makes very good biscuits.

Q. Does she do her baking on the premises in the tent?

A. No, but sometimes I carry things home and stop at the tent on the way home.

Q. And when Judge Cowenhoven interrogated you, or Judge Woodbridge, in reference to soda, you overlooked telling them that you had some baking soda there, didn't you?

A. Sure I did. Why should I tell it?

Q. Did you hear Dr. Nafey's testimony this morning?

A. I heard Dr. Nafey's testimony.

10

Q. And Dr. Forney's testimony?

A. And Dr. Forney's testimony.

Q. Did they say baking soda?

A. You bet they did, and they said some other things too, that I might tell you.

Q. You didn't say anything to them about baking soda this morning?

A. Not that I remember.

Q. And you didn't take a teaspoonful—

Mr. Cowenhoven—Let him answer.

20

Q. And you didn't take a teaspoonful or a tablespoonful and tell Dr. Nafey to take that?

A. I did not.

Q. And you didn't say anything about his nerves?

A. I said something about his nerves.

Q. Ah?

A. Just what I told you a while ago.

Q. What was that?

A. He said to me—shall I tell you the question again? You see, I remember this very, very vividly.

30

Q. Answer the question?

A. What did I say? I said it might be an ulcer, and it might come from the nervous condition. It might—and then I said also in addition to that, I said I don't know.

Q. If you don't attempt to practice medicine, why do you waste your time discussing these matters with people?

A. I have medicine to sell and I am selling lots of it.

Q. Why do you waste the time to sit down and ask them how they feel and shake hands and answer their questions in reference to how they feel and what they might have if you are not practicing medicine?

A. I have my medicine to sell, privately and publicly, and I am at my place of business every day from 11 o'clock until 4.

Q. You have your regular hours, do you, from 11 to 4?

10 A. Regular hours on that Chautauqua grounds.

Q. You have not answered me that question, by the way.

Question repeated by stenographer.

A. Have I ever asked anybody how they feel?

Q. Dr. Forney and Dr. Nafey testified that you did?

A. I said it to them just as I would say it to you if I had met you and shook hands with both of them and said, how are you. But I didn't ask it in a professional way.

20 Q. Well, why should you? You are not a doctor, are you?

A. No.

Q. You are only selling medicine?

A. That is all I said, how are you.

Q. But you sat down on the edge of the desk and when he told what was the matter with him you had conversation with him in reference as to what was the matter with him, didn't you?

A. I did.

30 Q. You said it might be this and it might be that?

A. I did.

Q. You didn't know?

A. I didn't know and I said that and I shook my head when I did.

Q. You didn't say, here, I don't know anything about it, I am not practicing medicine, I only have these bottles to sell at \$1.00 per, or we sell six bottles for \$5.00, don't you want them?

A. I tell that from the platform every night, so it is useless for me to say to Dr. Nafey.

Q. When you have your quiet little hours there from 11 to 4 you sit down and you talk with the people and you answer their interrogatives, don't you, in reference to how they feel, is that true, and then it leads up to the sale of a bottle of medicine, doesn't it, this so-called Sacred Bark, or isn't it true?

A. If you put it in that way you may look at it that way. I sell the medicine. But I have never offered for 10 sale. I have never tried to get anyone to buy it.

Q. Well, you talk with them about their condition and it ends by you selling the medicine, don't you.

A. If they want to buy it I sell it to them. I don't refuse to sell it.

Q. And of course, if I don't go in Dr. Forney's office, and I get some medicine from him, and if I don't want to take it, I need not take it, need I?

A. No.

Q. You see each one that comes in there, for in- 20 stance, separately?

A. I do not.

Q. If a woman comes in, you see her separately?

A. I do not.

Q. Do you mean to say that you talked with this girl, what is her name, Miss Malouf, about her ailment in front of other people?

A. Just as many as have a mind to be in there. I have just the one tent there. It is all open.

Q. You didn't see the people in their turn?

30

A. No.

Q. The one who came first?

A. That don't make any difference. All open. Sometimes I might say to one do you want to see—ask me about this medicine, what is it you wanted, do you want some of the medicine? So and so.

Q. How is it you kept the students waiting three-quarters of an hour?

A. I didn't keep anyone waiting. I never do. They came there. I remember them particularly. Shall I answer the question?

The Court—Yes.

A. They came there particularly. We were just getting ready to give the show, it was during the time for us to get ready for the entertainment, my people were all in there making up. This was a general place at night.

10 Q. So no matter who was there you discussed the physical ailments of the different people that came to see you without regard to who was present, is that right, whether it was a tape worm?

A. Why do you make that statement?

Q. You cannot interrogate me?

A. No, but you make a statement.

Q. And when you want to interrogate me you can, but not to-day. Just answer the question.

A. Answer your question?

20 Q. Question repeated by stenographer.

Q. (Continued) Or what the trouble was?

A. I do not discuss the details.

Q. Then you did see some of them privately?

A. I do not unless they happen to be alone. If they come there alone then I see them alone. If they come there—

Q. Do you mean to say if anyone wanted to discuss some troubles that they had of a private nature, and someone else was there, whether it was a man or woman

30 you would discuss their particular ailments in the presence of strangers, would you?

A. I don't discuss their ailments. That is not my business. I am selling medicine.

Q. Well, you discussed this young girl's ailment, did you not?

A. No. She came to me and told me that she was troubled a certain way and wanted—

Q. What was it?

Mr. Cowenhoven—One minute.

A. And wanted to know what the symptoms were and I told her that I did not know. That there was only one way that I knew of that that could be determined and that was by seeing parts of the parasite.

Q. And did she bring them to you?

A. She did.

Q. Would you discuss that before other people that were there?

A. No cause for discussion. The probabilities are that if there were others there she waited. I remember she came with her mother. 10

Q. You would see a case like that privately, would you not?

A. No, sir. I didn't say that.

Mr. Cowenhoven—I object to that question. He don't say that at all. That is his statement.

The Court—It is cross-examination. Objection overruled.

Q. Well, now, if you wanted to sell your medicine, why didn't you sell it like a druggist sells medicine? 20

A. A druggist?

Q. Why do you sit down and discuss the various ailments with the people that come to see you?

A. The druggist sells medicine after it has been advertised. I am a medicine advertiser. I advertise my remedy and I take the method of the platform for my method of advertising.

Q. Why do you take the time to discuss the various ailments of the different people who come to tell you, particularly? 30

A. I do not.

Q. Prior to taking a dollars for this so-called sacred bark?

A. I do not discuss their ailments.

Q. Well, you discussed the ailments of Dr. Nafey, did you not?

A. I did not.

Q. You discussed the ailments of Miss Malouf, did you not?

A. I did not. I listened to Dr. Nafey and told him that this remedy had been beneficial in some cases and might in others.

Q. And you discussed the ailments of the students, the Vose boy, did you not?

A. No. I asked him if he took plenty of exercise and told him a young man of his age should not be sick.

10 Q. And you found out what was the matter with Golden and gave him medicine, did you not?

A. I did not.

Q. You gave this young girl medicine, did you not?

A. I did. I made her a present of it.

Q. After you had ascertained what was the matter with her?

A. After she brought me the evidence.

Q. Well then, you gave her—she brought you evidence of what?

20 A. Of a tapeworm.

Q. And you gave her medicine to cure that tapeworm, did you not?

A. I gave her medicine that has cured thousands of tapeworms.

Q. Well, you gave her that medicine to cure that tapeworm, did you not? Answer it yes or no. Did you or didn't you?

The Court—You cannot compel him to answer that way. Go on.

30 Q. Did you or didn't you?

A. I gave her medicine that has been used and has removed thousands of tapeworms.

Q. Why should you give it to her unless she had a tapeworm?

A. Because she showed me the worm and said that the doctors had been trying to get it and they had failed.

Q. And then you gave it to her in order to remove the tapeworm, did you not?

A. I gave it to her and let her use her own judgment as to whether she would get rid of the tapeworm or not. But she did. I expected that it would.

Q. And you gave it to her for that purpose; why don't you stand up like a man?

A. I am telling you the facts. I am going to admit it.

Q. Didn't you give it to her for that purpose?

A. I gave it to her because she showed me a piece of a tapeworm.

Q. An then you gave it to her to remove it, did you not? **10**

A. I gave her the medicine to remove the tapeworm, sure.

Q. And you are satisfied to have it go to these twelve men that you did not give her that medicine to remove that tapeworm after you sent her home to get a sample of it, all right.

A. I just admitted that I did give her the medicine, with the expectation that it would remove the tapeworm, because it has done it before. **20**

Q. And she was suffering from a tapeworm, wasn't she?

A. She was suffering from a tapeworm, so she said.

Q. You made her get you the sample, didn't you? Did you, or didn't you?

A. I didn't make her get it; no, sir.

Q. No, but you told her you would like to see the sample and she came back the second time, did she not?

A. I would like to see the sample. I am interested.

Q. And in consequence of what you told her she came back a second time with the sample, is that right or not? **30**

A. She did.

Q. And what about Golden?

A. Has Golden been on the stand?

Mr. Cowenhoven—His testimony is not in the case.

Mr. March—I think it is proper to come under his general examination when he says that he

never prescribed for anybody. I do not think we have to have Mr. Golden on the stand. It is cross-examination.

The Court—Golden was withdrawn before he got into anything.

Mr. March—He testifies he has never prescribed for anybody.

The Court—Now you ask him about Golden. He can answer that.

10 Q. What about Golden?

A. Must I answer? Is Golden in this?

Mr. Reynolds—I object to that because there has been no identification of the time on the Golden case.

The Court—It does not make any difference.

Mr. Reynolds—But he is withdrawn.

Mr. Cowenhoven—We had no chance to cross-examine him.

20 Mr. March—I do not care whether it is Golden, Brown or Smith. By a general examination, I did not hold him down really to our main case, but on general examination he has sworn that he has never prescribed for anyone. Now I show that he has to Golden. It does not matter whether we had Golden on the stand or not.

30 Mr. Reynolds—It is material as to time. Now the fact was when Golden went on the stand he was withdrawn in order to identify the time as to when he went there, because the intimation was that he went there after the date of the complaint.

Mr. Cowenhoven—Besides that his testimony was not completed and we had no chance to cross-examine.

The Court—Both objections are overruled and the question allowed and exceptions allowed to counsel.

Mr. Cowenhoven—Even without my being able to cross-examine, if a man was a witness and only part of his testimony taken?

The Court—I do not know if I would convince you if I discussed it all day.

Mr. Cowenhoven—Did you ever know of a witness being withdrawn before his testimony was closed?

The Court—I will explain to you the ground of my rulings; I have not the slightest idea it will satisfy you that I am right; I have never known of a case yet where counsel ruled against thought I was right. This witness has testified that he has never prescribed for anybody, hasn't he? And has never practiced or diagnosed any case? **10**

Mr. Cowenhoven—Yes.

The Court—Now, Mr. March on cross-examination has called his attention to a particular case of a man named Golden. It is absolutely immaterial as to whether Golden was called as a witness in this case or not. Mr. March says to him, what about Golden, did you ever prescribe for him. It is perfectly proper cross-examination on the witness' direct examination to the effect that he never prescribed or treated anybody. Go on. Exception is allowed to you, Judge. **20**

Mr. Cowenhoven—I so understand it.

Exception allowed—sealed accordingly. **30**

Judge.

Q. What about Mr. Golden, didn't he have a tapeworm?

A. He did. I guess. He brought me a piece of tapeworm, anyhow.

Q. Did he bring it after or before he took some of your dose?

A. Both. He took some of the Sacred Bark and after taking that then he came and brought me a piece of tapeworm.

Q. And you told him to go home and get a piece first, didn't you?

A. I have forgotten whether I did or not. He brought me a piece.

Q. And then you gave him the Sacred Bark, didn't you?

10 A. Yes.

Q. And you told him it would act in three or four hours, didn't you?

A. Yes.

Q. And it acted, didn't it? You cured him didn't you?

A. I don't know. I have not seen him since.

Q. Well, I will say you cured him?

A. I don't know whether the medicine cured him or not. I didn't cure him. The medicine might have
20 cured him.

Q. The Sacred Bark, didn't it?

A. I hope so. It cured a lot of them.

Q. Anybody else cured of tapeworms?

A. Why—

Mr. Cowenhoven—I object.

A. I suppose I could mention thousands.

The Court—Objection sustained. I think it is too broad.

Q. Is this the only medicine you have for sale?

30 A. Oh, no. I have a liniment and salve.

Q. You didn't give this girl a liniment for the tapeworm, did you, nor you didn't give Golden a liniment for tapeworm; you gave him some of this Sacred Bark, didn't you?

A. Yes, sir.

Q. That has cascara in it, has it not?

Mr. Cowenhoven—I object.

A. It has.

The Court—Objection overruled.

Q. It has alcohol in it, has it not?

A. It has ten per cent.

Q. That is what puts the pep in them, isn't it?

A. It tells you right on the bottle.

Q. The first of the year you will have ten thousand placards coming in with it maybe?

A. This has stood the test of the United States Government in regard to alcohol.

Q. So the cascara acts on the bowels, is that right? 10

Mr. Cowenhoven—I object.

A. No, sir.

Q. It does not act on the bowels?

Mr. Cowenhoven—I object.

The Court—Objection sustained.

A. No, sir; not in the form and quantities that it—

The Court—I am sustaining the objection.

Your lawyer objects to it as improper.

Q. But you gave it to Sweeney for rheumatism, too, didn't you? Didn't you give Sweeney some of the 20 Sacred Bark for rheumatism?

A. I don't remember Mr. Sweeney. He was on the stand here to-day?

Q. Yes.

A. He says he was in and bought some of the Sacred Bark. I know, however, that people who used that Sacred Bark, plenty of them, have been permanently cured of rheumatism.

Q. Do you think alcohol helps rheumatism?

A. Have you ever heard it prescribed for rheuma- 30
tism? Have you ever heard it being sold for rheuma-
tism? Do you think I sell it for rheumatism? What
do you suppose that alcohol is in there for? The lowest
percentage you have ever heard of in any proprietary
medicine.

Q. I was just asking you; I am trying to get some
information. I am not a physician.

A. These are extracts in this. A certain percentage
of alcohol is necessary. The Government allows us

seventeen per cent. I have not over ten. The lowest that it is—the very lowest possible to preserve it during not weather. In an ice chest it would keep without any.

Mr. March—That is all.

Redirect examination, by Mr. Cowenhoven.

Q. Mr. Curtis, in all these cases to which your attention has been called, did you ever state to those people that called upon you and consulted with you concerning
10 their difficulties, did you ever say this medicine will cure you, take it?

Mr. March—I object.

A. I never used the term—

The Court—Objection sustained. You have been all into it on direct examination.

Mr. March—It is leading. We have been into it and it is not proper redirect examination.

Q. Well, take Mr. Golden, the same thing of Mr. Golden as all the rest of them, was it? That is all.

20 The Court—Do you rest?

Mr. Cowenhoven—We have here ten or eleven witnesses all of whom will testify that the doctor, that is, the party to whom they applied, Mr. Curtis, upon going there, never stated that he was a physician, and always told them—

The Court—Call your witnesses, Judge. I understood you were going to rest to-night and finish to-night.

Mr. Cowenhoven—We rest.

30

MOTION FOR DIRECTION OF VERDICT.

Mr. Richman—Before opening the case to the jury I move for a direction of a verdict upon two grounds:

1. That the doctor himself, on the witness-stand, says that when this young lady gave him the evidence of tapeworm he gave her the medicine and cured her. Now, from the evidence submitted by her, the physical

evidence, he determined, he diagnosed as to what was her complaint and what ailed her. And upon that diagnosis he prescribed the Sacred Bark, and she takes it and it cured the tapeworm. Now, from his own lips he comes within the meaning of the statute and has practiced medicine. Moreover, the gentleman whom he spoke of is in the same situation, the other man that he testified to that gave him the evidence of the tapeworm.

The Court—Mr. Golden.

10

Mr. Richman—Mr. Golden. Evidence of a tapeworm. He examined it. He diagnosed his case as being a tapeworm, and then he says, take the Sacred Bark, and he takes it and it cures him. Now, from his own lips, irrespective of other things he has testified to, irrespective of his blank denial here on the stand, from his own lips he says I have diagnosed these two cases and prescribed the Sacred Bark.

Now, passing that, certainly the State has carried the burden here. There is no contradictory proof of the State's case, except through the lips of the defendant. We stand here unchallenged, as a matter of fact, before this Court and jury in our case, and it seems to me clearly that from the lips of the defendant, and from our proof, which is uncontradicted, we are entitled to a direction of verdict at this stage in the case.

20

The Court—What do you say, Judge Cowenhoven? Just with reference to the case of Miss Malouf and Mr. Golden?

Mr. Cowenhoven—I say it is entirely a question for the jury. The authorities all hold, in cases of this kind, whether a man diagnoses a case and practices medicine without a license, and testimony is adduced before the Court it is a question for the jury.

30

In answering the suggestions made by counsel: In the case of the young girl, she testified that she went to that man, to Mr. Curtis, she told him what her trouble was, he gave her, whether it was the Sacred Bark, or whatever it was, I don't know, I do not recall. Admit-

ting that it were, he said this has cured some, it has cured others, it may cure you. He gave it to her. Not a dollar charge. A mere suggestion, a kind act to her. He said it may cure you, it has cured others and may cure you, try it. Was that prescribing? Was that diagnosing? Hasn't he a right to do with his own as he pleases? He wasn't entreating her to take it, he didn't solicit her to take it, he didn't advise her to take it; her own language was that she told him what was
10 the matter, he told her to bring that specimen there, she gave it to him, he said this has cured others, it may cure yours. Is that diagnosing? Is that prescribing? And the child took it. Now, I say that the question is for the jury to determine whether that is prescribing or diagnosing.

And in relation to this man Golden, his testimony as I recall—and I do not remember particularly—he went there to that man and he gave him some of the bark, is that the fact? Was that his testimony? I do not
20 remember. But the question was as to the time, and the Court held it must be within the time testified to in the complaint. Then he was withdrawn from the stand, and how can his testimony be regarded as being in this case before it was finished? Is the testimony of a witness before a Court whose direct testimony is taken, and the witness is withdrawn before the cross-examination allowed? Has your honor ever heard of such a thing? Have you ever heard—supposing the direct testimony is to a fact and the cross-examination would
30 show that the man was utterly incapable, from his position, and the manner in which he was placed, of testifying to that fact?

The Court—The cross-examination in regard to Golden was competent, entirely independent of the fact whether Golden was called as a witness or not.

Mr. Cowenhoven—Be that as it may, he was not cross-examined, and he was permitted to leave the stand and he never did come back. How can you take his testimony?

The Court—We are not taking his testimony on the subject. We are taking Mr. Golden's testimony on the subject.

Mr. March—We are merely attacking his credibility.

Mr. Cowenhoven—Take Mr. Golden's testimony, and if you believe Mr. Golden's testimony in one thing, you can in the other. He says that he never gave him a drop of that medicine, never prescribed, never diagnosed his case; he told him that this medicine had benefited others, it may benefit you; and he took the bottle and paid for it. Now, how are you going to receive it in one instance and discard it in the other? If your Honor will give me a few minutes, I just lost the book, there is a case where this question of whether there is a diagnosis of a case, or whether there is a prescription of a case, or a treatment of a case, in cases of this kind, it is a question for the jury. 10

The Court—I will leave the case to the jury under proper instruction from the court.

Mr. March prays exception. 20

The Court—Note an exception.

Exception allowed—sealed accordingly.

Judge.

Mr. Cowenhoven sums up the case for the defendant.

Mr. Richman sums up the case for the State.

NEW BRUNSWICK DISTRICT COURT.

STATE BOARD OF MEDICAL
EXAMINERS,

Plaintiff,

vs.

HAL A. CURTIS,

Defendant.

30

COURT'S CHARGE TO THE JURY, BY HON. FREEMAN
WOODBIDGE, District Court Judge, as follows:

GENTLEMEN OF THE JURY—We are not dealing in this case with remedies. We are not dealing in this case

with sympathies, or with questions as to how far we ourselves agree with doctors, or how far, if at all, we disagree with any statute of the State of New Jersey. In saying that I am not suggesting at all that we do disagree with the statute of the State of New Jersey under which we are proceeding here. What I am saying is that we are dealing in this case with existing law, with a regulation of the State of New Jersey intended and framed for the protection of the citizens of the

10 State at large against the practice of medicine by quacks and charlatans and fakers. In saying that I am speaking of the general policy of the statute and not reflecting, of course, upon anything the defendant may have said and done in this State, or here in Middlesex County.

What is the language of the statute which the Legislature has laid down on this subject? It is, in effect, that no person except those who have received a license to practice medicine after an examination by a constituted body or board of medical examiners of the State of New Jersey shall be permitted to diagnose, treat, operate or prescribe for human diseases, pains and physical ailments until that body of men, who have been appointed by the State, shall have made an examination of that person and by a test of his scientific knowledge, or his knowledge of the human frame, or his knowledge of medicines and drugs, or his knowledge of human diseases, or all of them, shall have been qualified and found qualified by the State Board of Medical Examiners to practice upon and treat the sick, the unfortunate and the diseased. The object of the statute, as you see, is to get a body of men who have been examined and tested to a certain degree and found qualified to treat human beings for those things which are most dreaded in their lives. Now, whatever school of medicine we may belong to, and however much we may feel that we have home remedies, or other remedies, or patent medicines, as they are so-called, or other medicines which the doctors do not prescribe, we must

all of us agree, I think, that the general purpose of the law is a good one. And the question for us to determine in this case is whether or not the defendant in this case violated the law of the State of New Jersey in that respect. It is admitted that he did not have any license to practice medicine. It is admitted in the case that he had never subjected himself to an examination by the constituted medical authorities of the State of New Jersey, or, if that latter is not admitted, it is admitted any way that they had never qualified him. I may say, **10** further, there is no testimony in the case on the subject, of course, as to whether or not he had ever attempted any such examination. It is admitted that he was not licensed to practice medicine, and that the Board of Medical Examiners constituted to preserve the health of the citizens of this State have never found him qualified.

The question to determine, therefore, in this case is, did he ever practice medicine within the meaning of the statute. Did he diagnose, treat, operate and prescribe **20** for human diseases, pains and physical conditions? Everything is out of this case except two cases; one is the case of Doctor Nafey, and one is the case of Miss Malouf.

The law on this subject is not very frequently found, but it is pretty well understood, when it has been passed on. The mere selling of patent medicines by one who does not pretend to diagnose diseases and determine what remedy is proper, is not a violation of the statute forbidding the practice of medicine by unlicensed persons. A vendor of medicines, who does not pretend to **30** diagnose disease and determine which of his remedies is proper in a particular case, does not violate the statute. Where, however, he attempts to diagnose the disease by examination or inquiry of the patient, and prescribe remedies in accordance therewith, he comes within the prohibition of the statute. This does not render liable one who, when the purchaser indicates

his complaint, informs him what remedies he has for such complaint, and which in his opinion is the best remedy, leaving the purchaser to exercise his judgment. Nor does the prohibition extend to one selling medicines, as in such a case, and merely giving the purchaser gratuitous advice as to the use to be made of them. But our New Jersey statute does not distinguish between gratuitous advice and advice which is charged for, if medicine is practiced within its meaning. So I

10 instruct you that we can leave out of this case all questions relating to compensation. It is immaterial in this case whether or not Mr. Curtis charged for what he did, or whether he gave it free, if he violated the statute. Under our statute I charge there is no question that if he practiced medicine within the meaning of it, he was guilty of the violation, even though he did not make any charge for it. I think our statute does not make any distinction in that respect, Mr. Richman.

Mr. Richman—That is correct, sir.

20 The Court—Doctor Nafey comes here and tells you certain things, and he is corroborated by Doctor Forney. The reason I am leaving the question to you in both cases is because the defendant contradicts it. Doctor Nafey is corroborated by Doctor Forney, that they went there to Mr. Curtis' tent, and that Doctor Nafey told him that he had a pain, and that he was troubled sometimes with vomiting, could not sleep, and so forth, and Mr. Curtis said to him you have ulcers of the stomach, or an ulcer of the stomach. You will remember the language. If that statement is true, made by Doctor Nafey and Doctor Forney, then I charge you that as a matter of law the defendant in this case is guilty. If, on the contrary, the testimony of the defendant is true, that he did not undertake to determine what was the matter with this man, Doctor Nafey, but simply Doctor Nafey came there and he said to him—whatever he said, you will remember the testimony—it was something like this: "I have this pain, do you think I have got an

ulcer of the stomach. I don't know. Do you think I have so and so, and so and so. I don't know. Here is a medicine that has helped lots of people. I do not know what is the matter with you. This will tone you up. Here is a medicine that I have for sale, it has helped lots of people, it may help you." I charge you that if that is true, it is not a violation of the statute.

To illustrate, I do not think that anyone ever considered that their mother, or their aunt, or their grandmother was guilty of a violation of the statute, if they went to her when they were a child, and said, I have got an awful pain, and she said, well, here are some remedies we have been using in the family for years and years, take a teaspoonful of it. If they went to a man, or to a woman, and said, I have an awful pain, and he made an examination and he said you have inflammation of the bowels, or you have appendicitis, or peritonitis, and here is a remedy which I direct you to take, or which I advise you to take, that, you see, is different; that is determining the character and nature of the disease, and it is that sort of thing particularly the statute is directed against. These two doctors come here, Doctor Forney, the President of the Middlesex County Medical Society, and Doctor Nafey, a physician over in Highland Park, and they tell you that Mr. Curtis said to Doctor Nafey, you have ulcers of the stomach and here is a medicine, and it is one dollar. If that be true, in whatever the language was, then I charge you that he is guilty.

Now, in regard to Miss Malouf, you see the distinction there is also well defined too. Her testimony is not quite so positive as the testimony of Doctor Nafey is; and Mr. Curtis' testimony on that subject is not quite so positive either. Although his testimony comes nearer to a confession than it does in regard to Doctor Nafey, because he makes a complete denial of everything that Doctor Nafey and Doctor Forney said took place. There Miss Malouf came to him and told him,

she says, that she had a tapeworm. He asked her for evidence of it. She brought him evidence of it. If what he says is true, and if what she says is true, he was not diagnosing her case. She says that he gave her some medicine which he said would cure her. He knew then from her, not through his determination and examination, but he knew from her that she had a tapeworm. If he undertook to prescribe for that tapeworm, knowing that she had a tapeworm, then I charge you
10 that he was guilty of violating the statute because he prescribed for disease. He says he did not. He says that he took her word, and saw the evidence that she had a tapeworm and said, here is a medicine, it has cured lots of people, it may cure you. Was that prescribing? Was it tantamount to prescribing?

I hesitated as to whether or not I ought to direct a verdict on that subject, but I think there is question enough for the jury, and I think it is for you to determine in that connection whether or not that was
20 equivalent to prescribing for her for a tapeworm. He knew that she had a tapeworm, he got the evidence from her, not from any physical examination that he made, but knowing it, did he then prescribe for her? Or, did he just say, here is something that may cure you? It does not make any difference. He says he gave it to her gratuitously. Under our New Jersey statute, whatever may be the law in other states, if he prescribed for her, knowing that she had disease at that time, then he was guilty of violating the statute, even
30 though he did not make any charge for it.

Now, you have the whole case. If you find that the defendant has been guilty of violating this statute, that is, determining what the ailments of persons were, treating them, or prescribing for them, either in the case of Doctor Nafey, or the case of Miss Malouf, you will find him guilty. And the penalty prescribed by the statute is two hundred dollars, but you will not find the two hundred dollars. You will find him guilty, and the verdict

of guilty will carry the two hundred dollars penalty with it. If you find, however, from all the testimony, that he has not violated the statute of the State of New Jersey, then you will render a general verdict of not guilty.

I, Freeman Woodbridge, Judge of the District Court of the City of New Brunswick, do hereby certify that the foregoing is the transcript of the proceedings and the testimony made by the stenographer in the above-entitled cause, to be used as the state of the case on the hearing of said appeal. 10

FREEMAN WOODBRIDGE,
Judge. [L. S.]

Dated January 5, 1920.

DISTRICT COURT OF THE CITY OF NEW BRUNSWICK.

STATE BOARD OF MEDICAL EXAMINERS
OF NEW JERSEY,

Plaintiff,

vs.

HAL A. CURTIS,

Defendant.

20

NOTICE OF APPEAL.

To Howard A. Reynolds, Esq., and Charles T. Cowenhoven, Esq., attorneys for defendant. 30

SIRS—Take notice that the plaintiff hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the City of New Brunswick, rendered in the above-stated action on the seventeenth day of November, A. D. nineteen hundred and nineteen.

THOMAS F. MCCRAN,
Attorney-General of New Jersey,
Attorney of Plaintiff.

Due and legal service of the within notice is hereby acknowledged this 26th day of November, 1919.

HOWARD A. REYNOLDS,
Attorney of Defendant.

NEW JERSEY SUPREME COURT.

10	STATE BOARD OF MEDICAL EXAMINERS OF NEW JERSEY,	<i>Plaintiff,</i>	}
	<i>vs.</i>		
	HAL A. CURTIS,	<i>Defendant.</i>	

SPECIFICATION.

20 The following is a specification of the determinations of the District Court with which appellant is dissatisfied in point of law:

1. Because the Court overruled the following question asked by plaintiff of Witness Ernest Little on direct examination:

“What did your analysis show that that bottle contained, or that medicine contained, of fluid contained?”

An exception was asked and granted to this decision of the Court.

30 2. Because the Court allowed the defendant over the objection of the plaintiff a trial by jury.

An exception was asked and granted to this ruling of the Court.

3. Because the defendant under an act entitled “An act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof,” approved May twenty-second, one thousand eight hundred and ninety-four,

and the acts amendatory thereof and supplemental thereto, was not entitled to a trial by jury.

4. Because the denial of the right of a trial by jury is not in violation of Section 7 of Article I of the Constitution of the State of New Jersey, as amended in 1844.

5. Because the Court denied the motion of the plaintiff to direct a verdict for the plaintiff and against the defendant.

An exception was asked and granted to this decision of the Court.

10

6. Because the Court refused to direct a verdict for the plaintiff when there were no disputed questions of fact to submit to the jury.

7. Because, under the evidence, whether the defendant violated the statute aforesaid was a question of law for the Court and not a question of fact for the jury.

THOMAS F. MCCRAN,
Attorney of Appellants.

20

NEW JERSEY SUPREME COURT.
FEBRUARY TERM, 1920.

STATE BOARD OF MEDICAL EXAMINERS	} Appeal from New Brunswick District Court.
<i>vs.</i>	
HAL A. CURTIS.	

OPINION.

(Filed June 14, 1920.)

Before Justices PARKER and SWAYZE.

Thomas F. McCran, Esq., Attorney-General, and
Grover C. Richman, Esq., Second Assistant Attorney-
General, for Plaintiff.

80

Charles T. Cowenhoven, Esq., for respondent.

Proceeding begun by warrant in New Brunswick District Court for practice of medicine without a license in

violation of the act of 1894, C. S. 3329 as amended in 1915, 1st Supp. 948. The district judge on demand by defendant issued a venire, and the case was tried before a jury who found defendant not guilty. The plaintiff appealed.

The opinion of the court was delivered by
SWAYZE, J.:

Two questions are raised. (1) Was it proper to
10 award a venire and try the case before a jury. (2) If so, should a verdict for the plaintiff have been directed.

As to the award of the venire we have differing but not necessarily inconsistent dicta in two cases. *Carter Bros. v. Camden District Court*, 49 N. J. Law 600; *Lowrie v. State Board of Dentistry*, 90 N. J. Law 54. The opinion on this point in the first case was confessedly obiter and rendered at the suggestion of the parties as a guide to other suits. The opinion on this point in the second case is palpably obiter. There is a
20 marked difference between the two cases. The penalty in the first case went to the State, in the second case to the state board of medical examiners for the benefit of that board and in some cases for incorporated medical societies. The former act required a sworn complaint of facts, the latter requires only a complaint based on the affiant's information and belief. The former authorized proceedings before a justice of the peace in any county, or before a recorder in any city, thus indicating a proceeding before a magistrate; the
30 latter authorizes proceedings only before a court, a District Court or the Court of Common Pleas. The former authorized an appeal to the next Court of General Quarter Sessions of the Peace, where a jury would no doubt be had; the latter authorizes no appeal unless it be authorized by the District Court Act or, in the case of the Court of Common Pleas, by the Practice Act of 1912. The latter provides for docketing the judgment; the former has no such provision. These differences are important as they bear on the question whether such

a proceeding as the present is a civil suit or a summary proceeding. As in the other cases, now growing numerous, where the question has been raised, the language of different sections of the Medical Examiners Act is incongruous and provisions may be cited which afford an argument for either side. Upon the whole the trend of the decisions has been to hold that the proceedings are a civil suit. This was held by the Court of Errors and Appeals in *Brophy v. Perth Amboy*, 44 N. J. Law 217 and it resulted that one imprisoned in the county jail by virtue of an execution against the body, was entitled to the benefit of the Insolvent Debtors Act. This was followed by the Supreme Court in *White v. Neptune City*, 56 N. J. Law 222, holding that it was most in harmony with the provisions of the act there under review, to hold that they are to be applied to suits brought in the court for the trial of small causes, rather than to summary proceedings before the justice of the peace as a magistrate. "This result is fortified," says Justice Dixon, "by the consideration that thereby greater safeguards are thrown around the property and liberty of the individual than he would enjoy in summary proceedings before a magistrate." The court was doubtless thinking of the chance to be relieved from imprisonment for debt, for it cited *Brophy v. Perth Amboy* and was probably thinking of the right of trial by jury. It held that the appeal being from the Court for the Trial of Small Causes must be to the Court of Common Pleas, as provided in the Justices Court Act. This was followed in *Board of Health v. Cattell*, 73 N. J. Law 516 and *Tenement House Board v. Gruber*, 79 N. J. Law 257. We think that in view of these decisions, it ought to be considered settled that, so far as this court is concerned, suits for penalties under statutes like the present are civil suits. The reasoning applies with all the greater force since the procedure under the Medical Examiners Act is confined to two courts, the District Court and the Common Pleas, which have always been peculiarly courts of civil jurisdiction.

The fact that the suit is a civil suit does not of itself settle the question of the right to trial by jury. There may be cases where it would be competent for the Legislature to prescribe a summary proceeding in a civil suit even where as at common law and at the time of the adoption of the Constitution of 1844, penalties were recoverable by the ordinary action of debt. *McGear et al. v. Woodruff*, 33 N. J. Law 213. We are not now concerned with the constitutional question. We have

10 to do only with the statute governing the district courts. The question is whether in a civil suit of which jurisdiction is given to the District Court, there is a right to trial by jury. The question seems to be answered by section 149 of the act, C. S. 1999, which enacts that either party may demand a trial by jury, and that a venire shall be issued. We need not repeat the conditions under which it issues since no suggestion is made that they were not complied with. We find nothing in the District Court Act to suggest that any class of cases

20 are not subject to the provisions of section 149. Apparently that section governs all civil suits brought in the court and only civil suits were there cognizable under the original act. Our result is the same as was reached by this court in *Harman v. State Board of Pharmacy*, 67 N. J. Law 117, and is not necessarily inconsistent with the result in *Carter Bros. v. Camden District Court*, since in that case the proceedings might well be held to be quasi criminal in their nature. We reach our result with the greater satisfaction since it does away

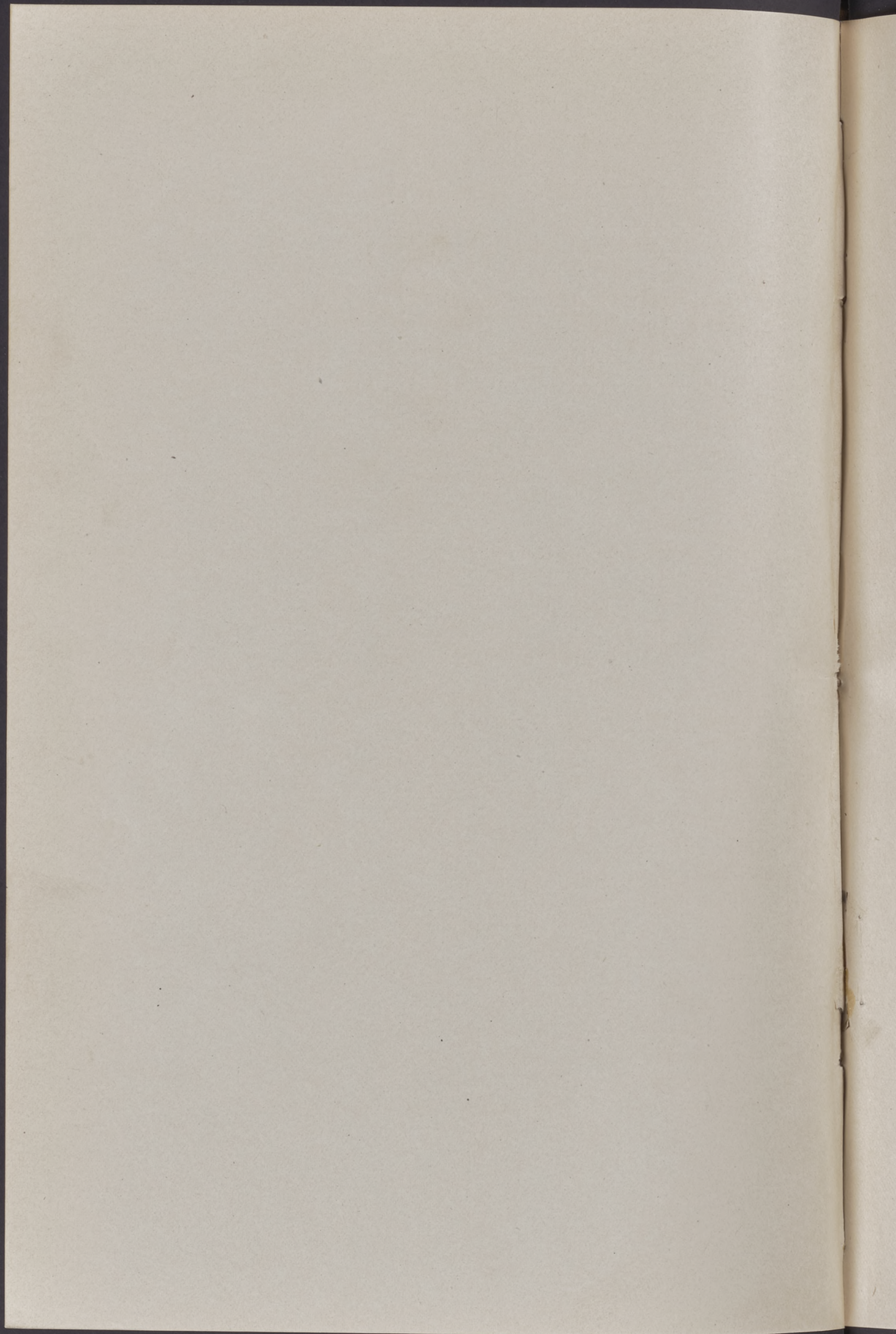
30 with the serious objection in point of policy to the Medical Examiners Act, in that the act permits the arrest and imprisonment for 100 or 200 days of a defendant on a complaint not by one having knowledge but upon mere information and belief. Such a provision would go far to make it impossible for a defendant wrongfully imprisoned to recover damages; the prosecutor would not even be obliged to show that his belief was a reasonable belief; it would be enough that

he had received information, which he believed, no matter from whom it came.

If we are wrong in our view, the result would not be a reversal of the judgment but a dismissal of the appeal. This appeal was taken by the ordinary notice used in civil suits in the District Court. But if the proceeding is a summary proceeding, not governed by the District Court Act, but before the judge or the court (it can make no difference which word we use) as a magistrate, it could only be reviewed by certiorari. The appeal is 10 in the nature of a writ of error. When courts act in a summary way, or in a new course different from the common law, a certiorari, and not a writ of error, is the proper remedy. *Reiman v. Wilkinson, Gaddis & Co.*, 88 N. J. Law 383; *City Bank of Bayonne v. O'Mara*, 88 N. J. Law 499; *Gordon v. Pannaci*, 90 N. J. Law 392.

It is urged, however, that the trial judge should have directed a verdict for the plaintiff. The evidence is suggestive that the defendant in one case at least under- 20 took to diagnose and prescribe, but his testimony is that he merely sold medicine and avoided any attempt to make a diagnosis or prescribe. He came very close to admitting facts sufficient to sustain the charge, but whether he did admit it depends on what he in fact said and what he in fact did. In view of the somewhat differing versions, we think a jury question was presented.

The judgment is therefore affirmed with costs.



NEW JERSEY

Court of Errors and Appeals.

STATE BOARD OF MEDICAL EX-
AMINERS OF NEW JERSEY,
Plaintiff, Appellant,
vs.
HAL A. CURTIS,
Defendant, Appellee.

On Appeal from the
Judgment of the Dis-
trict Court of the City
of New Brunswick.

Brief of Plaintiff, Appellant.

The complaint charges that the defendant, during the months of August and September, A. D. nineteen hundred and nineteen, at the City of New Brunswick, in the County of Middlesex and State of New Jersey, did violate section ten of an act of the Legislature of the State of New Jersey, entitled "An act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof," approved May twenty-second, one thousand eight hundred and ninety-four, and as said section 10 was amended by Chapter 271 of the Laws of 1915, which act was approved April twelfth, one thousand nine hundred and fifteen.

The case was tried on the seventeenth day of November, A. D. nineteen hundred and nineteen, before the District Court of the City of New Brunswick and a jury. A jury was allowed over the plaintiff's objection.

The jury found the defendant not guilty, and a judgment was entered accordingly, from which the plaintiff, appellant, appeals.

Thereafter the matter was argued before the Supreme Court, and there the judgment below was affirmed, with costs (Case, p. 151), whereupon this appeal was taken. The notice of appeal sets forth seven grounds as causes for reversal of the judgment of the Supreme Court (Case, p. 1), but for the purposes of this argument may be briefly stated, thus:

I.

The defendant in this proceeding was not entitled to a trial by jury.

II.

The proceeding to review is by appeal and not by certiorari.

III.

The Court should have directed a verdict for the plaintiff-appellant.

ARGUMENT.

I.

The defendant in this proceeding was not entitled to a trial by jury.

The statute under which the proceeding was commenced is chapter 271 of the Laws of 1915. Section 10, in part, provides:

“Any person hereafter commencing or continuing the practice of medicine and surgery in any of its branches in this State without first having obtained and filed the license herein provided for, or contrary to any of the provisions of this act, and any person who shall practice medicine or surgery under a false or assumed name,

or who shall falsely impersonate another practitioner of a like or different name, or who shall buy, sell or fraudulently obtain any diploma as a doctor of medicine, or any medical license, record or registration, or who shall violate any of the provisions of this act, shall be liable to a penalty of two hundred dollars, which penalty shall be sued for and recovered by and in the name of the State Board of Medical Examiners of New Jersey. *Every District Court in any city or judicial district in any county, and every Court of Common Pleas in any county is hereby empowered, upon the filing of a complaint in writing, duly verified, which said verification when made by any member of the said State Board of Medical Examiners of New Jersey, or by any member of any incorporated medical society of this State or of any county of this State, may be made upon information and belief, that any person has violated any provision of this act to issue process at the suit of the State Board of Medical Examiners of New Jersey as plaintiff; such process shall be either in the nature of a summons or warrant, which warrant may issue without any order of the Court or judge first being obtained against the person or persons so charged, which process, when in the nature of a warrant, shall be returnable forthwith, and when in the nature of a summons shall be returnable in not less than five nor more than fifteen entire days; such process shall state what provision of the law is alleged to have been violated by the defendant or defendants, and on the return of such process, or at any time to which the trial shall be adjourned, the said Court shall proceed in a summary manner to hear testimony and to determine and give judgments in the matter without the filing of any pleadings for the plaintiff for the*

recovery of such penalty, with costs, or for the defendant, and the said Court shall, if judgment be rendered for the plaintiff, cause any such defendant, who may refuse or neglect to forthwith pay the amount of the judgment rendered against him, and all the costs and charges incident thereto, to be committed to the county jail for any period not exceeding one hundred days." * * *

The statute, it is to be noted, uses the term "summary manner," and it is therefore pertinent here to ascertain the meaning thereof.

Black's Law Dictionary (2d Edition), p. 1122, defines the term "summary" to be

"Immediate; peremptory; off-hand; without a jury; provisional; statutory."

Bouvier's Law Dictionary, p. 3182, defines "summary proceeding"—

"A form of trial in which the ancient, established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury."

37 *Cyc.*, p. 528:

"Proceedings have been classified as regular or summary. When a court acts or professes to act upon common law principles, its proceedings are called regular, and not summary, however expeditiously it may act; but when a court of common law jurisdiction is by some law authorized to act different from the common law mode it is called a summary proceeding, a summary proceeding being defined to be a form of trial in which the ancient, established course of a legal proceeding is disregarded, especially in the matter of trial by jury, and in the case of the heavier crimes, presentment by a grand jury. *Summary proceedings are not, however, as might be inferred from this definition, ex-*

clusively criminal in their nature but are more often available to enforce civil rights."

37 Cyc., p. 530:

"Procedure in summary proceedings is governed by the provisions of the statute or statutes under which the proceedings are instituted, and such provisions must be strictly complied with and followed. Defendant must be notified or summoned to appear, and must be apprised of the nature and purpose of the proceeding either by notice or motion, or complaint or affidavit, which must show all the facts necessary to support the proceeding. Formal pleading is not, however, usually necessary in summary proceedings, and unless the statute otherwise provides, all defenses except the statute limitations set off, or matters in abatement may be given in evidence without a plea."

In *Phillips v. Phillips*, 8 N. J. L. 150, the Court, addressing itself to the meaning of the term "summary" at page 152, said:

"The meaning of this term *summary* is such proceedings as are not according to the course of the common law, 4 Bl. Com. 280, or, in other words, proceedings may be called regular or summary. Wherever a court acts or professes to act upon common law principles its proceedings are called *regular*, and not summary, however expeditious they may act. But where a court of ancient common law jurisdiction is by some law authorized to act different from the common law mode, it is called a *summary proceeding*." (Italics ours.)

In *State v. Zeigler*, 32 N. J. L. (3 Vr.) 262, the Court, speaking with reference to summary proceedings, at pages 267 and 268, says:

"Such summary proceedings were unknown to the common law, and depend entirely on the

statutes authorizing them, which must be strictly pursued. 4 *Black. Com.* 280; 1 *Burn. Jus.* 330; *The People v. Phillips*, 1 *Park. Cr. R.* 96; *Morewood v. Hollister*, 2 *Seld.* 309."

The question here raised—the right of a trial by jury in summary proceedings—is not new in this State. Our Courts have discussed and passed upon it in a number of cases where penalties have been sought under ordinances and statutes in varied form. A substantial review of the most important of these cases wherein our Courts have both allowed and denied a trial by jury in such proceedings is here given.

(A). CASES IN WHICH TRIAL BY JURY DENIED.

1837—*Johnson v. Barclay*, 16 *N. J. L.* 1.

This case was on information brought for the recovery of a penalty for profane swearing. The information was under oath made before a justice of the peace. The justice issued his precept to a constable, reciting the complaint and oath of the informant and commanding the constable to cause the said Johnson to appear before him on a certain day. The accused appeared before the justice, and the informant filed a state of demand. The said Johnson demanded a jury. This the justice denied and proceeded to hear the matter and convicted the defendant. The case was then taken to the Supreme Court on certiorari. The Court, at page 6, in discussing the defendant's right to trial by jury, said:

"7th. Objection—The justice refused a trial by jury.

"In doing so the justice was right. Convictions before a justice were in practice in this State long before the Constitution was formed. By the twenty-second article of that instrument the trial by jury was to 'remain confirmed' as a part of the law of this (then) colony; but it was not introduced as a *new* mode of trial in all

cases. It was adopted, or, rather, continued, as it was then used in England and in this colony, and was not at that time, either there or here, resorted to in cases of summary proceedings and convictions for petty offenses."

1868—*McGear v. Woodruff*, 33 N. J. L. 213 (4 Vr.).

Suit was brought to recover a penalty for the violation of an ordinance of the city of Bridgeton. The 10th section of the act incorporating the city gives the mayor or any justice of the peace of the city, as a magistrate, cognizance to try complaints for violations of the ordinances of the city. The action under the city charter is by an action of debt. The defendant demanded a trial by jury, and this was refused and the mayor proceeded to try the complaint without a jury. The Court held in this he was right, and at page 216 says:

"The language of the seventh section of article first, of the Constitution of 1844, that 'the right of a trial by jury shall remain inviolate,' is not substantially different from that of the twenty-second article of the Constitution of 1776, 'that the inestimable right of trial by jury shall remain confirmed as part of the law of this colony, without repeal forever.' By that section it was not intended to introduce trial by jury in cases where it did not exist before, but merely to preserve it inviolate in cases where it existed at the time of the adoption of the Constitution. Prior to the adoption of the constitution of 1776, convictions before magistrates for petty criminal offences and violations of police regulations were of frequent occurrence, and were recognized as part of the laws of England. Since the adoption of that Constitution, and prior to the adoption of the Constitution of 1844, that practice was pursued in this State without objection. It was not intended by the seventh section of the first

act of the Constitution of 1844 to introduce trial by jury in these cases where by law and by long practice the right did not previously exist."

And again, at page 217:

"Indeed, extensive and summary police powers are constantly exercised in all the States of the Union for the repression of breaches of the peace and petty offences, and these statutes are not supposed to conflict with the Constitutional provisions securing to the citizen a trial by jury."

1872—*Edwards et al. v. Elliott*, 36 N. J. L. 449 (7 Vr.).

In this case the Court had under consideration the Federal statute for the collection of demands against ships, steamboats and other vessels, and one of the objections raised was that it violated the right of a trial by jury given by the Constitution of the State of New Jersey. The Court, at page 456, said:

"Our colonial Constitution of July 2d, 1776, section 22, ordained that 'the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without appeal, forever.'

"Yet, in 1798, an attachment law against absconding and absent debtors was passed, which has the very features which are most obnoxious to the charges made against this law, and it still stands upon our statute book, enforced daily in our courts without a question as to its constitutionality.

"The goods of a defendant, upon affidavit of indebtedness, &c., are seized, notice is advertised; if he fail to appear, his property is sold by auditors and distributed among the applying creditors. The defendant may thus be deprived of his property without a trial by jury. Who doubts the legality of this proceeding? If the defendant appear, the statute regulates the

method and the manner of discharging his personal property from the lien of the attachment."

And again, at page 458:

"This act of 1857, giving a lien on vessels, introduces no new or arbitrary remedy, but uses such as is well-known and used in our law in similar cases, and the right of trial by jury under its proceedings remains inviolate. This conclusion appears to be clearly within the construction which has been given to the sections of the Constitution of the United States, and the Constitutions of other States, and many statutes of like import."

1874—*Howe v. Treasurer of Plainfield*. 37 N. J. L. 145 (8 Vr.).

The certiorari brings up the judgment and proceedings of the City Judge of Plainfield in a matter of complaint made against the defendant for violation of the ordinances of the city. By the charter of Plainfield power is given to the common council to prescribe by ordinance fines and penalties for the violation of any of its ordinances, with the proviso that the amount of fine shall in no case exceed \$100 or the term of imprisonment twenty days, preserving the right of trial by jury if demanded by the defendant in all cases, where the punishment prescribed may be imprisonment or the amount of fine exceed \$20. The suit involved one penalty of \$20 and the defendant claimed the right of trial by jury, which was refused, and this was alleged for error. The Court, at page 148:

"What, then, was this right thus cherished and thus perpetuated? We inquire not now after the mode in which such trial was conducted. Our business at present is to ascertain how far the right to a trial by jury extended—to which controversies it was applicable. It was a right—the title to which was founded upon usage—and its

measure is therefore to be sought in the usage which prevailed at the time when it was asserted. But never in England was there any usage, and, consequently, was there any right in the subject that every litigated question of fact should be submitted to a jury. In all that large class of cases which are cognizable in courts of equity, there never was any right of trial by jury, nor did the right extend to many other civil and criminal proceedings. Summary convictions for petty offences against statutes were always sustained, and they were never suffered to be in conflict with the common law right to a trial by jury."

1878—*Sparks v Stokes*, 40 N. J. L. 487 (11 Vr.).

This certiorari brings up a certain judgment in favor of the Treasurer of Millville against one Sparks, for the amount of the penalty of \$20 due for the violation of an ordinance of the City of Millville. The ordinance provided "such person or persons, on conviction thereof before the mayor or any justice of the peace, shall forfeit and pay for every such offence the sum of \$20, with costs of suit, recoverable in an action of debt in the name of the treasurer of the said city." The defendant demanded a trial by jury, and the justice refused. The Court, at page 492, says:

"The justice acted properly in refusing to allow a jury. That in this trial the magistrate did not sit as justice of the peace, but as a magistrate of the city adjudicating complaints for violations of city ordinances, and also that the defendant was not entitled to a jury trial, is the result of the ruling in *McGear v. Woodruff*, 4 Vroom 213."

1883—*Shivers v. Newton*, 45 N. J. L. 469 (16 Vr.).

This writ brings up the record of conviction and judgment in proceedings had before a justice of the

peace under the provisions of an act (*Pamphlet Laws*, 1882, p. 97) entitled "An act to prevent the adulteration and to regulate the sale of milk." The act provides that the provisions thereof may be enforced before any justice of the peace or recorder in any county where the offense is committed. A trial by jury was denied and the Court speaking with reference thereto, on page 476, said:

"The last of the constitutional objections to the act is that it makes no provision for a trial by jury. The law has so frequently been stated to the effect that the enforcement of regulations of the kind included within the statute by summary proceedings before a magistrate alone was not within the constitutional guaranty of trial by jury that I think further remark would be profitless."

1887—*Carter Brothers v. The Camden District Court*, 49 N. J. L. 600 (20 Vr.).

The action was commenced in the Camden District Court by William K. Newton, State Dairy Commissioner, to recover a penalty of the defendants for alleged violation of the provisions of an act entitled "An act to prevent deception in the sale of oleomargarine, etc." Upon the return day the defendants appeared and demanded a trial by jury. This was refused. Whereupon the defendants sued out a writ of certiorari. The act (P. L. 1886, Chapter 84, Section 10) provides:

"10. And be it enacted, *That every district court in any city, and every justice of the peace in any county, and any recorder in any city* is hereby empowered on oath or affirmation made according to law that any person or persons has or have violated any provision of this act, to issue process at the suit of the commissioner hereafter named as plaintiff for the use of the State of New Jersey, either in the manner of a summons or warrant, against the person or

persons so charged, which process shall, when in the nature of a warrant, be returnable forthwith, and when in the nature of a summons shall be returnable in not less than one nor more than ten entire days; such process shall state what provision of the law is alleged to have been violated by the defendant or defendants; and on the return of such process, or at any time to which the trial shall have been adjourned, the said court, justice of the peace, or recorder, shall proceed to hear testimony and to determine and give judgment in the matter, without the filing of any pleadings, for the plaintiff, for the recovery of such penalty, with costs, or for the defendant; and the said court, justice of the peace or recorder shall, if judgment be rendered for the plaintiff, forthwith issue execution against the goods and chattels and person of the defendant or defendants; and the said court, justice of the peace or recorder is further empowered to cause any such defendant who may refuse or neglect to pay the amount of the judgment rendered against him, and all the costs and charges incident thereto, unless an appeal is granted, to be committed to the county jail for any period not exceeding ninety days."

Mr. Justice Parker, speaking with reference to the defendants' right of trial by jury, at page 601 said:

"It is admitted that the statute in question is in the nature of a police regulation. It was enacted to prevent cheating in the sale of articles made to imitate butter and cheese. The proceedings to enforce it are intended to be summary in their character.

"Before the adoption of the constitution of 1776 penalties for the violation of statutes which provided for summary proceedings before a magistrate for their enforcement were disposed

of by the magistrate without a jury. The defendants in such cases were not entitled to trial by jury. Neither the act now in question nor any other act has given to either party in such case the right of trial by jury. It is claimed by these defendants as a constitutional right. The language of the constitution of 1776 is peculiar. It does not give the right of trial by jury where it did not previously exist. It does not enlarge, but merely secures the right, as it then existed, by the following clause, viz.: 'Section 11. The inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, forever.'

"Neither does the constitution of 1844 enlarge the right. The language of that instrument is: 'The right of trial by jury shall *remain* inviolate.' The meaning of the language is that where the right to a jury existed before the constitution it could not be taken away by the legislature, but where there was no such right previously it was not extended to such cases."

And again, at pages 602 and 603:

"That statute now under consideration does not provide for an action of debt, but points out a mode of summary proceeding to be used without the filing of pleadings. The mode of proceeding being pointed out by the act, the District Court could not legally pursue any other, and could not grant the defendants a jury. The legislature has the power to prescribe a mode of procedure, and no other form can be adopted than the one indicated in the statute, whether the action be commenced before a justice of the peace or a recorder or a District Court."

1889—*Bassette v. State of New Jersey*, 51 N. J. L. (22 Vr.) 502.

The prosecutor sought by certiorari to reverse a conviction for disorderly conduct had before a justice of

the peace under section 6 of the Disorderly Act (*Rev.*, p. 305). The prosecutor was denied by the justice a trial by jury.

Mr. Justice Garrison, who delivered the opinion of the Court, held that a trial by jury is not given by the act.

1908—*Minard v. Dover, etc., Gas Co.*, 76 N. J. L. (47 *Vr.*) 132.

The defendant was convicted by a justice of the peace for the violation of section 33 of the Fish and Game Act.

Under the Fish and Game Procedure Act (*P. L.* 1897, p. 109), justices of the peace, *District Courts* and police magistrates had jurisdiction to try and punish any persons for violations of the act. Such justice of the peace, District Court and police magistrate, upon receiving complaint in writing, duly verified, is authorized and required to issue a warrant commanding such person to appear before such justice, District Court or police magistrate and thereupon to proceed in a *summary* way to hear and determine the guilt or innocence of such person or persons.

Mr. Justice Trenchard, discussing the right of a trial by jury under the act, said at page 136:

"The Fish and Game Procedure Act of 1897 permits no trial by jury, the magistrate being required to proceed in a summary way to hear and determine the guilt or innocence of the person accused (*P. L.* 1897, p. 109, *sec.* 3), but an appeal is permitted to the Common Pleas (*P. L.* 1897, p. 111, *sec.* 9), which appeal is to be heard in the same way and manner as the case was heard before the magistrate, to wit, without a jury (*P. L.* 1897, p. 112, *sec.* 10)."

1913—*State v. Lakewood Market Company*, 84 N. J. L. (55 *Vr.*) 512.

This writ of certiorari brought up for review a conviction of the Lakewood Market Company in a pro-

ceeding before a justice of the peace on a complaint for violation of the Fish and Game Act.

Mr. Justice Trenchard, who delivered the opinion of the Court, at page 523, said:

"The validity of a provision for the collection of a penalty by summary proceedings, without a jury trial, depends not upon the amount of the penalty to be so recovered, but upon the character of the statute to be so enforced and upon the nature of the offence for which such penalty is provided. This is apparent from a reading of the decisions. It is the rule which has been generally adopted by the courts of other States, and approved by the text-book writers. *Prof. Jury Tr., sec. 95, et seq.*

"There are many kinds of proceedings in which a jury trial is not a matter of right. Among these may be mentioned matters properly cognizable before the Court of Chancery, the assessment of damages in proceedings for condemnation of lands, cases in the Orphans' Court, in the admiralty jurisdiction of the United States Courts, in proceedings for contempt of court, and proceedings for forfeiture of property for violation of law. See *Scudder v. Trenton-Delaware Falls Co.*, *Saxt.* 695; *Wood v. Tallman Coxe*, 153; *State v. Doty*, 3 *Vroom* 403; *Haney v. Compton*, 7 *Id.* 507, 525.

"It is well known that it has long been the practice to enforce police statutes and to punish minor criminal offences before a justice of the peace without a jury. It appears in 2 *Burn Just.* 295, that during the reign of George I, fish and game laws were enforced in England by summary procedure. See, also, 4 *Bac. Abr.* 442."

(B). CASES IN WHICH TRIAL BY JURY ALLOWED.

1880—*Greeley v. Passaic*, 42 N. J. L. (13 Vr.) 87.

The provisions of the charter of the City of Passaic provide in all cases where power is given to the City Council to pass ordinances on any subject that it may prescribe a penalty for the violation thereof, either by imprisonment, or by fine not exceeding \$50, to be recovered, with costs, in an action of debt, in the name of the city of Passaic, for the use of said city, before any justice of the peace of said county. The defendant was charged with the violation of a city ordinance passed pursuant to the provisions of the city charter. The proceeding was before a justice of the peace of said county and trial by jury was denied. The Supreme Court sustained the refusal of a trial by jury, and at page 89 said:

“Jurisdiction was given to a justice of the peace as a special magistrate; and the Legislature having failed to provide for trial by jury in such cases, it was not the right of the parties. I am unable to distinguish these cases from *Johnson v. Barclay*, 1 Harr. 1; *McGear v. Woodruff*, 4 Vroom 213; *Howe v. Plainfield*, 8 Vroom 145; *Sparks v. Stokes*, 11 Vroom 487, in which cases this question has been thoroughly discussed and uniformly settled against the views of the defendant’s counsel; and it is unnecessary to do more than merely cite them.”

Thereafter, the judgment of the Supreme Court was reviewed by the Court of Errors and Appeals (*Greeley v. Passaic*, 42 N. J. L. 429), and Mr. Justice Reed, who delivered the opinion of the Court, at page 431, said:

“The Supreme Court held that the justice was not acting under this act, but that jurisdiction was given to the justice under the charter of Passaic, as a special magistrate, to enforce these penalties as police regulations, in a summary

method, and that, inasmuch as the Legislature had failed to provide for a jury trial and an appeal, neither of them was a right belonging to the defendant. The question involved is, in this court, an open one, and resolves itself into an attempt to discover the legislative intent, arising from the fact that this body has provided, in the Passaic charter, for the recovery of a penalty by an action of debt, before a justice of the peace of Passaic County.

"It is perceived that nothing is said about procedure, except that it shall be an action of debt before a justice, and that an execution shall issue against the body, &c. The question that naturally arises is, what procedure is to be adopted to control the prosecution of this action of debt? Upon recurring to the common law for a procedure, we discover that there was none. At common law, a justice of the peace had no authority to take cognizance of an action at law."

1901—*Harman v. State Board of Pharmacy*, 67 N. J. L. (38 Vr.) 117.

This is a suit to recover a penalty under the act entitled "An act to regulate the practice of pharmacy in this State," approved March 19, 1901 (*P. L.*, p. 85).

The act provides:

"Any justice of the peace in the county or any District Court in the city, where the offense shall have been committed, under any section of this act, shall have authority and jurisdiction to hear and determine said action, and to render judgment therein, with costs, according to the laws and practice governing said courts in similar actions." * * * (*P. L.* 1901, p. 90, *Secs.* 7, 8.)

The return shows that the proceedings were brought in the Court for the Trial of Small Causes. It was

contended that this was error and that the proceeding should have been before a justice of the peace as a common law magistrate.

Mr. Justice Fort, delivering the opinion of the Court, at page 119, says:

"The action was properly commenced by a summons duly served under the Small Cause act, and by a state of demand filed in that court stating the plaintiff's cause of action.

"This finding makes it necessary to consider only one other objection found in the record. The justice refused a demand for a trial by jury, and proceeded to the trial of the cause before himself without a jury. This was error. The defendant is entitled to a trial by jury under the 'Act for the trial of small causes in cases triable in that court.' (*Gen. Stat.*, p. 1871, *Sec.* 33.)"

1908—*N. J. Society P. C. A. v. Atkinson*, 76 *N. J. L.* (47 *Vr.*) 286.

The prosecutor was convicted of a violation of section 13 of the act for the prevention of cruelty to animals (*Gen. Stat.*, p. 36, *pl.* 29) before a justice of the peace. He appealed to the Common Pleas, and the case was there tried *de novo* before a jury, who found him guilty. This proceeding was brought before the Supreme Court on certiorari. The prosecutor complained that he was denied a trial by jury in the justice's court, and that there was no legal conviction by the Common Pleas.

Mr. Justice Swayze, who delivered the opinion of the Court, at page 287, says:

"The proceeding is one governed by the practice of the small cause court. The penalty is to be recovered by action of debt, and section 14 (*Gen. Stat.*, pp. 39, 40) expressly enacts that judgment shall be rendered for the penalty in like manner as in actions for the recovery of

money or damages in the court for the trial of small causes, and that all proceedings shall conform to the course and practice of the court before which the same shall be instituted."

1917—*Lowrie v. State Board of Dentistry*, 90 N. J. L. (5 Gum.) 54.

This case was brought before the Supreme Court on certiorari. The prosecutor was convicted by the *Passaic District Court* under the act of 1915 (*P. L.*, p. 261) of practicing dentistry without a license. Section 14 of the act under which the proceeding was instituted, *Chapter 146, P. L. 1915*, in part provides:

"14. Any penalty incurred by violation of any provision of this act, except by any violation specifically made a misdemeanor by this act, shall be sued for and recovered by, and in the name of, the State Board of Registration and Examination in Dentistry. *Every District Court in any city or judicial district in any county, and every Court of Common Pleas in any county is hereby empowered upon the filing of a complaint in writing, duly verified, which said verification when made by any member of the said State Board of Registration and Examination in Dentistry, or by any member of any incorporated dental society of this State, or of any county of this State, may be made upon information and belief that any person has violated any provision of this act, except the provisions above referred to as misdemeanors, to issue process at the suit of the State Board of Registration and Examination in Dentistry, as plaintiff; such process shall be either in the nature of a summons or warrant, which warrant may issue without any order of the Court or judge first being obtained against the person or persons so charged, which process when in the nature of a*

warrant shall be returnable forthwith, and when in the nature of a summons shall be returnable in not less than five nor more than fifteen entire days; such process shall state what section of the law is alleged to have been violated by the defendant or defendants, *and upon the return of such process, or at any time to which the trial shall be adjourned, the said Court shall proceed in a summary manner to hear testimony and to determine and give judgment in the matter without the filing of any pleadings for the plaintiff for the recovery of such penalty, with costs,*"

* * *

It was argued that the District Court lost jurisdiction because a trial by jury was demanded and refused, but the record failed to show any demand for a jury trial.

Mr. Justice Swayze, who delivered the opinion of the Court, after pointing out certain phraseology in the statute which seemed to the Court to indicate the legislative intent, at page 56, said:

"Unless we are to assume that the legislature did not use legal terms in their well-established legal sense, we must assume that if they had meant the proceedings to be summary, they would have used the word complaint and not the word pleadings. If we look further than the mere language of the statute at its substance, we find that not only is the proceeding in effect a suit *inter partes*, but the judgment, if against the defendant, is for the plaintiff—the dentistry board—for its own benefit. Moreover, section 17 enacts that the costs shall be the same as costs taxed in actions in said courts, and that if the judgment is in a District Court, it may be docketed in the same manner as other judgments in that court. The fact that imprisonment is authorized in case of failure to pay the judgment does not affect our conclusion, since that point

was involved and decided in cases under similar statutes. *White v. Neptune City*, 56 N. J. L. 222; *Board of Health v. Cattell*, 73 Id. 516; *Tenement House Board v. Gruber*, 79 Id. 257. The present case is, if possible, clearer than those, especially since the legislature must be presumed to have known of those decisions when it passed the act of 1915 and modeled it on the statutes there construed. We conclude, therefore, that the defendant would have been entitled to trial by jury if he had made the demand required by the District Court act, and his present objection to the constitutionality of the act of 1915 fails. But as the record fails to show an application for a jury, no error appears in this respect."

1920—*State Board of Medical Examiners v. Curtis*, 110 At. 816.

In the case here submitted for review Mr. Justice Swayze, who delivered the opinion of the Court, likewise affirmed the judgment of the District Court in allowing the defendant a trial by jury under the act regulating the practice of medicine and surgery cited herein.

The Court, at page 817, said:

"The fact that the suit is a civil suit does not of itself settle the question of the right to trial by jury. There may be cases where it would be competent for the Legislature to prescribe a summary proceeding in a civil suit even where, as at common law and at the time of the adoption of the Constitution of 1844, penalties were recoverable by the ordinary action of debt. *McGear et al. v. Woodruff*, 33 N. J. Law 213. We are not now concerned with the constitutional question. *We have to do only with the statute governing the District Courts. The question is*

whether in a civil suit of which jurisdiction is given to the district court there is a right of trial by jury. The question seems to be answered by section 149 of the act, C. S. R. 1999, which enacts that either party may demand a trial by jury, and that a venire shall be issued."

There is, we submit, in the determination of this case, no constitutional right involved. The right of a trial by jury in summary proceedings, if it exists at all, exists by virtue of a statute. It is, therefore, a statutory right. The constitutional guarantee of the right of trial by jury in this State relates only to those cases wherein it existed at the time of the adoption of the Constitution. The constitutional provision, then, has no application to those cases created by the Legislature subsequent to the adoption thereof. The cases cited make this clear and conclusive.

Moreover, the Legislature may, by legislative enactment, deal with any subject matter within the limitations of the Constitution. There is, we submit, no constitutional objection to the Legislature conferring upon any judicial tribunal, civil or otherwise, summary powers. In fine, the Legislature undoubtedly can confer upon district courts summary powers in a civil suit. We need only refer to our statutes to find this to be so, viz.:

The Fish and Game Procedure Act of 1897 (2 C. S. 2556); the act to improve the condition of tenement houses (4 C. S. 5352); the act regulating the practice of dentistry (P. L. 1915, 146); the act regulating the practice of medicine and surgery (P. L. 1915, 476); the act regulating the sale of oleomargarine (2 C. S. 2579); an act for the prevention of forest fires (P. L. 1914, 512); the act amending the act regulating the business of undertaking (P. L. 1918, 316).

The inquiry then is what procedure does the statute provide for. This inquiry, whether in a criminal, quasi criminal or civil suit is equally pertinent. Whether or not the justice of the peace, magistrate or court shall

proceed in a summary manner depends upon what procedure the statute provides for.

Therefore, we submit, the fact that the proceeding instituted under the statute is civil does not answer the inquiry as to whether the proceeding is summary. It may be summary even though civil. A summary civil proceeding.

The Court in both the Lowrie and Curtis cases held, after pointing out what seemed to the Court to be significant phraseology, that the proceedings instituted under the Dental and Medical Acts, respectively, were civil, but, as we view it, left unanswered the question whether the proceeding, even though civil, was summary.

The Legislature in both statutes uses the phrase "*the Court shall proceed in a summary manner*," and the Legislature is presumed to have used that phrase with its legal meaning—without trial by jury. Yet the Court makes no reference to this but seeks to interpret the legislative intent otherwise than the plain language of the statute indicates.

In the Lowrie case, the Court points out that inasmuch as the Legislature did not confer summary powers *upon the judge of the District Court sitting as a magistrate*, but instead upon the District Court itself this was apparently conclusive that the Legislature intended the proceeding as provided for in the District Court Act to be adopted.

We submit this view is unsound and will not bear close analysis.

First, to hold that the Legislature should have conferred summary powers upon the judge of the District Court sitting as a magistrate is to assume that the Legislature could not confer summary powers upon the District Court. There must exist some legal objection to conferring summary powers upon the District Court or else there is no purpose served in arguing that the Legislature should have conferred summary powers upon

the judge thereof. There is, as we have indicated, no constitutional objection thereto, and therefore the failure of the Legislature to confer summary powers upon the judge of the District Court is indicative of nothing. The objection is without substance and hence fails.

Second, the Legislature has in numerous statutes, namely the Fish and Game Procedure Act of 1897 (2 *Comp. Stat.* 2556), an act relating to the sale of oleomargarine, *Chapter 122, P. L.* 1912, as amended (2 *Comp Stat.* 2579) and the act relating to tenement houses (4 *Comp. Stat.* 5352), conferred summary powers alike upon a justice of the peace and a District Court.

If, then, the view expressed in the Lowrie case is sound, under those statutes where the Legislature has conferred summary powers alike upon the justice of the peace and the District Court, the justice of the peace could hear and determine a matter without a jury, whereas the District Court could not. Indeed, we submit, in this circumstance, whether the defendant is entitled to a trial by jury under those statutes wherein summary powers have been conferred alike upon a justice of the peace and a District Court would depend not upon the provisions of the statute, but, in fact, upon the form in which the plaintiff or complainant chose to institute the suit.

The Legislature undoubtedly intended the procedure under the same statute to be uniform in all courts, whether that court be a justice of the peace or a District Court, and if that be true, it seems to us that the objection raised by the learned court is not valid.

The Court in the Curtis case (case here submitted), after characterizing its opinion in the Lowrie case on the question of a trial by jury as *palpably obiter*, endeavors to point out the differences in the phraseology of the Medical Act and the Oleomargarine Act, the latter statute being the one under consideration in *Carter Brothers v. Camden City District Court*, cited *supra*, and finally, because of those differences distinguishes

the Carter Brothers case under the Oleomargarine Act from the Curtis case under the Medical Act, upon the ground that the proceedings under the Oleomargarine Act might well be held to be *quasi criminal*.

We submit that Carter Brothers case is controlling here and that the distinction pointed out by the Court is unsound. The jurisdiction of the District Court (2 *Comp. Stat.*, p. 1962) is by statute confined to *every suit of a civil nature*, within certain limitations as to amount, including penalty suits as well. Yet if the view expressed in the Curtis case is correct, the District Court in the Carter Brothers case exercised quasi-criminal jurisdiction for which it had no statutory authority.

An examination of the various statutes conferring summary powers discloses that it is practically impossible to reconcile their provisions. We contend, though, this is not necessary. Those differences as they exist are of form only and not of substance. The important thing is—the procedure, that is, the mode of trial, and that, we urge, can be ascertained quite apart from any reference to technical terms, particularly when the statute itself provides, as here, *that the Court shall proceed in a summary manner*.

It is to be observed also that the Court in the Curtis case cited certain cases upon which it apparently relied for its conclusion therein expressed, but in none of those cases was the *right of a trial by jury involved*, save only *Harman v. State Board of Pharmacy*, cited *supra* and *Carter Brothers v. Camden City District Court*, cited *supra*.

The Harman case is readily distinguishable from the case here submitted, because there the Legislature provided for an action of debt and directed the justice of the peace or district court to hear and determine said action and to render judgment therein, with costs, *according to the laws and practice governing said courts in similar actions*. There could be no question as to the procedure to be adopted because the statute clearly in-

licated it, and because the statute clearly indicated it the Court followed it and that procedure carried with it a trial by jury.

In the Carter Brothers case, the Supreme Court sustained, under the Oleomargarine Act, the refusal of a trial by jury, and there clearly said that the Legislature having pointed out the mode of proceeding, the District Court could not legally pursue any other, and that procedure not carrying with it a right of trial by jury, of course the defendants therein were not entitled thereto.

The Legislature certainly in the enactment of the Medical Act intended that the procedure indicated therein should be adopted. If the Legislature did not so intend, then are we to say that those provisions are useless and surplusage? If the provisions were put in the statute for a purpose then what is the purpose? Was it not to prescribe the mode of procedure in cases of this character? If the Legislature had intended the procedure of the District Court to apply, why did it not say, as in the statute under consideration in the Harman case, that the case should be heard and determined according to the laws and practice governing the District Court? The fact that it did not, demonstrates clearly that the Legislature intended to provide quite a different procedure in the trial of cases under the Medical Act.

Moreover, the fact that the suit may be civil, which is not disputed, does not say at all that the mode of trial for the civil suit may not be summary. Indeed, if the case of *Carter Brothers v. Camden City District Court*, cited *supra*, is good law it establishes summary proceedings in civil suits. This, we urge, is precisely the procedure under the Medical Act—summary procedure in a civil suit.

We respectfully urge, therefore, that the Legislature having indicated the mode of trial, it was incumbent upon the trial courts to adopt the procedure therein indicated, and that the District Court could not legally

pursue any other, and that the defendant was not entitled to a trial by jury, and in that respect the ruling of the Court was erroneous.

Permit us to add in conclusion on this point that aside from the legal questions here raised, there is a substantial, practical difficulty in trying cases under the Medical Act and similar statutes before a jury.

Under the various statutes it is the duty of the boards and commissioners to prosecute violations, and yet we feel if a trial by jury is permissible, the performance of this duty under the various statutes would be greatly hindered and delayed, and we might further suggest that even the proper administration of those statutes in the interest of the public would be successfully frustrated.

We believe that the Legislature probably for these very reasons was prompted to provide a summary procedure in order that violations under the various statutes could be expeditiously prosecuted in the interest of the public.

II.

The proceeding to review is by appeal and not by certiorari.

The Supreme Court (Case, p. 155), with reference to the method of review, said:

"If we are wrong in our view, the result would not be a reversal of the judgment but a dismissal of the appeal. This appeal was taken by the ordinary notice used in civil suits in the District Court. But if the proceeding is a summary proceeding, not governed by the District Court Act, but before the judge of the court (it can make no difference which word we use) as a magistrate, it could only be reviewed by certiorari. The appeal is in the nature of a writ of error. When courts act in a summary way, or in a new course different from the common law,

a certiorari, and not a writ of error, is the proper remedy. *Reiman v. Wilkinson, Gaddis & Co.*, 8 N. J. L. 383; *City Bank of Bayonne v. O'Mara*, 88 N. J. L. 499; *Gordon v. Pannaci*, 90 N. J. L. 392."

The Medical Act (*Chapter 271, P. L. 1915*), under which this suit was instituted, does not provide a method of appeal. It does, though, direct suit to be instituted in the District Court, and the District Court Act (2 *Comp. Stat.* 2016) authorizes an appeal to the Supreme Court.

There is, we think, no doubt but that the proceeding under the Medical Act is civil.

Brophy v. Perth Amboy, 44 N. J. L. 217; *White v. Neptune City*, 56 N. J. L. 222; *Board of Health v. Cattell*, 73 N. J. L. 516; *Tenement House Board v. Gruber*, 79 N. J. L. 257; *State Board of Medical Examiners v. Curtis*, 110 *Atl. Rep.* 816.

We submit, however, that the proceeding is not civil as distinguished from summary, but rather civil as distinguished from criminal or quasi criminal. We submit the proceeding under the Medical Act is a summary civil proceeding, and that the case of *Carter Bros. v. Camden District Court*, cited *supra*, fully supports this view.

Therefore, the procedure, insofar as the Medical Act provides for it, should be followed, and thereafter, inasmuch as the suit was instituted in the District Court, the procedure respecting appeals, as provided for in the District Court Act, should be adopted.

White v. Neptune City, 56 N. J. L. 222; *Unger v. Fanwood*, 69 N. J. L. 548; *Tenement House Board v. Gruber*, 79 N. J. L. 257.

Mr. Justice Swayze, who delivered the opinion of the Court in the Tenement House Case, at page 257, said:

"This is a motion to dismiss an appeal taken by the defendant in proceedings brought by the board of tenement house supervision, under the act of 1904, *P. L.*, p. 96. The ground of the

motion is that the only remedy is by certiorari.

It must be conceded that the language of the act of 1902, which allows appeals in any action or proceeding in any District Court, is sufficient to warrant the appeal. It is argued, however, that the proceedings under the act of 1904 are of a summary character, the form of conviction being prescribed by the supplement of 1906. *P. L.*, p. 245. The distinction made is between suits of a civil nature, and criminal or *quasi* criminal proceedings. *Unger v. Fanwood*, 40 *Vr.* 548."

We, therefore, see no objection to the method of review adopted herein and respectfully urge that the same was proper.

III.

The court should have directed a verdict for the plaintiff-appellant.

The Supreme Court (Case, p. 155), with reference to motion to direct a verdict, said:

"It is urged, however, that the trial judge should have directed a verdict for the plaintiff. The evidence is suggestive that the defendant in one case at least undertook to diagnose and prescribe, but his testimony is that he merely sold medicine and avoided any attempt to make a diagnosis or prescribe. He came very close to admitting facts sufficient to sustain the charge, but whether he did admit it depends on what he in fact said and what he in fact did. In view of the somewhat differing versions, we think a jury question was presented."

The procedure under the Medical Act being civil, and the Court below having allowed a jury, the same rules apply to its conduct and the control of the Court over the jury as in other civil actions.

In *State Board of Health v. Van Druens*, 77 *N. J. L.* (48 *Vr.*) 443, a verdict was directed for the plaintiff,

the Board of Health, by the Common Pleas Court in the trial of an action brought for violation of the Pure Food Law of 1901 (*P. L.* 1901, *p.* 186). The procedure under this act is substantially identical with the procedure in the case here submitted, except that under that statute a jury trial was specifically provided for. Mr. Justice Minturn, commenting on the direction of a verdict, at page 445, says:

"The *status* of the proceeding having been repeatedly adjudged to be of a civil and not a criminal character, it follows that the rules of procedure peculiar to the civil jurisdiction were applicable in the trial of the cause; and that upon familiar principles it was competent for the Court to direct a verdict, if the testimony was of such a character as to warrant the direction. *Crosby v. Wells*, 44 *Vroom* 790; *Polhemus v. Prudential Realty Company*, 45 *Id.* 570."

See, also, *Lowrie v. State Board of Dentistry*, 90 *N. J. L.* (5 *Gummere*) 54; *Holtsman v. State Board*, decided February 21, 1917.

It follows, then, that the only question remaining for consideration is whether the undisputed evidence in the case shows that the defendant had violated the statute.

The statutory definition of the practice of medicine is found in section eight of the act, as amended by *P. L.* 1915, *p.* 482, and provides:

"An person shall be regarded as practicing medicine and surgery within the meaning of this act, who shall use the words or letters 'Dr.,' 'Doctor,' 'Professor,' 'M.D.,' or 'M.B.,' in connection with his or her name, or any other title intending to imply or designate him or her as a practitioner of medicine or surgery in any of its branches, and who, in connection with such title or titles, or without the use of such title, titles, or any of them, holds himself or herself out as being able to diagnose, treat, operate or

prescribe for any human disease, pain, injury, deformity or physical condition, or who shall either offer or undertake by any means or methods to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition; *and it is further provided*, that the provisions of this act shall apply to all persons professing and attempting to cure diseases by means of the so-called system 'faith-curism,' 'mind-healing,' 'laying-on-of-hands,' and other similar systems."

The undisputed evidence, as we understand it, is that the defendant is a salesman of medicine; that he sold Sacred Bark Compound, a liniment, a salve and a soap, a regular line of household remedies (Case, p. 116), the ingredients of which were known to him; that he traveled from place to place, this time to the City of New Brunswick, Middlesex County, and from there to Highland Park, at which place he was when the complaint was made; that to attract the attention of the people and make known his remedies he gave open-air entertainments consisting of muscular and athletic exhibitions and physical culture exhibitions or instructions (Case, p. 117).

The defendant, when located, erected a tent and a platform outside thereof. The performances were held in the evening, and in the daytime he had regular hours of business in the tent from eleven until four. People attended the entertainments in the evening and then would visit the defendant at the tent, where, upon inquiry of the patient, he ascertained his or her ailment or disease, discussed the same and then sold the medicine for certain prices, and made no charge other than for the medicine itself. The bottles containing the medicine had stamped thereon directions as to taking. The tent was so arranged inside that he could see patients, if he so desired, privately, which he sometimes did.

Among those who visited the defendant was witness Rose Maulouf (Case, p. 111), who testified:

"Q. Did you ever go to him for treatment, or secure any of his medicines?

A. Yes, I got some of his medicine."

And, further (Case, p. 112):

"Q. What did he say to you, if anything?

A. Why, I went up there with my mother, and he asked me what was the matter with me, and I told him. And he wanted to know if I had any proof. And I said yes. And so the first time that I went there I didn't take any medicine, but the second time I went up I took a dose of medicine right there.

Q. He gave it to you?

A. Yes."

The defendant, on cross-examination, testified (Case, p. 134):

"Q. You gave this young girl medicine, did you not?

A. I did. I made her a present of it.

Q. After you had ascertained what was the matter with her?

A. After she brought me the evidence.

Q. Well, then, you gave her—she brought you evidence of what?

A. Of a tapeworm."

And, further (Case, p. 135):

"Q. And then you gave it to her to remove it, did you not?

A. I gave her the medicine to remove the tapeworm, sure.

Q. And you are satisfied to have it go to these twelve men that you did not give her that medicine to remove that tapeworm after you sent her home to get a sample of it, all right?

A. I just admitted that I did give her the medicine, with the expectation that it would re-

move the tapeworm, because it has done it before."

And, further (Case, p. 137):

"Q. What about Mr. Golden, didn't he have a tapeworm?

A. He did. I guess. He brought me a piece of tapeworm, anyhow.

Q: Did he bring it after or before he took some of your dose?

A. Both. He took some of the Sacred Bark, and after taking that then he came and brought me a piece of tapeworm.

Q. And you told him to go home and get a piece first, didn't you?

A. I have forgotten whether I did or not. He brought me a piece.

Q. And then you gave him the Sacred Bark, didn't you?

A. Yes.

Q. And you told him it would act in three or four hours, didn't you?

A. Yes."

The Court, in *Bragg v. State*, 134 Ala. 165, defines the word *medicine* as follows:

"The word 'medicine' (Latin *medicina*) is derived from *medeor*—to heal. It is defined by the eminent lexicographer of medical words or terms, Gould, to be 'the science and art of preserving health, and preventing and curing disease; "the healing art," including, also, the science of obstetrics.' By Dunglison, another author of a medical dictionary, to be 'the healing art; physic; a science, the object of which is the cure of disease, and the preservation of health.' Bigelow, an eminent physician and author of medical works, says: 'Medicine is the art of understanding diseases, and curing or relieving them when possible.' The Universal

Cyclopedia, edited by Rossiter Johnson, Ph.D., LL.D., after giving the derivation of the word 'medicine,' from the Latin word *medicina*, defines it to be, 'the art of a physician or of healing; the art and science of curing diseases.' The Encyclopedia Britannica, under the title 'Medicine,' sub-tit. 'Synoptical View of Medicine,' says: 'Medicine, the subject matter of one of the learned professions, includes, as it now stands, a wide range of scientific knowledge and practical skill.' " * * *

In *Eastman v. People*, 71 Ill. Ap. 236, the Court said in part:

" 'Medicine is the art of understanding diseases and curing or relieving them, when possible.'—Bigelow. 'It is that branch of physics which relates to the healing of diseases.'—Dunglison."

In *People v. Allcutt*, 102 N. Y. Supp. 678, the Appellate Division of the Supreme Court of New York held that one who practices mechano neural therapy is guilty of practicing medicine within the provisions of the New York statute then in force. A number of cases are cited in the opinion of this case supporting the decision. In this case the Court said in part:

"To confine the definition of the words 'practice of medicine' to the mere administration of drugs or the use of surgical implements, would be to eliminate the very cornerstone of successful medical practice, namely, the diagnosis. It would rule out of the profession those great physicians whose work is confined to consultation, the diagnosticians, who leave to others the details of practice."

It is true that the mere selling of patent medicines by one who does not pretend to diagnose diseases or treat and prescribe therefor does not violate the statute, but the moment he goes beyond the mere selling and does

something more than sell, the question at once arises did he violate the statute regulating the practice of medicine?

This question appears not to have been raised by our courts. There are, however, decisions of courts in other States, the citing of which here is pertinent and may help in determining whether or not the defendant violated the statute.

In *Jordan v. Overseers of Dayton*, 4 Ohio, p. 294, an action for a penalty was brought against Jordan for practicing physics in violation of the statute regulating the practice of physics and surgery.

The defendant was the holder of a patent granting him the exclusive right of making, etc., a certain medicine; that the medicine prescribed and used by him in his treatment of patients were the same as set forth in the patent for the diseases mentioned in the patent, and the defendant contended that the selling of the patent medicine to persons suffering from the diseases for which the medicine was prepared was not practicing medicine.

The Court distinguished between prescribing the medicine for those diseases and the mere sale of the medicine in the following language:

"On the first point, the case shows that Jordan prescribed and administered medicine to two sick persons for fees; the stipendiary character of the service forbids the belief that it was an act of neighborly kindness or the execution of a moral duty. Administering medicine may be the office of a nurse; but prescribing medicine to the sick implies the exercise of skill in the discrimination of diseases and the selection of fit remedies, to acquire which skill is the object of medical education, and to exercise which, for fees, is but another name for the practice of medicine. In the absence of explanation we believe the statement sufficiently shows that Jor-

dan in these cases acted in the character of a physician."

In *Thompson v. Staats*, 15 *Wend.* 395, a suit to recover a penalty for practicing physics without authority, it was proved that the defendant visited a sick man, felt his pulse and gave him medicine which he took, and charged and received two dollars from the patient. The defendant offered to show that he was the owner of a patent covering a medicine which he administered. He administered no medicine except that covered by the patent and claimed the right under the patent to administer the medicine covered thereby. This evidence was rejected upon the ground that administering a patent medicine to a patient under the circumstances above mentioned was practicing medicine, and the patent conferred no right upon the holder thereof to practice medicine.

In *Springer v. District of Columbia*, 23 *Appeal Cases D. C.* 59, a proceeding was brought to recover a penalty for the illegal practice of medicine. The appeal court, in stating the evidence against the defendants, used the following language:

"It appears, therefore, that the defendant claimed to be an expert in the treatment of alcoholism, and had several patients in the City of Washington. He furnished the remedies and required licensed physicians to take immediate charge. These gave the defendant's remedies, and the only discretion exercised by them was with respect to the frequency of the doses for any complication that might ensue. In other words, professing knowledge of the science of medicine, he obtained patients, diagnosed their cases, decided that they were suffering from a malady for which he had discovered or compounded a remedy, prescribed and furnished that remedy, and employed other physicians to take immediate charge of the patients and administer the same."

The Court held that this was the practice of medicine.

The case of *Regina v. Howarth*, 24 Ont. 561, is directly in point. This was a summary proceeding for the collection of a penalty for practicing medicine for gain without a license. The defendant was a druggist. The prosecutor was one Thomas Wasson, a detective employed by the College of Physicians and Surgeons. The testimony showed that one J. M. went to defendant's shop, told the defendant that he felt that he was sick. The defendant told him to live on a milk diet, gave him a bottle of medicine and some pills, for which J. M. paid the defendant fifty cents. The defendant's account of what happened was that J. M. did not say he had diarrhœa, but the description of his symptoms led the defendant to believe that he had that disease.

Speaking of the effect of this, the Court said:

"The defendant, therefore, obtained from the complainant information as to his symptoms, and from the diagnosis that he made of the case, prescribed what he believed to be the proper remedy. The defendant further said, 'I have several kinds of diarrhœa mixtures, and have to inquire the symptoms in order to decide which mixture to give,' and this shows the custom of practice of the defendant. Section 45 of R. S. O. 1887, Chapter 148, being the Ontario Medical Act, enacts that: 'It shall not be lawful for any person not registered to practice medicine, surgery or midwifery, for hire, gain or hope of reward,' and provides for summary conviction."

Speaking further on this point, the Court said:

"Mr. Cassels contended that this was not practicing medicine within the meaning of the section referred to; secondly, that if it was, it was not for gain; thirdly, that even if it was practicing medicine for gain, the defendant was entitled, as an apothecary, to do what he did. I think, as I have said, that it was practicing medicine, and I have no doubt that on the au-

thorities it must be held that it was practicing for gain.

"The defendant says that he charged no more for the medicine than if he had not given the advice, but we cannot divide the transaction and apply the consideration all to the medicine. For the advice and the medicine the defendant received fifty cents. That he might charge somebody else the same figure for the medicine without the advice does not, I think, entitle him to say that what he did was not for gain. There was evidence on this point before the magistrate. We cannot say that the magistrate improperly found that he was practicing for gain."

It is to be noted that in this case, as in the case before us, the price charged was of such a character as to lead one to believe that the defendant charged the witness no more for the medicine and advice than he would have charged for the medicine without the advice.

It is to be noted further that the defendant, according to the testimony, made no diagnosis of the case except to inquire of the witness as to his symptoms.

The Supreme Court suggests that the defendant came very close to admitting facts sufficient to sustain the charge, but whether he did admit it depends upon what he in fact said and what he in fact did. We have put the testimony in the brief for the purpose of showing clearly what the defendant did and what he said, and it seems to us that what he said and what he did was diagnosing and prescribing within the meaning of the statute, and that therefore the Court, in view of the defendant's testimony, should have directed a verdict for the plaintiff and against the defendant.

Respectfully submitted,

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