

In view of the pleadings and the evidence, we think the court should have given the following instruction requested by defendant: "If you find from the evidence that Perrin agreed with Law that the total extent of Law's liability should be ascertained by determining the amount of marble set in the building and multiplying the same by the unit price for such marble as set forth in Perrin's offer of September 6, 1904, then I charge you that Mr. Law is not required to pay plaintiff for any excess marble that may have been shipped in Law's name from Colton to San Francisco unless you shall find that Law refused to turn over to Perrin such excess marble, if any there be."

If such instruction had been given it is quite likely that a different verdict would have been rendered.

It is apparent from an examination of the record that much confusion would have been avoided and less likelihood of error fostered if plaintiff had amended his complaint so as to show separately how much he claimed for the marble set in the building under the original contract and how much for the surplus appropriated otherwise by defendant. If the case is to be tried again it is to be hoped that such amendment will be made in order that the issues may be regularly framed.

We think the judgment and order should be reversed and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 16, 1915.

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[Crim. No. 549. First Appellate District.—July 21, 1915.]

THE PEOPLE, Respondent, v. TOM J. CHONG, Appellant.

CRIMINAL LAW—VIOLATION OF MEDICAL ACT—INSTRUCTIONS—TITLE OF ACT.—It is held in this prosecution for a violation of section 17 of the act of the legislature of 1913 for the regulation of the practice of medicine and surgery that there is no merit in the objection that the instructions of the court led the jury to believe that the defendant was charged with a violation of the laws of the

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United States; nor in the point that the title of the act under which defendant was prosecuted is defective.

**ID.—CONSTITUTIONALITY OF SECTION 8 OF MEDICAL ACT.**—Section 8 of said act is not unconstitutional and void in that it is an unrestricted invasion of the art of osteopathy, chiropractice and mechanotherapy in preventing practitioners of said system of the healing art from practicing their profession "without in any manner severing or penetrating any of the tissues of the human being."

**ID.—SECTIONS 9 AND 10 OF ACT CONSTITUTIONAL.**—Sections 9 and 10 of said act are not unconstitutional and void in that the board of examiners are vested with power to arbitrarily determine the fitness of applicants and the standard of colleges as a matter of mere personal discretion or approval, without regard to a standard of academic or scientific proficiency or exactness. It was proper for the legislature to demand some standard of proficiency, and it was equally within its power to declare that such standard shall be the one prescribed by the medical board of examiners.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Michelsen & Michelsen, for Appellant.

U. S. Webb, Attorney-General, and Louis H. Ward, for Respondent.

**THE COURT.**—The defendant was charged by information with violating section 17 of the act of the legislature of 1913 for the regulation of the practice of medicine and surgery. He was tried, convicted, and sentenced to imprisonment and to pay a fine. This appeal is from the judgment and from an order of the court denying his motion for a new trial.

There is absolutely no merit in defendant's objection that the instructions of the court led the jury to believe that the defendant was charged with a violation of the laws of the United States; nor in the point that the title of the act under which he was prosecuted is defective. The latter question was considered and decided in the recent case of *People v. Ah Fong*, 25 Cal. App. 724, [145 Pac. 153.]

Defendant contends that section 8 of the act is unconstitutional and void in that it is an unrestricted invasion of the

art of osteopathy, chiropractice, and mechanotherapy, in that it prevents practitioners of said systems of the healing art from practicing their profession "without in any manner severing or penetrating any of the tissues of the human being." Assuming, as asserted by defendant, that members of such schools, in practicing, as they do, by manipulation and adjustment, are constantly and continually severing tissues of human beings, and that the practice of their art is impossible without it, still it is very plain from a reading of the whole section that the word "sever" as therein used means a severance by cutting. Under one form of certificate the holders thereof, as provided in the act, may not only prescribe and use drugs, but may also sever and penetrate with a knife the tissues of human beings. The holders of other certificates are drugless practitioners, and they may not prescribe or use drugs, nor may they operate with a knife or in that way sever or penetrate the tissues of human beings, except that they may sever the umbilical cord.

The only other point seriously urged is that sections 9 and 10 of the act are unconstitutional and void, in that the board of examiners is vested with power to arbitrarily determine the fitness of applicants and the standard of colleges as a matter of mere personal discretion or approval, without regard to a standard of academic or scientific proficiency or exactness. This contention is disposed of by what is said in the cases of *Ex parte Gerino*, 143 Cal. 412, 418, [66 L. R. A. 249, 77 Pac. 166], and *Ex parte Whitley*, 144 Cal. 167, 177, [1 Ann. Cas. 13, 77 Pac. 879]. It was proper for the legislature to demand some standard of proficiency, and we think it was equally within its power to declare that such standard shall be the one prescribed by the medical board of examiners. In the *Gerino* case an applicant under the act of 1907, [Stats. 1907, p. 252], in order to be entitled to practice medicine, etc., must have graduated from some college or institution approved by the American Medical Association, while, according to the terms of the act under review, he must be a graduate of some college "approved by the board" of medical examiners. The *Gerino* case and the present one are similar in their facts so far as the point under discussion is concerned, and it must be held on the authority of that case that the contention of the defendant is without merit. It may not be amiss to add that by the terms of the present act, un-

like the old act, the applicant must not only have graduated from an approved college, but must also have studied for a certain prescribed length of time and have covered certain enumerated subjects, when, if the college from which he graduated, is one of those approved by the board, a certificate to practice medicine, etc., will be issued to him. These provisions are eminently fair and certainly not unconstitutional. The judgment and order appealed from are affirmed.

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[Crim. No. 543. First Appellate District.—July 21, 1915.]

THE PEOPLE, Respondent, v. CHOW JUYAN, Appellant.

CRIMINAL LAW—VIOLATION OF MEDICAL ACT—PLEADING—SUFFICIENCY OF INFORMATION.—In this prosecution for the violation of the act for the regulation of the practice of medicine and surgery it is held that the information is not insufficient, in that it, in attempting to identify the statute which appellant is alleged to have violated, specifically pleads a portion of the act of the legislature of 1907, which was repealed by an act of 1913; nor is it insufficient, in the absence of a special demurrer, in that in the first part the offense is conjunctively charged against the appellant and one other whereas later on in referring to the offenders, the word "himself" is employed.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order denying a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Michelsen & Michelsen, for Appellant.

U. S. Webb, Attorney-General, and Louis H. Ward, for Respondent.

THE COURT.—This is an appeal from the judgment of conviction and from an order denying defendant's motion for a new trial. It is urged in support of the appeal that the information is so defective that the court acquired no jurisdiction of the defendant because it was insufficient to inform him of the offense he was called upon to meet. It is argued that

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