Mc. Gary. (W. L.)

Are Medical Laws Constitutional?

OFFICE OF HEALTH AND HOME,
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DEAR SIR: The following article by that able jurist and constitutional lawyer, Judge McGary, of Washington, D. C., will appear in HEALTH AND HOME of Sept. 15th. You are at liberty to use it, in whole or in part, with proper credit.

Yours respectfully.

W. H. HALE,
Editor Health and Home.

ARE MEDICAL LAWS CONSTITUTIONAL?

EDITOR HEALTH AND HOME:

I acknowledge the receipt of your note of inquiry as to the law in regard to licensing physicians in the States, and also if by the laws of the United States, a license in one State is available in any other State.

In reply, it is not necessary to consider the statutes that the States may now have on the subject, but only to state the general principles on which they should be based, in order not to be unconstitutional, or opposed to the genius of our Government.

First, we must not treat the right to practice medicine as a natural, inalienable or sovereign right, as none of the States have so treated it at any time. And the reason is, that as the object of all government and law is the protection of citizens in all their rights of life, liberty and property, which includes the protection of the common health—and as the practice of medicine may injure as well as benefit it, particularly if improperly and ignorantly practiced—the States have justly treated the practice as a mere statutory right, created by the legislature, and to be authorized and regulated by license. They all have or may provide by statute for licensing all who are competent for the duty, within their own geographical limits, for a State's authority can go no farther. I believe the usual way has been, by the incorporation of medical schools or colleges, with the chartered right to award diplomas to their students for competency and proficiency in that branch of learning, and which diploma is tantamount to or actually the State's license. This right to issue the diploma is a vested right in the college, not to be annulled or taken from it, without forfeiting its charter, through the medium of a court of justice of its own State. And the license is also a vested right in the recipient.

But the State may doubtless create a board of health or a similar body, and require every physician to register his license with the board, or in the office of the county clerk or other appropriate place. But his right to practice will not depend upon this registration, as the right has already been vested and assured by the diploma and license of the college. And should the State also vest this board of health with the right and even duty of examining and licensing applicants, it could not apply to those who held a license from the incorporated colleges. Nor could it militate against or invalidate in any way the right of the colleges to issue valid diplomas and licenses, before or after; for not even can the State by its legislation divest or impair a vested right which the colleges already had.

But should a State not vest this power in a college or colleges of different schools, but vest it in an examining board, board of health or any other name, it should by all means be composed of men of different schools, for the jealousy among these schools is so great, that if the examiners be of but one school they would be too apt to abuse their powers, to the prejudice of the other schools, no matter what the restrictions imposed on them by the legislature, "such as that no man should be excluded or refused a license because he was or was not of a particular school." If it be true that the allopaths refuse to recognize as physicians the graduates of other schools, they might grant licenses to none but allopaths, and claim that they had not violated the law, because that, although they had refused licenses to the homœopaths or eclectics, yet they had not refused it to men competent to practice medicine. This would be setting themselves over the law, and arrogating to themselves the right to call him whom the law says is a physician, not a physician. In other words, the law says that he who has a competent knowledge of anatomy, physiology, theory and practice, i. e., of medicine, is a physician, and the allopaths say he is not a physician; then the law must appoint as judges those who will not deny its authority; or at least a sufficient number of the other schools as will nullify their judgment and arrogance, and if the allopaths refuse to serve on the board with those of the other schools, they must take the consequences, and submit to the other schools. Probably there was a time when no school was known, or even in existence, but the allopathic, and it may have been thought that that school had appropriated all the medical ideas that were known or knowable; but intelligence is no more stationary than the world. Many and wonderful are the discoveries and advances in knowledge in the last half century,

and it is known that one set of men or one school can not appropriate all knowledge, nor can prevent other people and schools from acquiring the same knowledge that they possess, nor of even advancing beyond them. There was also a time when there was but one church—the Roman—and that outside of it all was corruption and ignorance, but later ages have advanced far beyond the learning of that time, and there are far more schools of religion than of medicine, and yet all are equal before the law.

The examination of medical students, undoubtedly, should be by medical men, but not by any one school of medical men; and if one school is so prejudiced against the other as to do them injustice, the legislature of a State does violence to the genius of our laws and civilization, yea, to the Constitution itself, to make the examiners all of one school. The schools should be equally represented on any such board. And if made up of but one school, and they should refuse licenses to applicants of other schools, they can make but one excuse, and that is, that the applicant has not a competent knowledge of anatomy, physiology, obstetrics, chemistry, and theory and practice; and any one believing he had a competent knowledge and yet refused, might sue out a mandamus against them and oblige them to act according to law. But the best remedy by far is, for the legislature to appoint persons of the different schools on those boards.

If a State has once vested this or any other right in one body or corporation, it cannot thereafter vest the same right in any other board or body, to the prejudice of the first. And in whatever board or college it vests the right, it can and must act only in accordance with its authority, and not *abuse* it. It would be an abuse of it to refuse a license to a man because he does or does not belong to a particular school of medicine. The only authority the legislature could confer would be to license such men as were found to possess a competent knowledge of medicine, and as that is embraced in anatomy, physiology and theory and practice, the only power of the examiner would be to ascertain that the applicant was possessed of a competent knowledge of these branches, regardless of what school of medicine he advocates or hails from. That is a matter with which neither the State nor examiner has anything to do. It is the concern only of the physician and his patrons. A man may be an allopath, a homœopath or eclectic, and yet have a thorough knowledge of anatomy, physiology, obstetrics, chemistry, and the theory and practice, or the one as good a knowledge as the other, and each a competent knowledge, and if he has that, that the law can require of him to entitle him to a license.

All this has reference only to persons not previously having a license; for persons already having a license, and then going into another State to practise, may be regarded as having left it behind, and to entitle him to the privilege must obtain it from the State in which he proposes to practice, and must therefore apply to the board or other power appointed by the State for the purpose. This could be changed by the States passing a law to recognize the license of a sister State, upon proof of good moral character. But this involves something to be done by the applicant, viz: to have some one to vouch for his good moral character before some board or authority. The only difference would be that in the one, he must prove his good moral character, and in the other, that, and also that he is possessed of a competent knowledge of medicine—not allopathy, nor homœopathy, nor eclecticism, but of anatomy, physiology, and theory and practice.

Article 4, section 2, of the Constitution, which says, "The citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States," does not help him in this case, as it is not applicable; because, as I stated above, the practice of medicine is not a natural, but only a statutory right, created by the legislature of the State. For example, it is a natural and sovereign right for every citizen of a State to travel about or cross from one boundary of his State to the other, without let or hindrance by law, and for which his own State cannot tax him. But this gives him not the same right in another State, or even the right to enter into another State. Hence to avoid this, the section above was inserted into the Constitution; and by virtue of it alone a citizen of one State has the right to enter and travel in or pass across another State, and without taxation; because he can not be taxed for the same thing in his own State, and he cannot be taxed in the latter, because it is a natural and sovereign right. But the right to practice medicine, even in his own State, is not a natural or sovereign right; but a right created by the legislature, and hence we say a mere statutory right. The United States have nothing to do with matters of this sort. They are things peculiarly within the legislative powers of the States, independent of any interference by Congress.

To those who say there should be a uniform law on the subject, I reply, that could be done only by each State adopting the same law, which they have the power to do if they choose, or for Congress to pass an act; which it has not the power to do. It must be borne in mind,

that if Congress had that power, it would also have the power to regulate marriage, punish for petty larceny, and all the other things that the States alone have the power to provide for, and also the right to prescribe who should have the right to vote, the qualifications of voters, and the regulation of elections in the States. In short, if Congress had this right there would be no further use for the legislatures of the States, as Congress would have all other rights, and the States none. It is true, there are persons who contend that Congress has this right, and perhaps every other right, since the adoption of the 14th and 15th amendments to the Constitution; but they only express their wish and not their knowledge.

Our Government, Federal as well as State, was and is founded upon the absolute sovereignty of the people of thirteen, now thirty-eight communities, who have never surrendered their sovereignty, the States being *their* States or agency, and the Federal Government *their* Government, i. e., their agency.

All this must be reversed before Congress can pass such laws as above alluded to; that is, the sovereignty of thirty-eight communities must be surrendered and vested in one agency. Then the agency or government would be the sovereign, and not the people, as now; and the government might then do as it pleased, regardless of limitation or constitution. But the people will not thus put their liberties at the disposal of Congress, which always legislates according to the will and pleasure of which ever party is in power.

Washington, D. C. W. L. McGARY.