THE JURISPRUDENCE OF MEDICINE IN ITS RELATION TO THE LAW OF CONTRACTS, TORTS, EVIDENCE, WITH A SUPPLEMENT ON THE LIABILITIES OF VENDORS OF DRUGS

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Trieste

PREFACE.

The law of consensual obligations is one upon which so much has been written, that it might seem little else than supererogatory to discuss anew any chapter in it. But experience constantly demonstrates the fact that, while ponderous treatises majestically absorb the territory of particular sciences, they do not necessarily glean the entire harvest which it is capable of affording. Following in the track of even the most accomplished reaper, some few unobserved heads of wheat may be found, out of which to form still another sheaf. Nor, because humble in size, or unpretending in character, does it follow that it may not add something to those stores out of which the human mind may be fed.

Having often been consulted by physicians in relation to their professional rights at law, and being compelled, in verification of my opinions, to search for precedents, or, in the absence of recorded adjudications, to seek for analogies outside of any works on the positive law of contracts, I became long ago convinced that there existed a definite and well-marked branch of the department of obligations, upon which no systematic collection or expo-

sition of principles had yet appeared, in the form of a distinct treatise. This neglected chapter in the law of mandates, treating of the rights, remedies, and liabilities of an entire profession, as parties to consensual obligations relating to the rendition of personal services, I have undertaken to fashion into a legal entity, by bringing it under the light of positive law, both ancient and modern. In the discharge of this self-imposed duty, I have recognized the reciprocal claims of both Law and Medicine to a discussion of the subject within the boundaries of practical and perfect, rather than theoretical and imperfect obligation, endeavoring also to vindicate the deductions arrived at by the most authoritative adjudications. Nothing less than this would have met the necessity it was meant to supply. And with this end constantly in view, I have narrowed my discussions of principles in every instance, and so far as the nature of the subject would permit, down to the closest interpretation consistent with a logical exegesis of their essential features.

In the department of Medical Evidence, it has been difficult to unfold the subject in as systematic a form as would be desirable; but when it is remembered that skilled testimony at common law is, from its inherent attributes, a paradox in the law of evidence, it will more readily be understood why any discussion of it must necessarily carry us outside the domain of positive jurisprudence into that of legal philosophy. Something must be conceded, also, on account of the very loose state of the

law on this vexed question, since had there been more unanimity, or even a nearer approach to concurrence in views on the part of courts, my task would have been correspondingly easier. Under existing conflicts of opinion, I have felt authorized to apply the best rules of legal philosophy at my command, conscious that, with no arrogant assumption of critical superiority, I might still be able to point out some middle path *in aliud*, where, without radically overthrowing a principle settled by adjudication, we could modify its application *in melius*. It is in this spirit that not only the above chapter, but the entire work, has been undertaken, for at best its discussions involve too many inchoate doctrines to enable them to aspire to a textual character, and the most I venture to claim for them is the effort to illumine a pathway of civil obligation hitherto neglected, and therefore unknown.

Of the *Jurisprudence of Pharmacy*, as collateral to that of medicine, it is much to be regretted that so little can be found among the adjudications of our courts. The subject presents a most important problem in the tripartite relations existing at times between pharmaceutists, physicians, and the public, and certainly as a branch of the law of mandates, malpractice in it merits as high a grade in our penal statutes as a similar wrong in the domain of practical medicine. Yet nothing is more conspicuous in the history of our legislation than the continuous oversight committed in this direction, and the conse-

quent necessity imposed upon courts, in actions for torts committed by pharmaceutists, of searching in the fields of analogy for precedents by which to bring these innominate wrongs within the limits of their penal jurisdiction. Under so elastic a system as that of the common law, it can not be necessary to invent a fiction for the purpose of establishing the principle, that, the duties arising from consensual obligations are not exclusively private in their nature, and limited *ex vi termini* to the contracting parties alone, but that postulate to this fact are the exoteric duties which every individual owes to society at large, in proportion as his acts directly influence the life, health, property or reputation of his fellow beings. Measured by this standard of necessary law, the idea of duty rises into something of more positive consequence than a simple moral obligation, and we are brought to the recognition of a class of duties which, although associated with contracts, ante-date them in fact, arising as they do, not from any privity between parties, but by operation of law, and remaining therefore of ever-binding obligation, whatever may be the nature of the contract itself. Whenever these principles shall be generally understood by legislators, they will hasten to provide means for securing their enforcement, and thus simplify the duties of courts in passing judgment upon the liabilities of vendors of drugs.

In a work written to meet the wants of both professions of law and medicine, it has been next to impossible not to carry the discussion of many principles beyond that

point where, in a happy syncretism of both sciences, I could be easily followed by practitioners of either. Conscious at the outset how inevitably this must happen, I have at least endeavored to reduce the number of its occurrences to the fewest possible; and for this purpose have often compressed the discussion of important legal principles within limits stripping them of all argumentative development, and substituting for it such bald terms as might seem to savor of dogmatism. But the nature of the undertaking left me no other course to pursue, since what has been said in reference to legal principles will also apply with equal force to medical subjects.

In avoiding, therefore, any amplification of topics in directions where possibly a wider argument might have been justifiable, I have sought to combine precision with brevity, by generally selecting the analytical form of syllogism, and supporting conclusions of law by the reasons on which they synthetically rest. Much verbiage is thus escaped, and the subject divested of all necessity for circumlocution, by presenting it in its baldest and most striking outlines. And as I have always conceived this to be the best form in which the essence of a legal principle can be stated, I have accordingly pre-ordinated it to the inferior claims of external expression, leaving these to be met and answered by readers who will naturally supply the omitted steps for themselves.

J. O.

Roslyn, N. Y., *June*, 1869.

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