1775.

CHIROPODY—WHAT DOES AND WHAT DOES NOT CONSTITUTE PRACTICE OF CHIROPODY WITHIN MEANING OF SECTIONS 1274-1 ET SEQ. G. C.—ADVERTISEMENT BY RETAIL SHOE DEALER DISCUSSED.

1. *The advertisement by a retail shoe dealer, of shoes containing arches for the prevention and correction of weak arches, in which it is stated that the manufacturer and designer, or his agent, will be present at the store of such retailer, and advise and assist in the selection of such shoes without additional cost to the purchaser, does not constitute the practice of chiropody within the meaning of sections* 1274-1 *et seq. General Code.*

2. *One who examines or diagnoses a non-systemic foot ailment in connection with the recommendation or sale of an appliance involving or employing some scientific skill or principle, having reference to such ailments, for their care and for relief therefrom and receive as compensation of any kind, directly or indirectly, is practicing chiropody within the meaning of sections* 1262 *and* 1274-1 *et seq. G. C.*

3. *One who announces in a newspaper advertisement that he will so examine, diagnose, recommend or sell such appliance as above stated, is announcing himself as a practitioner of chiropody within the meaning of section* 12694 *G. C., and the sections above mentioned.*

COLUMBUS, OHIO, December 31, 1920.

HON. H. M. PLATTER, *Secretary, State Medical Board, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for the opinion of this department as follows:

> "The Ohio Pedic Association has presented to this office a request for prosecution of men engaged in the exploitation of arch supports and various appliances for the correction of minor foot ailments.
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> "The representatives of this Association allege that advertisements such as are herewith submitted, constitute a violation of the Rules and Regulations of the State Medical Board and the definition of chiropody as adopted by the State Medical Board. The recent decision of the Court of Appeals affirming the constitutionality of the Platt-Ellis Law and the right of the Board to make definition of limited branches and fix their limitations, is held by them as sufficient to convict these advertisers of a violation of Section 12694 of the General Code in this particular:' * * * *the announcing or advertising of a practitioner of medicine and surgery or any of its branches before he has obtained a certificate, etc.* * * *'*
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> "The definition of chiropody as adopted by the State Medical Board is as follows:
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> 'Chiropody consists of the treatment of ailments of hand or foot, non-systemic in character. It shall also include the fitting or recommending of appliances, devices or shoes for the correction or relief of minor foot ailments.'
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> "It should be stated that the latter part of the definition as adopted by the state medical board is more comprehensive than the definition for chiropody as set forth in our standard dictionaries. A hypothetical case is submitted herewith:
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> "Suppose a retail shoe dealer should announce to his trade the sale of a shoe for the correction of fallen arches or minor foot ailments and state that a representative of this shoe or a 'foot expert' would be present to

examine, diagnose and recommend the proper shoe. Suppose also this expert receives no fee for his services from the purchaser of the shoe but receives his compensation either from the local dealer or from the manufacturer of an appliance for the relief of fallen arches. Does such announcement in an advertisement constitute a violation of Section 12694 G. C.?

"Does not the use of the term 'foot expert' constitute as much a violation as a similar announcement by an individual that he is a 'stomach or head expert?'"

With your letter was enclosed samples of advertisements of the character described in your letter. Referring to certain shoes, it is noted that one of these in part states that such shoes "have a flexible arch construction which correctly fits the natural lines of the foot, thereby preventing and correcting weak arches and constant frequent pain from standing or walking. * * * Consult our foot expert." In another by the same firm, it is stated that the designer and inventor of this shoe will be at the shoe merchant's place and that "he will diagnose your foot troubles and personally supervise the fitting." The claim for another of the visiting foot experts is made that his examination and diagnosis "means complete relief from pain and discomfort you have suffered for years." This firm also advertises a particular kind of a shoe, indicating that it will "give you instant comfort and permanent relief from foot troubles." The advertisements so far quoted are of the same general tenure and may be considered together. One other is so essentially different as to require separate consideration.

Sections 1262 et seq. G. C. contain what is known as the State Medical Board act. Pertinent parts of section 1286, defining the practice of medicine and surgery, are:

> "A person shall be regarded as practicing medicine * * * who examines or diagnoses for a fee or compensation of any kind, or prescribes, advises, recommends, administers or dispenses for a fee or compensation of any kind, direct or indirect, a drug or medicine, appliance, application, operation or treatment of whatever nature for the cure or relief of a wound, fracture or bodily injury, infirmity or disease."

In State vs. Gravett, 65 O. S., 289, it was held that under this definition osteopathy, which consisted of a system of rubbing and kneading the body, and did not include the giving of medicine or drugs, was comprehended within the definition of the practice of medicine in this section. This case was later followed and affirmed in the Christian Science case in State vs. Marble, 72 O. S., p. 21. So that a diagnosis, recommendation, administration or giving of a drug, application or treatment, for a fee for the cure and relief of a bodily injury, infirmity or disease, would constitute the practice of medicine as defined in this section, regardless of the theory or principle employed.

However, in the limited practice act (105 O. L. 202) contained in sections 1274-1 to 1274-7, provision is made for what are therein referred to as limited branches of medicine and surgery.

Section 1274-1 of this act provides for the state medical board licensing persons to practice limited branches of medicine and surgery, including chiropody. This section does not define the special branch known as chiropody, but it gives the state board power to "establish rules and regulations governing such limited practice."

Webster defines a chiropodist to be: "One who treats diseases of the hands or feet; especially one who removes corns or bunions."

Acting under the powers of section 1274-1, the board, under the head of "Group 4," has defined this branch as follows:

"Chiropody consists of 'the treatment of ailments of hand or foot, non-systemic in character.'

"It shall also include the fitting or recommending of appliances, devices or shoes for the correction or relief of minor foot ailments."

This brief survey of the statutes suggests for consideration these two questions:

1. Will the things referred to in the advertisements come within the practice of chiropody, as defined in the board's regulation, as above quoted?

2. To constitute the practice of chiropody, is it necessary that a fee or compensation shall be received?

To decide the first question, it is only necessary to consider the latter part of the board's regulation defining chiropody, which in part is:

"It shall also include the fitting or recommending of appliances, devices or shoes for the correction or relief of minor foot ailments."

The things to be done and the services to be performed certainly would be the recommendation of shoes for the relief of minor foot ailments. It is noted in your letter that the definition so adopted is more comprehensive than the definition contained in the standard dictionaries. To give this definition literal effect would be to arbitrarily and unreasonably interfere with the conduct of a legitimate business; a retail shoe dealer, in recommending a certain size or shape of a shoe to avoid or relieve minor foot ailments, would be required to have a license as a chiropodist. The regulation of the board as to shoes can hardly be said to have a reasonable reference to the public health and welfare and consequently it must be held that the second sentence of this definition is ineffective to create a legal definition or rule of action in the matter of the practice of chiropody, and it remains to be seen if the first part of the regulation is independent and divisible from the part last considered. It is believed that it is.

It then remains to be determined if the information set out in the advertisements enclosed comes within the term "treatment of ailments of hand or foot, non-systemic in character."

Without attempting at this time to suggest a general rule for the application of the first part of this definition, it is deemed advisable to consider for a moment the subject of these advertisements. It is noted that the feature of one of them is the incorporation into the sole of a shoe an arch device so built and arranged to conform to the normal shape of the foot, preventing what is known as a falling of the arch and that one of the other shoes is said "to have a flexible arch construction which correctly fits the lines of the foot, thereby preventing and correcting weak arches and constant, frequent pain from standing or walking." As already indicated, without doubt this would fall within the latter part of the definition which has been found to be ineffective, but does the sale of a shoe containing, even though it does, arches of this construction, amount to a "treatment of ailments?" This department is inclined to believe that, regardless of the inducement and attraction of the advertisement, in stressing the idea of cure and prevention of foot ailments, the article advertised still continues to be a shoe and the parts thereof referred to as arches are, nevertheless, parts of shoes for the general fitting and sale of which no license is necessary. It is not believed that the legislature had in mind the regulation and licensing of this kind of a business in making chiropody a limited branch of medicine and surgery, and it is believed that the activities described in the advertisement do not constitute the practice of chiropody as that limited branch is understood in law.

This would seem to render unnecessary the consideration of the matter of fee or compensation in connection with the advertisements quoted.

The other kind of advertisement in part reads:

THE WIZARD FOOT EXPERT

IS HERE NOW

Come meet him. It costs you nothing for examination and diagnosis—but means complete relief from pain and discomfort you've suffered for years. The visiting Wizard Foot Relief Expert is ready and waiting to meet you, examine your stockinged feet and adjust the soft leather inserts in overlapping pockets so as to give you *instant* comfort and *permanent* relief from foot troubles.

WIZARD
Lightfoot
Arch Builders

Take advantage of this special opportunity. If you don't need shoes—come anyhow. We will *fix* your feet up with Wizard Lightfoot Arch Builders, under direction of the visiting expert, in the shoes you are wearing now. If you need new shoes, we will fit them scientifically and correctly so as to make absolute comfort certain. That is what you get when you have, fitted in your shoes, the proper Wizard Lightfoot appliance."

In so far as the fuller developments of the facts in this case may show the recommendation, fitting and sale of shoes so constructed that the arch is in fact a part of the shoe, this advertisement is not considered as such a condition as would bring it, in that respect, within the foregoing conclusion. It will be considered in the particulars quoted, which differ from those previously discussed in this:

The last quoted advertisement contemplates the examination of the foot, a diagnosis of the trouble, scientifically correct fitting of an additional appliance designed to cure or relieve the trouble and the sale of that appliance without a sale of the shoe. The term "diagnosis" is said by Webster to be:

> "1. (Med.) The determination of a disease by means of distinctive marks or characterization."

This is applicable to the term as used here. Of course the examination is the means employed, in part at least, in making such diagnosis, but section 1286, reading "examines or diagnoses" includes not only diagnosing, but examining preparatory to, or as a part of, such diagnosis. Applied to the present facts, these terms mean the determination of non-systemic foot ailments by means of distinctive marks or characterizations.

Because of the provisions of sections 1286 and 1274-4, supra, and of section 12694 G. C., the question must be considered from the viewpoint (1) of actual practice, and (2) the announcement or advertisement of practice, as section 12694 (108 O. L., Part 1, p. 41) in part provides that:

> "Whoever practices medicine or surgery, or any of its branches before obtaining a certificate from the state medical board in the manner required by law, or whoever advertises or announces himself as a practitioner of

> medicine or surgery, or any of its branches, before obtaining a certificate from the state medical board in the manner required by law; * * * ."

shall be fined, etc.

In the determination of actual practice, section 1286 is believed to apply; its general definition of practice of medicine and surgery is somewhat a parent section to the later sections relating to limited branches; as already pointed out, the supreme court held that without the limited practice act, 1286 included all methods of healing. So the practice of a limited branch is to be determined by 1286, subject to later special provisions as to such limited branches. There being no such provisions, it is concluded that the receipt of a fee or consideration, direct or indirect, is necessary to constitute such practice.

Part of this section may be re-quoted:

> "Examines or diagnoses for a fee * * * or advises, recommends * * * or dispenses for a fee a drug * * * or appliance * * * for the cure or relief of a * * * bodily injury, infirmity or disease."

It is rather confusing to consider a question of actual practice from an announcement or advertisement, as the test in the trial of a person accused of such practice without license will not be what he thus says he will do but what he actually does. In practical operation a prosecution under these laws on the facts stated would necessarily be difficult. The primary meaning of the term "appliance" literally, is any means by which something is effected or accomplished instrumentally, such as a device, an implement or tool. However, the facts as to the nature of the thing recommended or sold may become important. To illustrate: If it should develop that this arch is a device embodying or employing no especially scientific principle and is one of more or less general adaptability to the human feet to be applied or fitted to the foot rather mechanically and more according to its size or shape than to its diseased or healthy condition, very much the same as shoes are fitted, then it is doubtful if a court would hold it to be an appliance within the meaning of section 1286. If this term "appliance" is not subjected to some rule of reason, absurd results must follow. An insole to relieve a discomfort or pain when applied to the foot or inserted in the shoe, though being an appliance, would involve no such scientific principle and could be fitted without special skill in all shoes of certain size; shoes themselves are the instrumental means of obtaining relief and to avoid obvious sources of pain or injury.

As to the receipt of a fee, the statute is comprehensive, reading "for a fee or compensation of any kind, direct or indirect." The fact that the advertisement states that the service is free to the purchaser, does not indicate that the person diagnosing, recommending or selling does not receive compensation. The receipt of his fee or compensation from the manufacturer of the arch or from the local dealer, as stated in your letter, does not alter the fact that he does receive compensation. Common knowledge suggests that the purchaser ultimately pays such cost of sale.

Upon the facts presented, a categorical answer on the question of liability for actual practice would hardly be possible, but consistent with the result of the foregoing discussion, it can be said that if the accused examines or diagnoses a foot ailment or recommends or sells an appliance which embodies or employs some scientific skill or principle, having reference to foot ailments for their cure or relief, and receives a fee or compensation therefor, without having obtained a license to practice medicine and surgery, or this limited branch thereof, he has violated the law.

The matter of the liability of such person referred to as the expert under section 12694 for having announced himself as a practitioner, in some respects is simpler.

The thing prohibited by this part of the section is an unlicensed person advertising or announcing himself as a practitioner of medicine and surgery, or any of its branches. Here, unlike the matter of actual practice, the advertisement speaks for itself and is the basis of the state's claim. The test is now reversed and the rule will be that the accused will be judged not by what he does in actual practice, but by the terms of his announcement or advertisement. The advertisement is set out above. The expert is announced as such, and while the detail or principle upon which the appliance is based is not stated, it promises "instant comfort and permanent relief from foot troubles." And again, it is said "we will fit them scientifically and correctly so as to make absolute comfort certain."

Here special skill, the employment of scientific principles, and the relief or cure of a bodily ailment, is promised by the advertiser, who announces that the so-called foot expert can and will accomplish these things. The name "chiropody" is not mentioned, but the things which a chiropodist would do or claim to do are. The law regards the substance, rather than the names, of things, and, by the terms of the announcement, the expert is clearly brought within the definition of section 1286 if the things announced amount to the practice of chiropody. All of the essential elements are present in the announcement unless it be held that the announcement of a practitioner must indicate that a compensation is to be received. In the present case the announcement states that the service is without cost to the purchaser. The fair inference from the statements is that he is the agent or employe of the manufacturer of the arch in question, appearing at the store of the local dealer by agreement or arrangement between such dealer and the manufacturer, and the fair presumption from this is, as stated in your statement of facts, that such expert will receive compensation for such services from one or the other source. There is nothing else in the advertisement to negative this inference.

In view of these facts, it is believed that if the person advertised as the foot expert does not have a license to practice medicine or surgery, or chiropody, the announcement in question is a violation of section 12694 G. C. It perhaps should be added that the facts do not show that this advertisement has been published by the foot expert himself, but may have been published by the local dealer or the manufacturer. This feature of the matter becomes more or less important in view of the terms of the statute which read *"who announces himself."*

If, however, the foot expert has knowledge of such advertisement, and it is published in pursuance to the terms of his employment, or he otherwise aids, abets or procures its publication, he would be liable as having published the same within the terms of section 12360, which provides for the prosecution and punishment of aider and abettor as principals.

Respectfully,
JOHN G. PRICE,
Attorney-General.