

quired by Chapter 208 of the Laws of 1947, which certificate shall state an applicant for a marriage license has been given such an examination—including a standard serological test—as may be necessary for the discovery of syphilis.

The question arises because of the vague, ambiguous, and general language which the Thirtieth Legislative Assembly employed in Chapter 208:

“Section 1. Before any person, who is or may hereafter be authorized by law to issue marriage licenses, shall issue a marriage license, each applicant therefor shall file with him a certificate from a duly qualified physician, licensed to practice medicine and surgery in any state or United States territory, or any other person authorized by the laws of Montana to make such a certificate, which certificate shall state that the applicant has been given such an examination, including a standard serological test, as may be necessary for the discovery of syphilis, made not more than twenty (20) days prior to the date of issuance of such license, and that the report of the results of such serological test has been exhibited to the applicant and that each party to the proposed marriage contract has examined the report of the serological test of the other party to said proposed contract.

“ . . . In submitting the blood specimen to the laboratory, the physician, or any other person authorized by the laws of Montana to make such a certificate, shall designate that it is a premarital test. . . .

“Section 4. For the purpose of this act, a standard serological test shall be a test for syphilis approved by the Montana state board of health. . . .” (Emphasis mine).

The above quoted language specifically authorizes qualified and licensed physicians to execute the certificate required—but what is the meaning of the words “or any other person authorized by the laws of Montana to make such a certificate”? The chapter nowhere lists “any other person,” if any, who is authorized to

Opinion No. 75

Osteopaths—Chiropractors—Pre-Marital Examination.

Held: Osteopaths and chiropractors are not authorized under Montana law to give a standard serological test for syphilis, as that term is used in Chapter 208, Laws of 1947; and hence they are not authorized to execute the certificate required by Chapter 208, stating an applicant for a marriage license has been given such an examination, including a standard serological test, as may be necessary for the discovery of syphilis.

November 6, 1947

Dr. B. K. Kilbourne
State Board of Health
Helena, Montana

Dear Dr. Kilbourne:

You have inquired whether osteopaths may execute the certificate re-

execute the certificate; and therefore if such authority exists it must be found in some other statute. Obviously, the person or persons other than physicians if any, who might be authorized to make such a certificate must be authorized to conduct a "standard serological test" for the discovery of syphilis.

There are several standard serological tests for syphilis which are approved by the Montana State Board of Health and are accepted by the United States Public Health Service. They fall into two main categories: Precipitin or Flocculation and Complement Fixation Tests. And into those two categories fall the various tests approved by the U. S. Public Health Service: The Eagle, Hinton, Kahn, Kline, and Mazzini tests are the principal precipitin or flocculation tests ;and the Eagle, Kolmer, and Boerner-Lukens tests are the principal complement fixation tests. To perform any of these tests it is necessary to obtain blood serum; and there are two principal methods of obtaining this blood serum—by puncture of a finger or by puncture of a vein. All methods involve puncturing or cutting Procedures and methods are outlined in Kolmer's "Clinical Diagnosis by Laboratory Examinations." Chapter XXVII (143, D. Appleton-Century Company, Inc., publisher).

Chapter 268 of Volume 2 of the Revised Codes of Montana of 1935 is concerned with the regulation of osteopathy in this state. Section 3130, contained therein, prohibits the holder of a license to practice osteopathy from prescribing or using drugs or performing major or operative surgery:

"3130. Certificate does not authorize the practice of major or operative surgery. The certificate provided for in the preceding section shall not authorize the holder thereof to prescribe or use drugs in the practice of osteopathy, or to perform major or operative surgery; and any person holding a certificate under this act, who shall prescribe or use drugs in the practice of osteopathy, or who shall perform a major or operative surgery, shall be deemed guilty of a

misdemeanor; provided, that nothing in this act shall be so construed as to prohibit any legalized osteopath in this state from practicing major or operative surgery after having passed a satisfactory examination in surgery before the state board of medical examiners of the state of Montana."

Section 3136 defines the term "practicing osteopathy," and I note it here to point out the legislative intent it shall embrace only **manipulation** of the human body or any of its limbs, muscles, or parts **by the use of the hands or mechanical appliances** in order to relieve any pressure, obstruction, misplacement, or defect in any bone, muscle, ligament, nerve, vessel, organ, or part of the body. The word "vessel" embraces arteries and veins, but the practice of osteopathy—as defined by section 3136—does not include penetration, puncture, or cutting of vessels:

"3136. Definition of the Term 'practicing osteopathy.' Every person shall be deemed practicing osteopathy within the meaning of this act who shall: . . .

"2. Profess publicly to, or who shall, either' on his own behalf, in his own name, or in his trade-name, or in behalf of any other person, corporation, association, partnership, either as manager, bookkeeper, practitioner, or agent, treat, cure, alleviate, or relieve any ailment or disease of either mind or body, or cure or relieve any fracture or misplacement or abnormal condition, or bodily injury or deformity, by any treatment, or manipulation or method or manipulating a human body or any of its limbs, muscles, or parts, by the use of the hands, or mechanical appliances, in an effort or attempt to relieve any pressure, obstruction, misplacement, or defect, in any bone, muscle, ligament, nerve, vessel, organ, or part of the body, after having received, or with the intent or expectation of receiving therefor, either directly or indirectly, any bonus, gift, or compensation whatsoever, provided, however, that nothing in this section shall be construed to restrain or restrict any

legally licensed physician or surgeon in the practice of his profession."

By Section 3137 osteopathy is declared not to be the practice of medicine:

"3137. Osteopathy not practice of medicine. The system, method, or science of treating diseases of the human body, commonly known as osteopathy, is hereby declared not to be the practice of medicine or surgery within the meaning of sections 3116 to 3124, inclusive of this code, and not subject to the provisions of said sections."

Gould's Medical Dictionary (1928, P. Blakiston's Son and Company, Philadelphia, publishers) brings "blood letting" within the definitoin of the term "minor surgery:"

"... that part of surgery not involving danger to life, as bandaging, the application of dressings, sutures, counter irritation, cauterization, and blood letting."

The osteopathy statutes of this state have been before our Supreme Court on several occasions, but the most recent expression is the one most valuable to solution of the question here under consideration. In *State v. Thierfelder*, (1943) 114 Mont. 104, 132 Pac. (2d) 1035, the Court considered at considerable length the right of an osteopath to practice surgery:

"It is next contended that the defendant is authorized by the certificate issued to him by the State Board of Osteopathic Examiners to practice surgery. This contention is largely based upon the assumption that the original Act authorizing the practice of osteopathy in Montana expressly forbids an osteopathic licensee to practice "major, minor or operative surgery," (Laws 1901, p. 50, sec. 6), and the word 'minor' being omitted from the law by an amendment in 1905, (Chapt. 51, p. 106), therefore the legislature intended to permit osteopaths to practice minor surgery. To such contention we do not agree. We think the reason for the amendment was this: The section as originally

enacted in 1901 read: "The certificate provided for in Section five of this Act shall not authorize the holder thereof to prescribe drugs in the practice of osteopathy, for (or) to perform major or operative surgery; and any person holding certificate under this Act, who shall prescribe or use drugs in the practice of osteopathy, or who shall perform major, minor or operative surgery, shall be deemed guilty of a misdemeanor; provided that nothing in this Act shall be so construed as to prohibit any legalized osteopath in this State from practicing major or operative surgery after having passed a satisfactory examination in surgery before the State Board of Medical Examiners of the State of Montana." (Session Laws of 1901, page 50.)

"The only change made in this law in 1905 (page 109, Session Laws 1905) was to drop the word 'minor' from the section. This was obviously done to clarify the section and to make it uniform wherever it referred to operative surgery. According to all medical authorities 'operative surgery' include both major and minor surgery and we have no doubt the legislative assembly believed the term 'minor' was superfluous. We are further of the opinion that the amendment to the Medical Practice Act, by Chapter 101 of the 1907 Session Laws, does not in any manner broaden the powers of Osteopathic practitioners. This amendment is referred to in *State v. Wood*, 53 Mont. 566, 571, 165 Pac. 592, 594, as the 'so-called proviso added to section 1591.' It is now a part of section 3122, Revised Codes. Section 3129, Revised Codes, prescribes the examination osteopaths shall take and pass before they are entitled to a license to practice osteopathy. Section 3136 defines "osteopathy" and this court said in interpreting that section in *State v. Dodd*, *infra*: "The section provides among other things: 'Every person shall be deemed practicing osteopathy within the meaning of this Act, who shall * * * treat, cure, alleviate or relieve any ailment or disease of either mind or body, or cure or relieve any fracture or mis-

placement or abnormal condition, or bodily injury or deformity, by any treatment, or manipulation or method of manipulating a human body or any of its limbs, muscles or parts, by the use of the hands or mechanical appliances, in an effort or attempt to relieve any pressure, obstruction, misplacement or defect, in any bone, muscle, ligament, nerve, vessel, organ or part of the body.' Within the entire scope of his practice, the osteopath is confined to treatment by use of the hands or mechanical appliances.'

"In the case of *State v. Wood*, 53 Mont. 566, 571, 165 Pac. 592, 594, it said: 'In *State v. Dodd*, 51 Mont. 100, 149 Pac. 481, we considered these statutes at length and concluded that the practice of medicine and surgery does not include the practice of osteopathy, and that the practice of osteopathy does not include the practice of medicine or surgery; that the Legislature has grouped all persons practicing the healing art into two distinct classes, (1) physicians and surgeons, and (2) osteopathic practitioners, and that the so-called proviso added to section 1591 above 'did not affect the status of osteopathic practitioners in the least. They were confined thereafter, as theretofore, to the practice of osteopathy and forbidden to practice medicine or surgery without the certificate from the state board of medical examiners required of everyone who seeks to engage in such practice.' We are more than ever confirmed in the correctness in those conclusions. The so-called proviso found in section 1591, and the like provision in section 1605b, were doubtless enacted out of abundance of caution and to emphasize the legislative intention that neither school of practice should be held to infringe upon the other.'

"The Attorney General and *amicus curiae* are in accord in the case at bar in this: That operative surgery includes all surgery and the omission of the word 'minor' in the 1905 amendment to the Osteopathic Act does not authorize osteopaths to perform surgery of any kind,

either minor or major. With this we agree. The defendant's contention that he is authorized to practice minor surgery is grounded solely upon the 1905 amendment to the Osteopathic Act. The case of *State v. Wood*, supra, was decided in 1915, ten years after the 1905 Act on which defendant relies, and a number of later decisions of this court follow the rule laid down in that case, clearly denying any right of an osteopath to perform any surgical operation on human beings. The two schools of treatment are made separate and distinct by our statutes, and there is no reasonable ground for the assumption that an osteopath may 'practice medicine' without first obtaining a license as required by Chapter 267 of the Political Code, relating to the practice of medicine." (Emphasis supplied).

All statutes are presumed to be enacted with full knowledge of the existing condition of the law and the interpretations given by our Supreme Court with reference to it. (59 C.J., Statutes, Sec. 616). I cannot presume our legislative assembly was not informed of the fact a serological test for syphilis involves surgical procedure. It is significant—in view of the Thierfelder case, supra—our legislature did not include in Chapter 208 some mention of osteopaths as persons authorized to make the required certificates, especially since physicians licensed to practice medicine and surgery are specifically authorized.

What I have said here regarding osteopaths applies as well to chiropractors, licensed under Chapter 269 of Volume 2, Revised Codes of Montana, 1935.

We must take the law as our legislature enacts it and the interpretation given to the law by our Supreme Court.

It is, therefore, my opinion osteopaths and chiropractors are not authorized under Montana law to give a standard serological test for syphilis, as that term is used in Chapter 208, Laws of 1947; and hence they are not authorized to execute the certificate required by Chapter 208, stating an

applicant for a marriage license has been given such an examination, including a standard serological test, as may be necessary for the discovery of syphilis.

Sincerely your,
R. V. BOTTOMLY,
Attorney General