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1. LABORATORY—SEROLOGICAL—TESTS FOR SYPHILIS—APPROVED BY STATE DEPARTMENT OF HEALTH—MAY NOT REFUSE TO ACCEPT BLOOD SPECIMENS SUBMITTED FOR TESTS BY LICENSED PHYSICIAN—EXCEPTION, REASONS APPLICABLE ALIKE TO ALL PHYSICIANS—SECTIONS 1243-9, 11188 G. C.
2. STATE DEPARTMENT OF HEALTH, ACTING THROUGH ITS DIRECTOR, HAS POWER AND DUTY TO REVOKE APPROVAL OF LABORATORY IF IT REFUSES TO ACCEPT SPECIMENS SUBMITTED BY LICENSED PHYSICIAN.

SYLLABUS:

1. A laboratory approved by the state department of health to make serological tests for syphilis under Sections 1243-9 and 11188 of the General Code of Ohio may not refuse to accept specimens of blood submitted for such tests by a licensed physician, except for reasons applicable alike to all physicians;

2. In the event such laboratory does so refuse to accept specimens submitted by a licensed physician, the state department of health, acting through its director, has the power and duty to revoke the approval of such laboratory.

Columbus, Ohio, September 18, 1946

Dr. Roger E. Heering, Director of Health
Columbus, Ohio

Dear Sir:

Your request for my opinion is as follows:

"In compliance with the following provisions of the General Code, the director of health has approved local laboratories for the purpose of making serologic blood tests of applicants for marriage license and of pregnant women:

'Section 11188. * * * For the purpose of this act, a standard serological test for syphilis shall be a test approved by the state department of health and shall be made at a laboratory approved to make such tests by the state department of health. * * *'

'Section 1243-9. For the purpose of this act, a standard serological test for syphilis shall be a test approved by the state department of health, and shall be made at a laboratory approved to make such tests by the state department of health. * * *'

"Under the foregoing requirements, the director of health has approved some one hundred laboratories located in various parts of the state. In the procedure set up by the director of health, applicants for approval of laboratories have been required to forward to the director evidence of the qualifications of the person in charge of the laboratory and of the competence of personnel who carry on the procedures followed in making serologic tests for syphilis. These requirements are set forth in the attached personnel record and rules governing approved laboratories.

The question on which I desire to have your opinion is this: Has the director of health any jurisdiction regarding the approval of laboratories, or the operation of laboratories that have been approved, except to see that such laboratories are, and continue to be, competent to make the serologic tests required by law?"

In addition to the facts stated in your request, I am informed through enclosures transmitted therewith that the department of health has promulgated rules for the approval of and governing the conduct of laboratories which perform standard serological tests under the code sections set forth in your inquiry. Such rules, which are formally accepted by laboratories seeking approval, provide, among other things, for standards

of competency, tests to be performed, procedures with respect to the completion and forwarding of forms, etc., and provide in paragraph 16 of such rules that an "approved laboratory" shall comply with the intent, purposes and provisions of the Ohio premarital and prenatal laws.

According to information transmitted with your request, an approved laboratory has refused to accept blood specimens for testing from physicians or surgeons who are holders of degree of Doctor of Osteopathy. In the light of the information supplied, therefore, it appears that your inquiry resolves into the questions:

(1) Whether a laboratory approved by the state department of health to make serological tests for syphilis under Sections 1243-9 and 11188 of the General Code of Ohio may refuse to accept specimens of blood submitted for such tests by a licensed physician, other than for reasons applicable alike to all physicians.

(2) Whether in the event such laboratory does so refuse to accept specimens submitted by a licensed physician the state department of health has a power or duty to revoke the approval of such laboratory.

The present Section 1273 of the General Code of Ohio, which became effective July 30, 1943, provides for admission to practice and certification of practitioners of osteopathic medicine and surgery, along with provision for admission and certification of practitioners of medicine. The term "duly licensed physician" as used in Section 11188 of the General Code, and the term "physician" as used in Sections 1243-6 to 1243-12, inclusive, of the General Code, must therefore be taken to include physicians holding the degree of Doctor of Osteopathy who are licensed under the terms of Section 1274, General Code. Such physicians are, accordingly, subject to the rights conferred and duties imposed by the prenatal law (Sections 1243-6 to 1243-12, inclusive, General Code) and the premarital law (Section 11188, General Code).

Sections 1243-6 to 1243-12, inclusive, impose a mandatory duty upon "every physician" who attends any woman pregnant with child for conditions relating to pregnancy during the period of gestation to take or cause to be taken a sample of blood of such woman at the time of first examination, or within ten days thereof, and to submit such sample to an approved laboratory for a standard serological test for syphilis unless he

is of the opinion that the condition of such pregnant woman does not permit the taking of a blood sample for such submission. Section 1243-8 reads as follows:

“The approved laboratory making the test shall make a report in duplicate of the result of such test on forms prepared and furnished by the state department of health. The original report shall be sent to the physician or health commissioner submitting the specimen, and the duplicate shall be forwarded to the state department of health immediately.”

No provision is made for procedure in the event the approved laboratory does not accept the specimen of blood submitted by the physician.

Section 1243-11 provides:

“Any person who shall wilfully violate any of the provisions of this act shall, upon conviction thereof in a summary proceeding in the county wherein such offense was committed, be sentenced to pay a fine of not less than twenty dollars nor more than one hundred dollars to be paid into the general fund of the said county, and the costs of prosecution, and, upon failure to pay such fine and costs, shall be imprisoned not less than ten days nor more than thirty days.”

Likewise, Section 11188, General Code, imposes a mandatory duty upon persons intending to marry and applying for a marriage license to put in the possession of the clerk of the probate court a statement or statements.

“* * * signed by a duly licensed physician of the state of Ohio, within thirty days of such examination, that each applicant, within thirty days of the filing of the application for the statement or statements, has submitted to an examination to determine the existence or nonexistence of syphilis, which examination has included a standard serological test or tests for syphilis, and that in the opinion of the examining physician the applicant is not infected with syphilis, or, if so infected, is not in a stage of that disease which is communicable or likely to become communicable; * * *.”

Section 11188 provides further:

“* * * The physician's statement shall be accompanied by a statement from the person in charge of the laboratory making the test setting forth the name of the test, the date it was

made, the name and address of the physician to whom report was sent, and the exact name and address of the person whose blood was tested, but not setting forth the result of the test.

For the purpose of this act, a standard serological test for syphilis shall be a test approved by the state department of health and shall be made at a laboratory approved to make such tests by the state department of health. A report of such test shall be forwarded to the examining physician who has submitted the blood sample.

Such laboratory tests as are required to be made by this act shall, on request of the physician submitting the sample and on his certificate that the applicant is unable to pay, be made without charge by the state department of health. Where the test is made in a laboratory other than the laboratory of the state department of health, a copy of the report of the test shall be forwarded to the state department of health."

It may be argued that a laboratory equipped to perform serological blood tests is not per se a public utility but partakes rather of a private enterprise and therefore may elect to refuse the patronage of any physician or physicians, and to discriminate against any physician or group of physicians on a basis satisfactory to its managing directors. On the other hand, the rules promulgated by the state department of health provide that each laboratory approved under the act shall comply with the intent, purposes and provisions of the Ohio premarital and prenatal laws. It is clear from a reading of the premarital and prenatal laws that the legislature in enacting such laws did not have in mind the possibility that a state approved laboratory might refuse to accept specimens of blood submitted by physicians. In fact, it appears implicit in such laws that it is expected that the laboratories shall accept specimens so submitted. See Section 1243-8, General Code, (quoted supra) and the above quoted portions of Section 11188. An argument may be made that in the expression of a mandatory duty on the part of physicians and the omission of express mandatory duty upon the part of such approved laboratories, the legislature must be held to have excluded the implication of such mandatory duty, under the maxim *expressio unius est exclusio alterius*. However, such a holding would defeat the manifest purpose of the laws in question, since no mandatory duty is imposed upon anyone, if not upon the state approved laboratories, to see through to conclusion the tests provided under the premarital and prenatal laws.

It is pertinent at this point to quote from Sutherland Statutory Construction, 3rd Edition, Section 4917, where it is said with respect to the maxim *expressio unius est exclusio alterius*:

“As a tool of statutory interpretation the maxim is important only in so far as it is a syllogistic restatement that the courts will first look strictly to the literal language of the statute to determine legislative intent. And so, where the meaning of the statute is plainly expressed in its language, and if it does not involve an absurdity, contradiction, injustice, invade public policy, or if the statute is penal in nature or in derogation of the common law, a literal interpretation will prevail. Conversely, where an expanded interpretation will accomplish beneficial results, serve the purpose for which the statute was enacted, is a necessary incidental to a power or right, or is the established custom, usage or practice, the maxim will be refuted, and an expanded meaning given. In all cases the numerous intrinsic and extrinsic aids of interpretation are of importance in ascertaining whether the maxim will prevail.”

Certainly, a beneficial result would be achieved if the laboratories approved by the state under the prenatal and premarital laws were to be held to have a duty under such laws to accept without discrimination the specimens of blood submitted to them by physicians for serological tests. The confusion which may result from an opposite view is apparent. As previously pointed out, no duty exists on the part of anyone, if not on the laboratory, to see through to conclusion the serological tests required under the laws under consideration herein, since the duty of the physician in each case is discharged, as far as the statutes are concerned, upon his “*submission to an approved laboratory*” for a standard serological test. See Section 1243-6, General Code. Careful examination of Section 1243-8 clearly indicates that the legislature has assumed that there is no question concerning the acceptance of blood specimens by approved laboratories inasmuch as such section begins “The approved laboratory making the test shall * * *.” The assumption that an approved laboratory will be making the test is unwarranted if discretion is vested in such laboratory as to what samples it will accept and what samples it will reject.

Likewise, an assumption that a laboratory approved by the state department of health will make the test is inherent in the provisions of Section 11188, in which it is said:

“A report of such test *shall be forwarded* to the examining physician who has submitted the blood sample.”

(Emphasis supplied.)

It is manifest from an examination of the statutes under consideration herein that it was the intention of the legislature to accomplish a public purpose in the prevention, in so far as possible by premarital and prenatal examinations, of syphilis. Any interpretation of the premarital or prenatal law which would hold that discretion vested in a laboratory duly approved by the department of health, and could operate, in its exercise, to defeat the purpose of the act, would render the action of the legislature to that extent a nullity. Such an interpretation is repugnant to the best principles of statutory construction. In Sutherland Statutory Construction, 3rd Edition, Section 4510, it is said:

“A statute is a solemn enactment of the state acting through its legislature and it must be assumed that this process achieves an effective and operative result. It cannot be presumed that the legislature would do a futile thing.”

If as is my opinion, there is a mandatory duty upon a laboratory approved by the state department of health under the premarital and prenatal laws to accept blood specimens submitted by licensed physicians, the question then arises whether the department of health, acting through its director, has the power and duty to revoke the approval of such laboratory in the event the laboratory refused to perform such duty. This question must be answered in the affirmative. It has previously been pointed out that the regulations of the state department of health relative to approval of laboratories under the prenatal and premarital laws, which rules are accepted by such laboratories as seek approval thereunder, provide for the compliance with the intent, purposes and provisions of the laws presently under consideration. The failure of a laboratory to do so is a substantial failure to qualify under the rules of the state department of health for approval under the premarital and prenatal laws.

It is my opinion, therefore, that:

- (1) A laboratory approved by the state department of health to make serological tests for syphilis under Sections 1243-9 and 11188 of the General Code of Ohio may not refuse to accept specimens of blood submitted for such tests by a

licensed physician, except for reasons applicable alike to all physicians.

- (2) In the event such laboratory does so refuse to accept specimens submitted by a licensed physician, the state department of health, acting through its director, has the power and duty to revoke the approval of such laboratory.

Respectfully,

HUGH S. JENKINS,
Attorney General.