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*Writ of Error to Supreme Court.***WRIT OF ERROR.**

NEW JERSEY, ss.

The State of New Jersey to our Justices  
of our Supreme Court. GREETING:

(SEAL)

Because in the record and proceedings  
and also in the giving of the judgment upon  
a certain indictment, which was in our  
said Supreme Court before you, between the State, de-  
fendant-in-error, and John J. Kashkevich, plaintiff-in-  
error, on a writ of error issued out of the Supreme Court,  
to the Judges constituting the Court of Quarter Sessions  
in and for the County of Essex, as is said, manifest error  
hath intervened to the great damage of the said John J.  
Kashkevich, as from his complaint we have received in-  
formation, we be willing in this behalf to correct the  
error in due manner, if any there shall be, and that  
speedy justice be done to him, the said John J. Kash-  
kevich, do command you that if judgment be given,  
then you send distinctly and openly under your seal, the  
entire record, proceedings and indictment aforesaid, with  
all things touching and concerning the same, to our  
Court of Errors and Appeals, before the Judges thereof,  
in the twenty-fifth day of November, 1922, and this writ,  
and that the record and proceedings aforesaid being in-  
spected we may cause to be further done what of right  
and according to law ought to be done.

WITNESS, Hon. Edwin Robert Walker, Chancellor and  
President Judge of our said Court of Errors and Appeals,  
at Trenton, aforesaid, the 6th day of November, in the  
year of our Lord one thousand, nine hundred and twenty-  
two.

THOS. F. MARTIN,  
*Clerk.*

JAMES R. McDERMIT,  
*Attorney.*

A true copy.

THOMAS F. MARTIN,  
*Clerk.*

*Return to Writ.*

**RETURN.**

10 The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. J. GUMMERE,  
C. J.

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WRIT OF ERROR.

New Jersey Supreme Court

NEW JERSEY, ss.

(SEAL) The State of New Jersey, to our Judges 10  
of our Court of Oyer and Terminer, of  
the County of Essex, constituting the  
Court of General Quarter Sessions, in and for the said  
county, GREETING:

Because in the record and proceedings and also in the  
giving of judgment upon a certain indictment in the name  
of the State of New Jersey against one John J. Kash-  
kevich, for abortion, in the City of Newark, in the said  
County of Essex, found in our Court of Oyer and Ter-  
miner and in and for said county, heard and determined, 20  
manifest error hath intervened to the great damage of  
him, the said John J. Kashkevich, as from his complaint  
we have received information, we being willing in that  
behalf to correct the error in due manner, if any there  
shall be, and that speedy justice be done to him, the  
said John J. Kashkevich, do command you that if judg-  
ment be thereupon given that then you do send the record  
and proceedings aforesaid together with all things touch-  
ing and concerning the same, to us under your seal, dis-  
tinctly and openly, and this writ, so that we may have 30  
them before our Supreme Court of Judicature, at Tren-  
ton, on the fifth day of March next, that inspecting the  
records and proceedings aforesaid, we may further do  
thereupon for correcting the error that which of right  
and according to law, shall be fit to be done.

*Return.*

WITNESS, William S. Gummere, Chief Justice of our said Supreme Court, at Trenton, the 14th day of February, A. D. one thousand nine hundred and twenty-one.

ENOCH L. JOHNSON,  
*Clerk.*

10 McDERMIT & McDERMIT,  
*Attorneys.*

FRANK M. McDERMIT,  
*Counsel.*

**RETURN.**

20 STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

I, FRED G. STICKEL, JR., Judge of the Court of Quarter Sessions Court, Essex County, New Jersey, do hereby certify and return to the Supreme Court of Judicature of the State of New Jersey, the indictment and all things touching and concerning the same, together with the entire proceedings had at the trial, as by the within writ to me directed I am commanded.

30 IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County, at Newark, N. J., this 13th day of May, A. D. 1921.

(SEAL) FRED G. STICKEL, JR.,  
*Judge of the Court of Quarter  
Sessions, Essex County, N. J.*

Presented in open court, this 14th day of February, 1921.

40 FRED G. STICKEL, JR.,  
*Judge.*

*Indictment.*

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.

Be it remembered, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex, on the third Tuesday of September, in the year of Our Lord, one thousand nine hundred and twenty, by the Honorable William S. Gummere, Chief Justice of the Supreme Court of Judicature, of the State of New Jersey, and holding the said Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of Union Noble Bethell, James T. Reid, Hans Anderson, Geo. Linnett, Sol Berla, Raymond W. Kierstead, James F. Mullaney, Albert J. Holle, Lawrence E. Kocher, David B. Nathan, Nathan Goldsmith, Adrian G. Chamberlain, Thomas Goldingay, Geo. T. Mills, Michael H. Connelly, C. P. Oschwald, Wm. E. Van Buskirk, James Smith, 3rd, Wm. W. Young, Leslie B. Miller, J. J. Henry Muller, Jr., Alfred Klauber, Allison P. Clark, good and lawful men of the said County of Essex, duly commissioned and then and there duly sworn and charged to enquire in behalf of the State of New Jersey, in and for the said County of Essex, it is presented in manner and form following, to wit:

ESSEX OYER AND TERMINER.

September Term, A. D. 1920.

Essex County, to wit: The Grand Jurors of the State of New Jersey, in and for the body of the County of Essex, upon their oath present that John J. Kashkevich, late of the City of Newark, in the County of Essex aforesaid, on the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and twenty, with force and arms at the City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, unlawfully, maliciously and without lawful justification, in

*Indictment.*

and upon one Mary Czernea, a woman then pregnant with child, did use divers instruments to the Grand Jurors aforesaid unknown, with intent to cause and procure the miscarriage of the said Mary Czernea, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same. And the Grand Jurors of the State  
 10 of New Jersey, in and for the body of the County of Essex upon their oath aforesaid, do further present that the said John J. Kashkevich, late of the City of Newark, in the County of Essex aforesaid, on the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and twenty, with force and arms at the City aforesaid, in the County aforesaid and within the jurisdiction of this Court, did maliciously and without lawful justification, with intent to cause and procure the miscarriage of one Mary Czernea, a woman then pregnant with child,  
 20 administer to and prescribe for the said Mary Czernea, and advise and direct her, the said Mary Czernea, to take and swallow a certain poison, drug, medicine and noxious thing, to the Grand Jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of the State, the government and dignity of the same.

And the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex upon their oath  
 30 aforesaid, do further present that the said John J. Kashkevich, late of the City of Newark, in the County of Essex aforesaid, on the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and twenty, with force and arms at the City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, unlawfully, maliciously and without lawful justification, in and upon one Mary Czernea, a woman then pregnant with child, did use divers means, to the Grand Jurors aforesaid unknown, with intent to cause and procure the miscarriage of the said Mary Czernea contrary  
 40

*Plea.*

to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

J. H. HARRISON,  
*Prosecutor of the Pleas.*

10

On the sixteenth day of November, A. D. nineteen hundred and twenty, on which day the said indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, and the said Justice did then and there order the said indictment to be handed down to the Court of Quarter Sessions, and to be delivered to the Clerk of the Court of Quarter Sessions, in and for the said County of Essex, and then and there the said indictment was duly delivered and duly filed by the Clerk of said Court and an entry of such order and delivery and filing was then and there made in the minutes of said Court at the same time pursuant to the statute in such case made and provided.

20

And afterwards, that is to say, on the eighteenth day of November, A.D. nineteen hundred and twenty, at a Court of Quarter Sessions, holden at Newark, in and for the County of Essex, before the Honorable Fred G. Stickel, Jr., presiding judge of the Court of Common Pleas, John J. Kashkevich, in the custody of Samuel F. Wilson, Sheriff of the County of Essex aforesaid, and the said John J. Kashkevich being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, says that he is Not Guilty thereof, and therefore for good and evil he puts himself upon the country, &c., and J. Henry Harrison, prosecutor of the pleas of said State, for said County of Essex in this behalf doth the like.

30

40

*Judgment.*

Therefore, let a jury thereupon come before the Court of Quarter Sessions to be holden at Newark, in and for the County of Essex, on the sixth day of December, A. D. nineteen hundred and twenty, then next ensuing twelve free and lawful men, each of whom shall be a citizen of this State and resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said John J. Kashkevich to recognize upon their oath whether the said John J. Kashkevich is guilty of the premises in the said indictment specified or not guilty because the said J. Henry Harrison, Esquire, prosecutor, &c., as the said John J. Kashkevich puts himself upon the jury and the same time is given to the parties aforesaid at the same place.

And afterwards, that is to say, the tenth day of January, A. D. nineteen hundred and twenty-one, to which day the trial of aforesaid indictment was postponed, at the same Court of Quarter Sessions, holden before the Honorable Fred G. Stickel, Jr., Judge of the Court of Common Pleas, comes the said J. Henry Harrison, who prosecutes as aforesaid, and the said John J. Kashkevich, and the jury of whom mention is before made, and by Samuel F. Wilson, Sheriff of the County of Essex, for this purpose empanelled and returned to wit: after the following number were exhausted: by the State 2, by the defendant 3, John H. Smith, Louis Herman, James F. Bacon, William Rommel, Michael J. Clark, Alfred C. Eickhorn, Edward J. Kearns, Bert Reicheimar, Frederick A. Clarkson, Charles M. Coons, I. Weston Kayle, Charles Doolittle, being called were sworn upon that jury who to speak the truth of and concerning the premises and thereupon the trial of said issue was commenced and continued when the jury returned into Court in charge of the officer sworn to attend them and then and there in

*Judgment.*

the presence of the prosecutor, defendant and Court do say upon their oath, they find the said defendant, John J. Kashkevich guilty, and so they say all.

Judgment signed  
February 14, 1921.

FRED G. STICKEL, JR.,  
*Judge, &c.*

Whereupon all and singular, the premises being seen and by the Court now here fully understood, it is on this fourteenth day of February, A. D. nineteen hundred and twenty-one, ORDERED and adjudged that the said John J. Kashkevich be committed to the State Prison of this State for a term of not less than two years and not more than seven years at hard labor upon this conviction and from thence until the costs are paid, which said costs are taxed by the clerk at the sum of forty-five dollars and fifty-one cents, and the said defendant be in mercy, etc.

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*Mary Czernea, direct.*

ESSEX COUNTY COURT OF QUARTER SESSIONS.

Monday, January 10, 1921.

10	STATE, <i>vs.</i> JOHN J. KASHKEVICH.	}	<i>Indictment          No. 82, for          Abortion.</i>
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Before Honorable Fred G. Stickel, Jr., Judge, and a jury.

Wilbur A. Mott, assistant prosecutor of the pleas, for the State.

James R. McDermit for defendant.

20 Mr. Mott opens for the State.

MARY CZERNEA, sworn in behalf of State, testifies through the interpreter.

*Direct examination by Mr. Mott.*

Q Where do you live? A 661 High street.

Q Do you work there? A Yes.

Q For whom do you work there? A Dr. Haussling.

30 Q How long did you work there for Dr. Haussling? A Three months.

Q Well, where did you work before that? A Mr. Fort.

Q Where is that? A On Clifton avenue; I forget the number.

Q How long did you work for Mr. Fort, on Clifton avenue? A Two years and four months.

Q Do you know the defendant, Dr. Kashkevich? A Yes.

40 Q Did you go to see him? A Yes.

*Mary Czernea, direct.*

Q Do you remember when? A (In English.) Just, I cannot tell what time; I cannot tell the month; I cannot tell the date. (Through the interpreter.) April, but I cannot tell the date.

Q In April last? A April last.

Q I show you a card. Whose handwriting is that on the back of this card, do you know? 10

(Question withdrawn.)

Q Did you ever see this card before? A I went to see Dr. Kashkevich and he gave it to me.

Q Do you know who wrote the date on the back of that? Whose writing that is on the back of that card?

A No.

Q Was that writing there when he gave it to you? A No.

Q What did you say to the doctor when you went to see him? A I went there and asked him if he couldn't help me; I am in the family way. I told him, if I will be sick I don't want him to do anything to me; I don't want to get blood poisoning; and he told me no. I was there on Wednesday. He told me to come back on Friday. I came on Wednesday and he told me to come back on Thursday. I told him, "I am very much afraid." He told me I couldn't be afraid, and then he performed the operation and I went home. 20

Q Did you pay him any money? A On Wednesday I gave him two dollars. On Thursday I gave forty-five dollars. 30

Q And on which day did he perform the operation? A On Thursday.

Q On Wednesday you gave him two dollars? A And on Thursday forty-five.

Q Now, you say he performed an operation. What did he do with you? A I have not seen what he has done; I have been lying on the operation table. 40

*Mary Czernea, direct.*

Q Well, what part of your body was he working on?

A In my privates; because he put something in there.

Q Did you see the thing he put in your privates? A I seen he has taken two instruments, one was scissors and the other, I cannot tell.

10 Q What do you mean, you cannot tell? That you did not see it or you cannot describe it? A I have seen him, but I cannot tell what they call it.

Q What kind of a looking thing is it? A Like forceps. They opened.

Q How long were you on the operating table on the day of the operation? A Twenty-five minutes.

Q Did you tell the doctor anything about how long you had been in the family way? A I did.

20 Q What did you say to him? A I told him it was about three months. He said, "It does not matter—three and a half months—" he says, It does not matter; he can fix me up.

Q After you paid the doctor the forty-five dollars on that day, where did you go? A I had off, on Friday, and I went to my friend's.

Q Where? A Down town. I don't know the name of the firm, the name of the street; I cannot tell the name of the street; what it means, but I went home at seven o'clock that day.

30 Q What time was it when you left the doctor's office? A I cannot tell.

Q Well, about what time? A I cannot remember what time I have left there. I know what time I went there.

Q What time did you get there? A Two o'clock.

40 Q After you went home from your friend's and went to bed, did you have any other doctor? A The following week; on Sunday and Monday of the following week. On Friday I went back to work. On Saturday and Sunday I was lying in bed, and on Monday they brought in a doctor.

*Mary Czernea, cross.*

Q That is, Dr. Condon? A Yes.

*Cross examination by Mr. McDermit.*

Q How old are you? A Twenty-seven.

Q Your home is in Perth Amboy, isn't it? A I worked here in Newark. When I came out of the hospital I went to Perth Amboy.

10

Q Prior to your working in Newark you lived in Perth Amboy? That is, you came from Perth Amboy to Newark and got a job, didn't you? A When I have been in Newark I worked in Newark. This is the fourth year I am here.

Q You speak English pretty well, don't you? You understand what I am saying to you? A (In English.) Yes.

Q Now, when you went to the doctor's place—on Thursday, were you there? A (In English.) Yes; first Wednesday, and second, Thursday.

20

Q On the first visit that you made to the doctor, before anything was done to you at all, didn't you tell the doctor that you had womb trouble to a degree that you missed your menstruations quite frequently? A (Through the interpreter.) No.

Q Didn't he examine you about the stomach with his hands? A No.

Q He examined you up here (indicating) twice? A Yes, that is all.

30

Q Then did he examine you down below? A No.

*The Court.* "Up here" referred to the breast.

*Mr. McDermit.* Referring to the breast.

Q And didn't he say to you, after he had felt all your breast, "Why, you look as though you were in the family way"; didn't he say that to you? A Yes.

Q Didn't he say to you that you must have done something? Didn't he say to you that you must have been going around with some young man? A No.

40

*Mary Czernea, cross.*

Q Didn't he say that, "Some man must be responsible for the condition that you are in"? A I told him myself that I am going around with a young man, and I am supposed to get married. I gave him one hundred dollars to look up some rooms, and he left and ran away.

10 Q When you lay over the table, when he was making a further examination of you, didn't he say to you that the lower part of your womb is awful soft? A He didn't tell me anything. I just told him he should not hurt me. He says it would not hurt me.

Q Didn't he say to you, while you were lying on the table, as he was examining you, that you must have done something to yourself? And didn't you say no? A No; he has not told me anything.

20 Q Didn't you say to him that you had been to a midwife, who could speak Polish, up on Springfield avenue, who had done that to you? A No, he has not asked me anything and I have not told him anything.

Q Didn't he prescribe asperin tablets for you? A No. After the operation he himself gave me the medicine. One was a white pill and the other was a pink pill.

Q Didn't he further tell you that he could not do anything there because of the reason that there was matter, slimy stuff there? A No; he told me that he sure can perform an operation; that he would not hurt me.

30 Q You know where Springfield avenue is, don't you? A Yes. When I go to work I take a car on Springfield avenue.

Q And you do know some women folks on the hill, or did know some women folks on the hill at or about that time, didn't you? A No; I didn't; I didn't go on Springfield avenue; haven't any acquaintances there.

40 Q Isn't it a fact that the only time that you did call at this doctor's office was on this Thursday in April? A No, I have been there twice, Wednesday, the first time and Thursday, the second time.

*John F. Condon, direct.*

Q And isn't it a fact that the only time you paid him any money was a five dollar bill, altogether, and that was paid at the time of this examination? A No; I gave him on Wednesday, two dollars, and I gave him, on Thursday, forty-five, and he told me to come again, that the operation would cost eighty dollars, and to bring the additional thirty-five dollars.

10

Q What is your condition now? Do you feel well now? A Yes.

*Re-direct examination by Mr. Mott.*

Q Before you went to see the doctor, on Thursday, for the first time, had you been to see any other doctor? A No; I have been nowhere.

Q Had you been to see any midwife? A No.

Q Had you done anything to yourself? A No.

20

JOHN F. CONDON, sworn in behalf of the State.

*Direct examination by Mr. Mott.*

Q You are a practicing physician in this county, are you, doctor? A I am; yes, sir.

Q Have you been attending the complaining witness who was just on the witness stand? A I did.

Q Where did you first see her? A I first saw her at the residence of Mr. Frank P. Ford, 759 Clifton avenue, where she is employed as a domestic.

30

Q Are you the family physician of the Ford family? A Yes, sir; I am.

Q What is the condition of Mrs. Ford now? A Mrs. Ford is convalescing after an operation.

Q Is she able to be in court? A No.

Q What time did you first see her? A I believe in the afternoon.

Q Who sent for you? A Mrs. Ford.

Q Did you examine her? A I did.

40

*John F. Condon, direct.*

Q Did you say when it was you saw her first? A In the afternoon.

Q Did you say on what day it was? A May I look at my memorandum? (Consults memorandum.) On May 3, 1920.

10 Q Will you just tell the Court and jury what you did and what you found to be her condition? A I arrived at the house. I found the girl suffering from a lot of pain. She told me she was bleeding considerably. In getting her history I learned that she had been pregnant and had had an abortion performed. I recommended removing her to the hospital, which was done, and I operated on her the following day.

Q What hospital? A St. James' Hospital, Newark. I was anxious to know who did this, as long as she was a single girl, and she handed me this card that you have  
20 here, Dr. Kashkevich.

*Mr. McDermit.* I object.

*The Court.* It will be stricken out—"Dr. Kashkevich."

Q Go on. A I asked the girl who did it.

*Mr. McDermit.* I object.

30 Q Do not tell us what she said as to who did it, but go on and tell us what you found. A You mean about her physical condition or her history?

Q Her physical condition. A I found the woman was suffering from incomplete abortion.

Q Tell us what the conditions were? A She was having severe pains, as I told you before, and bleeding very profuse, and I had her removed to the hospital. I operated on her the following morning. I found retained placental tissue, afterbirth.

40 Q That shows what? A Shows she had been pregnant.

*Mary Czernea, direct.*

Q What did the physical conditions show or indicate to you? A Of an incomplete abortion, that she had had an abortion performed.

Q Could you tell whether it was instrumental or otherwise? A No.

Q How long did you attend the girl? A All during her stay in the hospital, which I think was about ten days or two weeks. 10

Q Were you able, from the physical conditions you found there, to determine how far pregnancy had approximately progressed? A No.

Q Had she recovered? A Absolutely.

Not cross examined.

*Mr. Mott.* I ask that this card be marked for identification.

Marked S. 1 for identification. 20

MARY CZERNEA, recalled in behalf of State.

*Direct examination* by Mr. Mott.

Q I show you this card, S. 1 for identification, and ask you if you had seen it before. I understood you to say no. What did you mean by that? A (Through the interpreter.) On Wednesday, when I came there he gave me two cards.

Q Who gave you two cards? A Dr. Kashkevich. 30  
One card I had in my coat and one card Dr. Condon had taken from me.

Q You mean you gave one to Dr. Condon? A Dr. Condon has seen it on my bureau. He asked me who gave it to me. I told him.

*Mr. McDermit.* I ask that that be stricken out as to anything that Dr. Condon said to her or she to him.

Q Dr. Condon did take it, did he? A Yes. 40

*John Joseph Kashkevich, direct.*

JOHN F. CONDON, recalled in behalf of State.

*By Mr. Mott.*

Q I show you this card, S. 1 for identification. Where did you first see it? A Miss Czernea gave it to me in her bedroom when she was sick.

10 Q The writing on the back of this card is your handwriting? A It is my handwriting; on the back, the date.

*Mr. McDermit.* I ask that that be stricken out, that his handwriting is on the back.

*Mr. Mott.* I offer this card in evidence, but suggest that something ought to be placed on the back of it, because I do not think that Dr. Condon's handwriting is part of it.

20 *The Court.* It will be admitted in evidence, but the Clerk will paste something over the back of it to hide Dr. Condon's writing.

Marked Exhibit S. 1.

STATE RESTS.

Mr. McDermit opens for the defendant.

30 JOHN JOSEPH KASHKEVICH, defendant, sworn in his own behalf.

*Direct examination by Mr. McDermit.*

Q Where do you live? A 341 Walnut street.

Q Newark? A Newark.

Q You are a practicing physician here? A Yes, sir.

Q You have been for how long a period of time? A About nine years and a half.

Q Here in the City of Newark? A Yes, sir.

40 Q What kind of a practice have you got down there, doctor, as regards the size of it?

*John Joseph Kashkevich, direct.*

*Mr. Mott.* I object.

*The Court.* How is that material?

*Mr. McDermitt.* To show his valuable business there. I think it is important in a case of this character. A man of his standing would not be delving in this kind of business.

*Mr. Mott.* From that standpoint I object to it. 10

*The Court.* I will sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed and it is signed and sealed accordingly.

FRED G. STICKEL, JR.,

*Judge.*

Q Well, your practice is confined to where, mainly? Where is your practice confined to mainly? A How do you mean? 20

Q Where do you practice here in Newark? A Well, here in Newark; sometimes in Harrison, Kearny or some other suburbs—Irvington.

Q Do you remember the 29th of April, last? A Yes, sir.

Q Do you remember this young lady coming to see you? A Yes.

Q Miss Czernea? A Yes, sir.

Q Tell the Court and jury what took place there between you and her. A On April 29, 1920, Mary Czernea came to my office. She said she was not feeling right for quite some time, she had a disturbance in the stomach. She couldn't eat. Backache; pains in the chest. 30

Q What did she say? A Backache.

Q She said she was not feeling well, and had what? A A disturbance of the digestion, backache, weak menstruation, and since she left from the old country she is not feeling right; and she asked if I could help her, in her condition, to make her feel better. I have examined 40

*John Joseph Kashkevich, direct.*

her, first, the chest, and didn't find anything particular. Then I examined her vaginally and found that her abdomen was rather tense, painful, tender; the lower part of the uterus of the womb, was rather soft and infiltrated, upon examination.

10 Q What was the matter with the lower part of the uterus? A Rather soft and infiltrated. After examination I noticed some yellow mucus, yellowish discharge on my fingers. I said to the woman, "Why, woman, you are in the family way." "Well—" she says—"Well, this may be true. I have been going around with a man. He told me that he would marry me and he left me, so please help me out." "Might I state it looks pretty bad; it looks to be the appearance of your womb, as if something has been done to your womb." She says, "I have not done anything." I says, "discharge and soreness of the womb, and tenderness—" it was so tender I couldn't  
20 tell the size of the womb; was spastic on the muscles. She says—which is more—"Doctor, I went to a midwife on Springfield avenue." I asked what midwife. She says she don't know exactly; maybe she is Jewish, but she could speak Polish. "I went there three times, and the midwife, put something in my womb each time, and it gives me much pain, but didn't do any good; didn't help me." Then midwife says couldn't help her; couldn't aid her; womb was too strong. I said, "Well, you are really  
30 in bad condition because it looks like womb has considerable discharge; by the appearance and condition of that womb it looks like you will hardly be able to stand much. So she says, "Maybe I will get medicine or something to help me out." "The only way," I says, "I can give you something to relieve the pain." I gave her some pink tablets and some asperin tablets and sent her home.

Q Did you use an instrument on her, doctor? A No, sir.

Q She says she was there on two occasions, and paid you two dollars, on one occasion, and forty-five dollars,  
40 on another occasion, is that true? A No.

*John Joseph Kashkevich, cross.*

Q On how many occasions was she there altogether?

A One time, 29th of April.

Q What did she pay you for your examination? A Five dollars; I charged five dollars, but she was not all five dollars; a few cents for car fare she was short.

*Cross examination by Mr. Mott.*

Q You came there and found that she was pregnant, did you not? A From the examination I should say that she was. 10

Q And what does a soft cervix, or womb, indicate? A It indicates that the womb has been disturbed, that something has been done to the womb, mechanically.

Q Isn't that always a condition of the womb in a case of pregnancy? A Not at all; only in the very latest stages; only the very last stages.

Q What stages? A Perhaps in the ninth month, the close of the term. 20

Q Do you say that the softness of the womb does not appear until the ninth month? A As a rule—not as a rule, yes, sir.

Q How much do you say was paid you? A Not quite five dollars. She didn't have all the change.

Q Did she give you the name of the woman on Springfield avenue, that she had been to? A She says that she does not remember; she knows where she lives, somewhere, but she does not know exactly the name of her. 30

Q From what you saw there, doctor, did you conclude that this woman on Springfield avenue had performed, or attempted to perform, an abortion on Mary? A Yes, sir.

Q There wasn't any doubt about that in your mind? A No, sir.

Q Did you notify the authorities that a crime had been committed by some woman on Springfield avenue by attempting to perform an abortion on Mary? A Yes.

Q Whom did you notify? A If I did notify? 40

*John Joseph Kashkevich, cross.*

Q Yes. A No, I couldn't notify, because she didn't know the name, and I didn't say anything. I says, "Well, it is too bad that you don't know the name."

Q Oh, but she told you that she could go to the place, didn't she? A Where to?

10 Q Didn't you understand my question? To the place where the woman lived. A Yes, she says that she could.

Q Well, then, why did you not notify the authorities that Mary could point out to them the woman that had committed the crime? A She says that she doesn't want to disturb, does not want to bother.

Q In other words, if a patient of yours asks you to conceal, to cover up a crime, you are ready to do it?

*Mr. McDermitt.* I object.

20 A No, sir.

Q Well, then, why didn't you notify the authorities of this crime?

*Mr. McDermitt.* I object, for the reason that he has already answered it. It is repetition and it has been answered.

30 *Mr. Mott.* I submit not. He gives his reasons for not notifying them that Mary had requested him not to. Then I asked him if it was his practice to not report crime when he was requested not to and he said no; therefore his reason falls and I am asking him what is the real reason.

*The Court.* I think that is proper.

Q Why did you not notify them?

*Mr. McDermitt.* I object.

*The Court.* Objection overruled.

40 Defendant's counsel prays an exception to this ruling of the Court.

*John Joseph Kashkevich, cross.*

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

FRED G. STICKEL, JR.,  
*Judge.*

A I didn't know really what to do. I knew that she was in a disturbed condition, her womb; I didn't know just how to behave. 10

Q You say that it was only a disturbance of the womb?

A I really don't know what really had happened to her, whether she could carry it to the term or not. Still I said, "Probably you would not be able to carry it to the term, by the appearance."

Q You said you were fully satisfied that an attempt had been made, at first, to commit an abortion, didn't you? A Yes.

Q That is the only explanation that you can give. Why didn't you report it to the authorities? A I was foolish, didn't know what to do. 20

Q Was the tenderness of the abdomen a sign of pregnancy in her case? A No, the tenderness itself is not a sign of pregnancy, but the size of the womb and conditions of the breast show sometimes.

Q Was the yellowish mucus discharge that you found there a sign of pregnancy? A The discharge itself might come from other reasons, not only from pregnancy, it is true. 30

Q What evidence of pregnancy, then, did you find there? A I found that her womb was larger than normal, a great deal larger, so far as I could tell; that her breasts were larger than they are generally.

Q You found an enlargement of the womb and a tenderness of the breast? A Yes, sir.

Q And from those two symptoms you concluded that she was pregnant? A Yes, sir.

*James Henry Lowry, direct.*

*Re-direct examination by Mr. McDermit.*

Q And because of the further fact of what she had told you, and your further examination by way of a vaginal examination—

*Mr. Mott.* I object.

10 *The Court.* Objection sustained.

Q You are a member of the Essex County Medical Society, are you, doctor? A Yes, sir.

JAMES HENRY LOWRY, sworn in behalf of the State.

*Direct examination by Mr. Mott.*

Q You are a practicing physician here in Newark, Doctor? A Yes, sir.

20 Q Where is your office located? A 79 Congress street.

Q Are you acquainted with Dr. John J. Kashkevich? A Yes, sir.

Q How long have you known him? A I have known him since he has practiced below the Pennsylvania Railroad, approximately eight or nine years.

Q Do you know what his reputation and standing is, in that community, as a doctor, so far as being a doctor is concerned?

30 *Mr. Mott.* I object to the "standing" part of it. (Question withdrawn.)

Q Do you know what his reputation is as a doctor in that community?

*Mr. Mott.* Reputation for what?

*Mr. McDermit.* For veracity.

*Mr. Mott.* I don't know that a doctor has a reputation, as distinct from his personality, for veracity. I object.

40 *The Court.* Objection sustained. I do not see what his profession has to do with his veracity.

*James Henry Lowry, direct.*

*Mr. McDermit.* I will put the question again. I would like to have a ruling on it.

Q Do you know what the professional standing is, as a doctor, of Dr. Kashkevich, in the medical fraternity?

*Mr. Mott.* I object.

*The Court.* Objection sustained.

10

Q Do you know what his reputation is, in the neighborhood, or the community in which he lives?

*Mr. Mott.* For what?

Q (Continuing.) For being a doctor.

*The Court.* Is that the final question, as a doctor, in the community in which he lives?

*Mr. Mott.* I object. Nobody has suggested that he is not a skillful man. He may be the most skillful man in the City of Newark for all I know. I don't think his skill is involved here.

20

Q Do you know what the reputation of Dr. John Kashkevich, in the community in which he lives, is, for veracity?

*Mr. Mott.* I object. I submit you cannot bolster up a witness whose veracity is not attacked, by other evidence, by simply calling people to state that he is truthful.

30

*Mr. McDermit.* I will put the question in this manner.

Q Do you know what the reputation of Dr. Kashkevich is for honesty and integrity in the neighborhood in which he lives?

*Mr. Mott.* Do you mean in his practice, Mr. McDermit?

*Mr. McDermit.* Practice or otherwise.

40

*Herbert W. Long, direct.*

*Mr. Mott.* I object. Now, I am not technical about this, but it seems to me that counsel is very careful to frame his question in this way. I submit that you cannot ask what his reputation is as a doctor. I say he can ask what his reputation is among other physicians as to being a careful and skillful practitioner; that I will not object to.

10

Q Do you know what reputation Dr. Kashkevich has in the neighborhood for carefulness as a doctor? A You mean among physicians or among members of the community not physicians?

Q Among the physicians or the community.

*Mr. Mott.* No, I object.

*The Court.* Objection sustained.

Q Then, among physicians? A So far as I know, among physicians, very good.

20

Q Now, among the community, do you know what his reputation is, for honesty and integrity in that neighborhood?

*Mr. Mott.* You ask him that as a doctor or as a man?

A I can say that he is a man coming in contact with a large number of people in that community. I have never heard anything against him.

30

Not cross examined.

HERBERT W. LONG, sworn in behalf of defendant.

*Direct examination by Mr. McDermit.*

Q You are a practicing physician in this city? A Yes, sir.

Q Your office is conducted where? A 102 Jefferson street.

40

Q Do you know Dr. John J. Kashkevich? A I have.

*John F. Condon, direct.*

Q How long have you known him as a doctor? A Over nine years.

Q Do you know what his reputation is, among the medical fraternity, for being a skillful and careful doctor?

A It is good.

*Mr. Mott.* Well, you have only got skill. Nobody attacks his skill. 10

Q Do you know what his reputation is, as a man, in that community, for honesty or integrity? A I have never heard anything against him.

Not cross examined.

DEFENDANT RESTS.

JOHN F. CONDON, recalled in behalf of State, in rebuttal. 20

*Direct examination by Mr. Mott.*

Q Doctor, have you devoted yourself especially to any particular line of practice? A Yes, obstetrics, child-birth.

Q Just what experience have you had in that? A I am visiting obstetrician at St. James' for the last twelve or fifteen years and associate at the City Hospital since 1915.

Q In the examination of the female, of the vaginal parts, it is found that the lower part of the uterus is infiltrated. What does that indicate to you—of the womb—what does that indicate? A I don't get your meaning. 30

Q (*By the Court.*) Infiltrated, he mentioned. A Yes.

Q (*By Mr. Mott.*) What does that mean? A Could mean several things. You could have an inflammation. It does not mean pregnancy. Disease of some kind.

Q (*By the Court.*) How early does that appear in pregnancy cases? A Infiltration in pregnancy cases? 40

*Mary Czernea, direct.*

Q (*By Mr. Mott.*) Has this any relation to pregnancy? A Absolutely not.

*Cross examination by Mr. McDermit.*

Q As to the lower part of the womb, what does that indicate? A That is a sign of pregnancy.

10 Q (*By Mr. Mott.*) When does that appear? A Very early, one of the first symptoms, softening of the cervix.

Q How early, doctor? A Within the first month.

MARY CZERNEA, recalled in behalf of State, in rebuttal.

*Direct examination by Mr. Mott.*

Q Mary, Dr. Kashkevich says that when you went to see him you told him that you had been to a midwife on Springfield avenue. Did you tell him that?

20 *Mr. McDermit.* I object. This is repetition and it has all been gone over.

*Mr. Mott.* She has not denied that she said that to the doctor.

A I did not say I was to a midwife on Springfield avenue, to Dr. Kashkevich.

STATE RESTS.

30 Recess from one to two P. M.

Mr. McDermit sums up for the defendant.

Mr. Mott sums up for the State.

*Charge to Jury.***CHARGE.**

The Court charged the jury as follows:

STICKEL, J.

Gentlemen of the Jury. The function of the Court is to instruct the jury in reference to the principles of law governing the case, and the law of the case you must take from the Court. The jury, however, are the sole judges of the facts, weight of testimony, credibility of witnesses, inferences to be drawn from the evidence and the ultimate conclusions to be reached on all the facts. 10

The Court, in referring to the evidence, is not to be understood as deciding any fact, but merely as attempting to elucidate the evidence for the convenience of assistance of the jury, or to illustrate or explain the application of principles of law. And, if, according to your recollection, the Court errs in its statement of any evidence, whether disputed or undisputed, or assumes or states the existence of presence in the case of evidence that is not actually before the jury, the jury should disregard the recollection of the Court and rely upon their recollection. 20

Again, if any part of the evidence is referred to, seemingly giving it particular emphasis, the jury are not to disregard other evidence which they may deem of equal or greater importance; for it is the duty of the jury to consider and weigh all of the evidence and pertinent proof bearing on the questions involved in this matter before the jury, not only that which is mentioned by the Court but all that has been presented here before you. 30

The law presumes that the defendant is innocent and this presumption continues until overcome by proof establishing his guilt beyond a reasonable doubt, and the burden of proving the guilt of the defendant, beyond a reasonable doubt is upon the State, represented by the Prosecutor, and that burden of proof remains upon the 40

*Charge to Jury.*

State, the Prosecutor, throughout the whole case, and never shifts.

10 The defendant is here charged with the crime of abortion, and as the Prosecutor has already told you there are three counts in the indictment, only one of which the State relies upon. The section of the statute upon which this count is founded, in so far as it applies to this first count, is as follows: "Any person who maliciously or without lawful justification shall use any instrument, with the intent to cause or procure the miscarriage of a woman then pregnant with child, is guilty of a misdemeanor."

20 The burden is upon the State, therefore, to prove, beyond a reasonable doubt, that the defendant used some instrument upon Mary Czernea with the prescribed intent; and the State need not show that the instrument used would produce a miscarriage. If the instrument used was employed with intent to cause a miscarriage it is sufficient, whether in the opinion of others it is capable of producing that result or not.

30 Mary says that she went to this doctor; that when he performed the operation she was lying on the table and he was working in her privates. He put something in there, two instruments. One, she says, was a scissors. Being asked to describe the instrument she said one looked like forceps; they opened. She says she was on the table twenty-five minutes; that she paid him \$47 for the operation and was to return and pay the difference between that amount and \$80, which the operation was to cost.

40 The second element which the State must prove to you is that such instrument was employed with intent to cause or procure the miscarriage of Mary. This is a vital essential of the crime here charged. It is immaterial whether a miscarriage was produced here or not; the question is what was the intent; and intent is an act of the mind which cannot be seen, but which can be inferred from the conduct and acts of the party whose

*Charge to Jury.*

intent is to be determined. On this point Mary said she called on him and asked him to help her, and said she was in the family way; that she did not want to get blood poisoning as a result of the operation. He said to her, "No, don't worry, don't be afraid," and that he then performed the operation.

The third element which the State must prove is that Mary was pregnant with child; but it is not essential to show, in order to prove intent, that the defendant knew that the woman was pregnant with child. Mere belief of the existence of pregnancy is sufficient, with other circumstances, to justify the inference of intent. The girl says that the doctor told her she was three and a half months pregnant and he himself says, as a result of the examination he made, that he concluded she was pregnant. 10

The fourth element required is that the defendant committed the acts with which he is here charged, maliciously or without lawful justification. This hardly needs further explanation. Did the defendant employ upon Mary the instruments maliciously or without lawful justification, with intent to cause or procure the miscarriage of Mary, and was the said Mary then pregnant with child? These are the questions presented for your consideration. The State says he did; he says he did not. If you believe the testimony here given by Mary and Doctor Condon there is evidence before you sufficient to find the defendant guilty. 20 30

The defendant, on the other hand, does not claim that he was lawfully justified in what he did, but claims that he did not violate the law at all, that he did not commit the abortion, or attempt to commit an abortion, or do anything with intent to commit an abortion. He says that Mary came to his office and said that she had not been feeling right for some time; that she had disturbed digestion, backache, irregular menstruation, and that since she left the old country had not been feeling well, 40

*Charge to Jury.*

and asked him to make her feel better. He examined her chest and found nothing particular there; then he examined her vagina. The abdomen was tense and painful; the lower part of the uterus soft and infiltrated. He says that that soft condition only arises in pregnancy cases in the ninth month, during the latter part of the gestation period. Doctor Condon says it is present often as early as the first month. Doctor Kashkevich says he examined her and found his hands had a yellowish discharge on them. He said, "Why, you are in the family way." She said, "Yes, I was going with a man; he left; I thought he would marry me, but he left me." He says he said to her, "This looks bad; looks as if somebody has done something to you." And she said, "Yes, doctor, I went to a midwife on Springfield avenue. She put something in my womb three times, but it didn't help me, and she said, 'Your womb is too strong.'" The doctor then gave her something to relieve her and she went home; that she was only there once; that although he only charged her five dollars she didn't have enough to pay him in full.

If you believe that story the defendant is not guilty. It presents itself clearly as a question of fact. Who is telling the truth, Mary or the doctor? That is peculiarly a question for you, as judges of the facts, to determine.

There is also some testimony in the case of good character. You may consider this evidence; it is competent, and the defendant is entitled to have you consider it, in making up your verdict. You must, of course, give it such weight as it may be entitled to. You may take into account the length of time the people have known the defendant, their opportunity for knowing what his reputation may or may not be. The doctors, if you will recall, limited their testimony to the defendant's reputation for care and skill, which, as I understand it, is not involved in this case, or his honesty or integrity. But while you may take his reputation into consideration, in making up

*Charge to Jury.*

your verdict, it would not, of itself excuse crime; for no matter how good a person's reputation is, that, in and of itself, would not excuse the commission of crime. But if on a consideration of the testimony relative to the defendant's good character there exists a reasonable doubt in your mind, of his guilt, even though that doubt is engendered and arises by his previous good repute, he is entitled to an acquittal. 10

You have heard the evidence in this case. It is for you to consider and weigh it, to search the minds and consciences of these witnesses and ascertain where the truth lies. You have a right to consider the manner and appearance of a witness on the stand, his or her means of observation, his or her accuracy of memory, his or her capacity to observe what is going on, and his or her power to state what he or she has seen, and all such other matters as may be helpful in determining the truthfulness, credibility and accuracy of the testimony. 20

One of the ways of ascertaining the truth of the story of a witness told on the stand is to ascertain the interest of the witness in the story that he or she tells on the stand. Has Mary any interest to deceive or mislead you; has Mary any reason to tell a story which may result in the conviction of this defendant of the charge made against him? Has Doctor Condon any reason or motive to tell a story to deceive or mislead you? You may ask yourselves these questions in considering this case. You may also apply this test to the story told by the defendant, and consider his interest in any verdict you may render, in considering the weight which you will give his testimony. 30

I have endeavored to direct your attention to certain features of the testimony. The issue will now be placed in your hands for determination. Give it your most earnest consideration, bearing in mind that your function is to decide the facts and to determine the guilt or innocence of the defendant upon the testimony before you, 40

*Exception to Charge.*

and that you should not be swayed or affected by sympathy or matters of like character.

10 The State is represented by the Prosecutor, and it is the duty of the Prosecutor to present such facts as are in his possession, in support of the indictment found by the Grand Jury. Counsel for the defendant is here to present to you facts which indicate to him his belief that you should find the defendant not guilty. The Court is here to charge you as to the law, to determine what evidence should be admitted and what evidence should be excluded, and in the event of a conviction to impose the penalty. Your function is to decide the facts and to determine the guilt or innocence of the defendant. We are each sworn to perform our duty and we must each observe our required oaths and neither encroach upon the prerogative of the other.

20 If, after a consideration of the testimony, you are satisfied beyond a reasonable doubt that the defendant is guilty, your verdict will be one of guilty; if you are not so satisfied your verdict will be one of not guilty.

Take the case.

(The jury retires.)

Defendant's counsel prays a general exception to the charge of the Court.

30 Exception allowed; let it be sealed, and it is signed and sealed accordingly.

FRED G. STICKEL, JR.,  
*Judge.*

*Certificate of Stenographer.*

## ESSEX COUNTY COURT OF QUARTER SESSIONS.

STATE,

*vs.*

JOHN J. KASHKEVICH.

10

I, ALAN G. KENNISH, one of the stenographers of the Essex County Courts, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by me at the trial of the case of the *State of New Jersey v. John J. Kashkevich*, on indictment No. 82, for abortion, which said trial was held before the Honorable Fred G. Stickel, Jr., presiding Judge of the Essex County Court of General Quarter Sessions, and a jury, on January 10, 1921, at Newark, N. J.

20

ALAN G. KENNISH.

30

40

*Certificate of Judge.*

ESSEX COUNTY COURT OF QUARTER SESSIONS.

STATE,

*vs.*

JOHN J. KASHKEVICH.

10

STATE OF NEW JERSEY, }  
COUNTY OF ESSEX. } ss.

I, FRED G. STICKEL, JR., presiding Judge of the Essex County Court of General Quarter Sessions and the Judge who presided over the aforesaid cause, certify that the foregoing printed book contains the entire record of the proceedings had upon the trial of the said cause, and that the same is returned by the plaintiff-in-error therein with the writ of error bringing up the bill of exceptions signed and sealed in this cause.

20

Dated April 6, 1921.

FRED G. STICKEL, JR.,  
*Presiding Judge of the Essex  
County Court of General Quar-  
ter Sessions.*

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40

*Assignment of Errors.***ASSIGNMENT OF ERRORS.**

## NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>	}	<i>On Writ of Error.</i>	10
<i>vs.</i>			
JOHN J. KASHKEVICH, <i>Plaintiff-in-Error.</i>		<i>Assignment of Errors.</i>	

Afterwards to wit, in the Supreme Court of Judicature, comes the said John J. Kashkevich, by James R. McDermit, his attorney, and says, that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. In that upon the trial of said cause the Trial Judge sustained the Prosecutor's objection to the following question put to John J. Kashkevich, a witness in his own behalf, on direct examination, to wit: 20

“Q What kind of a practice have you got down there, doctor, as regards the size of it?”

2. In that upon the trial of said cause the Trial Judge refused to sustain the objections of defendant's counsel to the following questions put to the defendant, John J. Kashkevich, on cross examination, to wit:

“Q Well, then, why didn't you notify the authorities of this crime? 30

Q Why did you not notify them?”

3. In that upon the trial of said cause, the Trial Judge sustained the objection of the Prosecutor to the following question before the said question was finished by counsel when being put to defendant, John J. Kashkevich, on re-direct examination, to wit:

“Q And because of the further fact of what she had told you, and your further examination by way of a vaginal examination—” 40

*Assignment of Errors.*

4. In that upon the trial of said cause the Trial Judge sustained the Prosecutor's objections to the following questions put to the defendant's witness, James Henry Lowry, on direct examination, to wit:

“Q Do you know what his reputation is as a doctor in that community?”

10 “Q Do you know what the professional standing is, as a doctor, of Dr. Kashkevich in the medical fraternity?”

“Q Do you know what his reputation is, in the neighborhood, or the community in which he lives? For being a doctor?”

5. In that upon the trial of said cause the Trial Judge charged the jury:

20 “The burden is upon the State, therefore, to prove, beyond a reasonable doubt, that the defendant used some instrument upon Mary Czernea with the prescribed intent; and the State need not show that the instrument used would produce a miscarriage. If the instrument used was employed with intent to cause a miscarriage it is sufficient, whether in the opinion of others it is capable of producing that result or not.”

6. In that upon the trial of said cause the Trial Judge misstated the testimony of the complaining witness, Mary Czernea, in charging the jury:

30 “He put something in there, two instruments. One, she says, was a scissors. Being asked to describe the instrument, she said one looked like forceps; they opened.”

7. In that the Trial Judge charged the jury:

“If you believe the testimony here given by Mary and Doctor Condon there is evidence before you sufficient to find the defendant guilty.”

8. In that the Trial Judge charged the jury:

40 “The doctors, if you will recall, limited their testimony to the defendant's reputation for care and skill, which, as I understand it, is not involved in this case, or his honesty or integrity. But while

*Assignment of Errors.*

you may take his reputation into consideration in making up your verdict, it would not of itself excuse crime, for no matter how good a person's reputation is, that, in and of itself, would not excuse the commission of crime."

9. In that the Trial Court charged the jury:

"Counsel for the defendant is here to present to you facts which indicate to him his belief that you should find the defendant not guilty." 10

Plaintiff-in-error, John J. Kashkevich, prays, that the judgment aforesaid be reversed and altogether for nothing holden, and that he may be restored to all things he has lost by reason of the said judgment, etc.

JAMES R. McDERMIT,  
*Attorney for Plaintiff-in-Error.*

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*Specification of Causes.***SPECIFICATION OF CAUSES.**

## NEW JERSEY SUPREME COURT.

10	STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>  <i>vs.</i>  JOHN J. KASHKEVICH, <i>Plaintiff-in-Error.</i>	}	<i>On Writ of Error.</i>  <i>Specification of Causes.</i>
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John J. Kashkevich, the plaintiff-in-error, by James R. McDermit, his attorney, hereby specifies the causes in the record relied upon for relief or reversal in the aforesaid cause as follows:

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1. Because there is no evidence that the defendant committed an instrumental abortion.

2. Because there is no evidence that the defendant committed an unlawful act.

3. Because the acts of the defendant in the use of forceps was necessary for a lawful purpose in making an examination of the complainant according to the practice of his profession.

30

4. Because the acts of the defendant were legal, being in accordance with law and the practice of his profession.

5. Because the Court excluded evidence on the part of the defendant as to the character and size of his practice in the neighborhood where he lived.

6. Because the Court permitted the Prosecutor to question the defendant as to why he did not notify the authorities that a crime was committed when defendant was not the person to judge that a crime had been committed nor had any knowledge of same, to the prejudice of his defense.

40

*Specification of Causes.*

7. Because the Court sustained the Prosecutor's objection to an unfinished question, being put to defendant on re-direct examination, as follows: "Q And because of the further fact of what she had told you, and your further examination by way of a vaginal examination—" to his prejudice.

8. Because the Court limited the testimony of defendant's witness, James Henry Lowry, on the question of the defendant's good character and repute and foreclosed proper evidence on this point to be brought to the jury, to the prejudice of defendant and his defense. 10

9. Because the Court charged the jury: " \* \* \* and the State need not show that the instrument used would produce a miscarriage. If the instrument used was employed with intent to cause a miscarriage it is sufficient, whether in the opinion of others it is capable of producing that result or not." Because this supposes that an instrument lawfully used was so used for an unlawful purpose. 20

10. Because the Court charged the jury: "He put something in there, two instruments,"—when in fact the testimony of Mary Czernea is that she saw two instruments but not that both were put in her private parts.

11. Because the Court charged the jury: "If you believe the testimony here given by Mary and Doctor Condon there is evidence before you sufficient to find the defendant guilty—" without giving the defendant the benefit of a reasonable doubt and his defense, as there is a total failure on the part of the Court to charge and define what is a reasonable doubt. 30

12. Because the Court charged the jury: "The doctors, if you will recall, limited their testimony to the defendant's reputation for care and skill, which, as I understand it, is not involved in this case, or his honesty or integrity. But while you may take his reputation into consideration in making up your verdict, it would not of itself excuse crime, for no matter how good a person's 40

*Specification of Causes.*

reputation is, that, in and of itself, would not excuse the commission of crime—" when as a matter of record and fact the Court of itself limited the testimony of good character to the prejudice of the defendant and the charge as charged is prejudicial to the defendant and his defense.

- 10 13. Because the Court charged: "Counsel for the defendant is here to present to you facts which indicate to him his belief that you should find the defendant not guilty." Which suppose that the defendant is presumed guilty and the burden is on him to prove his innocence of the crime charged against him.

JAMES R. McDERMIT,  
*Attorney for Plaintiff-in-Error.*

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*Opinion of Supreme Court.*

**OPINION OF SUPREME COURT.**

Filed November 3, 1922.

**New Jersey Supreme Court**

No. 3, February Term, 1922.

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THE STATE,

*vs.*

JOHN J. KASHKEVICH.

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Appeal from Essex Quarter Sessions.

Argued before Gummere, Chief Justice, and Justice Parker.

For the appellant, Charles E. S. Thorn.

For the State, J. H. Harrison, Prosecutor of the Pleas, and Wilbur A. Mott, Assistant Prosecutor.

The opinion of the Court was delivered by GUMMERE, C. J.

The defendant was indicted for the crime of abortion, committed upon the body of one Mary Czernea; and from the conviction had upon the indictment he now appeals. The case is brought up both on bill of exceptions and under the broad review provided by section 136 of our Criminal Procedure Act.

The assignments of errors and the grounds of reversal specified under the statute which have been relied upon by the plaintiff-in-error on the argument will be considered in the order in which they have been presented to us.

The first contention is that the Court improperly excluded the following question, asked of the defendant by his counsel while being examined as a witness: "What kind of a practice have you got, doctor, as regards the

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*Opinion of Supreme Court.*

size of it?" Counsel in his argument before us admits that this question was merely a preliminary one, leading up to some material fact; but, as he failed to advise the Trial Court what the material fact was that he proposed to prove, the question apparently was quite immaterial, and the Court, therefore, very properly dealt with it in that aspect.

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The next ground upon which we are asked to reverse this conviction is based upon the alleged improper admission of the following question, asked of the defendant on his cross examination, after he had stated that the complaining witness had advised him, when she came to see him, that a criminal abortion had theretofore been attempted upon her by a certain woman living in Newark, and that his own examination had disclosed the fact of such attempted abortion: "Question Why did you not notify the authorities of this crime?" The contention is that this examination was unfair; but the only ground of objection which was interposed was that the defendant had already answered it, and that a repetition of the question, therefore, was improper. The Court ruled that the question was not improper merely because it was a repetition of a preceding question, and this ruling, we think, was unobjectionable. The matter was one resting entirely in the discretion of the Court, and the exercise of that discretion was not legally injurious to the defendant.

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The next contention is that the Court erred in excluding the following unfinished question, asked of the defendant on his re-examination by his counsel: "And because of the further fact of what she had told you and your further examination by way of a vaginal examination—" This question was asked after the defendant had testified that his examination disclosed that the complaining witness was pregnant and after he had stated the reasons upon which that conclusion was rested by him. The

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*Opinion of Supreme Court.*

question was clearly objectionable as leading, and was properly excluded for that reason.

The next contention is that the Court improperly refused to allow Dr. Lowry, a witness called by the defense, to answer a series of questions directed at the professional standing of the defendant in the medical fraternity and in the neighborhood in which he lived. This exclusion is made the basis of an assignment of error, and it is also argued that the rulings are properly before us on a specification of ground of reversal under the statute. Defendant can take nothing by the assignment of error, for the reason that no exception was taken to the rulings of the Trial Court with relation to these questions. It is elementary law that when no exception is taken there is no foundation for an assignment of error. *N. J. Digest*, Vol. 1, column 338 at bottom; *State v. Brady*, 71 N. J. L. 360; *State v. Young*, 93 N. J. L. 401. Nor can the defendant take anything by his specification under the 136th section of the Criminal Procedure Act, which is "That the Court improperly limited the testimony of defendant's witness James Henry Lowry on the question of the defendant's good character and repute, and foreclosed proper evidence on this point to be brought to the jury, to the prejudice of defendant and his defense." In *State v. Herron*, 77 N. J. L. 523, it was held by the Court of Errors and Appeals that the 137th section of the Criminal Procedure Act requires that in all cases where the plaintiff-in-error shall elect to take up the entire record he shall specify the causes in the record relied upon for relief or reversal; that the purpose of this provision is to require the plaintiff-in-error to apprise the Court and the counsel for the State of the cause of reversal with sufficient precision to make the point intelligible; and that, therefore, where the objection is to the admission or rejection of evidence, the ground of reversal must point out the precise evidence which was erroneously admitted

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*Opinion of Supreme Court.*

or the precise offer which was erroneously rejected; and that, if this is not done, the causes assigned are too general to avail the plaintiff-in-error. (See also *State v. Rubertone*, 89 N. J. L. 285; *State v. McCormack*, 93 N. J. L. 287; *S. C. on appeal*, 94 N. J. L. 262, *State v. Comstock*, 95 N. J. L. 322.) For failure to specify in his  
10 ground of reversal the particular error or errors alleged to have been committed, the plaintiff-in-error can take nothing by it.

The next point submitted by counsel is that there was legal error in the following instruction to the jury: "The burden is upon the State to prove beyond a reasonable doubt that the defendant used some instrument with the prescribed intent (*i. e.*, the intent to produce a miscarriage); but the State need not show that the instrument used would produce a miscarriage. If the instrument used  
20 was employed with that intent it is sufficient." No argument is submitted to support the assertion that this instruction contains legal error; counsel contenting himself with the mere statement that "it supposes an instrument which was lawfully used was so used for an unlawful purpose." In disposing of this point, therefore, all that need be said is that the instruction contains no such supposition as it attributed to it by counsel.

The next contention is that the Court improperly charged the jury that, in attempting to commit the abortion, as the State alleged, the proof was that the defendant used two instruments, whereas the evidence only disclosed the use of one. It is enough to say in disposing  
30 of this contention that there was some evidence of the use of two instruments; and, further, that, if there had not been such proof, the misstatement was clearly harmless to the defendant.

The next point submitted is that the Court improperly instructed the jury as a matter of fact that the testimony  
40 of the complaining witness was corroborated by that

*Opinion of Supreme Court.*

given by a Dr. Condon, who was a witness called on the part of the State. A reading of the charge shows that no such instruction was given, although, if it had been, the testimony in the case sent up with the writ of error shows that it would have been justified. What the Court said upon this point was, "If you believe the testimony here given by Mary and Dr. Condon, there is evidence before you sufficient to find the defendant guilty." The plaintiff-in-error can take nothing by this misstatement of fact by his counsel. 10

The next contention is that the Court erroneously stated to the jury that the doctors called to testify in the case "limited their testimony to the defendant's reputation for care and skill. This statement was inaccurate, for the limitation was imposed by the Court, and not voluntarily by the witnesses themselves. But this misstatement cannot benefit the plaintiff-in-error on a review of his conviction, and for three reasons: In the first place, the Court in its instructions to the jury specifically told them that, in referring to the evidence, he must not be understood as attempting to decide any fact, and that where the Court erred in its statement of evidence they should disregard the recollection of the Court and rely upon their own recollection. So long as the right of the jury to decide disputed questions of fact for themselves is pointed out in the charge, the Judge's comments on evidence, even when they embrace actual misstatements of fact, afford no ground for the reversal of a criminal conviction. *State v. Engle*, 50 N. J. L. 274; *State v. Hummer*, 73 N. J. L. 714; *State v. Kroll*, 87 N. J. L. 330. In the second place, no specific objection was taken to the misstatement at the close of the instructions to the jury, the plaintiff-in-error contenting himself with taking a general exception to the whole charge, and making his objection specifically for the first time in this Court. The rule applicable to such a situation is thus stated by the Court of Errors and Appeals in *State v. Lovell*, 88 N. J. L. 355: 20 30 40

*Opinion of Supreme Court.*

“A misstatement of fact in the instruction by the Trial Court not in any way binding on the jury cannot for the first time be objected to in the Supreme Court. In fairness to the Court and in justice to the accused, any alleged misstatement of fact by the Trial Court in the charge should be called to the attention of the Court at the trial.”

10 For failure to follow the course indicated by the rule laid down in the case cited, the plaintiff-in-error cannot successfully attack the conviction upon the ground last indicated. In the third place, the misstatement could not have been harmful to the defendant; for whether the limitation upon the testimony of character witnesses was imposed by the Court or by the witnesses themselves was a matter which, as it seems to us, could not have had any effect whatever upon the minds of the jurors in reaching a determination upon the question of the guilt or inno-

20 cence of the defendant. Lastly, it is contended that there was error in the statement of the Court to the jury that “Counsel for the defendant is here to present to you facts which indicate to him his belief that you should find the defendant not guilty.” The argument in support of this ground of reversal is that it deprives the defendant of the benefit of a reasonable doubt as to his guilt, notwithstanding the fact that the Court in the earlier part of its charge had instructed the jury properly with relation to that subject.

30 The argument, as it seems to us, is illogical as it stands; but, when the charge is examined, it appears that the excerpt complained of was a part of the statement to the jury of the respective functions of the prosecutor of the pleas, the counsel for the defendant, the Trial Court, and the jury itself. Taken in connection with the whole subject matter of this portion of the charge to the jury, it is plainly unobjectionable.

Finding nothing of merit in the assignments of error or reasons for reversal, we conclude that the judgment under

40 review must be affirmed.

*Remittitur.***REMITTITUR.**

## NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>	}	<i>On Error.</i>	10
<i>vs.</i>			
JOHN J. KASHKEVICH, <i>Plaintiff-in-Error.</i>			

The above-stated cause having been duly submitted at the November Term, nineteen hundred and twenty-two, in the New Jersey Supreme Court, by J. O. Bigelow, Esq., attorney for the defendant-in-error, and James M. McDermit, Esq., attorney for the plaintiff-in-error, and the Court having considered the matter and finding no error in the record and proceedings in the Essex County Court of Quarter Sessions; 20

It is thereupon ordered and adjudged that the judgment of the Essex County Court of Quarter Sessions, removed by this writ of error in this cause, be affirmed in all things with costs; and that the record be remitted to the Essex County Court of Quarter Sessions to be proceeded with according to law and the practice of said Court. 30

On motion of

J. O. BIGELOW,  
Prosecutor of the Pleas,  
*Attorney of Defendant-in-Error.*

A true copy.

ENOCH L. JOHNSON.

*Assignment of Errors.*

**ASSIGNMENT OF ERRORS.**

Filed.

**New Jersey Court of Errors and Appeals**

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STATE OF NEW JERSEY,

*Defendant-in-Error,*

*vs.*

JOHN J. KASHKEVICH,

*Plaintiff-in-Error.*

*On Error to  
Supreme Court.*

*Assignment of  
Errors.*

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Afterwards, to wit, in the New Jersey Court of Errors and Appeals in the last resort in all causes comes the said John J. Kashkevich by James R. McDermit, his attorney, and says that in the record and proceedings aforesaid there is manifest judgment in this, to wit;

1. The Supreme Court erred in giving judgment for the defendant-in-error, the State of New Jersey, instead of for the plaintiff-in-error, John J. Kashkevich, for one or more of the assignments of error and causes for reversal filed in the Supreme Court and brought up with the record.

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JAMES R. McDERMIT,

*Attorney for Plaintiff-in-Error.*

CHARLES E. S. THORN,

*Of Counsel.*

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## New Jersey Court of Errors and Appeals

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STATE OF NEW JERSEY,

*Defendant-in-Error,*

*vs.*

JOHN J. KASHKEVICH,

*Plaintiff-in-Error.*

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*On Error.*

### **BRIEF OF JOHN O. BIGELOW FOR THE STATE.**

The opinion of the Chief Justice delivered in the Supreme Court deals at length with the questions presented in the brief for the plaintiff-in-error. This brief is merely supplemental to that opinion.

#### **I.**

#### **Assignment of Error No. 1, Specification No. 5.**

“Q What kind of practice have you got down there, doctor, as regards the size of it?”

*Mr. Mott.* I object.

*The Court.* How is that material?

*Mr. McDermitt.* To show his valuable business there. I think it is important in a case of this character. A man of his standing would not be delving in this kind of business.”

Objection sustained (Case, p. 16, l. 40).

The logic of defendant's counsel seems to be this: A successful doctor will probably not be tempted to malpractice; therefore, the size of his practice is material. Likewise it might be contended a rich man will probably not turn burglar; hence his wealth is at issue.

I know of no cases sustaining this view.

## II.

**Assignment No. 2, Specification No. 6.**

“Q Well, then, why didn't you notify the authorities of this crime?

*Mr. McDermit.* I object, for the reason that he has already answered it. It is repetition and it has been answered.”

Objection overruled (Case, p. 21).

In the brief in this Court other grounds are relied upon to sustain the objection of counsel.

A defendant, or other litigant, is not permitted to lead the Trial Court astray by advancing a fallacious ground for an objection, and thereafter in the Appellate Court, to rely on a different ground.

*State v. Faunce* (E. & A.), 91 N. J. L. 333.

The answer to the question was “I didn't know really what to do. I knew that she was in a disturbed condition, her womb; I didn't know just how to behave.”

Clearly this answer did not harm the defendant.

Furthermore, the question was proper cross examination

## III.

**Assignment No. 3, Specification No. 7.**

The defendant had stated on cross examination the symptoms which led him to conclude that Mary was pregnant. The final question asked him (p. 21, l. 38) was, “And from these two symptoms, you concluded she was pregnant? A Yes, sir.”

And thereupon on re-direct examination the question was asked: “And because of the further facts of what she had told you, and your further examination by way of a vaginal examination.”

Counsel for the defendant suggests that he had not completed his question—had in fact only stated a premise on which to base the question.

If that was the situation, he was not prevented from asking his question. If he had testimony to offer, then was his opportunity.

#### IV.

##### **Assignment No. 4, Specification No. 8.**

I have found difficulty in determining exactly what ruling of the Trial Court defendant objects to.

It appears, however, that all questions as to reputation of defendant relate to his reputation at the time of trial, January 10, 1921, and not to his reputation prior to the date laid in the indictment, April 29, 1920.

“It is the reputation one has in a community up to the time of the commission of the offense only which is admissible.” *State v. Sprague*, 64 N. J. L. 419.

However, when questions in approximately proper form were asked of the witness he was allowed to testify and did testify, first that the defendant's reputation among physicians was very good, and second, that in the community his reputation for honesty and integrity had never been called in question.

Certainly, the defendant was not entitled to more than this.

#### V.

##### **Assignment No. 8, Specification No. 12.**

The opinion of the Supreme Court deals too fully with this assignment to allow further argument.

#### VI.

##### **Assignment No. 7, Specification No. 11.**

The Court charged the jury: “If you believe the testimony here given by Mary and Dr. Condon there is evidence before you sufficient to find the defendant guilty.”

This charge was proper. This testimony of Mary and the doctor did in fact justify a verdict of guilty.

If anything, the charge was too favorable to the defendant, for if the jury had believed the testimony of Mary and disregarded the testimony of Dr. Condon, there would still have been evidence to justify a verdict of guilty.

**The judgment of the Supreme Court should be affirmed.**

Respectfully submitted,

J. O. BIGELOW,  
*Prosecutor of the Pleas.*

## New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,  
*Defendant-in-Error,*

*vs.*

JOHN J. KASHKEVICH,  
*Plaintiff-in-Error.*

*On Error to  
Supreme Court.*

Heard below be-  
fore Gummere,  
C. J., and  
Parker, J.

*On Error to  
Quarter Ses-  
sions of Essex.*

Stickel, J., and  
a Jury.

*On Conviction  
on Indictment  
for Abortion.*

### BRIEF FOR PLAINTIFF-IN-ERROR.

Defendant, plaintiff-in-error, a physician, was indicted for an abortion upon the prosecuting witness, Mary Czernea (p. 3). The State elected to stand upon the first count which alleged that plaintiff-in-error, "upon one Mary Czernea, a woman then pregnant with child, did use divers instruments to the Grand Jurors unknown, with intent to cause and procure the miscarriage of the said Mary Czernea, \* \* \* ." The case was tried at the Essex Quarter Sessions before Stickel, Judge, and a jury, and resulted in a conviction of defendant, to the judgment upon which conviction a writ of error was taken to the Supreme Court. The case was argued there both upon bill of exceptions and under the 136th section of the criminal procedure act. The Supreme Court affirmed the conviction. Whereupon this writ of error was taken.

Two witnesses were sworn for the State, Mary Czernea and John F. Condon, a physician. The woman was unmarried, a house servant, twenty-seven years of age, (pp. 8, 11). She said that in April, 1920, she went to defendant's office and asked him if he couldn't help her, she was in the family way. This was on Wednesday, and he told her to come back on Thursday. On this Wednesday she gave him two dollars. She told him she was very much afraid; she did not want to get blood poisoning. On the Thursday she returned and—

“Q Now, you say he performed an operation. What did he do with you? A I have not seen what he has done; I have been lying on the operation table.

Q Well, what part of your body was he working on? A In my privates; because he put something in there.

Q Did you see the thing he put in your privates? A I seen he was taken two instruments, one was scissors and the other, I cannot tell.

Q What do you mean, you cannot tell? That you did not see it or you cannot describe it? A I have seen him, but I cannot tell what they call it.

Q What kind of a looking thing is it? A Like forceps. They opened.

Q How long were you on the operating table on the day of the operation? A Twenty-five minutes.”

She then says that he told the doctor that she had been pregnant about three months, but he said that that did not matter, and she says she paid him forty-five dollars (\$45). On Thursday she went back to work and on Saturday and Sunday she was ill and on Monday they brought in Dr. Condon. Dr. Condon, the only other witness produced by the State, swore that he examined the prosecuting witness on May 3, 1920, and then he said:

“A I found the girl suffering from a lot of pain. She told me she was bleeding considerably. In getting her history I learned that she had been pregnant and had had an abortion performed. I rec-

commended removing her to the hospital, which was done, and I operated on her the following day."

He swears that he found that she was suffering from incomplete abortion, and that he cannot tell whether the abortion was "instrumental or otherwise" (p. 50).

The story of defendant (p. 16) was that he had practiced in the City of Newark for nine years and over; on the 29th day of April, he saw the prosecuting witness; she came to his office stating that she had not been feeling right for quite some time (p. 17). He examined her, first the chest and then vaginally and ascertained (p. 18) that it appeared as if something had been done to the womb. He put that to her whereupon she told him that she had gone to a mid-wife on Springfield avenue; that the mid-wife had three times put something into her womb but it didn't do her any good; he gave her something to relieve the pain and sent her home; she denies that he used an instrument on her or that she ever paid him any money (p. 18) and he denies that she was there more than once.

The only testimony offered by him, *as indeed the only testimony available to him*, was the testimony as to his reputation and he produced Dr. Lowry and Dr. Long (p. 24).

It will be observed that the only evidence of probative force against defendant connecting him with the crime was the evidence of the prosecuting witness and that the only evidence of probative force of a direct nature upon the part of defendant with respect to what happened at his office is the evidence of defendant. Defendant was driven, under the circumstances, to resort to evidence of his good reputation and in a case of this kind where a charge is made by a woman under such circumstances the evidence of reputation is entitled to great consideration. Indeed, in some States the law is that there cannot be a conviction in a case of this kind unless the prosecuting

witness is corroborated and corroborated in such manner as to connect the defendant charged with the crime. Wigmore on Evidence, Vol. 3, Sec. 2062, p. 2761.

We thus early refer to this point because we conceive that the defendant was particularly injured by the charge of the Court when the Court used the language—"If you believe the testimony here given by Mary and Dr. Condon there is testimony before you sufficient to find the defendant guilty."

The Supreme Court in dealing with this point held that counsel for plaintiff-in-error below had misstated the judge's charge in that he had indicated to the Court that the judge had stated that the evidence of the complaining witness was corroborated by that given by Dr. Condon whereas, as a matter of fact, all that the Court stated was as we have heretofore indicated.

It is submitted that whatever the language of the Court may have been the effect of the statement of the Trial Court taken in connection with the rest of his charge was that the complaining witness had been corroborated by Dr. Condon.

#### **Specification of Errors.**

1. The exclusion of the evidence of John J. Kashkevich, on direct examination (p. 17) assignment of errors in Supreme Court, No. 1, specification of causes for reversal No. 5.

2. The admission of the evidence of John J. Kashkevich on cross examination. Exception pp. 20-21, assignment No. 2, specification of causes for reversal No. 6.

3. The exclusion of the evidence of John J. Kashkevich on re-direct examination, objection pp. 22; specification of causes for reversal in Supreme Court No. 7.

4. The limitation of the evidence of James Henry Lowry, objection pp. 22, 23, specification of causes for reversal No. 8.

5. The charge of the Court as follows: "If you believe the testimony here given by Mary and Doctor Condon there is evidence before you sufficient to find the defendant guilty." Exception p. 32, assignment No. 7, specification of causes for reversal No. 11.

6. The charge of the Court as follows: "The doctors, if you will recall, limited their testimony to the defendant's reputation for care and skill, which, as I understand it, is not involved in this case, or his honesty or integrity. But while you may take his reputation into consideration in making up your verdict, it would not of itself excuse crime, for no matter how good a person's reputation is, that, in and of itself, would not excuse the commission of crime." Exception p. 32, assignment No. 8, specification of causes No. 12.

### I.

The question excluded is found on page 16 and is:

"Q What kind of a practice have you got down there, doctor, as regards the size of it?"

The charge against defendant was that he had committed an illegal abortion. There was but one witness against him who could testify to the facts, that is, the complaining witness. As heretofore indicated in many States there could be no conviction in a case of this kind without corroboration connecting defendant with the commission of the crime. Under the circumstances, it was important for the jury to know who the witnesses were. Defendants standing in the community is entitled to consideration. To some extent, the extent of his practice and the nature of it is helpful. While it is quite true that a physician with a large practice may commit crime nevertheless where the integrity of the doctor with respect

to the manner of his practice is attacked and where the knowledge of what happened necessarily rests with but two persons he may show generally the kind and character and extent of his business. It is no more than an identification so that the jury may know who he is.

## II.

The questions were put to the defendant on cross examination (p. 20):

“Well, then, why didn’t you notify the authorities of this crime?” “Why did you not notify them?” Over objection, the witness answered: “A I didn’t know really what to do. I knew that she was in a disturbed condition, her womb; I didn’t know just how to behave.”

It is true, as stated by the Supreme Court, that the only objection made upon the trial was that this was repetition, and that the real objection is that it was immaterial and unfair, but under section 136 of the Criminal Procedure act it is provided that if it appear from such record that the plaintiff-in-error on the trial below suffered manifest wrong or injury, either in the admission or rejection of testimony, whether objection was made thereto or not, or in the charge of the Court, or in the denial of any matter by the Court, which is a matter of discretion, whether a bill of exceptions was settled, signed and sealed thereto, or not, etc. It is quite true that the Court has held that to take the benefit of this section it is necessary that there be some action by the Court which action is usually provoked by an objection but the statute clearly contemplates that if the plaintiff-in-error be injured by reason of the admission or rejection of testimony he is not to be bound by the particular objection assigned below for the statute by its terms does *not require any objection*.

The Supreme Court held that permitting this testimony over the objection that it was mere repetition was a mat-

ter of discretion with the Trial Court, and that the exercise of the discretion was not legally injurious to defendant.

Under section 136 of the statute the question is not whether the exercise of the discretion is *legally* prejudicial to defendant but whether defendant, by reason of the exercise of the discretion, suffered manifest wrong or injury. It is submitted that the questions as to why the defendant did not report the supposed crime which had been committed by the mid-wife to the authorities were immaterial and that they were prejudicial. Legally they in nowise discredited the witness. Nevertheless the manner in which the examination was conducted by the Prosecutor of the Pleas whether the conduct of the defendant *legally* discredited him or not could not help but to influence the jury against him. When the Prosecutor of the Pleas, not satisfied with the answers by which under ordinary circumstances he would be bound because of a collateral matter, proceeded to continue the subject this course was objected to. It is true that the Court has a wide discretion to permit repetitious questions, but when the repetition goes to a subject matter which is immaterial but yet harmful it is submitted that the exercise of the discretion of the Court in permitting the question causes defendant manifest wrong and injury.

### III.

When under re-direct examination counsel for the defendant started to ask the question— “And because of the further fact of what she had told you, and your further examination by way of a vaginal examination—” and when counsel had reached this point the prosecutor objected and the objection was sustained. No reason was assigned by the prosecutor for his objection nor was there any reason assigned by the Court for its action. The Supreme Court held that the question was clearly objectionable as leading and was properly excluded for

that reason. It is true that the question starts out with a recitation of evidence previously given but whether counsel intended to finish his question in a leading manner does not appear. He might have finished it "what, if anything, did you do." What he had in mind at the time the question was asked does not appear from the record.

If the prosecutor had objected on the ground that it was leading or the Court had overruled it on that ground it might have been reframed. If the prosecutor is entitled to leave the precise ground upon which defendant's counsel objects so that he may cure the objection if possible (*State v Lyons*, March term, 1923, Supreme Court), is not counsel for defendant entitled to equal consideration and for the same reason?

The question was asked on re-direct. The matters to which it referred had been brought out on cross. All that counsel had done up to the time of the interruption was to bring to the doctor's mind what had been brought out on his cross examination.

It is submitted that he was entitled to bring it to the doctor's mind, and that there was nothing objectionable in the question so far as it had gone. The question might not have been followed up by "What did you do?" It might have been followed up by "What could you have done" which would have been clearly not leading.

The action of the Trial Court in preventing counsel from finishing his question may have deprived the defendant of evidence which would have cleared up matters which appeared detrimental to him brought out by the State on cross examination.

#### IV.

The questions excluded by the Court with respect to the general reputation of the defendant are found on pages 22, 23 and 24 and we urge that the exclusion of the questions which had to do with the defendant's general reputation was prejudicial to the defendant.

The Supreme Court declined to deal with this subject because:

First—There was no foundation for an assignment of error which we concede.

Second—That the specification of causes for reversal was too general.

The cause for reversal under which it is sought to argue this point is No. 8 “because the Court limited the testimony of defendant James Henry Lowry on the question of defendant’s good character and repute, and foreclosed proper evidence on this point to be brought to the jury to the prejudice of the defendant and his defense.”

Counsel did below, notwithstanding that he had no right to, assign error upon the refusal of the Court to permit this examination and in his assignment of errors he specifies the questions overruled. Assignment of error No. 4.

The Supreme Court stated that the reason that the causes for reversal must be specified— “is to require the plaintiff-in-error to apprise the Court and the counsel for the State of the cause of reversal with sufficient precision to make the point intelligible; and that, therefore, where the objection is to the admission or rejection of evidence, the ground of reversal must point out the precise evidence which was erroneously admitted or the precise offer which was erroneously rejected; and that, if this is not done, the causes assigned are too general to avail the plaintiff-in-error.” The Supreme Court cited:

*State v. Herron*, 77 N. J. L. 523;

*State v. Rubertone*, 89 N. J. L. 285;

*State v. McCormack*, 93 N. J. L. 287;

*On error*, 94 N. J. L. 262;

*State v. Comstock*, 95 N. J. L. 322.

In *State v. Herron*, the Court of Errors and Appeals, said:

“It should, therefore, when the objection is to the admission or rejection of evidence, point out

the precise evidence which was erroneously admitted and the precise offer which was erroneously rejected. If this is not done it becomes incumbent upon the counsel for the state and the court to examine the whole of a record which may be very voluminous, and the object of the act is not achieved."

In *State v. Herron* the alleged errors were supposed to be covered by general reasons that the judge rejected legal evidence and admitted illegal evidence.

In *State v. Rubertone*, 89 N. J. L. Court of Errors and Appeals, the point was supposed to be covered by general objections that the Court admitted illegal evidence and rejected legal evidence although in one of the causes for reversal the name of the witness was mentioned, but with respect to this the Court says:

"Manifestly, the service of these causes for reversal is intended, like the assignment of errors, to give notice of the precise points intended to be made, and none of the causes above quoted gives such notice. The fourth comes nearest to doing this, for it at least specifies the name of the witness; but it neither says that the Court erred as to every question and answer struck out, nor does it indicate which of several such rulings the plaintiff-in-error intends to attack."

The Court then said:

"It happens, however, that the same point is raised in effect by cause No. 3, which is that the Court refused to allow defendant to offer testimony showing the relations of the complaining witness with other men during the month of September, 1913. The testimony of Rothrock that was stricken out bore on this point."

In *State v. McCormack*, 93 N. J. L. 287, the Court was dealing with the last cause of reversal which was that there were other manifest errors, etc.

In *State v. Comstock*, 95 N. J. L. 322, the Supreme Court was not dealing with the admission of evidence.

In the case at bar, the specification of cause of reversal is No. 2 "because the Court limited the testimony of defendant's witness James Henry Lowry on the question of defendant's good character and repute and foreclosed proper evidence on this point to be brought to the jury to the prejudice of the defendant and his defense," and the defendant in the assignment of errors which was served with the specification of causes specified the particular questions.

It is urged that this specification of cause for reversal is sufficient to apprise the Court and counsel for the State of the precise point intended to be made and is quite as specific as the third assignment of cause for reversal in *State v. Rubertone*, 89 N. J. L. 285, which was that the Court refused to allow defendant to offer testimony showing the relations of the complaining witness with other men during the month of September, 1913.

There is no particular form of specification of cause for reversal required. All that is necessary is that the Court and the State be apprised of the point made. The point made was that upon the examination of James Henry Lowry the Court limited the testimony on the question of defendant's good character and repute and foreclosed proper evidence. When we examine the testimony of Dr. Lowry printed on page 22 of the record, it is submitted, we find that any further specification of cause would be superfluous.

It is, therefore, submitted that the Supreme Court should have considered this cause for reversal.

The defendant was entitled to have the matter of his reputation go to the jury.

Wigmore on Evidence, Vol. 1, Sec. 56. His skill as a doctor was not in issue as the learned Trial Court said but his general reputation and his reputation for integrity was in issue.

The effect of the ruling of the Court was to confine the questions directed to reputation to matters not relevant

and to exclude the evidence with respect to matters which were relevant.

We urge this particularly in view of the fact that as heretofore stated the only possible evidence that this man could produce was evidence of his reputation. This ruling of the Court was particularly harmful when taken in conjunction with the charge of the Court which will be next argued out of its numerical order.

## V.

The Court charged the jury—

“The doctors, if you will recall, limited their testimony to the defendant’s reputation for care and skill, which, as I understand it, is not involved in this case, or his honesty or integrity. But while you may take his reputation into consideration, in making up your verdict, it would not, of itself excuse crime; for no matter how good a person’s reputation is, that, in and of itself, would not excuse the commission of crime.”

In dealing with this assignment of error and specification of cause for reversal the Supreme Court held that the statement was inaccurate, but that the plaintiff in error could take nothing by reason of the inaccuracy for three reasons:

(1) Because the Trial Court in its instructions to the jury had specifically told them that in referring to the evidence he must not be understood as attempting to decide any fact, and that where the Court erred in its statement of evidence they should disregard the recollection of the Court and rely upon their own recollection.

(2) Because the plaintiff-in-error contented himself with a general exception to the charge.

(3) The misstatement could not have been harmful to defendant for whether the limitation upon the testimony of character witnesses was imposed by the Court or by the witnesses themselves was a matter which, as it

seems to us, could not have any effect whatever upon the minds of the jurors.

To consider the last reason assigned by the Supreme Court first. The effect of the *Court limiting* the character witnesses was not to indicate to the jury that the character witnesses *could not* testify to the general reputation of the defendant if they were permitted so to do. The effect of the Court's charge which I repeat again "The doctors, if you will recall, limited their testimony to the defendant's reputation for care and skill, which, as I understand it, is not involved in this case, or his honesty or integrity." is to impress the jury's mind with the fact that the doctors *voluntarily* so limited the testimony and the inference of course, was, particularly in view of the Court's interjection "which, as I understand it, is not involved in this case" that the witnesses *could not* testify generally or *did not desire* to testify generally to his reputation.

It is only where it is clear that the error of the Court worked no harm to defendant that the Court will not set aside the verdict. If the error complained of may have harmed the plaintiff-in-error it is the Court's duty to reverse.

*Bell v. Samuels*, 60 N. J. L. 370;

*Ruckman v. Bergholz*, 37 N. J. L. 437-441;

*State v. Hendricks*, 70 N. J. L. 41;

*Ryan v. State*, 60 N. J. L. 552.

The exclusion by the Trial Court of the questions directed to the witnesses with respect to defendant's reputation we submit was error, but the Supreme Court held that the defendant could not take advantage of this alleged error because of the manner in which it was sought to raise the point, and now it is stated by the Supreme Court that the Trial Court made an inaccurate statement to the jury with respect to its own act during the progress of the trial but decline to give the defendant the benefit of this inaccuracy for one

reason because it was harmless to defendant. If defendant was entitled to have evidence of his reputation with respect to the subject matter of the crime before the jury, and we insist he was, and if that evidence was improperly excluded by the Trial Court, as we contend it was, then it seems to us that a charge to the jury that the witnesses called for the defendant with respect to this material matter of reputation *voluntarily limited* their testimony to a matter of reputation which was not in issue is clearly harmful, at least it cannot be said that it is clear that it was not harmful.

Next the Supreme Court says that the plaintiff in error can take nothing by the misstatement of the Trial Court because the matter was not specifically brought to the attention of the Trial Court, citing *State v. Lovell*, 88 N. J. L. 355.

A general objection was taken to the Court's charge Secs. 140-141 of the Criminal Procedure Act. Under that general objection this portion of the charge was assigned for error. It was also specified as a cause for reversal under section 136 which specifically provides that the Court should reverse for manifest injury so shown either in the admission or rejection of evidence or in the charge of the Court or of the denial of any matter by the Court which was a matter of discretion whether a bill of exceptions was sealed, or error assigned thereon or not.

It is true that this Court said in *State v. Lovell*, 88 N. J. L. 353, citing *State v. Kroll*, 87 N. J. L. 330, that "A misstatement of fact in the instruction by the Trial Court not in any way binding on the jury cannot for the first time be objected to in the Supreme Court, in fairness to the Court and in justice to the accused, any alleged misstatement of fact by the Trial Court in the charge should be called to the attention of the Court at the trial."

But we have the statement of the statute to the effect that any error in the charge of the Court if objected to

or not if it caused manifest wrong or injury will warrant a reversal.

In *State v. Lovell*, and *State v. Kroll*, the Court was dealing with a statement by the Trial Court as to what the evidence in the case was or tended to show. The charge of the Court in the case at bar was more than a mere statement of the evidence. It had to do with the conduct of the witnesses and the action of the Trial Court. *The Court* had limited the testimony. The Court instructed the jury that the *witnesses* had limited the testimony. This is more than a mere comment on evidence and does not come within the reasoning of the Court of Appeals in *State v. Lovell*. But if it did, in view of the nature of the case, with the complaining witness on one side and the doctor on the other side and no one else knowing the facts, the matter of good reputation therefore being of great importance, it is submitted manifest wrong and injury was clearly done in the trial to defendant by the combination of the limitation by the Court of the witnesses with respect to good reputation and of the charge by the Court under discussion.

Next, the Supreme Court says that the inaccurate statement could not be made the basis of error because the Court charged the jury in other portions of its charge that they were the judges of the fact.

*Engle v. State*, 50 N. J. L. 272, was decided before the adoption of section 136 of the Criminal Procedure Act. Both *Engle v. State* and *Hummer v. State*, 73 N. J. L. 714, had to do with expressions of opinion by the Court, comments upon the evidence.

In *State v. Lovell*, 88 N. J. L. 353, cited by the Supreme Court, this Court said, after referring to the rule that it is the right and duty of a Trial Court to comment upon the evidence in the charge to the jury:

“This rule, however, is clearly distinguished from the equally well-accepted rule, that it is error in law for a judge in a criminal case to state in the charge a fact of the utmost importance when such

fact has neither testimony nor the color of testimony to support it. *Smth v. State*, 41 N. J. L. 370, *State v. Diamond*, 84 N. J. L. 17."

And the reason is expressed by Mr. Justice Garrison in *State v. Diamond*, 84 N. J. L. 17, at p. 18:

"When, however, the Judge told the jury in effect that Geyer had identified the horse as Brewster's the jury knowing that Geyer had said on the witness stand were forced to the conclusion that such testimony was in law an identification of the stolen property."

So in the case at bar, it is true that the jury had heard that the witnesses with respect to reputation had testified and it is likewise true that they perhaps had heard the rulings of the Trial Court, although that is not certain, they may never have heard what the Trial Court said. The colloquy between the Trial Court and counsel with respect to the admission of this testimony may have been *in camera*, but whether they heard it or whether they did not the effect of the charge of the Court was to inform them that in law what had transpired before the jury was a voluntary limitation by the witnesses of their testimony to a matter of reputation which was not in issue leaving the clear inference to the jury the doctors *could not* have testified to the good reputation of the defendant if they had been permitted to.

The remarks of the Trial Judge, therefore, were not comments upon the evidence but an erroneous instruction as to the legal effect as to what had transpired.

## VI.

The Court charged the jury:

"If you believe the testimony here given by Mary and Dr. Condon, there is evidence before you sufficient to find the defendant guilty."

The error in this portion of the charge was that it left the jury to infer that Dr. Condon had corroborated the

complaining witness whereas, as matter of fact, he had not. The Supreme Court says: "A reading of the charge shows that no such instruction was given, although, if it had been, the testimony in the case sent up with the writ of error shows that it would have been justified. What the Court said upon this point was, 'If you believe the testimony here given by Mary and Dr. Condon, there is evidence before you sufficient to find the defendant guilty.' The plaintiff-in-error can take nothing by this misstatement of fact by his counsel."

To consider the last reason assigned by the Supreme Court, first: There were two witnesses for the State, the complaining witness, Mary, and Dr. Condon. It is conceded that the Trial Court did not tell the jury that Mary was corroborated by Dr. Condon. But the Trial Court did say this: "The fourth element required is that the defendant committed the acts with which he is here charged, maliciously or without lawful justification. This hardly needs further explanation. Did the defendant employ upon Mary the instruments maliciously or without lawful justification, with intent to cause or procure the miscarriage of Mary, and was the said Mary then pregnant with child? These are the questions presented for your consideration. The State says he did; he says he did not. If you believe the testimony here given by Mary and Dr. Condon there is evidence before you sufficient to find the defendant guilty."

It is submitted that the inference which the jury got from this charge, whatever may have been the express language of the Court, was that Mary was corroborated by Dr. Condon.

We have already adverted to the fact that in many States by statute in crimes such as this the prosecuting witness must be corroborated.

*Wigmore on Evidence*, Vol. 3, sec. 2062, at p. 2761.

In most of the States the corroboration must consist of facts tending to connect the defendant with the commission of the crime.

*Wigmore on Evidence*, sec. 2062.

The evidence to be corroborative must be independent of the person corroborated.

3 *Wigmore on Evidence*, sec. 2059a with respect to accomplices.

In *People v. Haynes*, 55 Barb. (N. Y.) 450, citing *The Commonwealth v. Bosworth*, 22 Pick. 397, *Rex v. Webb*, 6 Car. & Payne, 595, and *Rex v. Wilkes*, 7 Car. & Payne, 272, the Court said:

“It seems therefore, that if corroborating evidence be admitted, it must be such as has some necessary connection with the guilt of the party charged, or of the correctness of the statement of the accessory in relation to such evidence. True, a party may be convicted (although he in general will not be) on the uncorroborated evidence of an accomplice; but if the case is to be strengthened by corroborating proof, the rights of the accused should not be prejudiced by confirmation on immaterial points, or as to facts which in no way connect him with the offense.”

In *People v. O'Farrell*, 175 N. Y. 323, the statement is made:

“What appears to be required is, that there should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it (Roscoe's Criminal Evidence, p. 122).”

Turning to the evidence of Dr. Condon we find (p. 14) that he says that when he arrived at the house he found her suffering from a lot of pain; she told him that she was bleeding considerably. In getting her history he learned she had been pregnant and had had an abortion performed. From his physical examination he found she

was suffering from incomplete abortion. Every fact to which the doctor testified was conceded. Recalled on page 25 he testified as an expert. But his testimony here was in denial of the testimony offered by the defendant, not in corroboration of the prosecuting witness.

It is submitted that the testimony of Dr. Condon in no-wise corroborated the prosecuting witness. He in no place by legal evidence connects the defendant with the commission of the alleged crime.

It is submitted therefore that the Supreme Court erred in its conclusion that the testimony shows that had the Judge charged the jury that Dr. Condon corroborated the prosecuting witness it would have been justified.

The effect of the Court's charge in linking the names of Mary and the doctor on the State's side of the case and in charging that the reputation witnesses called by defendant had limited their testimony to an immaterial matter, was to line up on one side of the case Mary and the doctor, leaving defendant alone on the other side of the case, whereas the true situation was that the only two persons who knew whether a crime had been committed or not was Mary, the prosecuting witness, and defendant. Defendant was entitled to the benefit of his reputation, of which, by the action of the Trial Court, he was deprived.

The State was entitled, so far as the evidence of Dr. Condon is concerned, to the full benefit of his evidence on the technical matter where it differed from that of defendant (p. 25). But it was not entitled to have Dr. Condon's testimony considered as corroborative of the prosecuting witness to the extent of involving defendant and that, it is submitted, is what the State actually received.

It is respectfully submitted that the judgment of the Supreme Court should be reversed and the conviction brought up by the writ of error be set aside.

Respectfully submitted,

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February Term, 1923.



