

just read, renders a physician incompetent to testify as to the physical condition of a patient in those cases only where the patient or his legal representatives insist that he shall not testify. In other words, the statute is construed in this state as conferring a privilege merely, that may be waived; it is not declaratory of any public policy. The public is not concerned in excluding the testimony of a physician as to the condition of a patient, if the patient himself does not object to such disclosures. In this respect the courts of this state follow the rulings in New York and Michigan, under a similar statute, as appears by the cases of *Cohen v. Insurance Co.*, 41 N. Y. Super. Ct. 296; *Railroad Co. v. Martin*, 41 Mich. 667, 3 N. W. Rep. 173. As the patient is at liberty to waive the privilege which the law affords him, it appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit is brought; and if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on any one who claims under the contract, whether it be the patient himself or his representative. The result is that, inasmuch as the assured by this application waived the privilege which the statute affords him, the father, for whose benefit the policy was issued, and who is now suing on the contract, is bound by that waiver. I therefore hold that the testimony is admissible.

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KEENER v. UNION PAC. RY. CO.

(Circuit Court, D. Colorado. May 7, 1888)

**NEW TRIAL—AS OF RIGHT—TIME OF MOTION.**

After judgment for defendant in an action for the possession of land, plaintiff paid the costs, and filed a motion for a new trial before the first day of the succeeding term. *Held*, under Code Civil Proc. Colo. §254, providing that the party against whom such judgment is rendered may, at any time "before the next succeeding term," upon paying all costs, have the judgment vacated upon application to the court, that the motion was in time, and that delay of the court in acting upon the motion did not defeat the right granted by the Code.

At Law. On motion for new trial. For the original report see 31 Fed. Rep. 126.

*Wells, McNeal & Taylor*, for plaintiff.

*Teller & Orahoad*, for defendant.

BREWER, J. After judgment for defendant in an action for the possession of real property, plaintiff paid the costs and filed a motion for a new trial before the first day of the succeeding term, and now asks an order of the court vacating that judgment, and granting him a new trial. It is objected that the application is not made in time. The statute (Code Civil Proc. § 254) provides that, when judgment shall be rendered,

etc., "it shall be lawful for the party against whom such judgment is rendered at any time before the next succeeding term, to pay all costs recovered thereby, and upon application the court shall vacate such judgment." It seems to me the party has brought himself within the very letter of the statute. It says, "before the first day of the next succeeding term." The party did pay the costs, and did file his motion, and that is making his application. Delay in the action of the court does not defeat his right. The hardship of this case, if there be hardship, ought not to interfere with the general rule. The case must be controlled by that rule. Judgment vacated, and a new trial ordered.

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UNITED STATES *v.* HARMON *et al.*

(District Court, D. Kansas. May 1, 1888.)

POST-OFFICE—MAILING OBSCENE MATTER—INDICTMENT.

An indictment under Rev. St. U. S. § 3893, charged defendants with mailing "a certain obscene, lewd, and lascivious paper and publication of an indecent character called 'Lucifer,' which paper and publication is so obscene, lewd, and lascivious as to dispense with the incorporation of the words and figures in this indictment," etc. *Held*, on demurrer, that the identification of the obscene matter was insufficient, neither the date of the paper, nor the title of the article, nor its general tenor or purport being given; and that the indictment was therefore bad.

Indictment under Rev. St. U. S. § 3893, prohibiting the mailing of obscene matter, etc. On demurrer.

*David Overmyer* and *G. C. Clemens*, for the demurrer.

*W. C. Perry*, Dist. Atty., *contra*.

FOSTER, J. This indictment is drawn under section 3893, Rev. St. It charges that the defendants did unlawfully and knowingly deposit in the United States post-office at Valley Falls, in this district, addressed to, and for the purpose of mailing and delivering to various parties therein named, through the United States mails, a certain obscene, lewd, and lascivious paper and publication of an indecent character, called "Lucifer," which paper and publication so deposited for mailing is so obscene, lewd, and lascivious as to dispense with the incorporation of the words and figures in this indictment, said parties well knowing that said paper and publication was non-mailable matter, contrary to the form of the statute, etc. It will be observed that the paper alleged to be obscene, and to have been mailed by the defendants, is not described or identified in any manner except by its title, "Lucifer." It appears to have been a newspaper published at stated periods at Valley Falls. The date of the particular issue is not set out, nor is the article or articles complained of identified by title or contents. There have been a great number of the paper issued entitled "Lucifer," and probably mailed to these same par-