

# Washington University Law Review

---

Volume 18 | Issue 3

---

January 1933

## Physicians and Surgeons—Malpractice—Lack of Skill

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Law Commons](#)

---

### Recommended Citation

*Physicians and Surgeons—Malpractice—Lack of Skill*, 18 ST. LOUIS L. REV. 266 (1933).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol18/iss3/13](https://openscholarship.wustl.edu/law_lawreview/vol18/iss3/13)

This Comment on Recent Decisions is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

If the sale is confirmed the mortgagor may still persuade the court to refuse a deficiency judgment. On the question of non-statutory equitable jurisdiction to render a deficiency judgment see: *Sacramento Bank v. Copsey* (1901) 133 Cal. 663, 66 Pac. 8; *Voorhis v. Crutcher* (1929) 98 Fla. 259, 123 So. 742; *Dunkley v. Van Buren* (N. Y. 1818) 3 Johns. Ch. 330; *Young v. Vail* (1924) 29 N. M. 324, 222 Pac. 912; 3 Jones, Mortgages (8th ed. 1928) 712, 725. Here as in the setting aside of a sale inadequacy of price is no defense unless accompanied by fraud or misconduct on the part of the plaintiff. *Pfeiffer v. Missouri State Life Insurance Co.* (1928) 177 Ark. 1013, 8 S. W. (2d) 505; *Anderson v. Walsh* (1923) 109 Neb. 759, 192 N. W. 328; *Mahoney v. Kurth* (1916) 163 Wis. 56, 157 N. W. 539; 3 Wiltsie, Mortgage Foreclosure (4th ed. 1927) 1217. In Florida the granting of a deficiency judgment is made discretionary with the court. *Taylor v. Prime* (1931) 101 Fla. 967, 132 So. 464; G. L. Fla. (1927) sec. 5751.

The principal case has gone beyond the accepted theories. General economic prostration has not heretofore been held to be a circumstance which, with inadequacy of price, will justify a denial of deficiency judgment. The trial court, influenced by local opinion, merely refused to render the personal judgment. The appellate court practically confirms the result but refuses to be so blunt. N. P. '34.

---

PHYSICIANS AND SURGEONS—MALPRACTICE—LACK OF SKILL.—Plaintiff sued for damages caused by the alleged failure of the defendant surgeon to exercise proper care and skill in treating her which resulted in serious illness and much physical and mental suffering. The trial court instructed the jury that the defendant was required to "possess and use that degree of knowledge, skill, and care ordinarily possessed and used by competent and skillful surgeons in St. Louis or similar communities". On appeal this instruction was held correct. *Sennert v. McKay* (Mo. 1933) 56 S. W. (2d) 105.

That a physician or surgeon must possess and use knowledge, skill and care, etc., is not new in Missouri. *Vanhooser v. Berghoff* (1886) 90 Mo. 487; *Krinard v. Westerman* (1919) 279 Mo. 680, 216 S. W. 938; *Trask v. Dumnigan* (Mo. 1927) 299 S. W. 116. However this has not been construed to mean that the physician is liable if he did not possess the required knowledge, skill and care if damage occurred from that cause alone, but rather that he is liable only when he fails to use the required knowledge, skill and care and thereby causes injury to the plaintiff. *Grainger v. Still* (1904) 187 Mo. 213; *MacDonald v. Crider* (Mo. 1925) 272 S. W. 980; *Hill v. Jackson* (1924) 218 Mo. App. 210, 265 S. W. 859. This is also the federal view. *Kallock v. Hoagland* (C. C. A. 6, 1917) 239 F. 252. Other states concur in this construction, and it appears that it is the weight of authority in America. *Talley v. Whitlock* (1917) 199 Ala. 28, 73 So. 976; *Markart v. Zeimer* (1925) 70 Cal. App. 52, 232 Pac. 715; *Wood v. Vromann* (1921) 215 Mich. 449, 184 N. W. 520; *Lollé v. Gray* (1925) 101 N. J. L. 337, 128 Atl. 256. The importance of *Sennert v. McKay* nevertheless will be far reaching if the dictum which it ex-

presses is adopted in subsequent decisions, for in this case the court stressed the fact that the petition charged "negligence" rather than "unskillfulness". The opinion seems to admit that if the petition had charged unskillfulness an instruction would have been proper which would have allowed recovery if the defendant physician had merely failed to "possess" the requisite knowledge. If this is true, then the court is departing from its past decisions and is adopting the old common law to the effect that it is the party's own fault if he undertakes without having sufficient skill, or if he applies less than the occasion requires. Story on Bailments sec. 431; 3 Shars. Blacks. p. 122, and note, and p. 169; *Connor v. Winton* (1856) 8 Ind. 315. Perhaps this would be the better rule, since then recovery for damage from treatment by the so called "quacks" would be made easier for innocent victims.

It is interesting to note further that the instruction as affirmed requires "the defendant to possess and use that degree of knowledge, skill and care ordinarily possessed and used by competent and skillful surgeons in *St. Louis or similar communities*." To use this instruction the jury may judge the defendant either according to physicians in St. Louis, or according to the skill which physicians in similar localities ordinarily possess. In a previous case the Missouri Supreme Court took the position that there should be no limiting the standard for judging the skill of a physician to the local vicinity of the practitioner. *Krinard v. Westerman*, *supra*. On the other hand, Missouri has held that a physician should possess and use that degree of skill and learning ordinarily possessed and exercised by members of his profession in similar localities. *Trask v. Dunnigan* (1927) 299 S. W. 116. The federal courts as well as the majority of the states have adhered to the opposite view. *Kallock v. Hoagland* (C. C. A. 6, 1917) 239 F. 252; 21 R. C. L. p. 381 and note.

It may be inferred that the instruction is a departure from the established rule in Missouri, since it allows the jury to choose between two alternatives. The argument against the federal rule is that it subjects one to a test in his own locality regardless of the fact that his particular community may be of higher standard than the average and thereby places the defendant at a disadvantage. Likewise if the locality in which the physician practices fosters a lower grade of physicians than similar communities, then the plaintiff suffers. The safer and more liberal standard in regard to determining the skill and care of a physician seems to be the one which Missouri has followed in the past. Let us hope that this case will not be extended to change that rule.

H. G., '35.

---

**TAXATION—UNITED STATES INHERITANCE TAX—"PROPERTY SITUATED IN THE UNITED STATES".**—The decedent was a subject of Great Britain and a resident of Cuba. On his death there were found in a safe deposit box in New York City certain stocks and bonds of domestic corporations and other stocks and bonds issued by corporations incorporated outside of the United States. *Held*: Both classes of securities are subject to the federal estate tax. *Burnet v. Brooks* (1933) 53 S. Ct. 457.