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HISTORY OF JOSEPH SMITH.

MARCH, 1843.

Friday, 10.—Clear and cold day.

I opened court at 10 a.m. Messrs. Emmons and Skinner, counsel for plaintiff, and Messrs. Marr and Rigdon, counsel for defendant. Parties present, and many spectators, and I delivered the following

DECISION.

Mayor's Court, City of Nauvoo, }
March 2nd and 3rd, 1843. }

Charles R. Dana }
vs. } In Assumpsit.
William B. Brink. }

This is an action of assumpsit commenced by summons, and brought by the plaintiff to recover damages, as he avers in his bill of particulars, sustained by the plaintiff by reason of the defendant's failing to perform his undertakings as physician, in a usual and skilful manner, which he had undertaken by his employment and his engagement in attending as such physician, the wife of the plaintiff in the city of Nauvoo, in the year 1842, to do. \$99.00

Also, for damage sustained from the malfeasance and misfeasance of the defendant in the treatment of plaintiff's wife, while employed as physician by the plaintiff to attend his said wife at Nauvoo in 1842; contrary to the defendant's undertaking as such physician, by reason of which bad acts and treatment of the defendant to plaintiff's said wife, in the premises, plaintiff's said wife is greatly injured in her health and put to lasting pain and suffering; and the plaintiff has thereby lost the services, company and comfort of his said wife, since said bad treatment of defendant; and been put to pain, trouble, expense and anxiety, not only from the present loss of his said wife's health, but also from well grounded apprehensions of the fatal consequences of the injury done to his said wife, by said defendant, in the premises, to his damage. \$99.00

After the witnesses were sworn for the plaintiff, the defendant's counsel raised an objection to them, on account, that one school of physicians is arrayed against the other. Plaintiff's counsel replied that the physicians were only to give their evidence as an opinion of skill, &c., for which he read Harrison's Digest, p. 1047. Defendant's counsel resumed, but the court decided that it could not determine the incompetency of the witnesses till there was something before the court to show the fact; therefore the court heard the witnesses.

Mrs. Miles: Was at plaintiff's house on Saturday, the 22nd of October, 1842, when Dr. Brink, the defendant, was called to administer to plaintiff's wife, in a case of fever or diarrhea; this was about noon; plaintiff's wife told witness she did not expect to be confined then, nor for ten days; she had been injured by a fright. Witness went home, and was recalled about 11 o'clock at night; plaintiff's wife had some pains then, witness thought they were labor pains; defendant said he had given her medicine,—that her child was pitched on one side,—had given her smut rye (ergot); said the amnion fluids were discharged. Witness thought the doctor hurt Mrs. Dana in his operations; he used force and violence; she screamed, and begged him to desist. Mrs. Dana said she did not expect to be confined, and did not know when she should be, nor did she know that the amnion fluids had discharged. Witness saw the doctor introduce his hand per vagina; patient manifested great pain, and urged him to quit; said he was hurrying her too fast; witness proposed having somebody else; has heard Mrs. Dana say that defendant's treatment to her was the cause of her sickness since that time.

Mrs. Duel: Was present when the plaintiff's wife was confined on the 24th of October, 1842; was called on the 22nd at 11 o'clock at night. Defendant called upon witness to borrow a syringe, said that Mrs. Dana was sick, and that he thought her child had been dead two or three days: when witness came, Mrs. Dana was in considerable distress; defendant thought she was ready for parturition, and would be delivered by three pains more. Defendant resorted to unusual means: Witness remon-

strated against his course, to let nature have time; while Mrs. Dana screamed, "do let me alone! you will kill me! do let go!" but defendant was then plying his hand, and said he could not, for something would go back: had given ergot and pepper, said the child was wrong, and must be turned before it could be born; that it was necessary to keep up irritation in order to create pains and hasten delivery. Witness proposed to have some one else called. Defendant opposed it, but finally consented. Witness saw patient next day at 11 o'clock, and she seemed free from pain.

Mrs. Sessions: Attended Mrs. Dana, plaintiff's wife, as an accoucher, last October; defendant was there when witness arrived; shook her hand and held it fast some time; said he had sent for witness because he had a very bad case; the child was wrong and dead; that the membrane was broken, and the amnion fluids escaped, and the child turned; had sent for witness because her hand was small, and she could turn it. Witness asked defendant what he had done; he replied, nothing. What have you given her? He answered, nothing but a little nerverine and cayenne pepper; however, he admitted he had given one dose of ergot, of eleven grains; defendant had ergot of witness the previous week. Witness proceeded to examine Mrs. Dana, plaintiff's wife, and by touching the child's ear, discovered it was a natural presentation; and by examination of the fontanella found the child was alive by pulsation; and that instead of the amnion fluids having escaped, they had not gathered. Witness also discovered three ruptures on the tinea os; and fresh blood upon the patient's under garments, and the bed clothes, as though bloody fingers had been wiped thereon. The color of the spots was different from hemorrhage at parturition. On the evening of the 24th of October, witness delivered Mrs. Dana of a living child, which, according to its small size, was rather a premature birth. When witness visited patient the day previous, there were no regular pains. Mrs. Dana told witness, since her confinement, that defendant's treatment to her had caused a weakness in her back, that she could not hold her urine, and had been troubled with the piles also, all of which she believed resulted from the injuries she received from defendant; and witness believed it was so too. Has practised obstetrics 30 years, and has never seen a physician conduct towards a woman as defendant did to Mrs. Dana, according to appearances.

Mrs. Dana, plaintiff's wife, was objected to as a witness for her husband, by defendant's counsel, on the ground that the interest of the husband and wife are both one in law. See Phillips on Evidence, 159.

Court overruled the objection. "In cases of evident necessity, when the fact is presumed to be particularly in the wife's knowledge, there is an exception to the general rule: thus, a wife may be a witness on the prosecution of her husband for an offence committed against her person." 1 Blackstone, 444, n. Bull's Nisi Prius, s. c. 287. "There are several exceptions to the general rule upon this subject, where, from the nature of the injury, the information to be expected is peculiarly within the knowledge of the husband or wife; and where, to exclude such evidence, would occasion insecurity to that relation of society, which is the object of the rule to protect." Phillips on Evidence, 169. Other authorities might be shown, but the foregoing are sufficiently to the point to warrant the court in saying that husband or wife can be a competent witness, where the injury has been committed upon the person of either, and where the testimony to be given is presumed to be beneficial for public security, and of general importance to guard individuals against imposition.

Mrs. Dana: Testified that defendant, Dr. Brink, was called on the morning of the 22nd of October last, to administer to witness in case of a fever, but did not arrive till noon. He then mixed some medicine, in which was pepper, which gave her great pain. Got a syringe and administered two injections himself, to witness, in which she thinks there was pepper; they were very hot and gave her great pain, seemed almost in a flame; actually gave her the cramp. Defendant stayed all the afternoon: during the night he insisted the patient's time had come, and that she should be delivered. He continued to give doses from time to time, which gave her great pain every time she took them. Patient told defendant it was not her time under four weeks, told him her labor pains were not on her. Defendant told her the child was dead, and every thing wrong. He interfered in such a way as to cause great pain; said an inflammation had taken place in her bowels, which had caused the death of the child; and used force which gave greater pain than she had ever endured before; patient begged of defendant to desist, and let her alone, saying, there was nothing unnatural before taking his medicine, and that she believed the child was right. The blood mentioned by the former witness, Mrs. Sessions, was discharged from no other cause than the violence which the doctor used in his operations. After he let her alone she was easier. Patient had no labor pains till Monday, 24th. Had had six children, and her reckoning had always been regular. Never endured such suffering before; since then has been troubled with weakness, a difficulty of retaining her urine, was never

troubled so before; has not been able to do anything since her confinement; has not been free from pain. Defendant used an unusual means in his operations, he placed his head on the patient's abdomen, and exerted his strength otherwise, which caused the most severe pain.

Drs. Bennett, Weld, Foster and Higbee, from hearing the testimony of previous witnesses, say that defendant's treatment to Mrs. Dana was unusual and uncalled for, and had they operated in like manner it would be unjustifiable, and that it was contrary to the general practice of physicians.

From a close and rigid cross examination of all the witnesses (save Mrs. Dana, who was not cross-examined), nothing was elicited to vary the main points of the evidence:

That Dr. Brink, the defendant, was called to administer to Mrs. Dana, in a case of fever or diarrhea, and not for parturition:

That his doses of ergot, or something else, to hasten delivery; were not expected, but was an imposition; as he was informed that her time had not come:

That he declared the child was dead without justifiable evidence, and practised violence upon supposition, to bring on a speedy delivery; thus endangering the health and constitution, if not the life of the patient:

That he practised a fraud upon a sick woman, declaring things wrong that were right:

That he pronounced the amnion fluids discharged, before they were gathered:

That he gave hot injections, himself, which (aside from the over heat, which caused great pain), was beneath the dignity of a gentleman:

That he gave ergot and mixtures, which, in connection with the force and violence which he used (leaving out the dangerous idea of using such poisonous potions, even "in extreme cases"), produced great pain:

That he introduced his hand, per vagina, without any necessity therefor, and by so doing made three ruptures in the tinea os, thereby endangering life:

That all his efforts seemed to have been directed, both by medicine and force, to bring on a premature birth, even at the risk of tampering with life:

And, that the whole treatment has resulted in weakness, and other impediments to health and comfort.

The only witness examined on the part of the defence, was

Dr. Eostwick: Said he had practised medicine twenty four years, and had attended as accoucher about 2,300 cases. If the testimony against defendant was true, he had done an injury. Gave some explanations and illustrations of obstetrics, and defined the use and nature of ergot; had found some cases without labor pains, but said nothing that tended to invalidate the testimony of the witnesses, who attended Mrs. Dana; or to counteract the opinions of the physicians who had previously been examined.

The defendant filed an account (with leave of plaintiff's counsel), for services rendered plaintiff's wife, on the 22nd and 23rd of October, 1842, of \$10.00.

The court refuses to allow this account as a set off, for this reason, that "the law implies an undertaking on the part of apothecaries and surgeons, that they will use a reasonable degree of care and skill in the treatment of the patients. This is the duty of the medical practitioner, and he is responsible to his patient for a breach of it, as for a tort, although the patient was not the party who retained, or was to remunerate him. And for gross carelessness or unskillfulness an action lies, although no reward was to be given. And if the patient is rather injured than benefited in his health, in consequence of any gross unskillfulness or carelessness, on the part of the medical attendant, an action for fees cannot be maintained." Chitty on Contract, p. 438. 8 East, 348.

Charles Ivins: Called as witness for the defendant, was rejected for the legal reason that this is an action of skill, not general character; that "the character of the parties to a civil suit, affords in general, such a weak and vague inference as to the truth of the points in issue between them, that it is not usual to admit evidence of this description." Phillips on Evidence, 438.

The defendant has failed to use his privilege, and rebut the plaintiff's testimony by other credible witnesses, if he had any; or to impeach a single witness of the plaintiff's.

The foregoing summary of facts, relating to the case before the court, is deemed sufficiently full, without bringing in every minutiae, in the recital and cross examination of witnesses, with their technicalities, objections and exceptions, which, while they enlighten one point, too often darken another.

The law knows no person till he comes within its purview; and injuries, affecting health, are among the most important cases that call for redress; such "as the neglect, or unskillful management of physicians, surgeons, or apothecaries. For it has been solemnly resolved that mala praxis is a great misdemeanor and offence at common law." 2 Blackstone, 122. The law implies a contract on the part of a medical man, as well as those of other professions, to discharge their duty in a skilful and attentive manner, and the law will grant redress to the party injured by their neglect or ignorance, by an action on the case, as

for a tortuous misconduct." 1 Sanders, 312 n. (2 Blackstone, 122 n. 7).

Independent of usage or practice, poisonous potions should not be administered to females in any case whatever. The law for such offences declares, that "To kill a child in utero is now no murder, but a great misprison; but if the child is born alive, and dieth by reason of the potion, or bruises it received in utero, it seems, by the better opinion, to be murder, in such as administered or gave them." 2 Blackstone, 198, and note 3. Hawkins' Pleas of the Crown, 80.

The highest authority upon injuries to women is the law of God: that says, "If men strive and hurt a woman with child, so that the fruit depart, and yet no mischief follow, he shall surely be punished according as the woman's husband will lay upon him, and he shall pay as the judges determine." Exodus 21 ch. 22 v.

The law acts by rules and facts, and when clothed in its dignity, knows no distinction; though modesty may suffer violence in darkness, yet upon testimony, justice is bound to bring the offender to light, whether his footsteps are traced among the tombs of the illustrious dead, or his head is pointed out among the homes of the honorable living.

The court decides that the plaintiff recover from the defendant, the sum of his bill, ninety nine dollars and costs.

After I had delivered my decision, I referred to the threat of the defendant's counsel, to intimidate, &c. Counsel explained satisfactorily.

I directed Lucien Woodworth to fix a room to confine the city prisoners in.

I told Theodore Turley that I had no objection to him building a brewery.

PROVERB.

As finest steel doth show a brighter polish
The more you rub the same;
E'en so, in love, rebuke will ne'er demolish
A wise man's goodly name.

I issued an execution against Dr. Brink, and a search warrant on oath of William Law, to search the house of Dial Sherwood; in the evening the marshal brought two try squares, one padlock, one shirt, also a bit stock, smoothing plane and other tools, some of which were claimed as stolen property.

AMOS LAWRENCE'S POCKET-BOOK.—We find in a stray newspaper, says the Boston Journal, the following good story, but know not where it originated, and consequently cannot give the proper credit. It is too good to be lost:

"The publication of the Diary of Amos Lawrence, naturally recalls many anecdotes of his life, and one of a certain remarkable pocket-book that belonged to him, deserves to be repeated. We will try to relate the fact in the way it was once told by Father Taylor, of Boston.

On the occasion of an anniversary in that city, a large number of orthodox clergymen were seated on the platform, and among them was the well known preacher to the seamen. A remark had been dropped by one of the speakers, implying a doubt "whether any Unitarian could go to heaven." Father Taylor fired up at the word, and springing to his feet he exclaimed, in his indescribable manner: "No Unitarian go to heaven! Mr. Chairman, I have a word to say about that. I have this day seen Mr. Amos Lawrence's pocket-book. It is such a pocket-book as was never made before. On one fold of it is printed, in gilt letters, 'What shall it profit a man if he gain the whole world and lose his own soul?' You open another fold and read, 'The gold is mine, saith the Lord of Hosts.' On still another fold is printed, 'He that giveth to the poor, lendeth to the Lord.' I asked Mr. Lawrence what all this was for. He told me that he remembered that, as men grew old, they sometimes grew selfish, and everytime he looked to his money he wanted to be reminded of the great principles of the Gospel, by which he ought to hold and use his worldly goods; and therefore he kept money in each of those folds of his pocket book, for all good uses which Divine Providence might suggest. Now, Mr. Chairman, what are you going to do with a man who carries such a book as that in his pocket? Do you mean to send him to hell? Do you think the devil and his angels would permit a man with principles like these to enter his domains? Why, sir, such doctrines carried to hell, would make an uproar and revolution there more terrible than ever before known, and it never could be easy till he was cast out. I ask again, what do you mean to do with him?" Father Taylor's question was not answered; but whatever trouble the case he supposed might create in the locality he named, certain it is that his own speech made quite a sensation on the platform."

CONSUMPTION.—Dr. Marshall Hall, an eminent English physician, says:—

"If I were seriously ill of consumption I would live out of doors day and night, except it was raining or mid winter; then I would sleep in an unplastered log house."

He says that consumptives want air, not physic—pure air, not medicated air—plenty of meat and bread. "Physic has no nutriment, gaspings for air cannot cure you; monkey capers in a gymnasium cannot cure you, and stimulants cannot cure you."