CONTRIBUTORY NEGLIGENCE IN MALPRACTICE.

The case of *Potter* v. *Warner*, 91 Penn. St. 362; S. C., 36 Am. Rep. 668, is of especial interest to physicians. It is there held that the measure of skill which a physician is bound to exercise is not affected by his refusal of the proffer of assistance from other physicians; and that if a patient contributes to present sufferings and permanent injury, attributed to malpractice of a physician, by disregard of his instructions, either personally or by those in charge of the patient, there can be no recovery in damages.

On the first point the court said: "Having assumed the charge of the boy Warner, the measure of professional skill which the plaintiff in error was bound to exercise did not depend on whether or not he refused the proffered assistance of other medical men. His refusal was no more than an implied declaration of his ability to treat the case properly. By assuming and continuing the charge of the patient, he was under an obligation to exercise a degree of skill which was neither increased nor diminished by such refusal." This doctrine will prove a gratification to the sensitive jealousy of the medical profession. It would be hard on the doctors to charge them with negligence in failing to call in a hated rival.

On the other point the court said: "The court, however, said to the jury, 'the doctrine of contributory negligence, if it is properly applied to this case, does not control it. The defendant is charged with unskillfulness and negligence in his professional treatment of the plaintiff. If he was guilty of unskillfulness or negligence which directly caused any injury to the plaintiff, he is responsible for such injury to the plaintiff; but of course he is not responsible for any injury resulting from any other cause. For instance, the permanent deformity of the limb may have resulted from the fault of the boy or his parents, for which the defendant could not be responsible; yet if the boy suffered unnecessary pain or a protracted illness from the fault of the defendant he would be responsible for that.' The learned judge failed to give due legal effect to contributory negligence of the defendant in error. It is true the plaintiff in error was charged with negligence and unskillfulness. Although guilty thereof, yet it did not necessarily follow that he was liable in damages therefor. If the contributory negligence of the defendant in error united in producing the injuries complained of, he was not so liable. This rule applies to the unnecessary pain and protracted illness as well as to the permanent deformity of the limb. The evidence is amply sufficient to submit to the jury the question of contributory negligence on the part of the defendant in error. If they find the parents of the boy were in charge of and nursed him during his sickness, and that they did not obey the directions of the plaintiff in error in regard to the treatment and care of their son during such time, but disregarded the same and thereby contributed to the several injuries of which he complains, he cannot recover therefor. If the injuries were the result of mutual and concurring negligence of the parties, no action to recover damages therefor will lie. A person cannot recover from another for consequences attributable in part to his own wrong."

The editor of the American Reports appends the following note to this case: "In *Hibbard* v. *Thompson*, 109 Mass. 286, it was held that a patient cannot recover, either in contract or in tort for injuries consequent upon unskillful or negligent treatment by his physician, if his own negligence directly contributed to them to an extent which cannot be distinguished and separated. The court said, the instructions 'seem to us to contain a careful and accurate discrimination between the different aspects of the case as the jury might find the facts to be.' They were first instructed that 'if it be impossible to separate the injury occasioned by the neglect of the plaintiff from that occasioned by the neglect of the defendant the plaintiff cannot recover;' but the judge added: 'If however they can be separated, for such injury as the plaintiff may show thus proceeded solely from the want of ordinary skill or ordinary care of the defendant he may recover.' The first part states the ordinary rule as to the negligence of the plaintiff; the second states the proper limitation of the rule. It is an important limitation, for a physician may be called to prescribe for cases which originated in the carelessness of the patient, and though such carelessness would remotely contribute to the injury sued for, it would not relieve the physician from liability