Present : Garvin J.

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600—P. C. Colombo, 42,475.

Medical registration—Massage—Manual treatment for cure of disease—Surgery—Ordinance No. 2 of 1905, s. 19 (b).

Manual treatment directed to the cure of disease, which amounts to nothing more than massage, is not surgery within the meaning of section 19 (*b*) of the Medical Registration Ordinance.

APPEAL from a conviction by the Police Magistrate of Colombo. The facts appear from the judgment.

H. V. Perera, for appellant.

Basnayake, C.C., for respondent.

January 18, 1929. GARVIN J.—

The appellant, Mrs. Starr, was charged and convicted of the following offence :—That she, not being a person registered under Ordinance No. 2 of 1905, did practice medicine and surgery for gain and thereby committed an offence punishable under section 19 (*b*) of the said Ordinance.

This prosecution is based solely on the facts and circumstances of the case of a Mrs. Ashford who died on May 25, 1928. An inquest was held and a post-mortem examination made by Dr. Scharenguivel, who expressed the opinion that the cause of death was hyperpyrexia (high temperature) due to malaria. Apart from this opinion there is no evidence that Mrs. Ashford suffered from malaria or any other type of fever. There is certainly no evidence that Mrs. Starr was invited to or professed to treat her for malaria. Miss Nell, who was in constant attendance, says nothing of malaria ; she merely states as a fact that she took Mrs. Ashford's temperature the day before she died—" it was sub-normal."

Assuming, though there is no specific evidence on the point, that Mrs. Starr attended this lady on the day of her death and was aware that she had fever, there is nothing to show that she did not suggest that a duly qualified medical man should be called in, or that she omitted to do so herself. She never gave Mrs. Ashford any drugs (see evidence of Miss Nell). There is therefore no evidence upon which Mrs. Starr can be convicted of practising medicine. Counsel for the respondent did not attempt to support the suggestion that

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Mrs. Starr practised medicine, and a perusal of the Magistrate's judgment indicates that the conviction of Mrs. Starr of practising medicine was due to inadvertance.

The question for consideration is whether she was rightly convicted of having practised surgery.

The late Mrs. Ashford had been suffering from creeping paralysis for about 2 years and 2 months before her death. She had been attended by medical men in Ceylon and had also received treatment in hospital. She was taken to England, but the doctors there said nothing could be done for her, and on advice she returned to Ceylon. Mr. and Mrs. Ashford, on the recommendation of friends, decided to try Mrs. Starr and called on her. Manifestly Mrs. Starr was called in to deal if she could with the paralysis, which the medical evidence ascribed to a disease of the spine. Mrs. Starr was not and did not represent herself to be a physician or surgeon. When the members of the faculty pronounced Mrs. Ashford's case incurable it was decided to try Mrs. Starr's methods, which whether it be labelled massage, manipulative therapy, or osteopathy, consisted of manipulation of the body.

The evidence as to what Mrs. Starr did consists mainly of that of Miss Nell, who said in chief—

> " She (Mrs. Starr) used to place her on a table and manipulate the spine "

and in cross examination,—

> " I can't say if the treatment amounted to more than that given by a masseur."

In the evidence of Mr. Ashford one finds the following passage :—

> " I was told by my wife that the treatment Mrs. Starr gave was a sort of massage."

This is all the evidence on the point. It fails to establish that the " manipulation " spoken to by Miss Nell was anything more than ordinary massage. The case in a nutshell is this :—Mrs. Ashford's case had been definitely diagnosed as a disease of the spine by duly qualified members of the profession, both here and in England, who admitted they could do nothing for her. The patient was then taken to Mrs. Starr, whose treatment consisted of manipulation, whether as the Police Magistrate says it was well known to amount to osteopathy or not. There is no evidence that Mrs. Starr diagnosed the case as something different to what the doctors had done, nor indeed that she was asked for or made any diagnosis at all. The fact is that she applied treatment to the spine which everybody is agreed was the seat of the trouble. That treatment is not proved to amount to anything more than massage. Whatever

Mrs. Starr may have done in the case of other persons or at other times, this is all she is proved to have done by the evidence adduced by the prosecution in this case.

The conviction of a person for a breach of section 19 (*b*) of Ordinance No. 2 of 1905, upon evidence which proves nothing against him beyond the bare fact that he treated a part of the body of another for gain by manipulation which is not shown to have amounted to anything more than massage, is only possible if massage can fairly be brought under the head of surgery.

Counsel for the respondent endeavoured to go this length despite the evidence of Professor Smith, the Registrar of the Medical College, which indicated that massage is not considered a surgical operation by the profession.

I am not satisfied that every form of manual treatment directed to the cure of disease, deformities, or injuries necessarily falls within the meaning of surgery under Ordinance No. 2 of 1905, except in so far as such manual treatment has a definite place in the art of surgery and is part of the business of a surgeon. I prefer on this point to accept what appears to be the view of the profession that the manual treatment known as massage is not surgery. It is a form of treatment which, with possibly some exceptions, is administered by persons who are not surgeons and not members of the medical profession and who frequently, if not generally, administer the treatment unsupervised by surgeons. Whether Mrs. Starr has transgressed the law or not must be determined with reference to the facts and circumstances established by the evidence. All that has been proved is that in this case she practised a form of manual treatment which has not been shown to amount to any thing more than massage, which is not surgery.

There is no occasion to attempt to define surgery or osteopathy, or to determine, if that be possible, the dividing line between massage and osteopathy.

I must not, however, be understood, to assent to the proposition that osteopathy is surgery within the meaning of Ordinance No. 2 of 1905, or the definition of surgery upon which it is sought to found that conclusion.

The English cases of *Hall v. Trotter*[1] and *Macnaghten v. Douglas*[2] are instructive. They were both actions by osteopaths to recover charges for professional services rendered. In each case it was contended that the action was barred by the provisions of section 32 of the Medical Act, 1858 (*21 & 22 Vic. c. 90*), which provides that "no person shall be entitled to recover any charge in any Court of law for any medical or surgical advice, attendance, or for the performance of any operation or for any medicine which he shall have both prescribed and supplied unless he shall prove

[1] (*1921-1922*) *38, Times Law Reports 30.* [2] (*1927*) *L. R. 2, K. B. 292.*

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upon the trial that he is registered under this Act." In each case it was held that the section did not apply to osteopathy so as to prevent an osteopath from recovering his charges for treatment as distinct from diagnosis or advice. Presumably the acts which constitute the actual treatment were not regarded as constituting a surgical operation. The language of our Ordinance is, of course, different. The question whether the application of osteopathic treatment apart from advice transgresses the provisions of our Ordinance is one of great difficulty and must await judicial determination if and when it is properly raised in an appropriate case, unless in the meanwhile the intention of the legislature is more clearly declared than it has been in the existing legislation.

At the conclusion of the argument of this appeal, I intimated my view of the matter to counsel engaged in the case. Counsel for the respondent then invited my attention to the circumstance that the offence was punishable with a fine which might extend to Rs. 200 and argued that the Police Court had no jurisdiction to try the case. The contention was entitled to suceed unless the Police Court has been given special jurisdiction to try such cases. I was under the impression that this Ordinance had been amended and reserved my order to consider the matter and give counsel an opportunity to forward to me in writing any further submission which he wished me to consider. Ordinance No. 2 of 1905 has been repealed and replaced by Ordinance No. 26 of 1927, and all offences under that Ordinance have been made triable by the Police Court. But this Ordinance which came into operation on October 5, 1928, has no application to this case, and in the result the contention that the Police Court had no jurisdiction to try this case must be allowed.

I direct that the proceedings be quashed and the accused discharged. It is for the authorities to consider whether in the circumstances this charge should be further prosecuted.

Proceedings quashed.