

1956

# James M. Alexander et al v. Hal S. Bennett et al : Plaintiffs' Brief

Utah Supreme Court

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Grant MacFarlane; Zar E. Hayes; Attorneys for Plaintiff;

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# In the Supreme Court of the State of Utah

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GEORGE WILLIAM TAYLOR, JOHN  
EVAN THOMAS, GEORGE ALBERT  
WILSON, JR., ROBERT O. BRECKEN-  
RIDGE and LAURENCE R. McDONALD,

vs.

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and STEWART M. HANSON, COMMIS-  
SIONERS OF THE DEPARTMENT OF  
BUSINESS REGULATION OF THE STATE  
OF UTAH, AND FRANK LEES, AS DI-  
RECTOR OF THE DEPARTMENT OF  
REGISTRATION, STATE OF UTAH,

FILED

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Clerk, Supreme Court, U-t

No. 8471

## PLAINTIFFS' BRIEF

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RECTOR OF THE DEPARTMENT OF  
REGISTRATION, STATE OF UTAH,

No. 8471

## PLAINTIFFS' BRIEF

## STATEMENT OF FACTS

The plaintiffs have filed their Petition with this Court setting forth the facts which they believe justify their request that this Court prohibit the defendants from cancelling, revoking or calling in licenses which have heretofore been issued and are outstanding in the hands of the plaintiffs (except the two hereinafter referred to) to practice their professions as "Naturopathic Physicians, including Minor Surgery and Obstetrics" and to prescribe and administer narcotic drugs in connection therewith, and requiring the defendants to issue to the plaintiffs the regular renewal licenses for the year 1956. As to the two defendants, Robert O. Breckenridge and Laurence R. McDonald, the petition asks that the defendants be required to issue to them licenses to practice their professions as Naturopathic Physicians, including Minor Surgery and Obstetrics and permitting them to prescribe and administer narcotic drugs in connection therewith. The defendants filed an answer wherein they admitted substantially all of the material allegations set forth in the plaintiffs' Petition. The matter is before this court on the Petition of the plaintiffs and the Answer of the defendants for determination.

Wherever throughout this Brief reference is made to the Petition, it will be referred to as "P" with the page number following.

All of the plaintiffs (except the plaintiffs Breckenridge and Laurence R. McDonald, who will be hereinafter separately referred to) hold licenses which have been heretofore issued to them by the Department of Business Regulation of the



State of Utah to practice as a "Naturopathic Physician, including Minor Surgery and Obstetrics." These original licenses have been issued to the plaintiffs at various times, but continuously, ranging back as far as May 9, 1939 and to October 27, 1954 (P-1 & 2; Schedule A). Prior to the issuance of such licenses, all of the plaintiffs took and passed examinations as naturopathic physicians, including minor surgery and obstetrics, which examinations included separate examinations in minor surgery and in obstetrics, and which said examinations were given under the direction of the Director of the Department of Registration. Prior to the taking of said examinations and the issuance of said licenses, each plaintiff met all of the educational requirements of the statutes of Utah and served the necessary internship as required by law. Such educational requirements included the training and graduation from a naturopathic college, recognized by the Department of Registration. All of the naturopathic colleges recognized by the Department of Registration have as a part of the tenets of their schools and as subjects taught therein courses in minor surgery, including clinical studies, and all of the plaintiffs as a part of their educational training have taken and passed courses in minor surgery and obstetrics at some school approved by the Department of Registration (P-2).

The examinations given to the plaintiffs and which they passed in order to obtain their licenses to practice as naturopathic physicians, including minor surgery and obstetrics, were given by and under the direction of the Department of Business Regulation and through the statutory committees set up under the Business Regulation Department. Said department provided and furnished to all applicants forms designed for appli-

cants to apply to take examinations as naturopathic physicans, including minor surgery and obstetrics (P-2, 3; (Ex. 1).

At all times since 1939 the Department of Registration has recognized the right of applicants, upon showing of qualifications as required by the statutes to take examinations as Naturopathic Physicians, including Minor Surgery and Obstetrics, and upon the passage of examinations so given have issued licenses to so practice and have permitted said licenses to remain outstanding from year to year. As indicated the plaintiffs herein are the holders of such licenses and have practiced thereunder since the issuance of said licenses and are still so practicing thereunder. During all of said time and as an incidence of said licenses, and in connection with their practice as naturopathic physicians, including minor surgery and obstetrics, the plaintiffs have prescribed and administered narcotic drugs in connection with the treatment of their patients, and such practice has been with the knowledge and approval of the defendants and has been administratively approved and recognized during all of said time (P-3.)

The procedure which has been administratively followed by the Department of Registration substantially without interruption since April 12, 1939, is as follows:

The director of Registration and the representative committee for practitioners of naturopathy have met in a regular meeting at the state capitol and prescribed the time for giving of examinations and the subjects upon which such examinations would be given for the licensing of applicants for "Naturopathic Physicians, including Minor Surgery and Obstetrics." At such meetings it was determined by whom the examination

should be given in the various subjects, including the subject of minor surgery, obstetrics, and narcotics. Applicants for examination were required to fill in and file with the Department of Registration an application upon a blank furnished by the Department of Registration, as required by Sec. 58-1-17 U.C.A. 1953. That form was as set forth in Exhibit 1, to which attention is directed. After checking said applications, and determining that the applicant met the statutory requirements, and the requirements set up by the department and the said representative committee, examinations were given in naturopathy, which included subjects of minor surgery and obstetrics and narcotics. After said examinations had been taken and the papers corrected, meetings were held of the director and the said representative committee at which time a report was made as to which applicants successfully passed the examination, and those applicants who had successfully passed the examination, including examinations for minor surgery, obstetrics and narcotics, were recommended for registration as "naturopathic physicians, including minor surgery and obstetrics." Upon such recommendation being made the Department of Registration issued to such applicants who had so successfully passed said examination, a license to practice within the State of Utah as a "Naturopathic Physician, including Minor Surgery and Obstetrics," which said license was delivered to the applicant upon a form substantially as follows:

STATE OF UTAH  
(THE GREAT SEAL OF THE STATE OF UTAH 1896)  
DEPARTMENT OF BUSINESS REGULATION  
REGISTRATION DIVISION  
(Name)

Having complied with all the requirements of the laws of the STATE OF UTAH and the rules of this Department, is hereby registered and licensed to practice as a

NATUROPATHIC PHYSICIAN, INCLUDING MINOR  
SURGERY AND OBSTETRICS

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed the official seal of the Depart-  
ment this.....day of....., A. D. 19.....

-----  
Director of Registration

License No.

-----  
(P-3, 4, Exhibit 2)

Upon the issuance and delivery of said license it was and has continued until this time to be the license of that person (one of the plaintiffs herein) to practice as is set forth on the face thereof, subject only to the payment by that licensee of the renewal license fee each year, and to his refraining from improper conduct. Each of the plaintiffs herein (except the two plaintiffs Breckenridge and McDonald as hereinafter referred to) hold and possess a license in the form of said Exhibit 2 and have held and so possessed said license from the time they were first licensed as naturopathic physicians, including minor surgery and obstetrics, as shown on Schedule A. At the end of each calendar year, the Department of Registration has given a notice to each of the individual plaintiffs herein that they should send in their renewal fee in order to renew their said licenses. Upon receipt of such renewal fee at the beginning of each year, each individual plaintiff herein was issued a renewal certificate which set forth that he was duly registered as a naturopathic physician, including minor

surgery and obstetrics, (Ex. 3) together with a pocket card certifying that he was so licensed (Ex. 4) (P-4, 5).

There is maintained in the office of the Director of the Department of Registration a Minute Book setting forth the minutes of the meetings of the Directors and said representative committee for practitioners of naturopathy. This is the committee established by and provided for in Sec. 58-1-5, U.C.A. 1953 which section reads in part as follows:

"The functions of the Department of Registration shall be exercised by the Director of Registration under the supervision of the Commission of the Department of Business Regulation, and when so provided, in collaboration and with the assistance of representative committees of the several professions, trades and occupations as follows: \* \* \* (11) for practitioners of naturopathy, a committee of three members each of whom shall be a graduate of a school of naturopathy of good standing recognized by the Department of Business Regulation \* \* \* ."

The minutes of the meetings of said Director and representative committee contain throughout references to the examinations given for and issuance of licenses for the practice as a naturopathic physician, including minor surgery and obstetrics, commencing with the minutes of April 12, 1939 and to the present time.

Section 58-1-15, U.C.A. 1953 provides that the Director of the Department shall assign to the several members of the respective committees the subjects in which such members shall prepare questions for examination and rate answers. A rather complete synopsis of the minutes of the meetings between the Director and the representative committee for practitioners

of naturopathy is set forth in plaintiffs' petition at pages 5, 6, 7 and 8. An examination of that synopsis and of those minutes will show that during all of said period from April 12, 1939 to the present time, meetings were held at rather frequent intervals wherein the examinations were set up and the subjects assigned to various members of the examining committee, by the Director, in connection with examinations to be given to those applicants to practice as Naturopathic Physicians, including Minor Surgery and Obstetrics, which subjects so assigned for examination included examinations in minor surgery, obstetrics and narcotics; and also such meetings and the minutes thereof reflect the passing of such examinations in the various subjects mentioned and the approval of the examinations taken by the candidates and the issuance of licenses to practice naturopathy, including minor surgery and obstetrics. Such minutes also include adoption of definitions of naturopathy in accordance with the tenets of the school (Exhibits 5 and 6) which matters will be more fully referred to in connection with the argument hereinafter in this Brief set forth; and also refer to the use of narcotics by naturopaths in connection with the practice by them of minor surgery and obstetrics, and approve such practices. Such minutes also reflect that not only the Director of the Department of Registration, but likewise members of the Commission of Business Regulation were present at some such meetings and particularly at meetings where there was discussed the matter as to whether or not the licenses issued to naturopathic physicians did and should include the right to practice minor surgery and obstetrics, and showing that such practice was approved at meetings where such Commissioners were present (P-7, 8).

The Department of Business Regulation issued at various times instructions to applicants for naturopathic registration (Ex. 8) and also issued in mimeograph form "Requirements for a License in Utah as Naturopathic Physican or Naturopathic Physician and Surgeon" (Ex. 9). Both of these exhibits recognize the right of applicants to take examinations in obstetrics and gynecology and in minor surgery and narcotics. Such exhibits (Ex. 8) recognize that the subjects of obstetrics, gynecology, minor surgery and narcotics are included in the subjects 'in the curriculum of recognized naturopathic schools.'

During the period from April 12, 1939 until the present time the only interruption whatsoever in the course of the procedure as administratively followed, as referred to hereinabove in this statement of facts, was for a period of one year subsequent to March 9, 1948 on which latter date in the minutes of a meeting of the Director and representative committee for practitioners of naturopathy, the following appears:

"A great deal of discussion took place with the subject of taking Minor Surgery off the examination as in the future or until the Legislature or Court amends the Naturopathic law, no further licenses will be issued to include Minor Surgery. Commissioner Hacking was prescent and stated that the Department would be required to issue licenses in the future to Naturopathic Physicians including Obstetrics, and delete 'Minor Surgery'."

During said period of approximately one year, it is true that no new licenses were issued to practice minor surgery, but neither were any of the outstanding licenses theretofore issued for such practice revoked or otherwise changed, nor were any practitioners notified that they should cease their practice as

previously carried on, and the practice of the Department of issuing licenses to practice as naturopathic physicians, including minor surgery and obstetrics, was resumed at the end of approximately one year as shown by the minutes as hereinabove referred to, and said practice has ever since continued. Except for said interruption there has been a constant and continuous administrative practice and procedure of giving examinations for and issuing licenses to practice as naturopathic physicians, including minor surgery and obstetrics since April 12, 1939 (P-9).

During said period of time from 1939 to the present time, there has been issued by the Attorneys General of the State of Utah numerous decisions interpreting the statutes of the State of Utah as related to said licenses under which decisions the Attorneys General of the State of Utah have held consistently that the statutes of Utah, as administered by the Department of Registration, contemplates the issuance of said licenses to practice as naturopathic physicians, including minor surgery and obstetrics, and have sustained the validity thereof, including the use by said naturopathic physicians of narcotics in connection with their practice of minor surgery and obstetrics. Said opinions are fully set forth and attached to plaintiffs' petition as Exhibits 11, 12, 13, 14, 15 and 16. The plaintiffs, and each of them, have relied upon said opinions and upon the administrative practices followed as a result of said opinions and have practiced and have built their practices and professions based upon the said opinions, and based upon the licenses issued by the Department of Registration thereunder (P-9).

Under date of September 2, 1955 the present Attorney



General, Hon. E. R. Callister, issued an opinion wherein he disagreed with previous holdings of the Attorneys General of the State of Utah and directed the Department of Registration to change its long existing practice of issuing licenses and hence forth to cease issuance of licenses to practice as naturopathic physicians, including minor surgery and obstetrics, and directed that they cease permitting plaintiffs to prescribe or administer narcotic drugs. A copy of said opinion is attached to plaintiffs' petition as Ex. 17. At the suggestion and request of the Attorney General, the Department of Registration prepared a Notice directed to each of the plaintiffs herein directing and requiring them to forthwith surrender their present licenses so that the same might be issued to eliminate any reference to minor surgery and said defendants threatened to mail said notices to plaintiffs and further threatened to refuse to renew plaintiffs' licenses so presently held by them permitting them to practice as naturopathic physicians, including minor surgery and obstetrics, and to prevent them from prescribing or administering narcotic drugs.

As to the plaintiffs Robert O. Breckenridge and Laurence R. McDonald, who joined this action on behalf of themselves and others similarly situated, they have met all educational and internship requirements of the statutes of the State of Utah to permit them to apply for and take the regular examination as naturopathic physicians, including minor surgery and obstetrics given by and under the direction of the Department of Business Regulation, through the said statutory committee known as the representative committee for practitioners of naturopathy. In accordance therewith each of said plaintiffs did apply for and take said examination, and each of said

plaintiffs successfully passed such examination, which included separately examinations in the subjects of minor surgery, obstetrics and narcotics, and the representative committee recommended to the Department of Business Regulation that licenses be issued by said Department to each of said plaintiffs to practice as naturopathic physicians, including minor surgery and obstetrics. The Department nevertheless failed and refused to issue to plaintiffs such a license, but on the contrary advised plaintiffs that no license would be issued to said plaintiffs to permit them to include as a part of their practice either minor surgery or obstetrics, and further that they could not administer narcotic drugs.

There are numerous other facts relevant to the matter which are set forth in the plaintiffs' petition and are admitted by the pleadings, including the various exhibits which are attached to the petition, which for the purpose of avoiding repetition will be referred to whenever deemed to be material and pertinent in connection with the argument as hereinafter set forth.

The applicable statutes will, of course, likewise be referred to to such extent as is deemed necessary in connection with the argument.

## STATEMENT OF POINTS

### POINT ONE

THE STATUTES OF THE STATE OF UTAH CONTEMPLATE THE ISSUANCE OF LICENSES TO PRACTICE AS NATUROPATHIC PHYSICIANS, INCLUDING MINOR SURGERY AND OBSTETRICS.

## POINT TWO

THE RIGHT TO PRESCRIBE AND ADMINISTER NARCOTICS NECESSARILY FOLLOWS THE RIGHT TO PRACTICE OBSTETRICS OR MINOR SURGERY OR EITHER OF THEM TO SUCH EXTENT AS NEEDED IN CONNECTION WITH SUCH PRACTICE; BUT IN ANY EVENT THE STATUTES SPECIFICALLY PERMIT THE ADMINISTRATION AND PRESCRIPTION OF NARCOTICS BY THE PLAINTIFFS.

## POINT THREE

IF THERE IS ANY QUESTION AS TO THE RIGHTS OF THE PLAINTIFFS TO PRACTICE IN ACCORDANCE WITH THE LICENSES HERETOFORE ISSUED TO THEM UNDER THE STATUTES OF THE STATE OF UTAH SUCH QUESTION ARISES BY AMBIGUITY IN THE STATUTES AND HENCE THE DOCTRINE OF CONTEMPORANEOUS ADMINISTRATIVE INTERPRETATION IS APPLICABLE AND THE RIGHTS OF THE PLAINTIFFS TO PRACTICE AS NATUROPATHIC PHYSICIANS, INCLUDING MINOR SURGERY AND OBSTETRICS, AND TO THE USE OF NARCOTICS IS ESTABLISHED BY LONG ADMINISTRATIVE PRACTICE.

## POINT FOUR

AS TO THE PLAINTIFFS BRECKENRIDGE AND McDONALD, THERE IS NO AUTHORITY IN THE LAW

FOR A REFUSAL BY THE DEPARTMENT OF REGISTRATION TO ISSUE TO THEM LICENSES TO PRACTICE AS NATUROPATHIC PHYSICIANS, INCLUDING MINOR SURGERY AND OBSTETRICS IN ACCORDANCE WITH THE EXAMINATIONS SUCCESSFULLY PASSED BY THEM.

#### POINT FIVE

THE LICENSES, AS ISSUED, AND THE RIGHTS PERTINENT THERETO, ARE VALUABLE PROPERTY RIGHTS AND CANNOT BE REVOKED OR THEIR RENEWAL REFUSED EXCEPT FOR THE REASONS AND IN THE MANNER REQUIRED BY STATUTE, NAMELY BY SECTIONS 58-1-23, 58-1-24, 58-1-25 AND 58-1-26, U.C.A. 1953 WITHOUT BEING IN VIOLATION OF ARTICLE I, SECTION 7 OF THE CONSTITUTION OF UTAH AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. NONE OF THESE PROCEDURES HAVE BEEN FOLLOWED IN THIS CASE.

#### ARGUMENT

##### POINT ONE

THE STATUTES OF THE STATE OF UTAH CONTEMPLATE THE ISSUANCE OF LICENSES TO PRACTICE AS NATUROPATHIC PHYSICIANS, INCLUDING MINOR SURGERY AND OBSTETRICS.

It is deemed advisable to cite all statutes which might have a bearing upon this matter, so that they can be referred to in this brief. For clarity and convenience the statutes are set out as they affect (A) The Representative Committee, (B) The Educational Qualifications, and (C) The Type of License Issued.

A. *Representative Committee.* From territorial times up to the enactment of the Laws of 1921, the only committee provided for was the committee of varying number, up to ten, composed of graduates of recognized medical schools, reputable and in good standing, plus the Attorney General.

In 1921, the Legislature created the Department of Registration by enactment of Chapter 130, Laws of Utah, 1921, Section (f) provided:

“For the medical practitioners, the practice of obstetrics, the practitioners of osteopathy and the practitioners of any other system or method of treating human ailments, five persons, each one of whom shall be a licensed practitioner of medicine of this state, and a graduate of a legally chartered medical school and in good standing; provided, that for the purpose of preparing questions and rating papers, on practice peculiar to any school, graduates of which may be candidates for registration, or license, the Director shall designate additional or other examiners whenever occasion may require it.”

Chapter 49, Laws of Utah 1923, amended Section 3 of the Laws of 1921, to read:

“For the practitioners of medicine and surgery in all their branches, and for the practice of obstetrics only, five persons, each of whom shall be a licensed prac-

tioner of medicine and surgery in this state, and a graduate of a regularly chartered medical college in good standing."

"For the osteopathic physician or the osteopathic physician and surgeon, three members, each of whom shall be a graduate of a regular chartered college of osteopathy in good standing and licensed in this state; for the practitioner of the treatment of human ailments without the use of surgery or drugs, except as otherwise provided, two of the number appointed to examine physicians and surgeons, to be designated by the director, and three persons from the particular school for treating human ailments for which the applicant desires a license to practice."

In the Revised Statutes of 1933, Section 79-1-6, Subsection 11, the Legislature created a new committee "for practitioners of naturopathy, a committee of three members each of whom shall be a graduate of a school of naturopathy of standing recognized by the Department of Registration."

The Legislature, in the Utah Code Annotated, 1943, and the Utah Code Annotated, 1953, has continued the representative committees for practitioners of medicine and surgery in all branches, for practitioners in the treatment of human ailments without the use of drugs or medicine and without operative surgery, for practitioners of naturopathy, for osteopathic physicians or osteopathic physicians and surgeons and for the practice of obstetrics only, in very much the same language as these committees existed in the Revised Statutes of 1933.

It is noteworthy that the Legislature of 1921, which set up representative committee composed entirely of graduates of medical schools provided:

" \* \* \* That for the purpose of preparing questions and rating papers on practice peculiar to any school of treating human ailments that the Director of Registration *shall* designate additional or other examiners whenever the occasion may require."

This indicated a definite legislative intent to have practitioners of the healing arts examined by their own representative committee.

In 1923, the Legislature created a separate committee of three members for osteopathic physicians, each of whom shall be a graduate of a regularly chartered college of osteopathy and a committee of five members for practitioners of the treatment of human ailments without the use of drugs or medicines and without operative surgery, *except as otherwise provided*, two of the number appointed to examine physicians and surgeons and three from the particular school for treating human ailments for which the applicant desires the license to practice.

Again, we have a definite legislative intent to have representative committees composed in toto, or at least a majority, from the members of the same school of practice as the applicant for the license. In setting up the representative committee for the practice without the use of drugs or operative surgery, the legislature placed the qualifying language "except as otherwise provided" before designating the qualification of the members of the representative committee. This indicated a direct legislative intent to create other committees to examine graduates of schools having different tenets. In conformity with the legislative intent, the Legislature of 1933 created a representative committee of three naturopaths. In Revised Statutes of 1933, Section 79-1-5, which provides:

"The functions of the Department of Registration shall be exercised by the Director of Registration, and, when so provided, in collaboration with and with the assistance of representative committees of the several professions, trades and occupations, as follows: . . .

"(11). For practitioners of naturopathy, a committee of three members, each of whom shall be a graduate of a school of naturopathy of standing recognized by the Department of Registration."

This Court, in the case of *Call vs. Billings*, 104 U. 429, 140 P2 640, held that the members of the naturopathic committee which was set up under the provisions of Section 58-1-5, Subsection 11, U.C.A., 1953, has the powers described in Section 58-1-7, U.C.A., 1953, which provides as follows:

"It shall be the duty of the several representative committees to submit to the Director *standards of qualification for their respective professions*, trades or occupations, requisite in applicants for license, and methods of examination of applicants. They shall conduct examinations at the request of the Director to ascertain the qualifications and fitness of applicants to practice the profession, trade or occupation, for which the examination may be held, shall pass upon the qualification of applicants for licenses, certificates or permits, and shall submit in writing their findings and conclusions to the Director."

The Statute also provides in Section 58-1-13:

"The following functions and duties shall be exercised or performed by the Department of Registration, but *only upon the action and report in writing of the appropriate representative committee*: (1) Defining for the respective professions, trades and occupations what shall constitute a school, college, university, department of university or other institution of learning



as reputable and in good standing." (See also subsections 2, 3, 4, 5 and 6 of the same section).

In conformity with the prescribed powers vested in the representative committee under the provisions of the two sections above quoted, the committee adopted a definition of Naturopathy in accordance with the tenets of the school which are set out in Exhibits 5 and 6. This definition included "minor surgery, obstetrics, use of anodynes, phytotherapy, biochemistry and narcotics." The representative committee further provided in Exhibits 5 and 6 "in order that the license shall include the practice of minor surgery and obstetrics, the applicant must show that he possesses comparable educational qualifications in said subjects to others having a similar license and pass an examination in said subjects before the Naturopathic Board."

The Director of the Department of Registration, Exhibits 8 and 9, acting upon the written recommendation of the representative committee to practice as a Naturopathic Physician, instructed prospective applicants for a license to practice as a naturopathic physician including minor surgery and obstetrics, that the examination would include among other subjects "*obstetrics and gynecology, minor surgery and narcotics.*" The Director, in these Exhibits (exhibits 8 and 9) also informed the applicants of the educational qualifications required before taking the examination which requirements are identical to the requirements contained in Chapter 95, Laws of Utah, 1939, and which have been adopted in Utah Code Annotated, 1943 and 1953.

## 2. *Educational Requirements.*

Chapter 91, Laws of Utah, 1921, set out the educational

requirements and qualifications for practitioners of medicine and surgery in all their branches:

(1) (a)

"For an applicant who is a graduate of a medical college prior to July 1, 1926, that he is a graduate of a medical college deemed to be reputable and in good standing at the time of his graduation and completed a course of study in such medical college in accordance with the laws, rules and regulations relating to the practice of medicine, established and in force in the State of Utah at the time of his graduation.

"(b) For an applicant who is a graduate of a medical college subsequent to July 1, 1926, that he is a graduate of a medical college deemed to be reputable and in good standing and which required of its students, as a prerequisite to graduation, either at least a 5-years course of instruction at the time elapsing between the beginning of the first year and the ending of the last, or fifth year in the medical college, not to be less than 50 months, or a prerequisite to admission to such medical college, two years in a college of liberal arts, approved by the Department of Registration, and pursuing in such college of liberal arts a course of study approved by said department, and at least a 4-years course of instruction in the medical college, the time elapsing between the beginning of the first year in the medical college and ending at the last, or fourth year, to be not less than 40 months, and in either case, in addition thereto, a course of training of not less than 12 months in a hospital approved by the Department of Registration."

"(2) For the practice of any system or method of treating human ailments without the use of drugs or medicines or without the use of operative surgery, prior to 1925; that the applicant is a graduate of a reputable professional school, college or institution

teaching the system of treating human ailments for which the applicant desires to be licensed, which requires as a prerequisite of graduation a three years residence course of instruction, the time elapsing between the beginning of the first year and the ending of the last, or third year, to be not less than thirty months; *provided that nothing herein shall apply to higher standards now in force by any other system.*

“(3) For the practice of any system or method of treating human ailments without the use of drugs or medicines and without operative surgery, subsequent to July 1, 1925; that the applicant is a graduate of a reputable professional school, college or institution, in good standing, teaching the system of treating human ailments for which the applicant desires to be licensed, which requires as a prerequisite of graduation a four-years residence course of instruction, the time elapsing between the beginning of the first year and the ending of the last, or fourth year, to be not less than 40 months.

“(4) For the practice of obstetrics: that the applicant is a graduate of a school or college of obstetrics in good standing, or, upon passing a satisfactory examination in obstetrics, as hereinafter provided;”

The Legislature, in Laws of 1923, Chapter 58, provided the standard of professional education for practitioners of medicine or surgery in all branches, osteopathy, practitioners without the use of drugs or operative surgery, and obstetrics. These minimum standards of professional education are almost identical to the provisions contained in Sections 58-12-(5, 6, 7, 8 & 9) ,Utah Code Annotated, 1953, for these practitioners.

In 1939, the Legislature, in Chapter 95, Laws of Utah, 1939, adopted educational qualifications for practitioners of naturopathy, as follows:

"An applicant desiring to practice as a Naturopathic physician, after the effective date of this act, must be a graduate of a legally chartered naturopathic college, in good standing at the time of his graduation, which required as a prerequisite to graduation at least a four-years residence course of instruction over a period of four school years of not less than eight and one-half months of actual school attendance of school and study in each of said years, comprising at least 4,500 hours in classwork in the subjects required in such school, and in addition, must be a graduate from a high school requiring attendance through four school years equal to 15 units and have completed one year of college work in a college of liberal arts approved by this department and in addition the applicant must have had a course of training of not less than 12 months in a hospital approved by the Board of Naturopathic Physicians, or a course of training for a period of 12 months in the office of a licensed naturopathic physician of the State of Utah."

It is worthy of note that the educational requirements set up for practitioners of naturopathy are equal to the educational requirements required by practitioners of medicine and surgery in all branches prior to July 1, 1926, and with the exception of the requirement of an additional year in a liberal arts college are equal to the requirements for medical practitioners at the present time. Qualifications of naturopathic physicians are also equal to and surpass in the number of hours to be spent in the naturopathic college the requirements for an osteopathic physician or an osteopathic physician and surgeon. They also surpass the educational requirements for practitioners without the use of drugs or operative surgery. The Legislature, in setting up a separate committee for the examination of applicants to practice as a naturopathic physician

and in setting up the stringent educational qualifications for such practitioners intended that their practice should include the tenets of the particular schools of which they were graduates. In conformity with this legislative intent, the representative committee has designated approved colleges of naturopathy which have been approved by the Department of Registration, as required in Section 58-1-7, U.C.A., 1953. The plaintiffs in this action have all graduated from such an approved college and this fact has been admitted by the defendants. The representative committee for the practice of naturopathy has also recommended in writing the courses of instruction and the subjects on which examinations should be given in order to test the qualifications of persons to be examined and these subjects have been designated by the Department of Registration in Exhibits 8 and 9, and include the subjects of obstetrics and gynecology, minor surgery and narcotics. Each of the plaintiffs have produced the required educational qualifications and have taken and successfully passed an examination in these subjects, and other than the last two plaintiffs, have received a license to practice as a naturopathic physician, including minor surgery and obstetrics, and this fact is admitted by defendants.

### *3. The Type of License Issued.*

Prior to the Laws of 1921, there were two types of licenses issued, one for the practice of medicine and surgery in all branches, and the other to practice obstetrics.

In Chapter 91 of the Laws of 1921, the Legislature provided:

“No person shall practice medicine and surgery or

any of the branches thereof, or any method of treating human ailments without the use of drugs or medicines and without operative surgery or obstetrics without a license to so do."

Section 10 of the same laws provided:

"Each applicant who successfully passes an examination shall be entitled to a license. The following kinds of licenses shall be issued:

"(1) To practice medicine and surgery in all their branches; (2) to treat human ailments without the use of drugs or medicines or without the use of operative surgery, and to practice such treatment in accordance with the tenets of the school of practice designated by the applicant under the provisions of Section 3 of this act. If the applicant successfully passes the Examination in Obstetrics, the license shall also set forth his right to practice obstetrics; (3) to practice obstetrics."

Chapter 58, Laws of Utah, 1923, provided:

"Each applicant who successfully passes an examination shall be entitled to a license. The following kinds of licenses shall be issued:

"(1) To practice medicine and surgery in all their branches; (2) to practice as an osteopathic physician; (b) to practice as an osteopathic physician and surgeon; (3) To treat human ailments without the use of drugs or other medicines and without operative surgery, and to practice such treatment in accordance with the tenets of the school of practice designated by the applicant under the provisions of Section 3 of Chapter 91, Laws of Utah, 1921; (4) to practice obstetrics."

Chapter 72, Laws of Utah, 1927, provided the following kinds of licenses:

“(1) To practice medicine and surgery in all their branches; (2) (a) to practice as an osteopathic physician without operative surgery in accordance with the tenets of the professional school of osteopathy recognized by the Department of Registration; (b) to practice as an osteopathic physician and surgeon in accordance with the tenets of the professional school of osteopathy recognized by the Department of Registration; (3) to treat human ailments without the use of drugs or medicines and without operative surgery, and to practice such treatment in accordance with the tenets of the school of practice designated by Chapter 91, Laws of Utah, 1921. If the applicant for a license under Subsection (2) or under this subsection successfully passes the examination in obstetrics, the license shall also set forth his right to practice obstetrics; (4) to practice obstetrics.”

Revised Statutes of Utah, 1933, provided the same kinds of license as in numbers (1) and (2), and provided, under Number (3) as follows:

“To practice the treatment of human ailments without the use of drugs or medicines and without operative surgery in accordance with the tenets of the professional school, college or institution of which the graduate is a graduate as designated in his application for license, if the application for a license under Subsection (2) or under this subsection successfully passes the examination in obstetrics, the license shall also set forth his right to practice obstetrics, and (4) to practice obstetrics.”

The kinds of licenses presently provided for are set out in Section 58-12-3, Utah Code Annotated, 1953, and provide as follows:

“The following classes of licenses shall be issued:

"(1) To practice medicine and surgery in all branches thereof.

"(2) (a) To practice as an osteopathic physician without operative surgery in accordance with the tenets of a professional school of osteopathy recognized by the department of registration.

(b) To practice as an osteopathic physician and surgeon in accordance with the tenets of a professional school of osteopathy recognized by the department of registration.

"(3) To practice the treatment of human ailments without the use of drugs or medicine and without operative surgery in accordance with the tenets of the professional school, college or institution of which the applicant is a graduate as designated in his application for license; if the applicant for a license under subsection (2) or under this subsection successfully passes the examination in obstetrics the license shall also set forth his right to practice obstetrics.

"(4) To practice obstetrics."

It will be noted that when the types of licenses were created by the Laws of 1921, three types of licenses were provided for, namely, (1) To practice medicine and surgery in all its branches, (2) to practice without the use of drugs or medicines or operative surgery, and (3) to practice obstetrics. Under the provisions of the statute to license practitioners to practice without the use of drugs or operative surgery, were the osteopathic physicans and osteopathic physicians and surgeons. They were examined according to the tenets of their profesisonal school of osteopathy and were licensed to practice their profession upon proof of having the required educational qualifications and after having successfully passed an exami-



nation. One of the tenets of the school of osteopathy for the practice as an osteopathic physican and surgeon was to practice major surgery. It can readily be seen that the Legislature did not intend that such practice would be limited by the words "without drugs or medicines or operative surgery," but that the practitioners should practice according to the tenets of the professional school of which they were graduates. The words "without the use of drugs and without operative surgery" was the designation of the license. The tenets of the school determined the scope of practice.

The tenets are defined by the Department of Registration upon the recommendation of the representative committee. In 1933, when the Legislature created a representative committee for the practitioners of naturopathy, it was intended that they should have a license to practice as naturopathic physicians according to the tenets of their school as recognized by the Department of Registration. In 1939, the Legislature increased the educational requirements for naturopathic physicians and thereafter, these practitioners were entitled to practice in accordance with the tenets of their school as defined by the Department of Registration. The Department of Registration, in setting up the tenets of their schools, had in mind the increased educational qualifications and intern training provided for in the 1939 laws.

The Legislature, in Chapter 91 of Laws of Utah, 1921, Section 8, provided for the examination of various practitioners as follows (See Section 58-12-13, U.C.A., 1953):

"The examination of those who desire to practice systems or methods of treating human ailments without

the use of drugs or medicines or without operative surgery shall be of the same character as that required by those who desire to practice medicine and surgery in all their branches, excepting therefrom Materia Medica, Therapeutics, Surgery, Obstetrics and Theory and Practice. If the applicant is a graduate of a professional school, college or institution, in which the subject of obstetrics is taught therein is deemed equal to that taught in medical college, reputable and in good standing, he may on his request be examined in the subject of Obstetrics. In the subjects of Theory and Practice, the applicant shall be examined in accordance with the theory and practice taught by the professional school, college or institution of which the applicant is a graduate."

The Department of Registration, in Exhibits 8 and 9, have set out the subjects on which applicants shall be examined for a license to practice as a naturopathic physican, including minor surgery and obstetrics. These examinations include the subjects of Materia Medica and Therapeutics, Principles and Practice of Naturopathy, Obstetrics, Gynecology and Narcotics.

The Legislature, in Chapter 91, Laws of 1921, provided in Section 11 for further examination of non-medical practitioners as follows:

"Any person licensed under the provisions of this act to practice in any school or system of treating human ailments without the use of drugs or medicines and without operative surgery, may be admitted to take an examination to practice medicine and surgery in all their branches, upon proof of having successfully *completed in a medical college admitted to be reputable and in good standing* the course of study required for admission to an examination for a license to practice medicine and surgery in all their branches."

The Legislature in 1923, Chapter 58, Section 11, in re-enacting said section, deleted from the section the words "completed in a medical college admitted to be reputable and in good standing," and substituted in lieu thereof "upon proof of having successfully completed a course of study such as required for admission to an examination for a license to practice medicine and surgery in all its branches." This was an indication of the legislative intent to enable the applicants to enlarge their license to practice medicine and surgery in all branches upon the passing of an examination in the subjects of Therapeutics, Materia Medica and Surgery. The educational training could be in a college of the applicant's choice and operated by any of the healing arts as long as such college was equal to a medical college as provided in the provisions of Chapter 91, Section 11, Laws of 1921, and approved by the Department of Registration.

The Attorney General in his answer, questions the license of the petitioners to practice obstetrics because they were not examined by the Medical Board. We invite the attention of the Court to Exhibit 14, said exhibit being an opinion of a former Attorney General, and particularly the language contained therein on pages 4 and 5, which states:

"It will likewise be observed that Section 79-9-3, Revised Statutes 1931, Subsection (4) provides for the issuance of a license to "practice obstetrics." This is a separate subsection, apart and different than the section which refers to the examination in obstetrics of osteopaths and naturopaths and the issuance to such persons of licenses to practice obstetrics along with their professions. Inasmuch as the reference to the examination in obstetrics of osteopaths and naturopaths is included as a part of the subsection relating to naturopaths and is sepa-

rate and apart from the section, relating either to the practice of medicine and surgery in all its branches, or to the section relating to the practice of obstetrics only, there would appear to be an indication of Legislative intent that the osteopathic and the naturopathic committees should handle the examinations of their respective applicants in all of the phases, including obstetrics. The so-called "medical committee" is clearly, under subsection (9) of Section 79-1-5, the committee which must give the examination, "for the practice of obstetrics only." Under this authorization it is our understanding that this board gives examinations covering the practice of obstetrics only to nurses, midwives, and other people who hold no other license to practice medicine or surgery or the treatment of human ailments in any other respect; so that the provision relating to an examination by the medical committee in "Obstetrics only" is given effect and practical application, and hence is not without meaning and effect, even though it might be held that such committee should not give the examination in obstetrics to osteopaths and naturopaths.

"It will be further observed that throughout the statutes relating to this matter and which have been above quoted, it appears that the Legislature intended that examinations taken by applicants to practice medicine and surgery or the treatment of human ailments should be examined "in accordance with the tenets of the professional school, college or institution" of which such applicants are graduates. Apparently the Legislature felt that a member of one profession who had received his training along lines taught in that profession could not properly give an examination to a person trained in a different profession and possibly along different lines and with different technique.

"It will be noted that Section 79-9-14, set forth above, provides that any person licensed to practice the treatment of human ailments without the use of drugs or medicines and without operative surgery (which would include a naturopath) who submits proof of having successfully completed a course of study such as is required for admission to an examination

for a license to practice medicine and surgery in all branches thereof, might take an examination to cover such practice. Further, that in such case, the applicant should take an examination in various subjects, including "obstetrics only." Clearly, the examination in such case would be given by the "medical committee" since that committee specifically is directed to give examinations in obstetrics only.

"The thing to observe, and which seems significant, is that in this Section, which relates to the examination to practice medicine and surgery in all branches thereof of persons previously licensed in other fields, it refers to an obstetrics examination as an examination in "obstetrics only", placing it under the medical board where it naturally would fall, because the person taking such examination is endeavoring to qualify for the practice of medicine and surgery in all its branches and, therefore, would naturally be required to pass the same type of examination as others who have a license of similar scope.

"In Section 79-9-3, Subsection (3), however, which relates to the examination in obstetrics of osteopaths and naturopaths, the reference is merely to "the examination in obstetrics" and not the examination in "obstetrics only." It would appear that the Legislature intended to make a distinction between the examination in obstetrics given to persons desiring to take such examination along with their examinations in osteopathy and naturopathy, and those desiring to take the examination in "obstetrics only" in connection with no other examination or in connection with an examination contemplated by Section 79-9-14."

It is apparent that the practitioner who is licensed to practice obstetrics will be called upon during the delivery of a child to make certain repairs to the mother. This repair comes under the heading of "minor surgery." It is inconceivable that the Legislature would set up educational qualifications, interne training, etc., for applicants for license, including

successfully passing an examination to practice obstetrics and then make it unlawful for the practitioner to perform minor surgery in the practice of obstetrics.

The Legislature has created a separate representative committee for practitioners of naturopathy; it has set up stringent educational qualifications for the profession of naturopathy; it has provided, since 1921 to the present time, that the license to practice shall be in accordance with the tenets of the professional school of which the applicant is a graduate. The tenets of the profession of naturopathy as adopted by the Utah Department of Registration, includes the practice of minor surgery, obstetrics and narcotics. It cannot with reason be argued that an applicant having successfully complied with all these legislative requirements for the practice as a naturopathic physician, is not entitled to a license to practice according to the tenets of his particular school, which tenets include the practice of minor surgery, obstetrics and narcotics.

## POINT TWO

THE RIGHT TO PRESCRIBE AND ADMINISTER NARCOTICS NECESSARILY FOLLOWS THE RIGHT TO PRACTICE OBSTETRICS OR MINOR SURGERY OR EITHER OF THEM TO SUCH EXTENT AS NEEDED IN CONNECTION WITH SUCH PRACTICE; BUT IN ANY EVENT THE STATUTES SPECIFICALLY PERMIT THE ADMINISTRATION AND PRESCRIPTION OF NARCOTICS BY THE PLAINTIFFS.

Our statutes relating to the use of narcotic drugs are set forth in Title 58, Chapter 13, U.C.A. 1953. Section 58-13-6 provides as to the persons to whom the manufacturer or wholesaler may sell, that sale may be made among others to "a physician"; Sec. 58-13-11 provides that an apothecary may sell upon written prescription of a "physician." Sec. 58-13-1 defines the word "physician" as follows:

*"Physician means a person authorized by law to practice medicine in this state, and any other person authorized by law to treat the sick and injured human beings in this state and to use narcotic drugs in connection with such treatment."*

Sec. 58-12-17 defines "practicing medicine" as follows:

*"Any person who shall diagnose, treat or profess to treat, or prescribe or advise for, any physical or mental ailment of, or any physical injury to, or any deformity of, another; or who shall operate upon another for any ailment, injury, deformity, shall be regarded as practicing medicine or treating human ailments."*

Under any interpretation of the license which has been issued to plaintiffs or to which they are entitled as naturopathic physicians, they certainly are persons who diagnose, treat or profess to treat, or prescribe or advise for, physical or mental ailments of another. .

Although by the very terms of Sec. 58-1-5 chiropractors are defined as "those engaged in the science of palpitating and adjusting the articulation of the spinal column by hands only," nevertheless it has been held that a chiropractor is "practicing medicine" at least where he diagnoses the symptoms of his patients. See *Board of Examiners v. Freenor*, 47 Utah 430,

154 Pac. 941; State v. Erickson, 47 Utah 452, 154 Pac. 948. See also State Board of Medical Examiners v. Terrill, 48 Utah 647, 167 Pac. 451, which holds that anyone who diagnoses or treats physical ailments is "practicing medicine" within the provisions of Sec. 58-12-17, and that the system used is not material.

Considering the matter, then, in the reverse order, for purposes of argument and logic, the plaintiffs are licensed to and do diagnose and treat symptoms of their patients in connection with physical or mental ailments, and therefore are "practicing medicine" and such practice is authorized under their licenses; since they are so authorized to "practice medicine," they are "physicians" as defined by Sec. 58-13-1 which is a part of our narcotics act. (Sec. 58-12-22 refers to them as "naturopathic physicians"), and being physicians, they are entitled to purchase and also to prescribe and administer narcotic drugs in connection with their legitimate professional practices.

In this connection, however, it is deemed advisable to call attention to the fact that the schools which these men attend teach narcotics and the examinations which they take cover the subjects of narcotics. (See Exhibits 6, 8 and 9). Furthermore, at least since August 13, 1941, under interpretations of the Department of Registration and as interpreted by the opinions of the Attorney General of the State of Utah, the plaintiffs have been permitted to and have administered and prescribed narcotic drugs. (See Exhibit 13).

The representative committee for the examination of naturopathic physicians adopted, on October 1, 1942, a defi-



nition of Naturopathy, according to the tenets of the schools, as follows. This definition was concurred in by G. V. Billings, Assistant Director of the Department of Registration, and is contained in Exhibit 5 of the petition. This definition, among other things, provides "that naturopathic practice as taught in naturopathic schools comprises, besides the fundamental subjects of anatomy, physiology, pathology, chemistry, etc., the following agents of healing: Biochemical Therapeutics, Use of Anodynes and Other Natural Methods. The definition adopted by the representative committee for examining naturopathic physicians adopted, on October 13, 1951. (Exhibit 6), a definition of naturopathy in accordance with the tenets of the schools as follows:

"Naturopathic medicine as taught in naturopathic schools comprises besides the basic subjects of anatomy, physiology, pathology, chemistry, histology, bacteriology, hygiene and sanitation, etc., the following agents, methods and specialties of healing: *Phytotherapy, Materia Medica, Biochemical Therapeutics, the Use of Anodynes, Hypnotics and Narcotics.*"

Phytotherapy is the science of prescribing and administering medicine and drugs of botanical origin, their derivatives and compounds. The right to practice phytotherapy conferred upon all naturopathic physicians the right to prescribe and administer medicines and drugs of botanical origin, their derivatives and compounds. The science of biochemistry, which is part of the tenets of the school of a naturopathic physician, comprehends the study of the metabolics of the human body and the reactions and actions of the human system to any drugs or medicines. A person who is trained in phytotherapy and biochemistry is certainly thoroughly qualified to prescribe and

administer any and all medicines whether of botanical or chemical origin.

This court should construe and interpret the practice of naturopathy as authorizing a legally licensed naturopathic physician including minor surgery and obstetrics in Utah to prescribe and administer any drugs of botanical or chemical origin, their derivatives and compounds. This of course includes morphine, because not only does the authority establish that morphine is of botanical origin, but it has been held by the Supreme Court of Florida, (*Hammers v. Southern Express Co.*, 85 S. 248) that morphine is of botanical origin, that opium is derived from poppy plants, that morphine sulphate, which is the form prescribed and administered, is derived by mixing the harmless by-products of sulphuric acid with the opium so as to make it soluble and its dosage standardized.

The construction and interpretation is not only supported by abundant authority as to the meaning of phytotherapy as applied to the practice of naturopathy, but it is fortified by the subsequent stringent provisions regulating the admission to as well as the practice of naturopathy.

The tenets of the school of naturopathy as set out in Exhibits 5 and 6, also permit a naturopath to practice materia medica. Sec. 58-12-3, U.C.A. 1953,, in defining the several classes of licenses which shall be issued, provides:

"(3) To practice the treatment of human ailments without the use of drugs or medicines and without operative surgery in accordance with the tenets of the professional school, college or institution of which the applicant is a graduate as designated in his application for license."

This section contains the special provision that the applicant shall be licensed in accordance with the *tenets of his professional school* and this special provision must be read as an exception to the general provision to practice the treatment of human ailments without the use of drugs or medicines and without operative surgery." This interpretation of specific and general provisions of the law is in conformity with the interpretation of statutes by the courts. 50 Am. Jur. Page 371, indicates that Courts, in construing and interpreting a statute which has a special and general provision, holds that the Legislature intended that the special provision should prevail over the general provision contained therein. Sec. 58-13-1, U.C.A. 1953, is an act to regulate the administration, dispensing, etc., of narcotics in the State of Utah, and said act confers upon physicians the right to prescribe, administer, dispense, mix, or otherwise prepare narcotic drugs, etc.

The Courts, with practical unanimity, hold that the meaning of "physician" is not confined to any particular school of medicine, and that the practice of medicine is not confined to any particular school and that therefore a person legally authorized to practice as a naturopathic physician is a physician and when engaged in his practice, is practicing medicine. The act does not restrict or confine the definition of "physician" or "the practice of medicine" to any one particular school, and therefore, this Court should construe and interpret said statute as applicable to and including the school of naturopathy.

This is obvious in view of the right of a naturopathic physician to practice phytotherapy and biochemistry, so that under our statute, a person legally licensed to practice natur-

opathy in this state may perform and do all of the things authorized by the narcotic act, to be done by physicians as therein provided. The only authority of the legislature to regulate any profession is based upon protection to the public. Such laws and regulations must be reasonable and not arbitrary. The undisputed record shows that requirements prescribed by the legislature for admission to practice naturopathy qualify such persons to prescribe and administer medicines and drugs of a botanical and chemical origin, their derivatives and compounds, and under this condition it would be arbitrary and unreasonable and violative of rights secured under the State and Federal Constitutions to deny to such persons the right to put into such practice, when the necessity arises, such matters upon which the state requires such qualifications.

A practitioner having a license to practice obstetrics of necessity must have a license to administer narcotic drugs to relieve the pain of his patients, and to stop hemorrhages. Such a practitioner also requires a license to practice minor surgery to adequately handle his obstetrics cases.

### POINT THREE

IF THERE IS ANY QUESTION AS TO THE RIGHTS OF THE PLAINTIFFS TO PRACTICE IN ACCORDANCE WITH THE LICENSES HERETOFORE ISSUED TO THEM UNDER THE STATUTES OF THE STATE OF UTAH SUCH QUESTION ARISES BY AMIBGURITY IN THE STATUTES AND HENCE THE DOCTRINE OF CONTEMPORANEOUS ADMINISTRATIVE INTERPRETA-

TION IS APPLICABLE AND THE RIGHTS OF THE PLAINTIFFS TO PRACTICE AS NATUROPATHIC PHYSICIANS, INCLUDING MINOR SURGERY AND OBSTETRICS, AND TO THE USE OF NARCOTICS IS ESTABLISHED BY LONG ADMINISTRATIVE PRACTICE.

From the review and analysis of the numerous and various statutes which are brought into play in considering our problem here raised, one thing certainly is most apparent. That is that the Legislature did intend that these men receive a license of some sort and that such license should permit them to practice their profession in accordance with their training and abilities as reflected from the courses of study given in the schools which they had attended. In other words, it appears clear that these men were intended to be given examinations to practice in accordance with the tenets of the schools which they attended.

Particular attention has been called to the wording of Sec. 58-1-5 setting up the various representative committees to collaborate with the Department of Registration, and particularly the fact that such section refers to these as "representative committees of the *several* professions, trades and occupations." Attention is again invited to the fact that under such section there are set up separate committees "for practitioners in the treatment of human ailments without the use of medicine and surgery \* \* \* \*" (Sub. Sec. 10) and another committee "for practitioners of naturopathy." (Sub-Sec. 11). Furthermore, the Legislature set up separate educational requirements for practice as a naturopathic physician (Sec. 58-12-22 U.C.A. 1953). The Legislature clearly recognized that these are separate and distinct branches. It certainly then must

be clear that the Legislature intended that separate and different types of licenses should be issued to these different professional groups.

Under the provisions of Sec. 58-1-13, the Department of Registration, upon the action and report of the appropriate representative committee, is authorized to prescribe rules governing applications for licenses, certificates of registration, etc. The Department of Registration did adopt such rules and regulations as regards the licensing and applications for licenses of naturopathic physicians, including minor surgery and obstetrics. (See Exs. 8 and 9).

In setting up these rules and regulations, the department recognized that, included in the curriculum of the recognized naturopathic schools, were the subjects of minor surgery and narcotics and the subject of obstetrics.

Since 1939 and after the educational requirements for naturopathic physicians were raised by the Legislature, the Department of Registration under the regulations issued by it, has continually given examinations to persons who have filed applications to take examinations as naturopathic physicians, including minor surgery and obstetrics. As required by Sec. 58-1-15 the Director of the Department of Registration has assigned the subjects for such examination to the respective members of the examining committee. Such examinations have thereupon been given by those persons to whom these exams were assigned and the applicants have been separately examined in the subjects of obstetrics, minor surgery and narcotics.

If there could exist any doubt whatsoever as to the rights of the plaintiffs herein to practice in accordance with the

licenses heretofore issued them under the statutes, and as to the rights of others properly trained in recognized naturopathic schools to take examinations for, and having passed the same to practice as, naturopathic physicians, including minor surgery and obstetrics, then such question arises solely and only by reason of ambiguity in the statutes. Such being the case, the doctrine of contemporaneous administrative interpretation is applicable. In the opinion of the present Attorney General and the one which has given rise to the present action, Attorney General Callister brushes aside the doctrine of contemporaneous administrative interpretation. He refers to the case of *Utah Hotel Co. v. Industrial Commission*, 107 Ut.; 151 Pac. (2d) 467 and to the case of *Lewis v. Utah State Tax Commission*, 218 Pac. (2d) 1078, and states, relying upon said cases, that an erroneous construction of a statute made by an administrative body is not binding upon the Court. We have no quarrel with that rule where the statute is clear, and from the statute itself one can get a plain, clear and concise answer to the problem. The Attorney General has assumed that such is the situation here. Nothing could be further from the facts.

We submit that the statutes are pregnant with ambiguities and uncertainties. Sec. 58-1-5 sets up separate committees for the "*several* professions" of "practitioners in the treatment of human ailments without the use of medicine and surgery" and separately "for practitioners of naturopathy." Strangely enough, however, only four types of examinations are set up by Sec. 58-12-3 and none is separately set up for the practice of naturopathy. There is however one set up, "To practice the treatment of human ailments without the use

of drugs or medicines and without *operative surgery* in accordance with the tenets of the professional college, school or institution of which the applicant is a graduate as designated in his application for license," such being Sub-section 3 of said section. There is nothing anywhere in the statutes to indicate what is meant by "operative surgery." If the license to practice as a naturopathic physician must be carved out of Sub-section 3 of Sec. 58-12-3, what part of that sub-section is applicable and what part is inapplicable to such licenses? Certainly it could not properly be said that the part relating to the practice "without the use of drugs or medicine" is applicable to the naturopathic physician and that we should ignore completely that part which states that he should practice "in accordance with the tenets of the professional school, college or institution of which applicant is a graduate as designated in his application for license." As indicated above, and as shown by Exhibits 5, 6, 8 and 9, the tenets of the professional school of naturopathy include minor surgery and obstetrics as well as narcotics.

There is every reason to assume from the wording of the statutes that the Legislature intended that there be some distinction between the various types of surgery. The statutes refer in one place to "medicine and surgery in all branches thereof." Other places throughout the statute they refer to "operative surgery."

With the statutes in such a state that it was impossible to ascertain clearly therefrom as to the exact type of examination and the exact type of license which should be given to those making application to practice as naturopathic physicians, the



Department of Registration being the administrative body charged with the examination and issuance of such licenses and with the regulation thereof, adopted rules, regulations and procdeures as have been heretofore set forth in the Statement of Facts above in this brief, based upon logic and common sense and based upon those sections of the statutes which indicated that licenses should be issued in accordance with the tenets of the professional school of which the applicant is a graduate. In other words, that licenses should be issued in accordance with the training of the applicant.

As indicated above such procedure has been followed almost uninterruptedly since 1939. At various intervals during that time a question would arise with regard to the matter and inquiry would be made of the Attorney General. In every instance during that period of time, the Attorney General, after reviewing the various statutes involved and after considering and commenting upon the fact that such statutes were ambiguous, upheld the procedure of the administrative agencies in giving examinations for and licensing naturopathic physicians, including minor surgery and obstetrics, and also in the use of narcotics. Almost without exception also in those opinions the Attorneys General suggested that in view of the uncertainty of the statutes the matter ought to be presented to the Legislature for clarification.

Never during that entire period of time was the matter ever clarified by the Legislature. On the contrary, twice during that period of time, namely in 1941 and again in 1953, the Legislature re-enacted without change insofar as it relates to the practitioners involved in this suit the statute which has

given rise to the greatest questions and uncertainties in the matter, namely, Sec. 58-1-5.

It is a well established rule of statutory construction that the re-enactment of a statute upon which an administrative department of government has previously placed a construction will operate as a legislative adoption of that construction. Sec. 233, Crawford's Statutory Construction; United States v. Folk, 204 U. S. 143, 27 Sup. Ct. 191, 51 L ed 411; VanVeen v. Graham County (Ariz.) 108 Pac. 252. The rule of contemporaneous administrative interpretation is, of course, so well established and entrenched in our judicial system, that it should require no more than a mere mention of the rule to bring this matter sufficiently to the attention of the court as to the bearing which such rule has upon this case. As recognized above, the rule applies only where there is a statute or combination of statutes of doubtful meaning involved and where there has been a practical construction of such statutes by those for whom the law was enacted or by public officers whose duty it was to enforce the statute, acquiesced in by all for a long time. When such situation exists that interpretation is entitled to great, if not controlling influence. See Sec. 218 Crawford's Statutory Construction; City of New York v. New York City RR Co., 193 NYS 543, 86 New York 565; People v. Miller 1 NYS (2d) 267, 164 Misc. 726. In Sec. 219 Crawford's Statutory Construction we find the following statement:

" \* \* \* where a certain contemporaneous construction has been placed upon an ambiguous statute by the executive or administrative officers, who are charged with executing the statute, and especially if such construction has been observed and acted upon for a long time, and generally or uniformly acquiesced in, it will

not be disregarded by the courts except for the most satisfactory cogent or impelling reasons. In other words the administrative construction generally should be clearly wrong before it is overturned. \* \* \* "

In 50 Am. Jur., Statutes, Sec. 319, it is stated:

" \* \* \* the practical construction given a statute for a long period of time has been considered strong evidence of the meaning of the law. Such contemporaneous or practical construction is treated by the courts as of importance, and as entitled to great weight, respect, and persuasive influence. Indeed the practical construction of a statute, or the meaning publicly given it by contemporary usage, is usually presumed to be the true one. It should not be disturbed, disregarded, or overturned, especially where all other suggested constructions are at least as doubtful as the practical one adopted except for cogent or convincing reasons, such as its contravention of the constitution, or unless it is clear that such construction is erroneous, and operates to defeat the manifest purpose of the statute and the intention of the legislature, as expressed by the language employed. These rules prevail, even where the language has etymologically or popularly a different meaning. Only compelling language in the statute itself will warrant rejection of a construction long and generally accepted, especially where overturning the established practice will have far reaching consequences."

See also *Murdock v. Maybe*, 59 Ut. 346, 203 Pac. 651; *Loman and Hanford v. Ervin* (Wash) 290 Pac. 221; *Board of Education v. Bryner*, 57 Ut. 78, 192 Pac. 627; *Norville v. State Tax Commission*, 98 Ut. 170, 97 Pac. (2d) 937, 127 A.L.R. 1318; *Washington County v. State Tax Commission*, 103 Ut. 73, 133 Pac. (2d) 564.

The presumption with regard to our statutes is that the legislature was aware of the construction which had over a long period of time been placed upon them by the administrative body, and if the legislature did not agree with such interpretation and desired that the statute be administered differently, they would change the statutes to clearly indicate the interpretation which they desired.

One of the contentions as set forth in the answer of the defendants is that the applicants are not entitled to practice obstetrics, because the examinations have been given to them by the committee for practitioners of naturopathy rather than the committee for medicine and surgery and all its branches. As regards this, it should be pointed out that from the time the first examination was given in obstetrics and in minor surgery such examinations were given by the committee for practitioners of naturopathy and the assignments to give such examinations were made to such committee and the examiners thereunder by the Director of the Department of Registration. No examinations were ever given by any other committee nor did the Department of Registration ever consider that any other committee should give such examinations. If, therefore, the Legislature desired that the "medical committee" should give all examinations which in any way cover the subject of obstetrics, the presumption is that it would have so indicated when amending and re-enacting Sec. 58-1-5 in the years 1941 and again in 1953.

The admitted facts are that all of the plaintiffs have taken their examinations as naturopathic physicians, including the subjects of minor surgery, obstetrics and narcotics, have passed

those examinations and have received their licenses to practice as naturopathic physicians, including minor surgery and obstetrics; that based upon such licenses so issued by the Department, under practices administratively adopted by said Department, these men have established themselves and engaged in the practice of their professions and changed their positions and status considerably to conform to such practices as permitted under such licenses. To change their status or position by revoking or limiting their licenses would result in irreparable injury to them. Because of the long established practices the public and the individuals affected by such practices have a right to assume that such practices will continue at least until the statutes upon which such practices are based are changed by the Legislature.

We submit that there is abundant evidence of contemporaneous, long, uniform and practical construction of these ambiguous statutes. To change such construction to comply with the construction as contended for by the present Attorney General would disrupt the status of the plaintiffs and throw their whole lives into turmoil. It would destroy vested rights and work a great hardship upon plaintiffs. No legal or other justification therefor can be established.

#### POINT FOUR

AS TO THE PLAINTIFFS BRECKENRIDGE AND McDONALD, THERE IS NO AUTHORITY IN THE LAW FOR A REFUSAL BY THE DEPARTMENT OF REGISTRATION TO ISSUE TO THEM LICENSES TO PRACTICE AS

NATUROPATHIC PHYSICIANS, INCLUDING MINOR SURGERY AND OBSTETRICS IN ACCORDANCE WITH THE EXAMINATIONS SUCCESSFULLY PASSED BY THEM.

All of the arguments herein in this Brief set forth apply with equal force to the plaintiffs Breckenridge and McDonald as they do to the other plaintiffs. The only difference in the position of these plaintiffs and the others is that as to these two plaintiffs, they are persons who have just recently taken their examinations and successfully passed the same. As indicated in the statement of facts, they passed all of the educational requirements, took the examinations including separate examinations in obstetrics, minor surgery and narcotics, given by examiners designated by the Director of the Department of Registration. They have done everything necessary to entitle them to their licenses to practice, but the Department has refused to issue them licenses which would include minor surgery, and obstetrics or the right to use narcotics.

If the arguments as set forth hereinabove and elsewhere in this Brief are sufficient to convince the Court, as we think they should, that the licenses heretofore issued to the other plaintiffs to practice as naturopathic physicians, including minor surgery and obstetrics and the use of narcotics, are persuasive and sufficient, then, of course, it follows as a matter of course that the plaintiffs Breckenridge and McDonald should be granted licenses of the same scope. Under the provisions of Sec. 58-1-18 it is required that the Department of Registration shall issue the appropriate license to any

applicant found qualified to exercise any of the professions, trades or occupations subject to the Department of Registration, subject only to such applicant having, where required, passed the necessary examination. All of such requirements have been met by the plaintiffs Breckenridge and McDonald.

## POINT FIVE

THE LICENSES, AS ISSUED, AND THE RIGHTS PERTINENT THERETO, ARE VALUABLE PROPERTY RIGHTS AND CANNOT BE REVOKED OR THEIR RENEWAL REFUSED EXCEPT FOR THE REASONS AND IN THE MANNER REQUIRED BY STATUTE, NAMELY BY SECTIONS 58-1-23, 58-1-24, 58-1-25 AND 58-1-26, U.C.A. 1953 WITHOUT BEING IN VIOLATION OF ARTICLE I, SECTION 7 OF THE CONSTITUTION OF UTAH AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES. NONE OF THESE PROCEDURES HAVE BEEN FOLLOWED IN THIS CASE.

A license to practice a profession is a valuable property right and there is no distinction between revoking or attempting to revoke such license and a refusal to renew the same. See *Baker v. Department of Registration*, 78 Ut. 424, 438; 3 Pac. (2d) 1082.

It is no answer that the Department of Registration has agreed to issue a license covering a part of the rights which were given under the licenses heretofore issued and now held by the plaintiffs. A license stripped of prime and principal rights thereunder is of course as no license at all.

The procedures which must be followed in revoking a license issued under authority of statute, in order to comply with the constitutional provisions of due process of law, are generally set forth in 3 Am. Jur. page 382 as follows:

" \* \* \* where a statute or ordinance authorizes the revocation of a license for causes enumerated, such license cannot be revoked on any ground other than those specified." Citing numerous cases.

As stated in the case of Higgins v. Board of License Commissioners, 31 N.E. (2d) 526:

"Where the statute provides for grounds for revocation and for procedures to be followed, such procedures including notice and a hearing, such notice and hearing are essential to due process, and even upon such hearing, the revocation can be only upon the grounds authorized by the statute. Otherwise, there is a failure of due process."

In the case of Burley v. City of Annapolis, 34 Atl. (2d) 603, it is stated:

"In those cases where attempts have been made to revoke under an authority not reserved in the granting statute or ordinance, there seems to be a unanimity of holding that it cannot be done." Citing Am. Jur. page 382 and numerous other cases.

In the case of Moormeister v. Golding, 84 Utah 324 27 Pac. (2d) 447, this court held that the Director of Registration has no authority to revoke a physician's license unless competent evidence was submitted to the physicians' board upon which it could legally make recommendation of revocation.

Under our statutes it does not lie within the power of the Director of the Department of Registration or the Com-



mission under which it acts, to arbitrarily refuse to renew a license. Sec. 58-1-23 provides that the department shall annually renew a license once issued, subject only to the requirement that the renewal fee be paid within the time fixed by the Department of Registration. Even if the fee is not paid and a license becomes revoked, Sec. 58-1-24 provides that it must be reinstated at any time within three years upon payment of the required fees. No other basis for refusal to renew is anywhere set forth in our statutes.

Except for failure to pay the renewal fee, so that the license would thereby not be renewed, the only other grounds for refusal to renew or for revocation of a license once issued (which of course includes all rights covered by such license) are those set forth in Sec. 58-1-25 U.C.A. 1953. The pertinent part of that section reads as follows:

"The department of registration may upon the written recommendation of the appropriate representative committee refuse to issue or renew or may suspend or revoke any license, certificate, permit, student card or apprentice card in the following cases:

(1) If the applicant or holder of such license, certificate, permit, student card or apprentice card is not of good moral character or has been guilty of unprofessional conduct.

(2) If he has been convicted of crime involving moral turpitude.

(3) If he has obtained or attempted to obtain a license, certificate, permit, student card or apprentice card by fraud."

It will be observed that none of the reasons set forth in the statutes as a ground legally to refuse to renew or to

revoke a license are present in connection with the threat of the Department of Registration to revoke or decline to renew the licenses of the plaintiffs. There had been no contention made that any plaintiff is not of good moral character or has been guilty of unprofessional conduct; there has been no contention made that any has been convicted of a crime involving turpitude; there has been no contention made that the license was obtained by fraud. Such being the case, there can be and is no ground whatsoever upon which the Department of Registration can legally revoke or refuse to renew these licenses.

Even assuming any reason to exist why the license of any plaintiff might be revoked or a refusal to renew the same might be justified, it is obvious that the Department of Registration neither followed nor attempted to follow any statutory procedure to accomplish that end. The statutes, of course, contemplate that in the event the license issued and outstanding is to be revoked that notice and a hearing thereof should be had. Sec. 58-1-26 provides for a notice of the charges and a hearing to be had, at which time the interested parties may present evidence bearing upon the question. No such notice or hearing has ever been had nor proposed.

We recognize fully the rule that the power of the state to grant a license carries with it the power to revoke that license, but only upon the grounds and in the manner as provided by the statutes relating thereto and after proceeding in a manner sufficient to guarantee to the licensee due process of law.

We submit that the threatened action on the part of the

defendants to revoke or refuse to renew the licenses of the plaintiffs or to refuse to issue licenses to the two plaintiffs Breckenridge and McDonald are unlawful, arbitrary and capricious and are without authority of statute and are in fact contrary to the statutes of the State of Utah and being arbitrary and beyond any authorized statutory procedures, are in contravention of Article 1 Section 7 of the Constitution of the State of Utah and the Fourteenth Amendment to the Constitution of the United States; and that the Commission of Business Regulation and the Department of Registration in the actions and threatened actions are acting beyond their jurisdiction.

We call the attention of the court to the fact that there is no question here involved touching upon the public health. No question has been raised touching upon the qualifications of the plaintiffs, nor is there any question as to comparative qualifications between the plaintiffs and others licensed in the healing arts by the Department of Registration. There has never been any contention by the Department that these plaintiffs lack the qualifications to practice in accordance with the licenses which have previously been issued to them. In fact, it is admitted that they have met all educational requirements. The educational requirements, and the showing that the tenets of their schools cover the full scope of the licenses as heretofore issued, speak affirmatively of the fact that they do possess the necessary qualifications. Nevertheless, that is not an issue in these proceedings. The only issue to be decided is as to whether or not they have the right under the licenses issued in accordance with the statutes of the state of Utah, as administratively interpreted over the years, to practice as

they have been doing. It is not a question as to what they should or should not be permitted by statute to do. It is solely a question as to what the statutes, as interpreted, do permit them to do.

We submit that the interpretation previously placed on such statutes, and followed administratively for 17 years is the proper one and that no deviation therefrom should be permitted in the absence of legislative change.

### CONCLUSION

Plaintiffs accordingly respectfully submit that this Court should enter its orders as prayed in plaintiffs' Complaint.

Respectfully submitted,

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