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LEGAL CONTROL OF MEDICAL CHARLATANISM

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In the long and painful history of the development of science, the charlatan is a figure that appears as often and prominently as does the true scientist. Indeed, it is difficult to conceive of changes taking place in human behavior attitudes and procedures so revolutionary and profound as those brought about by scientific discoveries of the last few centuries without the production of numerous false scientists, cultists and humbugs. This proclivity is abundantly illustrated in the field of medicine.

In the art of curing disease, with the health of the citizenry involved, however, there is greater reason for control of such charlatanism than in many other fields. And in our era of sociological jurisprudence the legal profession could contribute to that end by improving methods of legal control of such practices.

It is difficult to determine the line between the practice of medical quackery and "scientific" medicine; and although most licensed doctors of medicine practice a certain amount of charlatanism,[1] it is nevertheless certain that the health and well-being of the general public will be better promoted if there be prohibited the most flagrant forms of charlatanism foisted on the people by self-styled experts with little or no scientific training or even elementary knowledge of anatomy, biology, chemistry, or bacteriology.

The slow but steady advance of the science of diagnosis and cure of disease to its present level has been parallelled by the development of extraordinarily effective means of advertisement, such as the radio; and as a result the struggle between the licensed scientific practitioner and the unlicensed charlatan has become more acute.[2]* The frequent victory in patronage by the charlatan has made the struggle more obnoxious.

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[1] See HARDING, FADS, FRAUDS AND PHYSICIANS (1930), Ch. VI: *Where Does Medical Quackery Begin?* 122-145.

[2]* Fishbein, *Modern Medical Charlatans,* 16 HYGEIA 21, 113. On page 21 Dr. Fishbein says: "The charlatan of an earlier day was limited in the number of people he could reach, because the radio, the newspaper syndicate and the other modern methods of exploitation had not yet been developed. Whereas the traveling quack of 1890 spoke to a few hundred people each night from the back of a wagon, the quack of 1937 speaks to millions over the air; not infrequently he employs a public relations counsel who procures for him feature articles in magazines with a circulation of millions, and the newspaper feature services that have even greater distribution."

The problem might be separated into two broad aspects: that of the purveyor of "patent," or, more properly, proprietary, medicines and various devices sold or rented by enterprisers to ill and harried people, often of advanced age and limited means; and that of the unorthodox healer who diagnoses and then attempts to cure by his own pseudo-scientific or cultist method. With the first branch of the problem this article is not concerned.[3*]

So far as the second branch of the problem is concerned, the struggle is not a now one. From the time of Hippocrates to the present the regularly licensed physicians and surgeons have contested for public patronage with the faith healers, osteopaths, napropaths, naturopaths and other cultists and unorthodox healers of all kinds.[4*]

In the United States the struggle became especially acute in the early part of the nineteenth century, centering around the activities of one Samuel Thompson, "an illiterate New Hampshire farmer . . . endowed with undoubted native ability, and self-educated in the supposed curative properties of roots, herbs, and vegetables."[5] In 1809 he was indicted, tried, and acquitted on a charge of murder, but the suggestion of the presiding judge that there was an urgent need for legislation to prevent such unqualified practitioners from practicing medicine resulted in the passage of rather severe laws in the states that had not theretofore had such legislation.[6]

However, most of these laws were short-lived, for, as has always been true, public sentiment favored the "irregulars."[7] The staidness, conservativeness, and high professional standards of a learned profession are handicapped in coping with the blatant, self-advertising methods of the charlatan, whose appeal is particularly to the emotions of the ignorant and hopelessly afflicted.[8*]

[3*] Of the numerous books and articles dealing with this problem, the following are representative: CRAMP, NOSTRUMS AND QUACKERY (1921); FISHBEIN, THE NEW MEDICAL FOLLIES (1927); KALLET AND SCHLINK, 100,000,000 GUINEA PIGS (1933); Fishbein, *supra* note 2; and various articles featured in the department conducted by the *Journal of the American Medical Association* under the name of "Bureau of Investigation." The control of this type of practice is chiefly by means of the issuance of fraud orders under the postal laws, by use of the Pure Food and Drug Acts, and by means of education. The American Medical Association has been active in the latter type of control. Much yet remains to be done, however.

[4*] In FISHBEIN, *op. cit. supra* note 3, there is listed in Chapter I, *An Encyclopedia of Cults and Quackeries*, an alphabetical list of cults numbering sixty-three, from "Aerotherapy" to "Zodiac Therapy." Since the publication of that book in 1927 numerous other cults have appeared.

[5] Caldwell, *Early Legislation Regulating the Practice of Medicine* (1923) 18 ILL. L. REV. 225. Mr. Caldwell gives a thorough and enlightened discussion of early legislation.

[6] *Id.* at 238.

[7] *Id.* at 239.

[8*] In Crum v. State Board of Medical Registration and Examination, 219 Ind. 191, 37 N. E. (2d) 65 (1941) the court sustained the lower court's finding of gross immorality and affirmed the revocation of the defendant's license entitling him to practice chiropractic, naturopathy, and electrotherapy. The proceedings were instituted by the State Board of Medical Registration and Examination. In this

The regularly licensed practitioners eventually won out,[9*] however, and at present every state of the union has statutes regulating and licensing the practice of medicine and surgery.[10]

Since the foundation of the American School of Osteopathy by Dr. A. T. Still in Kansas in 1872[11] and the cult of chiropractic by D. D. Palmer in Iowa in 1894[12] these two healing cults have steadily intruded themselves into the field of medicine. Many legislatures have recognized that such cults have a place in the modern art of healing, and now every state in the union and the District of Columbia provide for the licensing of osteopaths[13] and all except Louisiana, Mississippi, New York and Texas provide for the licensing of chiropractors.[14] But it is when the osteopath and chiropractor fail to stay in the realm of "hand manipulation and kneading" and encroach on the licensed physician's perogative to prescribe and administer drugs and that of the surgeon to use the knife that these cultists and the "regulars" come into headlong conflict.

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case the defendant used a small wooden box in which was contained an electric bulb and a glass tube filled with ordinary hydrant water. There was also a pedal and a dial on the outside of the box, neither of which had any connection with the interior. The defendant usually had the "patient moisten a slip of paper with saliva and deposit it through a slot on the top of the box. . . . After this was done, the appellant rubbed the pedal with his thumb and talked to the machine, repeating the popular names of diseases and organs of the body. Among the diseases which the appellant claimed to be able to treat and relieve, and in some instances cure, by this method were cancer, blindness, arthritis, nervous disorders, hemorrhoids, abscesses, kidney ailments, stomach disorders, leakage of the heart, skin ailments, ovarian trouble, varicose veins, and tumors. He asserted that he could lengthen or shorten a patient's legs; cause amputated fingers to grow back into place; and fill cavities in teeth, not with a foreign substance but by restoring them to their original condition. . . . His case is not helped by the fact that he produced numerous witnesses at the trial who voluntarily testified as to miraculous cures that had been brought about by the use of his machine. 'Hope springs eternal in the human breast,' and it is not uncommon for persons who are afflicted with dreadful diseases to be misled and beguiled into believing that they have been helped by quacks and charlatans. . . ."

[9*] The interesting and dramatic struggle between the regulars and the irregulars, and particularly the clash of the so-called homeopathic physicians and the regulars or "allopaths" during the eighteenth century is well told in Caldwell, *supra* note 5, at 239 ff. Mr. Caldwell attributes the repeal of most early regulatory statutes to these distasteful bickerings. Although this article is not primarily concerned with the history of medical legislation, it might be pointed out that homeopathy became so popular in America that it still has official recognition in a number of state statutes.

[10] For a compilation of such statutes, see the AMERICAN MEDICAL DIRECTORY OF THE AMERICAN MEDICAL ASSOCIATION (Seventeenth Edition 1942).

[11] FISHBEIN, *op. cit. supra* note 5, at 55.

[12] *Id.* at 24.

[13] Mimeographed pamphlet prepared by the Bureau of Legal Medicine and Legislation, American Medical Association, Chicago, January, 1940, entitled *Memorandum Showing Methods in Force in the Several States for Regulating the Practice of Osteopathy.*

[14] Mimeographed pamphlet prepared by the Bureau of Legal Medicine and Legislation, American Medical Association, Chicago, May, 1938, As Supplemented October, 1940, entitled *Scope of Chiropractic Practice in the United States.*

A recent legislative development which seems to give much promise in the control of some forms of cultism, particularly in the cases of osteopathy and chiropractic, is the so-called basic science statute,[15] a form of which has been passed in seventeen states and the District of Columbia.[16] The purpose of the basic science law is set forth in a bulletin published by the American Medical Association:[17]

In most states there are two or more independent examining boards to test the professional qualifications of persons desiring to practice the healing art. Each board operates under an independent act and applies a different standard to determine the qualifications of the applicant. . . .

The elimination of this system of licensure and the substitution of a single, adequate standard by which the proficiency of all aspiring practitioners can be judged is the logical solution of the problem. Such a solution, however, is remote of attainment. Because of that remoteness, it has been necessary to seek another solution. A basic science law seems to afford the answer. Such a law creates a single, unbiased, nonsectarian examining board to determine whether any applicant for a license to practice any form of the healing art is sufficiently well informed concerning those sciences on which the art is based to justify his examination by one of the state boards authorized to issue such a license as the applicant desires. . . .

The basic science statutes are supplementary to the usual licensing statutes and require that the applicant obtain, as a prerequisite to securing a license in a particular field of the healing arts, a certificate showing that he is proficient in certain basic sciences, usually anatomy, physiology, pathology, chemistry, and bacteriology. In other words, in these states the demonstration by the applicant of his proficiency in these basic sciences does not entitle him to practice one of these arts; it merely entitles him to appear before the professional board of his choice —that of medicine and surgery, osteopathy, etc.—for an examination in his field of specialization. These statutes of course serve only as a a basis of controlling the licensure of unqualified persons, and leave untouched the more important question of prevention of unlicensed practice. But in preventing the licensure of unqualified persons, they have apparently worked well,[18*] and they are endorsed by the Ameri-

[15] Wisconsin passed the first of such statutes in 1925. Wis. Laws 1925, c. 147.

[16] Ariz. Laws 1936, c. 9; Ark. Acts 1929, Act No. 147; Colo. Laws 1937, c. 106; Comm. Laws 1925, c. 161; 45 STAT. 1326 (1929) (D. C.); Fla. Laws 1939, c. 19281; Iowa Laws 1935, c. 17; Mich. Acts 1937, Pub. Act. No. 59; Minn. Laws 1927, c. 149; Neb. Laws 1927, c. 155; N. M. Laws 1941, c. 189; Okla. Session Laws 1936-1937, c. 24, art. 28; Ore. Laws 1933, c. 158; R. I. Laws 1940, c. 891; S. D. Laws 1939, c. 104; Tenn. Acts 1943, c. 92; Wash. Laws 1927, c. 183; Wis. Laws 1925, c. 147.

[17] Pamphlet, *Basic Science Laws,* published by Bureau of Legal Medicine and Legislation, American Medical Association, May, 1938, 1.

[18*] Pamphlet, *Basic Science Laws, op. cit. supra* note 17. On pages 2 and 3 the pamphlet states: "Have Basic Science Laws been effective? They have.

can Medical Association,[19] upon whom we may rely to welcome effective means of suppressing charlatanism and cultism. The American Medical Association has drawn up a Uniform Basic Science Statute, which it recommends to the various state legislatures.[20*] In this statute the definition of "healing art" is specifically given,[21] and the members of the board may not be actively engaged in the practice of the healing art but must be members of faculties of state educational institutions.[22] These features seem particularly advisable.

In addition to discouraging and eliminating would-be, unqualified practitioners, such statutes expedite the use of the remedy of criminal prosecution.[23*]

Another useful type of legislation is that requiring the annual regis-

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From 1927 to 1937, inclusive, 8,960 persons have been examined by the basic science examining board of the several states named. Eight thousand one hundred and eighty-eight of the applicants examined, or approximately 92%, were either medical students or doctors of medicine. Four hundred and forty-four, or approximately 6%, were osteopaths, and two hundred and three, or approximately 3%, were chiropractors. There were examined in addition a small group, approximately one hundred twenty-five persons, who are not classifiable in any of the three main groups just mentioned.

"In the first group, the medical students and doctors, only nine hundred and seventy-seven, or 12% failed, and were unable thereafter to apply for a license to practice. In the second largest group, the osteopaths, one hundred and eighty-two, or 41% failed. In the third group, composed of chiropractors, one hundred and fifty or 74%, failed.

"These figures indicate clearly that in States that have enacted basic science laws a substantial part of all would-be practitioners of one or another form of the healing art are so incompetent that unbiased, non-sectarian, non-medical basic science boards refuse to permit them even to appear for an examination before the professional boards of the States. . . ."

The author has written letters to board officials in all states having basic science statutes, and in most cases those who answered were enthusiastically in favor of such legislation. A more or less typical answer was this one, written on April 6, 1943, by Professor John F. Conn, Secretary, State Board of Examiners in Basic Science of the State of Florida: "The Florida law has been in effect a little over three years now and seems to be accomplishing the purpose for which it was enacted. . . . A member of the State Board of Medical Examiners told me some time ago that since the Basic Science law was enacted that the number of failures on the medical examinations have markedly decreased. Many persons without sufficient training or qualifications write in to request information concerning the Basic Science law and on learning the stiff requirements decide to turn to other fields. It is a significant fact that no state having once adopted a Basic Science law has ever repealed this law."

[19] Pamphlet, *Basic Science Laws, op cit. supra* note 17.

[20*] Some of the more important sections of this statute are set forth in the appendix.

[21] §2.

[22] §3.

[23*] Letter to the author from Mr. J. W. Holloway, Jr., Director, Bureau of Legal Medicine and Legislation, American Medical Association, dated March 25, 1942. Mr. Holloway says: "Looking at the basic science law from one viewpoint, of course, it does aid in the enforcement problem because in some of the States, particularly in Minnesota, practically all prosecutions based on unlicensed practice are brought under the provisions of the basic science law, rather than under the medical practice act or the osteopathic act or the chiropractic act. The experience in that State has been that convictions are more easily obtained when instituted under the basic science act than if instituted under the several licensing laws."

tration of practitioners. Twenty-five states have passed statutes requiring such registration,[24*] with fees varying from nothing in Georgia to five dollars in North Dakota, Oregon and Washington. One important advantage of such a requirement is, of course, that it gives an up-to-date list of practitioners who are licensed, and permits a ready determination of whether a particular individual is or is not licensed, thus helping in enforcement procedures.

Although in most states the responsibility for enforcement of the licensing statutes is given to the licensing board, whose chief function has been to report to prosecuting officials instances where there has been a violation, there has arisen a tendency in recent years to separate enforcement activities from licensing functions.[25*] This separation certainly makes for the efficiency resulting from specialization in general, and it is hoped that more states will follow the example of these pioneers.

Although the lack of progressive legislation of these types contributes to the undesirable situation in this field, there are other factors worth noting. As in the legal profession,[26] one of the chief reasons

[24*] For a compilation of such statutes, see the AMERICAN MEDICAL DIRECTORY, *op. cit. supra* note 10. The states having such statutes are: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Washington, Wisconscin, and Wyoming.

[25*] Mr. Holloway's letter of March 25, 1942, *op. cit. supra* note 23. Mr. Holloway describes the purpose of such legislation and gives some of its chief advantages in these words: ". . . As a general rule, examining boards are composed of persons who are from training and experience primarily qualified to test the applicant's knowledge in the subject of medicine and to determine a licentiate's fitness from a professional viewpoint to retain his license. Members of such boards are not particularly qualified to engage in enforcement activities. In a number of states, such as in Illinois, the District of Columbia, and certain others, central agencies have been created on which have been devolved the duties of law enforcement. In such jurisdictions the professional boards look into the qualifications of applicants by passing on the sufficiency of their educational background and by subjecting them to examinations. If the professional board in such jurisdictions finds that an applicant is qualified for licensure that fact is reported to the central agency which in turn issues a license.

"If complaint is filed against a licentiate based on charges for which a license may be revoked, the matter is referred to the professional board to determine the sufficiency of the charges and the sufficiency of the proof to sustain them. If in the opinion of the committee the license should be revoked, a recommendation to that effect is made to the central agency which proceeds to enter the order of revocation. Here we have a separation of the professional functions and the law enforcement functions. The duty of enforcing the law devolves on the central agency and the professional board is charged with the duty only of determining the professional questions. In my judgment, that is a happy division of functions, at least from a theoretical viewpoint. Members of examining boards customarily, I believe, engage in private practice and the remuneration they receive for functioning as board members is insufficient to enable them to spend much time in promoting law enforcement, even if they were otherwise qualified to do so. The central agency, on the other hand, is staffed by full time state officials and such officials may be selected because of their particular qualifications to function as law enforcement officials. . . ."

[26] Llewellyn, *The Bar's Troubles, and Poultices—And Cures?* (1938) 5 LAW AND CONTEMP. PROB. 104.

for the encroachment of laymen on the traditional field of the regularly licensed physician and surgeon is the latter's lack of progressiveness, failure to make needed internal house-cleaning, and the lack of business methods in obtaining and disposing of the practice that comes to him. The fact that most cases dealing with the control of unauthorized practice in the field of optometry[27] are cases in which the alleged offender is a corporation bears witness to the fact that the streamlined efficiency of the corporation has been one of the most efficient causes of the encroachment.

It is unquestionably true that there is a deplorable economic waste occasioned by harmless but useless treatment; but the chief cause for alarm lies in the fact that such treatment prevents or delays until too late effective medical treatment of diseases which were originally curable.

It may be that the profession, through the American Medical Association and local medical associations, might well conduct a vigorous campaign to inform and arouse the public to the danger,[28*] but this article is not primarily concerned with such extra-legal questions.

It is undeniable, I believe, that the legal profession has been more successful, in the last decade, in coping with unauthorized practice of law than has the medical profession in coping with the unauthorized practice of medicine. This is due, in part, of course, to the fact that the practice of law is part of the judicial process; and, too, contempt proceedings are available in the former case but ordinarily not in the latter. Nevertheless, of the formidable array of weapons available to the lawyer, a number of such weapons are also available to the physician. And although the courts have been more reluctant to permit the use of these weapons in the cases of illegal practice of medicine than in similar cases of the illegal practice of law,[29*] there have been enough

[27] Such cases include: Silver v. Lansburgh & Bro., 27 F. Supp. 682 (D. C. 1939); State v. Gus Blass Co., 139 Ark. 1159, 105 S. W. 853 (1937); Sage-Allen Co., Inc. v. Wheeler, 119 Conn. 667, 179 Atl. 195, 98 A. L. R. 897 (1935); State v. Kindy Optical Co., 216 Iowa 1157, 248 N. W. 332 (1933); State v. Goldman Jewelry Co., 142 Kan. 881, 51 P. (2d) 995, 102 A. L. R. 334 (1935); Dvorine v. Castleberg Jewelry Corp., 170 Md. 661, 185 Atl. 562 (1936); Seifert v. Buhl Optical Co., 276 Mich. 692, 268 N. W. 784 (1936); State v. Gate City Optical Co., 339 Mo. 427, 97 S. W. (2d) 89 (1936); State v. Knapp, 327 Mo. 24, 33 S. W. (2d) 891 (1930); New Hampshire Bd. of Reg. in Optometry v. Scott Jewelry Co., 90 N. H. 368, 9 Atl. (2d) 513; Stern v. Flynn, 154 Misc. 609, 278 N. Y. Supp. 598 (1935); Rowe v. Standard Drug Co., 132 Ohio St. 629, 9 N. E. (2d) 609 (1937); State v. Myers, 128 Ohio St. 366, 191 N. E. 99 (1934); Neill v. Gimbel Bros., Inc., 330 Pa. 213, 199 Atl. 178 (1938); Ezell v. Ritholz, 188 S. C. 39, 198 S. E. 419 (1938); Golding v. Schubach Optical Co., Inc., 93 Utah 32, 70 P. (2d) 871 (1937).

[28*] See, for example, the discussion of the radio program sponsored by the Buffalo Bar Association as an educational program to discourage the public from hiring unlicensed—and unprincipled—lawyers, found in the article by Diamond, *Buffalo Bar Attacks Problems of Public Relations from a New Angle—Puts Significant Series of Dramatized Sketches on the Radio* (1937) 23 A. B. A. J. 940.

[29*] ". . . the cases as they now stand generally recognize an attorney's right

cases where such means have been used successfully to give hope for the future.

Many states, of course, provide machinery for the discipling of licentiates who have abused the privileges granted them by such a license, but this article is not concerned with such proceedings.[30*]

Let us look at some of the legal weapons available to prevent the practice of medicine by unlicensed and unqualified persons.

Criminal Prosecution

If there is a statute making criminal the practice of medicine without a license—and all states and the District of Columbia have statutes of this type[31]—there seems to be little difficulty in using these statutes to discourage such practice, whether it be by trained physicians or by unskilled cultists or charlatans.[32*] Indeed, the author found that of thirty-four cases that were appealed, the upper court upheld the convictions in thirty of them.[33] In the cases where the judgment of

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to enjoin encroachment on his field but refuse to give the same protection to doctors, dentists, *et cetera*. . . . In the last analysis it seems that the only real explanation is in the fact that a lawyer is the special favorite of the court and that a point will be stretched in the eagerness of the court to protect him." Comment (1938) 11 So. Calif. L. Rev. 476, 483.

[30*] For example, N. J. Stat. Ann. (1940) tit. 45, c. 9, §16 reads as follows: "The board may refuse to grant or may suspend or revoke a license or the registration of a certificate or diploma to practice medicine and surgery filed in the office of any county clerk in this State under any act of the Legislature, upon proof to the satisfaction of the board that the holder of such license (a) has been adjudicated insane, or (b) habitually uses drugs or intoxicants, or (c) has practiced criminal abortion, or been convicted of the crime of criminal abortion, or has been convicted of crime involving moral turpitude, or (d) has advertised fraudulently, (e) becomes employed by any physician, surgeon, homeopath, eclectic, osteopath, chiropractor, or doctor who advertises fraudulently, or (f) shall have presented to the board any diploma, license or certificate that shall have been illegally obtained or shall have been signed or issued unlawfully or under fraudulent representations, or obtains or shall have obtained a license to practice in this State through fraud of any kind, or (g) has been guilty of employing unlicensed persons to perform work which, under this chapter (45:9-1, et seq.) can legally be done only by persons licensed to practice medicine in this State, or (h) has been convicted of a violation of any Federal or State law relating to narcotic drugs. . . ."

[31] For a compilation of these statutes, see the American Medical Directory, *op. cit. supra* note 10.

[32*] Typical of such cases are People v. Vermillion, 30 Cal. App. 417, 158 Pac. 504 (1916); Commonwealth v. Lindsey, 223 Mass. 392, 111 N. E. 869 (1916); Allison v. State, 127 Tex. Cr. 322, 76 S. W. (2d) 527 (1934); and Miller v. Commonwealth, 180 Va. 36, 21 S. E. (2d) 721 (1942).

In Miller v. Commonwealth, *supra* at 43, 21 S. E. (2d) at 724, the court said: "Be it remembered that those who practice medicine without license, be they quacks, charlatans or savants, do so at their peril."

[33] People v. Saunders, 61 Cal. App. 341, 215 Pac. 120 (1923); People v. Goscinsky, 52 Cal. App. 62, 198 Pac. 40 (1921); People v. Vermillion, 30 Cal. App. 417, 158 Pac. 504 (1916); People v. Ratledge, 172 Cal. 401, 156 Pac. 455 (1916); State v. Ghadiali, 6 Harr. 308, 175 Atl. 315 (Del. 1933); State v. Sawyer, 36 Idaho 814, 214 Pac. 222 (1923); People v. Mattei, 381 Ill. 21, 44 N. E. (2d) 576 (1942); People v. DeYoung, 378 Ill. 256, 38 N. E. (2d) 22 (1941); People v. Kane, 288 Ill. 235, 123 N. E. 265 (1919); State v. Hughey, 208 Iowa 842, 226

conviction in the court below was reversed on appeal, most of the cases were those in which the state had failed to prove that the defendant had done acts coming under the specific terms of the statute.[34*]

However, it is undoubtedly true that there are many cases in the trial courts in which the defendant is acquitted that do not reach the appellate courts, particularly since a criminal case is more difficult to establish than is a civil case. This difficulty is aggravated by the well-known inclination of juries to exercise leniency in such cases.

An even more serious reason why this form of control is no more effective here than elsewhere is the fact that undoubtedly only a small minority of the cases which are brought to the attention of the prosecuting officials are made the basis of prosecution. Obviously, where the prosecuting official's election, or re-election, is to be considered, and particularly where the unqualified practitioner is popular with the more gullible—but voting—members of the community, the prosecutors are understandably reluctant to see justice done.

Moreover, almost universally the practice of medicine without the practitioner's having first obtained a license is made only a misdemeanor, with the penalty varying from $10 to $500.[35] Some states make the penalty for subsequent offenses greater, but usually then the penalty is still for a misdemeanor.[36*] Arizona makes the practice of

N. W. 371 (1929); Commonwealth v. Lindsey, 223 Mass. 392, 111 N. E. 869 (1916); State v. Gardner, 231 S. W. 1057 (Mo. App. 1921); State v. Thierfelder, 132 P. (2d) 1035 (Montana 1942); Carpenter v. State, 106 Neb. 742, 184 N. W. 941 (1921); Pinkus V. MacMahon, 129 N. J. L. 376, 29 A. (2d) 885 (1943); State Board of Medical Examiners of New Jersey v. Adler, 12 N. J. Misc. 664, 174 Atl. 215 (1934); Miller v. New Jersey State Board of Medical Examiners, 11 N. J. Misc. 653, 167 Atl. 740 (1933); State Board of Medical Examiners of New Jersey v. DeYoung, 6 N. J. Misc. 231, 140 Atl. 676 (1928); State Board of Medical Examiners v. Curtis, 94 N. J. L. 324, 110 Atl. 816 (1920); People v. Eifertsen, 136 Misc. 32, 239 N. Y. Supp. 111 (1930); People v. Warden of City Prison, 168 App. Div. 240, 152 N. Y. Supp. 977 (1915); People v. John H. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697 (1908); Sorgen v. State, 36 Ohio App. 281, 172 N. E. 835 (1930); Feige v. State, 23 Okla. Cr. 434, 215 Pac. 437 (1923); State v. Burroughs, 130 Ore. 480, 280 Pac. 653 (1929); Allison v. State, 127 Tex. Cr. 322, 76 S. W. (2d) 527 (1934); Larson v. State, 106 Tex. Cr. 261, 285 S. W. 317 (1925); Miller v. Commonwealth, 180 Va. 36, 21 S. E. (2d) 721 (1942); State v. Lydon, 170 Wash. 354, 16 P. (2d) 848 (1932); Nickell v. State, 205 Wis. 614, 238 N. W. 508 (1931).

[34*] State v. Cornelius, 200 Iowa 309, 204 N. W. 222 (1925) (one licensed to practice osteopathy had a right to prescribe such medicine as the law permitted an osteopath to administer); State v. Carlstorm, 224 Mo. App. 439, 28 S. W. (2d) 691 (1930) (statute specifically stated that osteopathy is not the parctice of medicine and surgery within the meaning of the criminal statute); Williams v. State, 118 Neb. 281, 224 N. W. 286 (1929) (where an emergency existed, when exigency of obstetrical case required action before services of physician could be readily procured, conviction not sustained); Denton v. State, 83 Tex. Cr. 67, 201 S. W. 183 (1918) (state failed to prove its case).

[35] See collection of statutes, AMERICAN MEDICAL DIRECTORY, *op. cit. supra* note 10.

[36*] MISS. CODE ANN. (1930) §1099; N. H. PUB. LAWS (1926) c. 204, §21; N. J. REV. STAT. (1937) tit. 45, c. 9, §22; ORE. CODE ANN. (1939) §68-2120; R. I. GEN. LAWS (1938) c. 275 §7; VA. CODE ANN. (Michie, 1936) §1623.

medicine without a license a felony.[37] And seldom will a few dollars' fine effectively discourage one from continuing an illegal, but lucrative, practice. Even more true is this of a corporation which is illegally engaged in the practice of medicine, for a small fine—and no possibility of imprisonment—will scarcely serve to force it to terminate the probability of continued financial good fortune.

There is no escape from the conclusion that under our present criminal statutes and our existing legal machinery we cannot rely solely on the criminal law effectively to protect the public from unlicensed and unskilled practitioners.

Quo Warranto

In the cases of illegal practice of law the extraordinary remedy of quo warranto has been used against both individuals[38] and corporations.[39] The remedy was first used against corporations furnishing legal services[40] but it has not been used extensively even in that field,[41] although it has been urged as a desirable means of prohibiting the unauthorized practice of law.[42]*

It has been used infrequently to prevent the illegal practice of other professions. In a Colorado case,[43] the remedy was successfully used to prohibit the defendant corporation from maintaining dental offices in which salaried, registered dentists were employed. In an earlier New York case[44] the remedy was refused, where the defendant corporation was organized previous to the Public Health Law of 1916, which prohibited a corporation from practicing dentistry but specifically exempted legally incorporated dental corporations existing on January 1, 1916.

A typical statute is that of Oregon, which provides a penalty of $200 to $500, or imprisonment for not more than six months, or both, for the first offense; there is no further penalty for a subsequent offense except that it is mandatory that at least a ten-day sentence be imposed.

[37] Revised Code of Arizona, 1928, c. 58, sec. 2560.

[38] Berk v. State, 225 Ala. 324, 142 So. 832 (1932); State v. Perkins, 138 Kan. 899, 28 P. (2d) 765 (1934).

[39] People v. Merchants' Protective Corporation, 189 Cal. 531, 209 Pac. 363 (1922); State v. Retail Credit Men's Assn. of Chattanooga, 163 Tenn. 450, 43 S. W. (2d) 918 (1931); State v. Merchants' Protective Corp., 105 Wash. 12, 177 Pac. 694 (1919).

[40] Sanders, *Procedures for the Punishment or Suppression of Unauthorized Practice of Law* (1938) 5 Law & Contemp. Prob. 135, 166.

[41] *Id.* at 167.

[42] *Id.* at 167. Professor Sanders says: "In many respects this remedy would seem to be the simplest and most direct of those so far considered. . . . It does not require a showing of a special interest in the moving party that characterizes the use of the injunction. Frequently it may be brought as an original proceeding in the supreme court of the state thus obviating the delay attendant upon appeals. The hazards of jury trial are eliminated. In view of these facts it is somewhat surprising that greater use has not been made of the remedy."

[43] People v. Painless Parker Dentist, 85 Colo. 304, 275 Pac. 928 (1929).

[44] Lewis v. Woodbury Dental Parlors Co., 106 Misc. 78, 175 N. Y. Supp. 269 (1919).

The relief has been denied in one case[45] where a defendant corporation was charged with the practice of optometry, on the ground that the acts of the defendant, the conduct of an optical department in a department store, with the examination being done by registered optometrists, did not constitute the "practice of optometry" within the optometry code. In an Alabama case[46] an unlicensed chiropractor was prohibited from the practice of his calling.

Only four cases have been found in which the remedy of quo warranto has been attempted in cases where the respondent was alleged to have illegally practiced the profession of medicine, and in three of these cases[47] the relief was refused. Since the latest of these cases was decided in 1905, and since at that early date the courts apparently were reluctant to give any relief against the illegal practice of a profession, these cases should bear comparatively little weight. In the fourth case,[48] decided in 1936, the Supreme Court of Illinois allowed the relief on the petition of the People, by the Attorney General. The court held that a corporation maintaining a clinic in which only licensed physicians were employed was properly held to be engaged in the practice of medicine, and that the criminal provisions of the Medical Practice Act did not afford an adequate remedy and did not preclude resort to the action of quo warranto. This case, it may be hoped, will serve as a precedent for the extensive use of this remedy; for the reasons urged in support of its use in the legal cases[49] may be urged with equal force in the medical cases.

At common law the state, on the relation of the attorney general or other state law officer, would seem to be the proper official to institute proceedings. But state statutes generally permit the action to be commenced also at the instance of private individuals, corporations or associations, who are called relators.[50]

Alabama[51*] and Kansas[52] have specific statutory provisions permitting the action of quo warranto where one is practicing a profession

[45] State v. Gate City Optical Co., 339 Mo. 427, 97 S. W. (2d) 89 (1936).
[46] Frutiger v. State, 215 Ala. 451, 111 So. 37 (1927).
[47] State v. Green, 112 Ind. 462, 14 N. E. 352 (1887); State Electro-Medical Institute v. State, 74 Neb. 40, 103 N. W. 1078 (1905); State v. Lewin, 122 Mo. App. 212, 106 S. W. 581 (1905).
[48] People v. United Medical Service, Inc., 362 Ill. 442, 200 N. E. 157 (1936).
[49] Sanders, *supra* note 40, at 167. See note 42 *supra*.
[50] 44 AM. JUR. (1942), *Quo Warranto*, p. 142, §73.
[51*] ALA. CODE ANN. (Michie, 1928) §9932: "An action of quo warranto may be brought in the name of the state against the party offending in the following cases: (1) When any person usurps, intrudes into, or unlawfully holds or exercises . . . any profession requiring a license, or certificate or other legal authorization within this state . . ."
Cases permitting the use of this remedy under the statute include Fraser v. State, 216 Ala. 426, 113 So. 289 (1928); Frutiger v. State, 215 Ala. 451, 111 So. 37 (1927); Belding v. State, 214 Ala. 380, 107 So. 853 (1926).
[52] KAN. GEN. STAT. ANN. (Corrick, 1937) §1-3.

without a license. The Kansas statute states that this action is in addition to criminal prosecutions provided by statute, and shall not be construed as a punishment.[53]

As has been noted,[54] the remedy has not been used extensively in any of the cases of illegal practice of a profession; and although probably it is possible to secure the relief in medical cases without a statute of the type found in Alabama and Kansas,[55*] the general enactment of that type of statute should prove helpful.

INJUNCTION

Previous to 1931 the use of the injunction to prevent the unlicensed practice of medicine was consistently denied,[56] except in Utah,[57] where under a statute specifically so authorizing, injunctions were granted in actions instituted by the Board of Medical Examiners of that state to prevent defendants whose licenses had been revoked from continuing their practice. Moreover, in other professions the use of the injunction was denied.[58]

Prior to 1931 the remedy of injunction had not been attempted in the cases of unauthorized practice of law,[59] but in that year the propriety of the relief was recognized in the celebrated case of Dworken v. Apt. House Owners' Association.[60] Since that time injunctions have been granted quite consistently in this field.[61*] Since the decision in the Dworken case at least seven states[62] have granted the relief in medical cases in proceedings instituted by the state, on the relation

[53] *Id.* at §2.

[54] See notes 41, 43, 46, and 48 *supra.*

[55*] In Redmund v. State, 152 Miss. 54, 118 So. 360 (1928) the court refused to give an injunction but said that an action of quo warranto was available at common law.

[56] Dean v. State, 151 Ga. 371, 106 S. E. 792, 40 A. L. R. 1132 (1921); People v. Chiropractors' Assn., 302 Ill. 228, 134 N. E. 4 (1922); State v. Green, 122 Ind. 462, 14 N. E. 352 (1887); State v. Maltby, 108 Neb. 578, 188 N. W. 175 (1922); Merz v. Murchison, 30 Ohio Cir. Ct. 646 (1908).

[57] Bd. of Medical Examiners of Utah v. Blair, 57 Utah 516, 196 Pac. 221 (1921); Bd. of Medical Examiners of State of Utah v. Freenor, 47 Utah 430, 154 Pac. 941 (1916).

[58] Winslow v. Kan. State Bd. of Dental Examiners, 115 Kan. 540, 223 Pac. 308 (1924) (dentist); Nelson v. State Bd. of Health, 108 Ky. 769, 57 S. W. 501, 50 L. R. A. 353 (1900) (osteopath); People v. Universal Chiropractors' Assn., 302 Ill. 228, 134 N. E. 4 (1922) (chiropractor); Goldsmith v. Jewish Press Pub. Co., 118 Misc. 789, 195 N. Y. Supp. 37 (1922) (certified public accountant); Drummond v. Rowe, 155 Va. 725, 156 S. E. 442 (1931) (veterinarian).

[59] Comment (1938) 11 So. CAL. L. REV. 476.

[60] 38 Ohio App. 265, 176 N. E. 577 (1931).

[61*] The relief was denied in Wollitzer v. National Title Guaranty Co., 241 App. Div. 757, 270 N. Y. Supp. 968 (2d Dep't. 1934). In 1935, however, the attorney general was specifically authorized by statute to apply for an injunction to restrain the unauthorized practice of law. New York Civil Practice Act, §1221-a, 1221-b.

[62] Arizona, Indiana, Iowa, Kansas, Nebraska, New Mexico and New York.

of the attorney general,[63] the district attorney[64] or a state board of registration.[65] And in one jurisdiction the relief has been granted at the instance of an individual practitioner.[66] Incidentally, the use of the injunction to restrain the unlicensed practice of the professions of optometry and chiropractic has been much less successful,[67*] while it has been almost as markedly successful in the dentistry cases as in the medical cases.[68] Its consistently successful use in the legal cases, and its generally successful use in the medical and dentistry cases may be attributed to the fact that these three professions constitute the so-called "learned" professions.[69*]

In a bill of this nature one of the first things for a court of equity to determine is, of course, the adequacy of other remedies. And although occasionally the courts have refused the relief on the ground that other, adequate remedies existed,[70] usually the courts have not been thus deterred.[71*] Unquestionably a suit for damages is not adequate, for the injury to another practitioner or to an association by the defendant's acts would be highly speculative. Quo warranto is some-

[63] State v. Smith, 43 Ariz. 131, 29 P. (2d) 718 (1934); State v. Howard, 214 Iowa 60, 241 N. W. 682 (1932); State v. Cooper, 147 Kan. 710, 78 P. (2d) 884 (1938); State v. Wagner, 139 Neb. 471, 297 N. W. 906 (1941); People v. Laman, 277 N. Y. 368, 14 N. E. (2d) 439 (1938).

[64] State v. Cooper, 44 N. M. 414, 103 P. (2d) 273 (1940).

[65] State v. Cole, 215 Ind. 562, 20 N. E. (2d) 972 (1939).

[66] Sloan v. Mitchell, 113 W. Va. 506, 168 S. E. 800 (1933).

[67*] The relief has been denied in about sixty per cent of the cases of alleged illegal practice of optometry, and in these cases the defendant was a corporation which was attempting, directly or indirectly, to practice the profession. The leading case denying the relief is Dvorine v. Castleberg Jewelry Co., 170 Md., 661, 185 Atl. 562 (1936); the leading case permitting action is Seifert v. Buhl Optical Co., 276 Mich. 692, 268 N. W. 784 (1936). No case has been found permitting an injunction in the case of an individual or corporation illegally practicing the profession of chiropractic. A leading case denying this relief is People v. Universal Chiropractors' Assn., 302 Ill. 228, 134 N. E. 4 (1922).

[68] The relief was given in Boykin v. Atlanta-Southern Dental College, 177 Ga. 1, 169 S. E. 361 (1933); Kalman v. Walsh, 355 Ill. 341, 189 N. E. 315 (1934); State v. Boston System Dentists, 215 Ind. 485, 19 N. E. (2d) 949 (1939); State v. Bailey Dental Co., 211 Iowa 781, 234 N. W. 260 (1931); City of Independence v. Hindenach, 144 Kan. 414, 61 P. (2d) 124 (1936); Commonwealth v. Pollitt, 258 Ky. 489, 80 S. W. (2d) 543 (1935).

[69*] In State v. Gus Blass Co., 139 Ark. 1159, 105 S. W. (2d) 853, 855 (1937) the court said: "The weight of authority . . . is to the effect that optometry is only a profession within the broader definition of that word, meaning 'a vocation,' which requires some degree of skill and learning."

[70] Redmond v. State, 152 Miss. 54, 118 So. 360 (1928); People v. Laman, 250 App. Div. 660, 295 N. Y. S. 728 (3d Dep't. 1937). This case was afterward reversed on this point by the court of appeals, 277 N. Y. 368, 14 N. E. (2d) 439 (1938).

[71*] Sanders, *supra* note 40, at 162. Professor Sanders says: "In granting an injunction against certain forms of unauthorized practice of law the courts have usually been called upon to sidestep the principle that an injunction should not issue where there is an adequate remedy at law. In no instance have the courts allowed this principle to prevent the granting of the relief prayed for. In those proceedings where there has been a refusal to grant the relief, this has never been announced as the basis for the refusal."

times used, but, as pointed out heretofore, with a varying and unpredictable degree of effectiveness.

Every state has criminal statutes, but, as previously noted, too frequently a jury will acquit one prosecuted for illegally practicing a profession; and, since in most states the illegal practice is made just a misdemeanor, the proceeding is of dubious value, particularly where the defendant is a corporation, for there the imposition of a fine of several hundred dollars is hardly a deterrent. In the practice of law the remedy of contempt has been quite effective,[72] but that is of course because of the fact that lawyers are officers of the court and an instrument of the judicial function; and as a remedy in the first instance in the cases dealing with the illegal practice of medicine that remedy is not available.[73*]

Although the declaratory judgment acts have been used in one instance in an optometry case,[74*] this method has never been used to prevent the unauthorized practice of medicine. Too, the Court of Appeals of New York, in an opinion written by Judge Cardozo, held proper the committal of an attorney who had refused to testify in an inquisatorial proceeding conducted by a trial court in the matter of evil practiced by attorneys, brought to its attention by three local bar associations.[75] A Wisconsin trial court was held to have a like power of inquisition,[76] but of course this type of proceeding is of necessity confiend to unethical or illegal practice of law by members of the bar.

It seems patent, therefore, that the other remedies available are in fact generally inadequate, either because they are too difficult to secure, too slow and cumbersome, or ineffective if obtained; and that equity should not hestitate to give its superior relief of injunction, if a suitable theory can be found.

The theories adhered to by courts granting injunctive relief include (1) Infringement of franchise, or a "right in the nature of a franchise," and (2) Nuisance.

[72] Examples of such cases are: People v. Denver Clearing House Banks Performing Trust Functions, 99 Colo. 50, 59 P. (2d) 468 (1936); *In re* Brainard, 55 Idaho 153, 39 P. (2d) 769 (1935); People v. Securities Discount Corp., 361 Ill. 551, 198 N. E. 681 (1935); People v. Assn. of Real Estate Taxpayers of Ill., 354 Ill. 102, 187 N. E. 823 (1933).

[73*] *But see* State v. Martin, 155 Kan. 801, 130 P. (2d) 601 (1941), in which the court sustained the lower court's conviction in contempt proceedings growing out of defendant's disregard of a decree enjoining him from engaging in practice of medicine without a license.

[74*] Sage-Allen Co., Inc. v. Wheeler, 119 Conn. 667, 179 Atl. 195, 98 A. L. R. 897 (1935). In this case the action was filed by corporations asking for the relief and naming the members of the state board of examiners in optometry as respondents.

[75] People v. Culkin, Sheriff, 248 N. Y. 465, 162 N. E. 487, 60 A. L. R. 851 (1928).

[76] Rubin v. State, 194 Wis. 207, 216 N. W. 513 (1928).

(1) FRANCHISE THEORY

The franchise theory is often used in the various types of cases, both in granting and denying the relief. Although the judicial definitions of a franchise are numerous, in general they follow the definition given by Kent:[77] "A certain privilege conferred by grant from government and vested in individuals." The courts are not in accord on the proposition that the right of practicing a profession is a franchise, but the courts are more prone to call the right of a member of a "learned" profession, such as law, medicine, and dentistry, to practice his calling a franchise than those of the "skilled" professions, such as optometry, chiropractic and chiropody.[78] In Sloan v. Mitchell,[79] the court said:

Cases are legion holding in one way or another that the right of a licentiate to practice his profession is a property right, or a right in the nature of a property right, or a valuable franchise, or a valuable privilege. Most of these cases are the outgrowth of proceedings for the revocation of professional license, but their recognition of the high order of the licentiate's right is as pertinent in a case such as is at bar as in the cases where iterated.

The West Virginia court also relied heavily on the cases permitting the use of the injunction to restrain the illegal practice of law, and particularly the case of Dworken v. Apartment House Owners' Association,[80] which, incidentally, was contra, at least in spirit, to the earlier Ohio Circuit case of Merz v. Murchison.[81] In Merz v. Murchison the court had refused to give an injunction in favor of a licensed medical practitioner to restrain the practice of the defendant of such a profession without a license.

In the Apartment House Owners' case the court said that the right to practice law was a valuable privilege exclusive in a class of persons and thus the licentiate possessed a "right in the nature of a franchise." Finally, the court said that since franchises are property rights and the right of the licentiate is a right in the nature of a franchise, his right is "an interest in the nature of a property right," and is therefore entitled to protection.

[77] 3 Kent 458.

[78] State v. Gus Blass Co., 132 Ark. 466, 105 S. W. (2d) 853 (1937); Georgia State Board v. Friedmans' Jewelers, Inc., 183 Ga. 669, 189 S. E. 238 (1936); Dvorine v. Castleberg Jewelry Corp., 170 Md. 661, 185 Atl. 562 (1936); Attorney General Voorheis v. Kindy Optical Co., 265 Mich. 265, 251 N. W. 343 (1933); State v. Gate City Optical Co., 339 Mo. 427, 97 S. W. (2d) 89 (1936); Jaeckle v. Bamberger & Co., 119 N. J. Eq. 126, 181 Atl. 181 (1935); Neill v. Gimbel Bros., Inc., 330 Pa. 213, 199 Atl. 178 (1938); West Virginia State Medical Association v. Public Health Council of West Virginia, 23 S. E. (2d) 609 (W. Va. 1942).

[79] 113 W. Va. 506, 168 S. E. 800, 801 (1933).

[80] 38 Ohio App. 265, 176 N. E. 577 (1931).

[81] 30 Ohio Cir. Ct. 646 (1908).

Other cases[82] granting injunctions restraining the unlicensed practice of law have used the franchise theory, although recent cases have not stressed it, preferring rather to emphasize the protection of the courts and the public. This results, no doubt, from the fact that lawyers and courts dislike the implication in the franchise cases that the injunction is obtained for the material economic benefit of the licensed attorneys.[83*]

Possibly because of the same reluctance to invite criticism of the public, the natural disinclination of courts to protect licensed medical practitioners, and the fact that the later medical cases had the benefit of the earlier legal ones, the cases in the medical field have not used the franchise theory very extensively. Nor have they used the theory of protection of the public, for although the interest of the public bulks even larger in this field, yet the licentiate here could not emphasize the protection of the courts and the administration of justice, which usually accompanies the argument of protection of the public, and of itself is of no little importance in some of the later legal cases.[84]

(2) Nuisance Theory

In the cases which have issued an injunction preventing the unlicensed practice of medicine, the nuisance theory has frequently been relied on.[85] There are, of course, two possibilities here: (a) the theory of public nuisance; and (b) the theory of private nuisance. In all cases that have granted the relief on the theory of nuisance it has been on the ground of a public nuisance.[86]

[82] Fitchette v. Taylor, 191 Minn. 482, 254 N. W. 910 (1934); Unger v. Landlords' Management Corp., 114 N. J. Eq. 68, 168 Atl. 229 (1933); Judd v. City Trust & Savings Bank, 133 Ohio St. 8, 12 N. E. (2d) 288 (1937); Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N. E. 650 (1934).

[83*] Sanders, *supra* note 40, at 160. Professor Sanders says: "Some of the courts which have used the 'property right' theory have indicated that it was not altogether satisfactory, and in no recent decision has any stress been placed upon it. The reason for this abandonment is not hard to find. One of the greatest difficulties of the bar associations' campaign against unauthorized practice has been to dispel the idea that what was being done was for the material benefit of lawyers and to replace it with the idea that it was primarily the public welfare with which the bar was concerned. It is not surprising, therefore, that the reasoning of the Apartment House Owners' case should be frowned upon as tending to defeat this objective."

[84] Depew v. Wichita Retail Credit Assn., 141 Kan. 481, 42 P. (2d) 214 (1935); Fitchette v. Taylor, 191 Minn. 582, 254 N. W. 910 (1934); Boyd v. Second Judicial District Court, 51 Nev. 264, 274 Pac. 7 (1929); State Bar of Oklahoma v. Retail Credit Assn., 170 Okla. 246, 37 P. (2d) 954 (1934); Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934).

[85] State v. Smith, 43 Ariz. 131, 29 P. (2d) 718 (1934); State v. Cole, 215 Ind. 562, 20 N. E. (2d) 972 (1939); State v. Howard, 214 Iowa 60, 241 N. W. 682 (1932); State v. Cooper, 147 Kan. 710, 78 P. (2d) 884 (1938); State v. Compere, 44 N. M. 414, 103 P. (2d) 273 (1940); People v. Laman, 277 N. Y. 368, 14 N. E. (2d) 439 (1938); Sloan v. Mitchell, 113 W. Va. 506, 168 S. E. 800 (1933). The relief was denied in Redmond v. State, 152 Miss. 54, 118 So. 360 (1928).

[86] See cases *supra* note 85.

Ten states and the District of Columbia make specific statutory provision for the remedy of injunction.[87] Some of these states permit an injunction at the instance only of the state board of medical examiners,[88] others at the instance of either the state board or the attorney general,[89] or at the instance of specified officials.[90*] One authorizes the granting of such injunction at the instance of any citizen of the country,[91] one by the board or by "any person affected . . .",[92] and two simply state that unlicensed practice may be restrained.[93]

In each of these statutes, with the exception of those of the District of Columbia, Nebraska, New Jersey, Tennessee, Louisiana and Utah, there is a specific provision that this remedy is additional to any criminal action and not in lieu thereof, and the Louisiana statute provides that an action for an injunction and a criminal action may be joined in the same suit. The statutes of Oregon and Indiana each provide that there need be no showing of actual damages, thus changing the ordinary rule of equity, and so avoiding one of the most difficult features of maintaining that action. Utah has a specific statute which permits the use of the injunction to prevent one whose license has been revoked from continuing to practice.

It would seem to be clear that the provisions of the Oregon and Indiana statutes which require no showing of damage to the petitioner, and the provisions of the Indiana statute that the relief may be instituted by any citizen of the country in which the unauthorized practice takes place is legislation worthy of emulation by other states.[94*]

[87] D. C. CODE (1929) tit. 20, §152; Ind. Laws 1927, c. 248; IOWA CODE (1935) 2519; Kan. Laws 1935, c. 270; LA. CODE PRAC. ANN. (Dart, 1932) §9654; NEB. COMP. STAT. (1929) §71-801; N. J. Laws 1939, c. 115; Ore Laws 1937, c. 277; TENN. CODE ANN. (Michie, 1932) §9316; TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 4509; UTAH REV. STAT. ANN. (1933) §79, 1-37.

[88] Louisiana and Oregon.

[89] New Jersey.

[90*] District of Columbia (commission, commissioners of D. C., or the major and superintendent of police); Kansas (attorney general); Texas (attorney general, the district attorney of the district in which the defendant resides, the county attorney of the county in which the defendant resides, or any of them).

[91] Indiana.

[92] Tennessee.

[93] Iowa and Nebraska.

[94*] IND. STATUTES ANN. (Burns, 1926) §12243 reads: ". . . The attorney general, prosecuting attorney, the state board of medical registration and examination, or any citizen of any county where any person shall engage in the practice of medicine, as herein defined, without having first obtained a license to do so, may, in accordance with the laws of the State of Indiana governing injunctions, maintain an action in the name of the State of Indiana to enjoin such person from engaging in the practice of medicine, as herein defined, until a license to practice medicine be secured. . . . Provided, that such injunction shall not relieve such person so practicing medicine without a license from a criminal prosecution therefor as is now provided by law, but such remedy by injunction shall be in addition to any remedy now provided for the criminal prosecution of such offender. In charging any person in a complaint for injunction or in an affidavit, information or indictment, with a violation of this law by practicing medicine, surgery or obstetrics without a license, it shall be sufficient to charge that he did, upon a certain day and in a certain county, engage in the practice of medicine, he not having any

It might be noted that the remedy of injunction has not been used extensively, even in the states where it is specifically authorized by statute. Specifically, cases have reached the appellate courts in only four of the ten states which have authorized its use: Indiana, Iowa, Kansas, and Nebraska.[95] And use of the remedy has been permitted in Arizona, New York, New Mexico and West Virginia without specific statutory authority.[96]

Pomeroy has said: "Every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated, is a public nuisance."[97] Therefore, since it is true that every state has a statute requiring registration and licensing as a prerequisite to the practice of medicine, it seems that any unlicensed practice—and certainly that of an untrained cultist or charlatan—is a public nuisance. And since a public nuisance concerns the public generally—in this case the very important matter of public health is involved—it is the duty of the government to take steps to enjoin it.

As noted previously, a number of cases have permitted the use of the injunction in suits instituted by either the attoreny general, the local district attorney, the state board of medical examiners, or an individual petitioner. The moving force in these cases is usually either individual licentiates, local medical associations, or the members of the state board of registration. However, because, in the absence of a statute permitting the board of registration to sue on its own initiative, the action must be started by the proper public official, the means is often slow, cumbersome, and ineffective. Moreover, the objection of political considerations arises here also.

Under normal circumstances, it would seem that a suit by an individual practitioner—who has his own pecuniary interest at stake—should prove much more effective. It is a recognized principle of equity, however, that, even when a public nuisance is established, an individual can obtain injunctive relief only when he can show special injury to himself.[98] And of course it is very difficult for the practitioner to show such damage, for that apparently means that he must establish the fact that there actually has been a loss of business to himself. In the absence of statutes like that of Indiana and Oregon, then,

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license to do so, without averring any further or more particular facts concerning the same. . . ."

The Indiana State Board of Medical Registration and Examination states that the injunctive method has been found most effective and satisfactory.

[95] See notes 63 and 65 *supra.*

[96] See notes 63, 64 and 66 *supra.*

[97] POMEROY, EQUITABLE REMEDIES (2nd ed. 1919) §478.

[98] 39 AM. JUR. (1942), *Nuisances,* p. 379, §124, and Parties, p. 863, §11; 1 C. J. S., *Actions,* p. 1073 §29a; 4 POMEROY, A TREATISE OF EQUITY JURISPRUDENCE (5th ed. 1941) §1349.

it would seem that the use of the franchise theory in injunctions suits at the instance of individuals is preferable.

CONCLUSION

It is fair to conclude that, on the whole, the remedies used in the past in controlling the dangerous unlicensed cultist and charlatan have not effectively protected the health of the public, despite the universality of licensing statutes.

Perhaps one of the most important methods of meeting the problem is the supplemental, extra-legal method of education of the public. This will have to be carried on, for the most part, it seems, by the medical profession, especially through the various medical associations. As suggested in the introductory paragraphs, more extensive use of the radio as a medium therefor should prove helpful.

Of the strictly legal methods used in the past, the criminal prosecution will be continued, and should be. Its effectiveness can undoubtedly be increased by more general enactments of basic science statutes, which are of themselves of great value in eradicating charlatanism and cultism.

The relief of quo warranto, although its use is limited by the nature of the relief, could be more effectively utilized, particularly if statutes such as that of Alabama were more widely copied.

Recent successful use of the remedy of the injunction, even in the absence of specific statutes permitting its use, gives promise of this as an increasingly successful means of control. If liberal statutes similar to that existing in Indiana were passed, specifically authorizing the use of the injunction upon the petition of any citizen of the county where the unauthorized act takes place, such statutes should prove the most effective of all, for such statutes would encourage the persons who had the most to lose, financially, by such charlatanism, to take the inital steps.

It would seem, then, that by a combination of existing remedies, made more effective by much-needed liberal statutes, we could go far in stamping out the present blight on the health of the nation.

APPENDIX

Section 1.—*Basic Science Certificate Required.* No person shall be permitted to take an examination for a license to practice the healing art or any branch thereof, or be granted any such license, unless he has presented to the board or officer empowered to issue such a license as the applicant seeks, a certificate of ability in anatomy, physiology, chemistry, bacteriology, and pathology (hereinafter referred to as the basic sciences), issued by the state board of examiners in the basic sciences. . . .

Section 2.—*Healing Art Defined.* For the purposes of this act, the healing art includes any system, treatment, operation, diagnosis, prescription, or practice for the ascertainment, cure, relief, paliation, adjustment, or correction of any

human disease, ailment, deformity, injury, or unhealthy or abnormal physical or mental condition.

Note.—This definition brings within its scope non-sectarian medicine, osteopathy, chiropractic, naturopathy, sanipractic, and other modes of healing. It is inclusive enough to cover dentists, nurses, chiropodists, pharmacists, optometrists, and others, but Section 17 excepts them from the operation of the Act.

Section 3.—*Board of Examiners in the Basic Sciences Authorized.* The Governor, within thirty days after this act takes effect, shall appoint a state board of examiners in the basic sciences (hereinafter referred to as the board), consisting of five members. The members of said board shall be appointed one for one year, one for two years, one for three years, one for four years, and one for five years, from the dates of their respective appointments. On the expiration of the term of any member, the Governor shall fill the vacancy by appointment for a term of five years. On the death, resignation, or removal of any member, the Governor shall fill the vacancy by appointment for the unexpired portion of the term. Every member shall serve until his successor is appointed and qualified. The members of the board shall be selected because of their knowledge of the basic sciences aforesaid, and each member shall be a professor, or an assistant or associate professor, or an instructor of the faculty of the ( ) or some other institution of learning in the State of ( ) of equal rank. Each member shall have resided in ( ) not less than one year next preceding his appointment. No member of the board shall be actively engaged in the practice of the healing art or any branch thereof.

Note.—This section aims at the creation of an examining board in which, by reason of the overlapping of the terms of members, there will be a continuity of policy and administration. The section proposes to limit the appointment of members of the basic science board to members of the faculties of approved universities and colleges, if possible. There should be inserted at the appropriate place the name or names of such school or schools. . . .

Section 6.—*Examinations.* The board shall conduct examinations at such times and places as it deems best. Every applicant, except as hereinafter provided, shall be examined to determine his knowledge, ability, and skill in the basic sciences. The examinations shall be conducted in writing, but may be supplemented by oral examinations, and if practicable shall be supplemented by examinations in the laboratory, dissecting room, and dispensary, and at the bedside. If the applicant receives a credit of 75 per cent or more in each of the basic sciences, he shall be considered as having passed the examination. If the applicant receives less than 75 per cent in one subject and receives 75 per cent or more in each of the remaining subjects, he shall be allowed a reexamination at the examination next ensuing, on application and the payment of the prescribed fee, and he shall be required to be reexamined only in the subject in which he received a rating less than 75 per cent. If the applicant receives less than 75 per cent in more than one subject, he shall not be reexamined unless he presents proof, satisfactory to the board, of additional study in the basic sciences sufficient to justify reexamination.

Section 7.—*Requirements for Certificate.* No certificate shall be issued by the board unless the person applying for it submits evidence, satisfactory to the board, (1) that he is not less than twenty-one years old; (2) that he is a person of good moral character; (3) that before he began the study of the healing art he was graduated by a high school accredited by the [Insert state accrediting agency] or a school of similar grade, or that he possesses educational qualifications equivalent to those required for graduation by such an accredited high school; and (4) that he has a comprehensive knowledge of the basic sciences as shown by his passing the examination given by the board, as by this act required. This shall not be construed to prevent the issue of certificates under the provisions of Section 8 of this act [reciprocity provisions]. . . . .

Section 11.—*Practice Without Basic Science Certificate Forbidden.* Any person who practices the healing art or any branch thereof without having obtained a valid certificate from the state board of examiners in the basic sciences, except as otherwise authorized by this act, shall be fined not more than [ ] dollars or imprisoned for not more than [ ], or both, in the discretion of the court. . . .

Section 12.—*Fraudulent Certificates Forbidden.* Any person who obtains or attempts to obtain a basic science certificate by dishonest or fraudulent means, or

who forges, counterfeits, or fraudulently alters any such certificate, shall be fined not more than [ ] dollars or imprisoned not more than [ ], or both, in the discretion of the court. . . .

Section 15.—*Fees Paid Unauthorized Practitioners Recoverable.* A person who has paid money or anything of value to a person not authorized to practice the healing art or any branch thereof, as compensation for services rendered in the practice of the healing art or any branch thereof, when the payor did not know at the time of payment that the payee was neither the holder of a certificate issued by the state board of examiners in the basic sciences nor authorized to practice without such a certificate, may recover such money or the value of the thing paid, by an action at law instituted within two years from the date of payment.

Section 16.—*Enforcement.* The state board of examiners in the basic sciences and the several boards authorized to issue licenses to practice the healing art and branches thereof shall investigate every supposed violation of this act coming within the scope of the authority of such boards respectively, and report to the proper [ ] attorney all cases that in the judgment of the board warrant prosecution. Every police officer, sheriff, and peace officer shall investigate every supposed violation of this act that comes to his notice or of which he has received complaint and apprehend and arrest all violators. It shall be the duty of the attorney general and of the several [ ] attorneys to prosecute violations of this act.

Section 17.—*Exceptions.* This act shall not be construed as applying to dentists, pharmacists, nurses, optometrists, and chiropodists, practicing within the limits of their respective callings; not to persons licensed to practice the healing art or any branch thereof in [ ] when this act takes effect; nor to persons specifically permitted by law to practice without licenses, who practice each within the limits of the privilege thus granted to him.