aggravated his injuries to an extent that will account for the mischief complained of, he cannot recover damages from the medical man, having regard to the general law of contributory negligence. The burthen of proof to shew contributory negligence is, of course, on the defendant in an action for malpractice.

The failure on the part of a medical man to give a patient proper instructions as to the care and use of an injured limb is negligence for which the medical man is liable for injury resulting therefrom.

These are the principal propositions of law involved in the consideration of the present case.

In addition to the cases cited above, I refer to Slater v. Baker, 1767, 2 Wilson, 359; Carpenter v. Blake, 60 Barbour, 488; same case, 50 N.Y. 696; Beven, Negligence 2nd Ed. page 1390 *et seq.*; Smith on Negligence, Blackstone ed.* 195 *et seq*; American & English Encyc. of law, 1st ed., vol. 14, page 76 *et seq.*; Bouvier Law Dictionary, *sub tit.* Physician.

Actions of this kind were, as a matter of course, formerly tried, both here and in England, by a jury; and it was the almost inevitable result that juries, perhaps innocently and unconsciously, looked more favourably upon the case presented by the patient than on that presented by the physician or surgeon. To remedy this condition of affairs, and not to leave doctors entirely at the mercy of juries, the courts in this country early became astute to lay down limitations and restrictions on the actions of the Twelve; or, rather as to what matters ought to be left to them to deal with. For example, in 1869 the Court of Queen's Bench held in Jackson v. Hyde, 28 U.C.R. 294, that in an action against a surgeon for negligent malpractice, where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury.

In Fields v. Rutherford, 1878, 29 C.P. 113, although there was professional evidence that a different course of treatment might preferably have been pursued, but the weight of evidence showed that the course of treatment pursued by the defendent was such as would have been adopted by medical men of competent skill and good standing in the profession; it was held that there was no evidence of negligence to be submitted to the jury, and a non-suit was entered. These cases were followed in McQuay v. Eastwood, 1886, 12 O.R. 402. The *ratio decidendi* of these cases was, that a medical man ought not to be placed in peril with a jury where their decision would involve the consideration of difficult questions in the region of scientific enquiry.

The next step in the practice was the suggestion by the courts that this class of cases ought more properly to be tried by a judge without a jury. This was the corollary or natural logical sequence of the cases