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Note and Comment

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NOTE AND COMMENT

INTERNAL REVENUE TAX ON STATE DISPENSARIES UPHELD.—No recent case, perhaps, has brought out more clearly than that of *South Carolina* v. *United States* (26 Sup. Ct. Rep. 110), the necessity which the written constitution is always under, of meeting new and unanticipated conditions. The question in that case was, whether the United States government can legally demand from the officers of the state dispensaries for the wholesale and retail sale of liquor, the regular license taxes prescribed by the United States internal revenue act. These dispensaries were established by several statutes of South Carolina, which also prohibited the sale of liquors in that state by any others than the official dispensers. The general limitations upon the power of the federal and state governments to tax each other's property and agencies had, of course, been pretty well settled by the great case of *McCulloch* v. *Maryland*, 4 Wheat. 316, and a long line of subsequent cases, many of which are cited and discussed by MR. JUSTICE WHITE in his dissenting opinion in the present case. But here, at least according to the majority opinion, is an effort by the federal government to tax officers of the state, engaged not in governmental functions, but in the private or corporate business of the state; and the point is made and strongly relied upon that the objections to and dangers attendant upon

permitting the federal government to tax any of the instrumentalities of *government* of a state cannot be urged against a license tax imposed upon the means by which the state acquires property in the pursuance of functions *not governmental* in nature. In the dissenting opinion MR. JUSTICE WHITE says that the United States Supreme Court has not recognized this dual nature of government and denies the appositeness of the reasoning of the majority of the court based upon its supposed existence. Granting that this distinction between the governmental and the corporate functions may be illogical, difficult to define and still more difficult to apply, the principle as a rule of law is too thoroughly embedded in the jurisprudence of this country, to be disturbed by any but positive rulings necessary to the decision by courts of last resort. The two cases cited by MR. JUSTICE WHITE certainly do no more than "point the other way," as he says. In neither case were the remarks on that subject necessary to the decision. *Barnes* v. *District of Columbia,* 91 U. S. 540, 23 L. ed. 440; *Workman* v. *New York,* 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212. Indeed the distinction as to function, so far as municipal corporations are concerned, seems to be distinctly recognized in both the majority and minority opinions in the latter case.

But the application of the doctrine to the case in hand seems much more doubtful. Had the license tax been applied to the operation of one of the "public utilities" or other businesses which MR. JUSTICE BREWER, speaking for the majority of the court, anticipates may, some day be operated by the state, then the pertinence of this doctrine of "dual functions" would have been much clearer. But it can scarcely be denied that in conducting these dispensaries of liquor, the state was engaged in purely governmental functions. To be sure it was shown that the dispensaries yielded a profit of more than $500,000 during the year 1901; but that was merely incidental to the fundamental, if not the sole purpose of the statutes, namely, the regulation and control of the liquor problem. That such regulation and control is a legitimate governmental function pertaining to the police power of any autonomous state, is of course, too well settled to require citation of authorities. The constitutionality of the statutes creating the dispensary had already been expressly declared by the Supreme Court in *Vance* v. *Vandercook Co.* (No. 1), 170 U. S. 438. As it is true that the "power to tax involves the power to destroy" it would follow that if this license tax may be lawfully demanded of the dispensary officers, it might be made so high as to break down or make ruinously expensive the whole dispensary system, thus rendering impossible the method chosen by the state of exercising its police power in regard to the liquor traffic. It is no answer to this argument to say that Congress can be trusted not to exact exorbitant taxes; for as was said by CHIEF JUSTICE MARSHALL in *McCulloch* v. *Maryland,* supra, "this is not a case of confidence" but of constitutional law. If this reasoning be correct, one of the principal arguments of the majority of the court in support of their decision is not valid. Moreover it had already been held that a "state might not impose a tax on any property of the United States, including real estate of which the United States had become the owner as the result of a sale to enforce the payment of direct taxes previously levied by the United States." *Van Brocklin* v. *Tennessee,* 117 U. S. 151.

The majority of the court further argue that "the tax is not imposed on any property belonging to the state, but is a charge on a business before any profits are realized therefrom. In this it is not unlike the taxes sustained in *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, and *Snyder* v. *Bettman*, 190 U. S. 249, 47 L. ed 1035, 23 Sup. Ct. Rep. 803. In the former case a succession tax of the state of New York was sustained, although the property charged therewith was bequeathed to the United States, the court holding that the latter acquired no property until after the state charges for transmission had been paid, saying, 'This therefore is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will or by descent and distribution.'" Admitting the force of this argument and of the precedents by which it is sustained, it yet seems difficult to escape the conclusion, that the prevailing opinion, if not a departure from what have been regarded as settled principles, is at least to some extent a new view of an old subject. In *Collector* v. *Day*, 11 Wall. 113, 20 L. ed. 122, MR. JUSTICE NELSON said, "It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" Does not the application of this license tax to the officers of the state dispensaries of South Carolina tax, and in that sense, make subject to federal control, the "means employed in conducting the operations" of the government of South Carolina? And if it does, was the majority of the Supreme Court justified in being influenced by possible economic disaster to the government of the United States, should the several state governments at some future time take into possession not only the "public utilities" but other kinds of business and industry, thus making "it almost impossible for the nation to collect any revenues?" H. M. B.

WHAT IS THE PRACTICE OF MEDICINE?—In a popular sense, and as ordinarily understood the practice of medicine is the applying of medical or surgical agencies for the purpose of preventing, relieving, or curing disease, or aiding natural functions, or modifying or removing the results of physical injury. *Stewart* v. *Raab*, 55 Minn. 20, 56 N. W. Rep. 256. But in some relations, and for some purposes, the expression has a more extended meaning. This is to be found sometimes in statutory provisions, sometimes in the decisions of the courts upon questions involving the construction of the expression and sometimes in both. Medical acts not infrequently state what shall be deemed to be the practice of medicine under them. But even where this is so, the courts are often called upon to interpret the words of the legis-

lature and to determine whether or not certain acts of a party make him a practitioner of medicine within the meaning of the governing statute. Where the medical act contains no direct provision in regard to the matter, the court, in case of litigation, must determine what is the practice of medicine, and in so doing must take into consideration the general scope and purpose of the statute. The medical statutes have been enacted primarily for the protection of the public, although incidentally the medical profession are protected by these laws. The difficult cases are not those where a person attempts to heal disease by the use of drugs or ordinary appliances, but rather those where resort is had to new or extraordinary methods. Some of the ways in which this question has arisen appear in the following paragraphs.

In the recent case of *State* v. *Yegge* (S. Dak.), 103 N. W. Rep. 17, 69 L. R. A. 504, it was contended that the defendant was practicing medicine in violation of the statute of the state which provided that "When a person shall append or prefix the letters 'M.B.' or 'M.D.,' or the title 'Dr.' or 'Doctor,' or any other sign or appellation in a medical sense, to his or her name, or shall profess publicly to be a physician or surgeon, or who shall prescribe or direct for the use of any person any drug, medicine, apparatus, or other agency for the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or bodily injury or deformity, after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift or compensation, he or she shall be regarded as practicing within the meaning of this act." It seems that the defendant was a practitioner of what he called "ophthalmology", that he advertised himself as such, and that he claimed in his advertisements that certain specific diseases could be cured by removing the causes through the use of his methods. He administered no drugs or medicines of any kind, but treated his patients simply by the fitting of glasses. His advertisements were signed "Dr. M. F. Yegge." It was contended on the part of the defendant that the evidence was insufficient to warrant his conviction in that it failed to show that he was practicing or attempting to practice medicine within the provisions of the act quoted, and that he was simply engaged in the business of fitting glasses to the eye. But the court held that it was not only clear from the language of the advertisement which was in evidence that it would be generally understood that he was holding himself out as a regular physician, or at least a specialist in the branch of medicine treating of ophthalmology, but that he was plainly within the statute by reason of having prefixed the term "Dr." to his name when signing his advertisements. "The legislature," says the court, "evidently intended in enacting the law to prevent persons not properly educated in the science of medicine from assuming to act as physicians and to protect the public. * * * The law should not be so construed as to deprive the people of the benefits intended by the act, but such a construction should be given it as to carry into effect the evident intention of the legislature." A case somewhat similar to the foregoing arose in the state of Illinois, where the medical act provides that any person shall be considered a medical practitioner within the meaning of the act, "who shall treat or profess to treat, operate on, or prescribe for any physical ailment or any physical injury to, or

deformity of, another." Hurd's Ill. Stat. (1903) Chap. 91, Sec. 11 In *People* v. *Smith*, 208 Ill. 31, 69 N. E. Rep. 810, it was held that one who travels from place to place fitting and selling spectacles, and who advertises himself as "The Famous Chicago Eye Expert," and invites persons having the symptoms described to call upon him, but stating that he does not give medical or surgical treatment, is not within the provisions of the medical act of the state.

Sometimes the statute regulating the practice of medicine provides that the statute shall only apply to those practicing for reward or compensation. *State* v. *Paul*, 56 Neb. 369, 76 N. W. Rep. 861; *State* v. *Pirlot*, 20 R. I. 273, 38 Atl. Rep. 656; *State* v. *Hale*, 15 Mo. 606; *State* v. *Wilcox*, 64 Kan. 789, 68 Pac. Rep. 634; *Blalock* v. *State*, 112 Ga. 338, 37 S. E. Rep. 361. In the absence of such a provision, one may be a practitioner within the meaning of the governing statute although he does not practice for compensation. *State* v. *Welch*, 129 N. C. 579, 40 S. E. Rep. 120. But ordinarily it would not be held to be the practice of medicine to give advice or medicine to a sick person in a friendly or neighborly way, the person performing such services not holding himself out as a physician, or charging for his services. The legislature in the exercise of its police power might, perhaps, prohibit such friendly services, but in the absence of a direct prohibition in regard to the matter, the rendering of them would not ordinarily be the practice of medicine. *Nelson* v. *State*, 97 Ala. 79, 12 South. Rep. 421. Gratuitous medical services rendered in case of an emergency would not be the practice of medicine. *Greenfield* v. *Gilman*, 140 N. Y. 168, 35 N. E. Rep. 435. An exception in regard to such services will be found in some of the medical acts. *State* v. *Paul*, 56 Neb. 369, 76 N. W. Rep. 861. But in order that the emergency exception of a statute may apply, the emergency must be a real one; the situation must be such as to demand immediate medical aid in order that life or health may not be endangered. *People* v. *Lee Wah*, 71 Cal. 80, 11 Pac. Rep. 851.

Where it was provided in an act making it a misdemeanor to practice medicine without first having obtained a certificate of qualification from one of the authorized boards of medical examiners, that the act should not apply "to any physician practicing medicine in this state for the past five years," it was held that the word "physician" was used in its popular sense, as one who practices medicine or the healing art, and that one who continued the practice of medicine for the time mentioned in the statute, although without a certificate of qualification, was within the proviso of the statute. *Harrison* v. *State*, 102 Ala. 170, 15 South. Rep. 563. But in this connection it should be noted that in Iowa the attitude of the Supreme Court upon a somewhat similar question is different. It is held by this court that a provision of the medical act of that state to the effect that a physician shall not by the act be prohibited from practicing if he has been in practice in the state for five consecutive years, three of which have been in one locality, provided satisfactory evidence of such practice be furnished the state board of examiners and a proper certificate secured from said board, does not give such physician a right to the certificate of the said board upon proof by him of the fact of his practice as provided in the statute. The court takes the position that the

board in such a case may pass upon the competency of the applicant to practice medicine, not because the act expressly provides that this may be done, but because such authority in the board is in accordance with the spirit and purpose of the law. *State* v. *Mosher,* 78 Ia. 321, 43 N. W. Rep. 202.

Some of the medical statutes require special certificates for different departments of practice, but this is an exceptional provision. Usually the certificate from the state board in terms confers the right to practice medicine and surgery in the state, and this means to practice medicine and surgery in any of their branches. But sometimes the act provides for the regulation of the "practice of medicine," and the certificate from the examining board authorizes the holder "to practice medicine" in the state. The term "practice medicine" as so used has been held to signify the practice of medicine in all of its branches, including surgery. *Stewart* v. *Raab,* 55 Minn. 20, 56 N. W. Rep. 256.

A question that has of late frequently challenged the attention of the courts is whether or not the practice of osteopathy as a profession and means of livelihood, is the practice of medicine within the provisions of the medical acts. Each case, of course, has necessarily been considered with reference to the language of the medical act in force where it arose. An examination of the acts and decided cases, however, will disclose the fact that similar language in different statutes has been differently construed by the courts of last resort. This subject was fully considered in 1 MICH. LAW REV. 309, where all of the cases that had come before the courts of last resort up to the time of the writing of the note were reviewed. See also 2 MICH. LAW REV. 51 for a supplemental note upon the subject. It may be suggested here that osteopathy has been held to be the practice of medicine within the medical acts of Alabama, Nebraska and Illinois. The Ohio act of 1896 provided that "Any person shall be regarded as practicing medicine within the meaning of this act who shall * * * for a fee, prescribe, direct, or recommend for the use of any person any drug, or medicine, or other agency for the treatment, cure, or relief of any wound, fracture, or bodily injury, infirmity, or disease." In *State* v. *Liffring,* 61 Ohio St. 39, the Supreme Court of the state held that osteopathy was not an "agency" within the meaning of the act. The reasoning upon which this conclusion was based was that the meaning of the word "agency" was limited by the associated words "drug" and "medicine," and that nothing could be regarded as an "agency" as the word was used in the act, that did not partake in some way of the general character of a drug or medicine, and that could not be applied or administered as drugs or medicines usually are. After the decision in this case, the Ohio statute was amended so as to include within its operation those "who shall prescribe, or who shall recommend, for a fee for like use, any drug or medicine, appliance, application, operation, or treatment, of whatever nature, for the cure or relief of any wound, fracture, or bodily injury, infirmity, or disease." 94 Ohio Laws (1900) 197-201. The statute as amended has been construed by the Supreme Court of the state to include the practice of osteopathy. *State* v. *Gravett,* 65 Ohio St. 289. In Kentucky the Supreme Court regards the practitioner of osteopathy as on the plane of the trained nurse and as not within

the provisions of the statute. *Nelson* v. *State Board of Health*, 68 Ky. 769, 57 S. W. Rep. 501, 50 L. R. A. 383.

The legislature of North Carolina in 1903 amended the medical act of the state by passing a law defining the "practice of medicine and surgery." It is in the following terms: "For the purposes of this act the expression 'practice of medicine and surgery' shall be construed to mean the management, for fee or reward, of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever: Provided, that this shall not apply to midwives nor to nurses; Provided further, that applicants not belonging to a regular school of medicine shall not be required to stand an examination except upon the branches taught in their respective colleges (such branches being given in the act); Provided, that this act shall not apply to any person who ministers to or cures the sick or suffering by prayer to Almighty God without the use of any drug or material means."

In *State* v. *Biggs*, 133 N. C. 729, 46 S. E. Rep. 401, 64 L. R. A. 139, the defendant was indicted upon the charge of unlawfully and wilfully engaging in the practice of medicine and surgery for fee or reward without having obtained from the state board of medical examiners a license so to do. Upon the facts found in a special verdict, the court below adjudged the defendant guilty. It appeared that he advertised himself as a "nonmedical physician;" that he held himself out to the public to cure disease by a "system of drugless healing," and to treat "patients by said system without medicine;" that the acts that he was found to have performed were to administer massage baths and physical culture, to manipulate the muscles, bones, spine, etc., and to advise his patients as to diet. He used no drugs in his treatment. The defendant admitted that he had no license from the state board and claimed no exemptions by virtue of the provisos in the act. It was found that he had treated patients since the passage of the act and had received compensation therefor. The defendant's acts undoubtedly brought him within the statutory provisions above quoted, but the Supreme Court found that he was not guilty, as the police power does not confer upon the legislature authority so to define the practice of medicine and surgery that it shall include "the management, for fee or reward, of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever." "The act," says the court, "means more than its friends probably intended, for it says 'any case of disease, physical or mental, real or imaginary.' Is not a disease of the eye physical, and is not a disease of the ear, or of the teeth, or a headache, or a corn, physical? Then every dentist and aurist and oculist is indictable unless he has also license from the state medical society as an M.D., as is also every corn doctor who relieves aching feet, and every peripatetic of stentorian lungs, on the court house square who banishes headaches, real or imaginary, by rubbing his hands over some credulous brow. * * * Then there is the closing expression, forbidding treatment 'for fee or reward,' by other than an M.D., 'by any other method whatsoever.' This would take in all the old women and the herb doctors, who, without pre-

tending to be professional nurses, relieve much human suffering, real or imaginary, for a small compensation. Then it is forbidden to relieve a case of suffering, physical or mental, in any method unless one is an M.D. It is not even admissible to 'minister to a mind diseased' in any method, or even dissipate an attack of the blues without that label duly certified. * * * The act is too sweeping. Besides, the legislature could no more enact that 'the practice of medicine and surgery' shall mean 'practice without medicine and surgery,' than it could provide that 'two and two make five,' because it cannot change a physical fact. And when it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M.D., it attempted to confer a monopoly on that method of treatment, and this is forbidden by the constitution."

This legislation is, perhaps, subject to some of the criticisms made upon it by the court in this case, and possibly the conclusion reached by the court as to the constitutionality of the act is correct, though it may be said in passing that the language of the judge writing the opinion is hardly judicial in character. Two members of the court concur in the result reached, probably for the reason that they do not countenance the language used in the opinion. The North Carolina court, as indicated by the holding in this case, is evidently not in sympathy with the notion that medical legislation should be so comprehensive in its range that none can properly practice medicine in any of its forms excepting those who have been thoroughly trained so to do. In the opinion of this court, such legislation should be confined to provisions in regard to the admission to some branch of the regular medical profession. The court says: "The public have the right to know that those holding themselves out as members of that ancient and honorable profession are competent and duly licensed as such. The legislature can exercise its police power to that end because it is a profession whose practice requires the highest skill and learning. But there are methods of treatment which do not require much skill and learning, if any. Patients have the right to use such methods if they wish, and the attempt to require an examination of the character above recited for the application of such treatment is not warranted by any legitimate exercise of the police power. The effect would be to prohibit to those who wish it, those cheap and simple remedies, and deprive those who practice them of their humble gains, by either giving a monopoly of such remedies to those who have the title M.D., or prohibiting the use of such remedies altogether, neither of which results the legislature could have contemplated." It may be suggested that so narrow a construction of the police power in connection with medical legislation would result in very little protection to the public from designing quacks and pretenders. A statute similar to that of North Carolina, above quoted, has been upheld by the Supreme Court of New Mexico. *Territory of New Mexico* v. *Newman*, (N. M.), 79 Pac. Rep. 706, 813, 68 L. R. A. 783.

The practice of Christian science, so-called, has been held by the Supreme Court of Rhode Island not to be the practice of medicine within the provisions of the medical act of the state. *State ex rel Swarts* v. *Mylod*, 20 R. I.

632, 40 Atl. Rep. 753, 41 L. R. A. 428. But in Nebraska one who practices Christian science has been held to be subject to the medical act of the state. *State* v. *Buswell*, 40 Neb. 158. The medical act of Illinois contains an express provision that it shall not apply to "any person who ministers to, or treats, the sick or suffering, by mental or spiritual means without the use of any drug or material remedy." Hurd's Ill. Stat. (1903) Chap. 91, Sec. 11.

A magnetic healer who advertised himself as such and styled himself "professor" has been held to be subject to the restrictions of the statute requiring a license of persons who announce to the public a readiness to cure disease, or who in connection with their names use the word "professor," or any other title, intending thereby to designate themselves as practitioners of medicine in any of its branches. *Parks* v. *State*, 159 Ind. 211, 64 N. E. Rep. 862, 59 L. R. A. 190. And a medical clairvoyant has been held to be a practitioner of medicine within the provisions of the statute making the recovery of compensation for medical or surgical services dependent upon a compliance with a statute in regard to professional attainments, moral character, etc. *Bibber* v. *Simpson*, 59 Me. 181. But it has been held that a person who recommends and offers for sale an instrument or appliance to be attached to the body for the cure of disease is not practicing medicine within the meaning of the provision of the Illinois act hereinbefore quoted. *People* v. *Lehr*, 196 Ill. 361, 63 N. E. Rep. 725. The vendor of proprietary medicines who simply sells the medicines and does not attempt to diagnose disease and prescribe his remedy, is not a practitioner of medicine, yet he may become such by holding himself out as a physician and varying his prescriptions of proprietary remedies, to meet the symptoms discovered by him on his own examination. *State* v. *Van Doran*, 109 N. C. 864, 870, 871, 14 S. E. Rep. 32; *Payne* v. *State*, 112 Tenn. 587, 79 S. W. Rep. 1025; *Regina* v. *Howarth*, 24 Ont. 561. If in selling proprietary medicines the vendor distinctly declares that he is not a physician, and receives pay simply for the medicine, he could not be held to be a medical practitioner, even though he gives advice as to the use of his medicine. *Commonwealth* v. *St. Pierre*, 175 Mass. 48, 55 N. E. Rep. 482.

It may properly be suggested that the medical laws as a rule are framed with a view of reaching conditions existing at the time of their enactment, and that they are often ineffective because of a failure to provide by comprehensive language for changed conditions. By reason of this fact, as an examination of the statutes and decided cases will show, the ignorant and designing pretender who is foisting upon the public some new but worthless and perhaps harmful treatment is not infrequently beyond the reach of the law.

H. B. H.

APPEALS FROM DECREES FOR COSTS.—A decision particularly valuable for its exhaustive presentation of authorities upon the subject of appeal for costs in equity, both in the United States and England is that in the case of *Nutter* v. *Brown et al.* (1905), — W. Va. —, 52 S. E. Rep. 88. Certain costs in the form of attorney's fees and receiver's compensation had been decreed to be paid out of funds belonging to the defendant in the hands of the court. The

defendant appealed and the court *Held,* that such a decree, even though for costs only, could be reviewed.

That, independently of any constitutional limitation, a decree for costs only is not appealable is a general rule much voiced by the courts of this country. *DuBois* v. *Kirk,* 158 U. S. 58, 15 S. Ct. 729, 39 L. ed. 895; *State* v. *Vann,* 127 N. C. 243, 37 S. E. 263; *Joselyn* v. *Parlin,* 54 Vt. 670; *Howe* v. *Hutchinson,* 105 Ill. 501; *Dodge* v. *Stanhope,* 55 Md. 113.

The reason given for the rule is that the awarding of costs in equity lies wholly within the discretion of the trial court. However, under the old English chancery practice, from which the rule in this country was originally deduced, there are certain instances in which the question of costs has been held not to be discretionary and an appeal allowed. In *Angell* v. *Davis,* 4 Myl. & Cr. 360, the court says, "when the case is not one for personal costs, in which the court has ordered one party to pay them, but a case in which the court has directed them to be paid out of a particular fund, an appeal lies on the part of those interested in the fund." To the same effect are *Johnstone* v. *Cox,* 19 Ch. D. 17, 45 L. T. 657, 30 W. R. 114, and *In re Chennell, Jones* v. *Chennell,* 47 L. J. Ch. 80, 8 Ch. D. 492, 38 L. T. 494, 26 W. R. 595. Appeals have also been heard where the error of the chancellor appeared upon the face of the record so that the question of costs could be decided without going into the merits of the case. *Chappell* v. *Purda,* 2 Ph. 227, 16 L. J. Ch. 261, 11 Jur. 256; *Walker* v. *French,* 21 W. R. 493. When the decree involved equitable principles as to payment of costs, an appeal was entertained. *Taylor* v. *Southgate,* 4 Myl. & Cr. 203, 8 L. J. Ch. 137, 3 Jur. 214; *Rochester Corp.* v. *Lee,* 2 De G. M. & G. 427. For other instances see 4 Mews, C. L., Digest 854 et seq. The Judicature Act of 1873, § 49, declaring as it does that no appeal shall be entertained so far as relates to those costs which are in the discretion of the court, seems to have recognized these exceptions and merely confirmed the old chancery practice.

The courts of the United States, being under the erroneous impression that it was the only exception allowed under the old practice, have tended to allow appeals for costs only in case the trial court had directed them to be paid out of a particular fund. *Trustees* v. *Greenough,* 105 U. S. 528, 26 L. ed. 1157; *Foster* v. *Elk Co.,* 99 Fed. 617; *Temple* v. *Lawson,* 19 Ark. 148. Although appeal may be heard when a mere question of statutory regulation in respect to the allowance or denial of costs is presented (*City of Augusta,* 80 Fed. 297, 25 C. C. A. 430; *Crosby* v. *Stephan,* 97 N. Y. 606), or when the trial court's discretion has been improperly exercised. *Penn. Co.* v. *Bank,* 195 Pa. St. 34; *Torras* v. *Raeburn,* 108 Ga. 345. In the class of cases mentioned above—where payment is decreed out of a fund—there is, as pointed out by the court in the principal case, something more than discretion involved. The right of a receiver to his compensation or of an attorney to his lien is a strong equity analagous to an obligation founded upon an implied contract, and is not wholly dependent upon the mere arbitrary discretion of the court. There may be discretion as to the mode or amount of compensation because the lower court has better means of knowing what is just and reasonable, but clearly there can be none as to whether any at all shall be

paid. *Bank* v. *Cannon*, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. ed. 451. In the statement of the rule then our courts have ignored an exception which they constantly observe in the exercise of jurisdiction. Even though these exceptional instances be not extended to conform with the old practice, a more accurate statement of the rule would seem to be that of the court in the principal case—"that no appeal lies from a decree for such costs as are in the discretion of the chancellor." R. E. J.

THE HEARST ELECTION CONTEST.—The recent election in New York City and the rapid succession of decisions in the contest following it were so dramatic that the opinion of the Court of Appeals just reported is invested with more than purely technical interest. Defeated on the face of the returns by a plurality of less than 3,000 out of 590,000 votes, Mr. Hearst applied to the Supreme Court for mandamus to the inspectors and clerks of the second election district of the sixth assembly district to compel a recount of the ballots. On November 28 an order was granted for a recount to be had December 1. Upon appeal the Appellate Division affirmed the order with slight modification. On December 13 the Court of Appeals rendered the final decision in the case, reversing the lower courts and denying the writ (*In re Hearst et al.*, — N. Y. —, 76 N. E. Rep. 28). Within one month the contest had been carried through three tribunals to a final adjudication.

The petitioner claimed that in the precinct in question the total number of votes reported in the tally sheet was less than the number of ballots issued by the ballot clerk. The grounds for the action were purely statutory and the demand was based on the Election Law (Laws of 1896, p. 896). This act, in section 84, which prescribes the form and contents of the tally sheet, provides that the sheet shall contain a column entitled "Total Number of Ballots Accounted for," in which shall be entered ballots legally cast, blank ballots, and void ballots. "Their sum must equal the number of ballots voted, as shown by the ballot clerks' return of ballots [the ballot clerks were to keep an account of the number of ballots issued], and if it does not, there has been a mistake in the count and the ballots must be recounted." Section 111 provides that forthwith upon the completion of the official statement of the vote "the ballots voted, except the void and protested ballots, shall be replaced in the box. * * * Each such box shall be sealed. * * * They shall be preserved inviolate for six months after such election and may be opened and their contents examined upon the order of the Supreme Court or a justice thereof, or a county judge of said county."

These sections, the court through JUDGE GRAY decided, do not authorize a mandamus for recount. Section 84 is merely a direction for the guidance of the election commissioners when casting up the results. The sentences under discussion are interjected into the provisions regarding the form of the tally sheet. Their true intent is shown by their being repeated on the sample tally sheet which was made a part of the act, and also by the absence of any special provision for mandamus, such as was made in other sections of the act. Section 111 merely permits the judge to open the boxes, but does

not authorize him to order a recount. Its purpose is to facilitate the utilization of the ballots as evidence in quo warranto or in a criminal prosecution of the election commissioners.

JUDGES BARTLETT and VANN vigorously dissent from the proposition that mandamus will not lie to enforce a ministerial duty specifically required by law. What is accomplished, they ask, if the judge may open the box for the mere purpose of a useless examination? To what purpose are the ballots preserved for six months, if they cannot be recounted save in an action of quo warranto which may drag through the courts for years? Mandamus need not be specifically authorized; its warrant is independent of the election law and lies in the inherent power of the court to compel every officer to do his duty.

The law had been several times construed; and from dicta in previous cases it was quite generally believed that a recount might in certain cases be ordered. In the *Matter of Stewart*, 155 N. Y. 545 (1898), it was held that, when the return of election district inspectors differs from the result shown by the tally-sheet, the board of county canvassers may be compelled by mandamus to summon the inspectors to correct their return. The tally sheets were held to be superior to the inspectors' returns. To the argument that there would be then no provision in the law for the correction of an erroneous tally sheet the court replied that, for that purpose "it is the obvious intention of the statute that the boxes of voted ballots preserved for six months under Section 111 shall be opened and examined * * * to determine the actual vote cast." In the later case of *People ex rel. Brink* v. *Way*, 179 N. Y. 174 (1904), mandamus for a recount was refused where numerous defects in the count were alleged, and the court said that only in the contingency mentioned in Section 84, i. e. a discrepancy between the number of ballots voted and the number accounted for in the tally sheet, was it made the duty of the inspectors to recount the votes. "In such a case," however, "it is by statute made the duty of the board of canvassers to recount the ballots. * * * In the event of a failure to make such recount the court may by mandamus compel it." *Expressio unius est exclusio alterius.* The minority, BARTLETT and VANN, JJ., contended that the express provision for a recount in the case of non-agreement between tally sheet and ballot clerk's register was not to be construed to deny the right to a recount for other defects, since "a reading of the entire section in this connection very clearly discloses the legislative intention that where this discrepancy appears at the close of the count there must be forthwith a recount *before the final result is announced.* This provision does not refer to mistakes or frauds sought to be remedied by a recount compelled by mandamus." Thus we have the curious spectacle of a position in each opinion in the *Brink* case which is flatly antagonistic to the position assumed later by the same judges respectively in the *Hearst* case.

Misled by the dicta which I have quoted above, mandamus for a recount was issued in several cases in the Appellate Division, *Matter of Larkin* (46 App. Div. 366), *People ex rel. Maxim* v. *Ward* (62 App. Div. 531), *Matter of Stiles* (69 App. Div. 589). It now appears to be definitely decided, how-

ever, that there is no remedy by mandamus to correct illegalities or mistakes in the precinct canvass and that the only way to get behind the returns is by quo warranto. By a policy of delays it might be possible to defeat entirely the will of the people. On the other hand, by the cutting off of the right to a recount there is gained an added certainty of result and expedition of announcement which is highly desirable. The period of uneasiness and animosity lasts long enough in any event, without being extended by all sorts of contests and appeals; and by doing away with them much is gained, provided an honest election is not thereby endangered. This is not apt to be the result. On the dishonesty of inspectors there is still check enough in the preservation of the ballots, which may be used as evidence in a criminal prosecution. Distrust of public officials has caused the courts to be burdened with all sorts of administrative duties and to be made censors of every step taken by administrative officers. Why should the courts be made boards of canvassers? If election inspectors are dishonest or incapable the remedy is by removing them and selecting better; and the less responsibility the courts assume the more care will the people exercise. C. L. D.

THE LAPSE OF A LEGACY TO A DECEASED CHILD.—The New York Court of Appeals has recently had before it that section of the Code which provides against the lapse of legacies on account of the death of the legatee before the testator, and has held by the close vote of four to three that it will not prevent the lapse of a legacy given to a child who is mentioned merely as one of a class, and is dead at the time the will is made. *Pimel* v. *Betjemann*, (1905), — N. Y. —, 76 N. E. Rep. 157. The facts were that in 1889 one Bahrenburg died leaving a will made in 1887, in which he gave his executors instructions to pay to each of his children who should at the time of his death have reached the age of twenty-one years, five hundred dollars, and to each child who should be a minor at that time, five hundred dollars when he or she should attain the age of twenty-one years. At the time of his death there were living ten of his eleven children, the other having died in 1882, five years before the will was made, leaving a daughter, the present complainant. This daughter claimed to take her mother's share under the statute relating to lapsed legacies, which provides in substance, that when a devise or legacy is made to any child of the testator and such child shall die during the lifetime of the testator leaving a child or other descendant who shall survive the testator, the devise or legacy shall not lapse, but shall rest in the surviving child of such legatee as if the legatee had survived the testator and died intestate. 2 Rev. St. (1st Ed.), p. 66, pt. 2, c. 6, tit. 1, § 52. From a judgment in favor of the plaintiff below the defendant appealed to the Appellate Division, where the judgment was affirmed (91 N. Y. Supp. 49, 99 App. Div. 559), following *Barnes* v. *Huson* (1871), 60 Barb. 598. The judgment of the Appellate Division is now reversed.

The prevailing opinion, written by CHIEF JUSTICE CULLEN, admits at the outset that the statute applies equally to those cases where the legatee is dead

when the will is made and where he dies between that time and the death of the testator, and disclaims the doctrine of the Rhode Island and Maryland cases which hold that inasmuch as a bequest to a dead person is void, no rights arise which can be taken by substitution. *Almy* v. *Jones,* 17 R. I. 265, 21 Atl. 616, 12 L. R. A. 414; *Billingsley* v. *Tongue,* 9 Md. 575. See also for the same rule, *Lindsay* v. *Pleasants* (1846), 4 Ired. (N. C.) Eq. 320; *Pegues* v. *Pegues* (1860), 11 Rich. Eq. 554. The question here is rather whether the testator can be presumed to have intended to include in his general bequest to his children one who had to his knowledge been dead for five years at the time the will was made. In a similar case the Massachusetts court has held that no such presumption arose under the statute and so a descendant of a deceased legatee should be excluded. *Howland* v. *Slade,* 155 Mass. 415, 29 N. E. Rep. 631. This doctrine the New York court follows, fortifying its position with citations from Georgia and Iowa, (*Tolbert* v. *Burns,* 82 Ga. 213, 8 S. E. Rep. 79; *Downing* v. *Nicholson,* 115 Ia. 483, 88 N. W. 1064, 91 Am. St. Rep. 175) and from the English cases which hold that the statute does not apply to bequests to a class. "It seems to me, therefore," says JUDGE CULLEN, "that the clear weight of authority is in favor of the proposition that a bequest to a class does not include persons dead before the making of the will, who, had they survived till that time would have fallen within the description given to the class—of course in the absence of something in the surrounding circumstances to show a different intent." He argues further that to permit the plaintiff to recover here would be to overturn the rule that the word children does not include grandchildren, unless an intention to that effect appears; that if the testator had named his dead child he might have been presumed to have intended her or her issue to take, but as he did not, no such presumption would arise. The case of *Barnes* v. *Huson,* 60 Barb. 598, relied on by the court below and the dissenting judges here, is distinguished on the ground that in it the dead child was named specifically and this showed an intention that he should take, which could not be gathered from the bequest to "each of my children" in the present case.

The dissenting judges, speaking through JUSTICE VANN, argue that *Barnes* v. *Huson,* supra, governs because there is no valid distinction to be drawn between cases where the dead child is mentioned and where he is not, the evil sought to be remedied by the statute being the same in both cases, namely the lapse of legacies to children who ought in justice and equity to receive them; that the statute is remedial and should be liberally construed; and that as the authorities are pretty evenly divided on the question, the nobler and more humane doctrine of *Barnes* v. *Huson* should be followed. They note that even in those states where the "lapsed legacy" statute is held not to apply to cases where the child is dead at the time the will is made it is nevertheless held to apply to bequests to a class. *Howland* v. *Slade,* supra; *Re Stockbridge's Petition,* 145 Mass. 517, 14 N. E. 928; *Bray* v. *Pullen,* 84 Me. 185, 24 Atl. 111. On the point of distinction between the *Barnes* case and the one at bar made by the majority opinion JUDGE VANN says: "There is no substantial difference between a gift to all the members of a class naming none and a gift to each member of a class, naming each one. As the statute

applies to the descendants of every deceased child it should apply to the descendants of a child who is described with certainty, although not by name."

As may be gathered from the two opinions in the present case the courts of the United States are not at all in harmony as to what effect should be given to these statutes, and there is an uncertainty apparent in some of the cases as to the exact basis for their application. *Schumacher* v. *Pearson* (1902), 67 Ohio St. 330. In some of the courts the narrowest possible rule obtains and the statute is held not to apply where the legatee died prior to the making of the will (*Almy* v. *Jones,* supra), in others the time of death is disregarded, but the statute is not applied when the bequest is to a class. *Tolbert* v. *Burns,* supra; *Matter of Nicholson,* supra. In still other jurisdictions the statute is given the widest possible scope and is held to apply to a case like the one under consideration where the bequest is to a member of a class dead at the time the will is made. *Nutter* v. *Vickery,* 64 Me. 490; *Moses* v. *Allen,* 81 Me. 268, 17 Atl. 66; *Guitar* v. *Gordon,* 17 Mo. 408; *Jamison* v. *Hay,* 46 Mo. 546. In view of these conflicting decisions, and taking into consideration that the former rule of the common law worked a great hardship which the statute is designed to alleviate, it seems reasonable to hold with the dissenting opinion that the statute should be looked upon with favor by the courts and no limitations placed upon its operation by them where the legislature has placed none. Mere technicalities should not be permitted to defeat the very purpose of the statute. Those who are entitled to its benefits are equally so whether their dead parent was one of a class or was mentioned by name; whether he died before the will was made or afterward.

C. H. L'H.

UNSIGHTLY ADVERTISEMENTS AND BILLBOARDS.—Æsthetic principles may not be considered by the courts in determining questions concerning the validity of ordinances whose object is to regulate the use of billboards; in order to be upheld statutes and ordinances relating to such matters must be obviously intended to provide for the public safety and must be reasonably necessary to secure it. *City of Passaic* v. *Paterson Billposting, Advertising & Sign Painting Co.*—New Jersey Court of Errors and Appeals—62 Atl. Rep. 267.

Under a statute authorizing the governing body of any city to regulate the size, height, location, position and material of fences, signs, billboards, and advertisements, a city ordinance was passed providing that no sign or billboard shall be at any point more than eight feet above the surface of the ground and that it shall be constructed not less than ten feet from the street line. The plaintiff in error was convicted of the violation of this ordinance and the Supreme Court affirmed the conviction, holding that because the erection of such signs might be attended with danger to the public at times of severe storms or by the decay of their supports, the ordinance was not without legal authority. The Court of Errors and Appeals, however, holds that "such a possibility is not sufficient to justify the municipal authorities in

depriving a man of the ordinary use of his land," and that the effect of the ordinance is to take private property without compensation, and that the regulation is not reasonably necessary for the public safety and cannot be justified as an exercise of the police power. The court attributes the enactment of the ordinance "rather to æsthetic considerations than to considerations of the public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Æsthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation," citing *Crawford* v. *Topeka,* 51 Kan. 756, 33 Pac. 476, 20 L. R. A. 692, 37 Am. St. R. 323; *Commonwealth* v. *Boston Advertising Co.,* 188 Mass. 348, 74 N. E. 601; *People* v. *Green,* 83 N. Y. Supp. 460; and distinguishing *Rochester* v. *West,* 164 N. Y. 510, 79 Am. St. R. 659, 53 L. R. A. 548.

It may be that some court will take another view of this matter. "It is generally assumed that the prohibition of unsightly advertisements (provided they are not indecent) is entirely beyond the police power, and an unconstitutional interference with the rights of property. Probably, however, this is not true. It is conceded that the police power is adequate to restrain offensive noises and odors. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognized principle to further applications. In the matter of offensiveness, the line between a constitutional and an unconstitutional exercise of the police power must necessarily be determined by differences of degree. It is true that ugliness is not as offensive as noise or stench. But on the other hand offensive manufactures are useful, and the offense unintentional and inevitable, whereas in the case of an advertisement the owner claims the right to obtrude upon the public an offensive sight which they do not want, and which but for this undesired obtrusion would not be of the slightest value to him." (FREUND, POLICE POWER § 182.)