

# New Jersey Court of Errors and Appeals

THE STATE,

*Defendant in Error,*

*vs.*

JOHN H. YOUNG,

*Plaintiff in Error.*

*On Error to  
the New  
Jersey Su-  
preme Court.*

## Brief for Plaintiff in Error.

This case comes on for review on bill of exceptions, and also under Section 136 of the Criminal Procedure Act (Case, p. 428).

The defendant is a practicing physician and surgeon, and was indicted for and convicted of manslaughter in connection with the death of a patient, Mrs. Truesdell, who, at the time she died, was undergoing an operation at his hands.

The Supreme Court affirmed the conviction in a *per curiam* opinion found on page 445.

The defendant, after graduating from Amherst College, pursued the regular medical course at the New York Homeopathic College, from which he was graduated with distinction in 1906. He spent four months as resident house physician at the Laura Franklin Hospital in New York City, and one summer as interne at the Metropolitan Hospital on Blackwell's Island. He subsequently pursued a special course in obstetrics at the Lying-in Hospital, and then spent several weeks at Saint Gregory's Hospital in New York, as well as several vacations at the Cumberland Street Hospital in Brooklyn. He was also interne at Flower Hospital in New York for one year. After some

short practice in Westchester County he commenced to practice in Montclair in 1907, and from that time has pursued a successful and increasing practice, enjoying the confidence both of his patients and associates in the profession. During this period of nine years he has filed certificates of 383 births, attended to by himself, among which he only had one maternal death, due to pneumonia and not the child birth (pp. 188-191; 383). Of these labor cases nine were by caesarean sections. (*Id.*) On p. 195 appear the names of other physicians in Essex County who have employed the defendant in obstetrical cases, and there is no dispute but that until the fatality in question the career of the defendant had been highly honorable and successful.

The deceased, at the time of her death, was twenty-one years of age. She was the wife of a practicing dentist in Montclair, and had been married some time. She and her husband lived in an apartment, and were apparently happily married. She was a small woman, weighing probably one hundred pounds, and not over five feet in height. In September or October, 1915, her husband and she, believing her to be pregnant, consulted Dr. Young, and employed him to take care of her. It is not necessary to detail at length the great care manifested by Dr. Young for the succeeding months. It is described on pages 196, *et seq.* Suffice it to say that periodic urine analyses were made, her diet was restricted, and examinations of the patient were made from time to time. The diagnosis was that birth would take place in May, 1916. On the third of February, 1916 (p. 207), a further physical examination was made, including the use of a stethoscope, with the result (p. 209) that the doctor concluded that the

fetus was dead, and that the interruption of pregnancy had been between the third and fourth month. This conclusion (*Id.*) was at once communicated to Dr. Truesdell, with the statement (p. 210) that, of course, the fetus should be removed, but with the recommendation, however, that they await the next menstrual cycle, to see if nature would remove it. This course was adopted, and at the expected time Mrs. Truesdell suffered severe pains, but failed to deliver the fetus, whereupon the operation was arranged for, and a Miss Regan, who had previously assisted Dr. Young at but one operation (p. 212), was employed as nurse, and prepared the patient on the forenoon of the 15th of February. The place selected for the holding of the operation was the kitchen of the apartment, where the light and heat were good. This was evidently a small room in the apartment (p. 139, l. 35). The doctor arrived at about half-past eleven with his office nurse, Miss Cox, who acted as anesthetist, she being very skillful in that line, and his obstetrical outfit (p. 212, l. 38). The obstetrical outfit is described at the top of page 213. It was left in the room and directions were given to administer hypodermically an H. M. C. tablet to the patient, for the purpose of quieting her nerves, so that she would take the ether easily. Dr. Young then left to make some calls, and returned about half-past twelve, and at once sterilized himself for the operation, his instruments having in the meantime been prepared by the nurse. Mrs. Truesdell's mother, Mrs. Wolf, who lived in Newark, was in the apartment, but, although requested, was unwilling to be present at the operation (pp. 26-27). Dr. Truesdell, her husband, was present, holding his wife's hand and limb until he grew faint, when, at

Dr. Young's request, he sent for another nurse—Miss Speicher, who arrived while the operation was in progress. She was an entire stranger to Dr. Young. The defendant describes (at pp. 214, *et seq*) the details of his procedure, which should be carefully read. It is, perhaps, sufficient to say here that he found great trouble in dilating the cervix sufficiently, using for that purpose Kelly dilators. In this he consumed from fifteen to twenty minutes, encountering less than the ordinary amount of blood (p. 218). He next used the bi-valve dilator, securing an opening of about the size of a twenty-five cent piece, and then introduced a curet for the purpose of measuring the size of the interior of the womb. The doctor concluded (p. 223) that the uterus was larger than he had determined by his physical examination on the 3rd of February. He met no moisture and concluded (p. 223, l. 40) that the amniotic fluid had gone. At just about this time there was presented at the mouth of the womb "a little knuckle—a flesh tissue—I drew that down through the cervix to expose it for—to my eyes—and spent considerable time in examining it" (p. 224). It had no mesentery or other attachment to it; was perfectly free, and in view of the fact that the curet had disclosed the womb to be larger than the external examination on the 3rd of February had led him to expect, he concluded (p. 228, l. 30) that the pregnancy was more advanced than he had diagnosed, and that the knuckle of tissue was fetal. (*Id.*) He then inserted sponge forceps into the womb, and hunted for the fetus, with no success. He broke his technique and made a physical examination on the outside of the abdomen, to determine, if possible, the size of the uterus, but with no success, owing to the rigidity of the

patient's body, and (p. 231) he finally concluded that he had penetrated the abdomen of the fetus, and that it was larger than he had diagnosed on the 3rd of February. He met no hemorrhage, nor was there any fecal odor. Meantime, as already stated, Dr. Truesdell had left the room, and the nurse whom he procured arrived and assisted, taking the place of Dr. Truesdell in holding the patient's limb. Shortly after her arrival the patient's heart began to exhibit bad symptoms, whereupon the vagina was packed with gauze, and the doctor devoted his energies to administering restoratives, both by enema and through the mouth. In the meantime he telephoned for Dr. Bunn, a distinguished surgeon of East Orange, who hurriedly arrived, and entered the room just as the patient expired. A small portion, about sixteen inches, of this knuckle or tissue, which the doctor then believed was fetal intestine, fell into the pail at the foot of the table, and at the time the vagina was packed there was presented from the outlet of the womb to the mouth of the vulva (p. 272) another piece of this same tissue, which was left there.

As before stated, the closest attention is invited to the detailed description given by Dr. Young of the operation. None of the nurses could see the operation itself, being engaged in their respective duties, and the only other witness who undertook to describe the appearance of this tissue was Dr. Truesdell, who was called by the State. He says (p. 12) that after the insertion of the different instruments the doctor pulled out a "tube." He was asked:

"Q You say 'tube.' What do you mean by tube? A Why, it was—looked like a tube about the size of my little finger and it was pulled out about that far (indicating) in a loop like—the two ends were in

the body and this one loop was out, protruding.

Q What did it look like? A Why, it was white or reddish white and appeared to be about the size of my finger.

Q And what did it look like? What did you take it to be? What did it look like?

*Mr. McCarter.* Let him describe it.

A Well, I don't know what it might have been. It might have been anything.

*Mr. McCarter.* Never mind what it might have been. I do not think this witness ought to undertake to tell what it might have been.

*The Court.* No.

*Witness.* I don't know what it was, Mr. Mott.

*The Court.* What did it look like? Was it flesh or blood or what?

*Witness.* Oh, it was like—flesh like—might have been intestine but I never have seen intestines but pictures; it might be intestines."

There was no mesenteric attachment to it (pp. 31 and 32).

After stating that when studying dentistry he had studied anatomy, and had seen pictures of intestines, he was permitted to say that the "tube" looked like pictures of intestines (p. 15).

"Q When you saw this loop, what did you do? A I was pretty well shaken up and I simply couldn't look any more and I went out of the room.

Q Did you return at any time to the operating room after that? A Why, I walked back and forth and came to the door and once I went through to fix the—I went down—I thought the furnace would need fixing and went down to put coal on the furnace.

Q When you went through to go to the furnace on what was your vision fixed? A

Why, I couldn't look at it—my little wife—I looked away as I passed through. I couldn't stand looking at it. Just didn't want to see her because it affected me too strongly.

Q When you went through to go to the furnace did you look at your wife and did you see anything that was being done at that time? A No; I couldn't see, Mr. Mott."

After her death Dr. Young immediately busied himself in procuring the attendance of the coroner, who sent the Assistant County Physician. He did not, however, arrive until about four o'clock, the patient having died at a quarter past two o'clock (p. 300, l. 18). In the meantime the nurses, who, as before stated, were entire strangers to Dr. Young (the anesthetist, Miss Cox, having gone home) in the regular course of their duty, without any orders from Dr. Young, cleaned the instruments and tidied up the room, and among other things emptied the pail of its contents. They both agree that it was only about one-third full, and that its contents were, beside two towels, some yellow looking fluid having the appearance of iodine, some little flesh tissue and some pieces of cotton (p. 308).

Some stress is laid by the State upon the extent of information that was disclosed to Dr. Simmons before his autopsy, and the giving of his death certificate. On his direct examination (p. 237) Dr. Young was asked:

"Q Did you report to Dr. Simmons anything? A I told him just what I have told here today.

*The Court.* That is very indefinite.

Q You mean with reference to the operation? A Yes, sir.

*Mr. McCarter.* Does your Honor think I ought to go over that again, the entire conversation?

*The Court.* No."

On cross examination he was asked (p. 258):

"Q I am asking the plain, simple question, what became of the exposed part of the fetal intestine? A The last that—the last step of my operation that there was an end protruding and that—I packed around that with gauze; left this protruding down through the mouth of the womb into the vagina, to the outlet of the body.

Q How far was it protruding? A Just to the outlet.

Q Well, how far? A That is probably two and a half or three inches from the mouth of the womb.

Q Two and a half or three inches in full view then? A Yes, sir.

Q And you left it there? A Yes, sir.

Q And it was there when Dr. Simmons went there? A Yes, sir.

Q Did you call his attention to it? A No, sir.

Q Well, you knew it was there, didn't you, doctor? A Yes, sir.

Q Why didn't you call his attention to it? A I told him to step by step—I was—I had given him the report of my case. I did then whatever he told me to do.

Q Why didn't you call his attention to this exposed fetal intestine that was hanging down there two or three inches? A I can't tell you that. I don't know.

Q Did you want him to know it was there? A I told him it was there.

Q Oh; why, doctor, you told us a moment ago you did not call his attention to it? A When he first came in I gave him the report of my case, of the protrusion of what I thought was fetal intestine, down through the cervix.

Q I asked you a moment ago if you called Dr. Simmons' attention to the fact

that fetal intestine was exposed—protruding, as you have described, and you said no. Do you wish to change that answer?

A I wish to explain it. I thought your question was at the time of the autopsy.

Q It was at the time— A I called his attention to it when he first came in. I recited it to him when he first came into the house.

Q Tell us what you said, please. What did you say to him about it? ‘Recited’ doesn’t mean anything very definite. What did you say to Dr. Simmons about it? A It told him step by step of my operation, of my dilation, of the presentation at the mouth of the womb of this small knuckle of intestine which I examined as well as I could.

Q Again I ask you what did you say to Dr. Simmons about the exposed fetal intestine? A I told him that after my dilation of the mouth of the womb that a small bit of tissue presented. I told him of my examination of it. I told him of my search for the fetus. I told him of the packing of the vagina, the administration of the drugs—the saline, of calling Dr. Bunn.

Q And that is all you said to Dr. Simmons about the exposed fetal intestine? A I believe so—I think so.

Q Why didn’t you call his attention to it, in terms? A I did call his attention to it.

Q Please tell me the words you used, or substantially, not verbatim. I don’t mean literally. A I told him that after my dilation of the mouth of the womb there appeared a bit of tissue which I believed to be fetal—fetal intestine, small intestine.

Q Well, there appeared, yes. Well, what else did you tell him? A Then I told him of my search for the fetus.

Q Did you tell him that three or four inches of that fetal intestine was at that time exposed to view? A Yes, sir.

Q Did he look at it? A No, sir.”

And on p. 271:

“Q You have spoken of the exposure of a piece of what you thought was fetal intestine after the dropping of what has been called the loop. How long is the vagina? A About two inches and a half.

Q Now, do I understand that by exposure you mean some—

*Mr. Mott.* I object.

Q What do you mean by exposure? Where do you locate the piece that still hung after the loop had dropped? A The piece that protruded from the cervix down into the vagina was left there with gauze.

Q One moment. Did it protrude out of the mouth of the vulva?

*Mr. Mott.* Objected to.

*The Court.* Objection sustained.

Q How far through the vagina did it extend? A To the outlet.

Q Have you given then the limitation?

A Yes, sir.

Q To the outlet? A Yes, sir.”

After the arrival of Dr. Simmons, the Assistant County Physician, and an explanation of the circumstances by Dr. Young to him, as above indicated, an incision was made in the abdomen by Dr. Young at the request of Dr. Simmons, about five inches in length, and the uterus was exposed, showing a rupture on one of its sides. Dr. Young (p. 239, 1. 2) was asked:

“Q After you had made the incision just tell the jury slowly, now, all that occurred? A I drew aside the walls of the abdomen and stepped a little one side for Dr. Simmons to look. I took from what was left of a roll of cotton, that was probably that large (indicating), just a handful, a batch probably as large as my fist. I ran it down in through the incision to each iliac process, as we call it; that is this part of the abdomen (indicating) right side and left; brought

the cotton up barely tinged with blood; threw it down in the pail; took a fresh piece of cotton, turned it a little bit so that my hand went up towards the diaphragm, down in under—over each kidney, each time with a fresh piece of cotton, and threw it in the pail.

Q Did you find any blood other than this little that you found on the cotton in the abdomen? A No, sir."

Dr. Simmons, called by the State (p. 50), says:

"Q And after the incision was made what was done? A There was a little blood wiped up with some cotton.

Q Blood where? A In the abdominal cavity.

Q Who did that? A Dr. Young."

On cross examination (p. 55, l. 40), he was asked:

"Q \* \* \* You say that a little blood was wiped up with cotton. Won't you describe what you mean by that? A He took some cotton and put it in the cavity and soaked up some blood.

Q The cavity wasn't full of blood, was it? A No, sir."

(P. 56.)

"Q The only blood that you saw was on the piece of cotton that you put into the orifice that he opened and brought out on the cotton that he brought out? A Yes, sir.

Q Just a little soaking of that piece of cotton? A Yes, sir.

Q That is all the blood that you saw? A Yes, sir."

In view of subsequent events, and of the contention of the State, too much emphasis cannot be laid upon the quantity of blood observed by Dr. Simmons, the Assistant County

Physician, at the time of this autopsy. On p. 57, l. 15, he was asked:

“Q And do you remember telling Chief Gallagher on that occasion that there was a break in the uterus but that you were glad to say there was no blood in the abdomen? A No, sir.

Q You deny that you said that? A I don't remember saying it. I may have said it. I don't remember.

Q It was true, wasn't it? A I guess so.

*The Court.* Do you guess, doctor. State your best recollection. You already said there was some blood in the abdominal cavity.

*Witness.* Oh, yes, some.

*The Court.* Now, you have said there wasn't.

Q I ask you now if you told Chief Gallagher on the occasion in question there was no blood in the abdomen and that the absence of blood looked good for Dr. Young? A No, sir.

Q Sir? A No, I don't remember saying that.

Q Will you say you didn't? A I don't remember saying it.

Q Well, you told us today the extent of the blood that you did observe? A Yes, sir.”

Chief of Police Gallagher testifies (p. 382) that after the autopsy Dr. Simmons did tell him he was glad to say there was no blood in the abdomen of Mrs. Truesdell.

Dr. Young and the nurses all swear that white thread was used by Dr. Young in sewing up the abdominal incision. They also state that the incision was fastened together with a continuous suture. Dr. Simmons was not asked, when he testified the first time, what material was used in sewing up the incision, but he did say

(p. 57, l. 1), that it was a continuous stitch, and this he reiterates when called in rebuttal (p. 396, l. 40).

The two nurses, Misses Regan and Speicher, were present at this autopsy, and after Dr. Simmons had satisfied himself as to the cause of death, he, in the discharge of his official duty, filed a death certificate, Exhibit D. 2 (pp. 426-427), in which he stated:

“I hereby certify that I saw deceased Feb. 15, 1916. THE CAUSE OF DEATH \* was as follows: Hypodermic of H. M. C., 4 oz. of ether and shock. (Contributory) Rupture of uterus and injury to soft parts from curetting.”

Two undertaker's assistants, Rommele and Adler, arrived somewhere between five and seven o'clock, and embalmed the body, consuming an hour or more in their work. There was no other person in the room. Rommele, called by the State (p. 135), says that he found the incision there inadequately sewed together, and in order to make it tight, so that the embalming fluid would be retained within the body, he removed the old stitches, and himself sewed up the wound with “a baseball or continuous stitch.” He says that the stitches he found were cat gut and separate—*three distinct separate stitches and not continuous*. Adler, the assistant embalmer, was not called by the State, but by the defense (p. 373). He testified that he thought the stitch he found was a continuous stitch of cat gut, although he had previously told the witness Creamer, whose testimony immediately follows that of Adler, that they were separate stitches.

Dr. Truesdell states that his wife's brother, Fred Wolf, who in the meantime had arrived, while Dr. Simmons and Dr. Young were in the

death chamber, asked him, Truesdell (p. 38, l. 40), if the automobile outside the house was Dr. Young's, and if he had a big practice, and whether he owned the house in which he lived.

The funeral took place in due course from the house of Mrs. Truesdell's mother in Newark, and her body was interred in Fairmount Cemetery. About three weeks thereafter the body was exhumed, and another autopsy was conducted in the presence of Drs. Washington and Hicks. Dr. Richman, the Wolf family physician, was present during a portion of this autopsy. It should be noted, in passing, that Dr. Washington was employed, and paid, to conduct this autopsy by John A. Bernhard, Esquire, the counsel for Fred Wolf, who had made the significant inquiries concerning the property of Dr. Young, above referred to; and that the autopsy itself was neither inspired or paid for by the State (p. 156). Mr. Bernhard sat by and was associated with the prosecutor throughout the trial of this case. An incision was made in the dead body and the abdomen opened, with the result as described by Dr. Hicks (p. 103, l. 15):

“We found that there was about—the whole of the duodenum was present, that is the upper part of the small intestine, and probably about twelve inches of the jejunum, or the next small intestine; all the rest of the small intestines, including both divisions, and the large intestine down to the sigmoid flexure was absent; only the two ends of the alimentary canal were left there. There was a little fluid that was stained—sanguineous stain—but there was no fecal matter and there was no blood except the staining of what appeared to be the post mortem fluid.”

Dr. Washington (p. 149, l. 3), thus describes the situation:

“The first noticeable thing was the open end of the duodenum which is the small part of the intestine. It was hanging loose in the upper part of the abdomen, about an inch in diameter, the rest of the duodenum being attached by the peritoneum to the posterior wall of the body. The other two parts of the small intestine, that is the jejunum and ilium, together with all of the large intestine except the lower part of the sigmoid flexure and the rectum, all of the mesentery, all of the various mesocolons, which act in a similar capacity for other parts of the intestines, were gone, with the exception of some loose fringes left where their site had been. \* \* \* Complete absence of any blood in either of the cavities.”

Dr. Hicks, upon cross examination, was asked (p. 110, l. 32):

“Q Now, how much of the large intestine in inches or feet were gone? A How much was gone?

Q Yes. A Why, all of it down to within a few inches of the rectum.

Q In length, how much, doctor? A Well, the large intestine measures from four to six feet in length, differs in length with different people; so I should imagine that three feet had been taken away.

Q Three feet. Was there some remnant of it there? A Well, the lower part of what we call the sigmoid, which extended up to a few inches beyond the rectum.

Q You said four or five feet gone; you thought? A No; I said I supposed around three feet.

Q Around three feet. What was the diameter of the piece of the large intestine that you saw there? A I didn't measure it.

Q I know you didn't but you had eyes and you know a couple of inches when you see it. Roughly speaking what was the

size of the piece of the large intestine that remained? A Two inches.

Q Two and a half or three? A I suppose it was around two inches, either more or less. I don't know. It is merely a guess.

Q Why didn't you measure it, doctor?

A I didn't think it was necessary. I am sorry I didn't.

Q Yes. You never had observed that kind of an evisceration before, had you? A No, sir.

Q That was the most remarkable thing you struck on your autopsy, wasn't it? A Yes, sir."

There is no dispute that the small intestine is about twenty-two feet in length. Dr. Richman (p. 86, l. 20), says, and he swears for the State (p. 90, l. 10), that all but about twelve or fifteen inches of the intestines were gone, besides the mesenteries.

In other words, this autopsy displayed that this woman's body had at some time been completely eviscerated, and it is undisputed that immediate and fatal hemorrhage would be the inevitable result of such treatment.

This discovery was at once made public. It created great excitement, and the indictment of the defendant followed. In his opening address the prosecutor frankly stated to the jury that the State did not rely upon the mere fact that the uterus of this woman had been torn. Indeed, Dr. Richman, called by the State (p. 95), admits that this will happen with the best physicians. The State relied wholly upon the claim that the defendant had, in the course of his operation, completely eviscerated this woman, and hence the Court, in charging the jury, said (p. 412, l. 12):

"The State contends that this defendant in a grossly careless manner without the

exercise of any skill, judgment or diligence, removed the intestines and that the shock, bleeding or hemorrhage caused death, and that such gross negligence evinces a reckless disregard of human life, and that therefore the defendant is guilty as charged in the indictment."

In a word, the claim is that the defendant, in the operation that he performed, extracted through the uterus and vagina, by the use of instruments, about twenty-one feet of the small intestine, and approximately three feet of the large intestine with their mesenteries and the entire omentum (p. 146, l. 13). The mesenteries are attached on one side to the intestines, and on the thicker side adhere to the spinal column. They are permeated with blood vessels, and perform the double function of supplying the intestines with blood and keeping them in their proper place. See Dr. Hicks' evidence, at pp. 114, 115. They grow thicker on the side that adheres to the bone, and were torn or cut off at the toughest or thickest part, where they are most difficult to remove (p. 116, l. 35). As before stated, it is undisputed that any such evisceration—assuming it to have been possible—would have resulted in a severe hemorrhage. (Dr. Richman, p. 91, l. 2; p. 93, l. 10; Dr. Hicks, p. 115, l. 6; Dr. Washington, p. 155, l. 10.)

This resultant hemorrhage admittedly would have produced a quick death, and Dr. Bunn's evidence, at the bottom of p. 336, to the effect that death would have resulted in three or four minutes is not contradicted. Miss Cox swears (p. 299) that she stopped administering ether shortly after one o'clock. Miss Speicher (p. 304) arrived there between one o'clock and a quarter after one, and she states (*Id.* l. 20) that Dr. Young stopped operating probably a minute

after she came in. Dr. Young then busied himself in packing the vagina and administering restoratives. He also summoned Dr. Bunn, who arrived in about eight minutes after being summoned (p. 334, l. 22), and the patient died as he entered the room (p. 33, l. 10). This was at a quarter past two (p. 300, l. 15). *It thus appears that Mrs. Truesdell lived somewhere between fifty and sixty minutes after it is conceded Dr. Young stopped operating. No one pretends that a patient who has been eviscerated, as the second autopsy disclosed that Mrs. Truesdell had, could possibly survive for any such period.*

There would also, necessarily, have been a decided fecal odor.

Dr. Richman, p. 93, l. 30;

Dr. Hicks, p. 117, l. 15;

Dr. Washington, p. 159, l. 10.

And the testimony of all the medical witnesses called by the defense, whose examinations should be carefully read. Now, it is most significant that neither Dr. Truesdell nor Dr. Simmons, both of whom were called by the State, saw or smelt the results of any such evisceration. Neither did either of the nurses, who were strangers to the defendant; nor did Dr. Bunn, who arrived there and went into the room just as the patient died. Can it be imagined that any such mass of entrails as was involved, could have been exposed in that room and none of these people have seen them, or the consequent blood, or smelt the fecal odor. The physical space occupied by such mass of intestines as twenty-one feet of the small intestine and three feet of the large intestine, with their mesentery attachments, would necessarily be great. The smell, as Dr. Hicks says,

would have been very malodorous; the hemorrhage would have been profuse, and yet none of these witnesses—I am not now referring to Dr. Young—saw it or smelt it. So revolutionary and extraordinary was the discovery three weeks after burial of this evisceration, that Dr. Simmons testified (p. 62) as follows:

“Q Did you ever see in your life, in the course of your professional career, at an autopsy, a body completely eviscerated? A No, sir.

Q If this body had been completely eviscerated, that is, all its intestines been taken out and you had known it, you would have said so on the certificate, wouldn't you, doctor? A Why, if I had seen it, yes, sir.

Q Yes that would have been as absolute a cause for her death as you could imagine, wouldn't it? A Yes, sir.”

While Drs. Richman, Simmons, Martland, Hicks and Washington were all called by the State, and Richman and Hicks, with Washington, attended the autopsy, and Martland made a pathological examination of some of the organs, no one of them, except Dr. Washington, ventured the opinion that it would have been possible for Dr. Young to have caused this evisceration of the small and large intestines, with their mesenteries, to the extent described in the testimony of Drs. Hicks and Washington, through the rent in the uterus. Dr. Hicks (p. 123) after admitting that it would have been impossible to have done it through that avenue with the fingers, said (p. 123, l. 31):

“A surgeon might, with sufficient forceps, have obtained a grip on the bowels with which he could make something give way.”

He did not venture to say he could have done what it is claimed that Dr. Young did. The State, therefore, rests entirely upon the opinion

of Dr. Washington, who was hired and paid for by the same Mr. Wolf, who, at the hour of his sister's death, was inquiring as to the financial responsibility of Dr. Young. He ventures the opinion (p. 152, l. 15) that it could have been done very easily.

In the court below, the brief for the State said:

“Dr. Washington was not asked at any time whether in his opinion the intestines could have been drawn down with the instruments produced in court. His testimony that they could have been so drawn by proper instruments remains absolutely uncontradicted.”

The inaccuracy of this statement appears from a glance at the testimony of Dr. Washington which is as follows (p. 152, l. 10):

“Q Doctor, assuming that a physician inserted dilators and made the tear in the womb which you found and afterwards used forceps forcibly in your opinion could the bowels that you found absent from this woman have been drawn down through that tear with the forceps? A Very easily.”

Of course, the “dilators” and *the* “forceps” involved in the foregoing question were they which had already been offered in evidence and the sole subject of comment.

Not only did Dr. Simmons fail to observe or testify to any such thing, and file an official certificate of an altogether different cause of death; not only did Dr. Truesdell fail to see any such thing; not only did Dr. Young positively deny that any such thing occurred; not only did the nurses and the anesthetist likewise deny that any such thing occurred—and it could not have occurred without their knowing it—not only did Dr. Bunn (p. 338), who arrived just as the patient died, fail to see evidences of any

such thing, but Drs. Carl E. Sutphen (p. 316), Louis L. Davidson (p. 349), Otto Lowy (p. 351), Widmer E. Doremus (p. 353), Charles W. Banks (p. 331), and Bond Stow (p. 360), all but two of whom were allopathic surgeons, swear positively and unequivocally that it would have been a surgical and physical impossibility for the thing to have been done; that the adhesions are so strong and the position necessarily so cramped that it simply could not have occurred. The refusal of the State's surgical witnesses to follow Dr. Washington in his isolated opinion is very significant. The question became the supreme issue of the case, and surely without their backing, and against the positive statements of seven distinguished and disinterested surgeons of vast experience, the wholly uncorroborated opinion of Dr. Washington—it was necessarily an opinion, based upon no experience—for he never pretends to have done the thing he believes could be done, and indeed, he admits that he never has performed an abdominal operation (p. 186, l. 18)—loses force, and the conclusion seems inevitable that his private retainer in this matter has been of weight in influencing his views.

This situation naturally raises the inquiry—How then did the jury find a verdict against the defendant? The answer is obvious, and in it lies the first and fundamental error in the case, and injustice to the defendant, namely:

## I.

The State, in summing up, without any proof whatever, claimed that the impossibility of the evisceration having been done through the uterus was shrewdly based upon the hypothesis that the instruments which Dr. Young testified to having used were, in fact, used; that none of the medical witnesses for the defense deny the possibility of its having been done with some instruments, and that the jury could conclude that other instruments were, in fact, used. (See the stipulation, p. 442.)

The moment this theory of the State was broached, the defendant submitted a supplemental request to charge as follows (p. 423, l. 32):

“There was no duty to examine the witnesses with respect to any other instruments than those which the evidence disclosed were used. No inference can be drawn from the fact that the question was confined to the instrument which the evidence disclosed were used, there being no evidence whatever to show that any other instruments were used.”

which was refused and an exception taken. Error is assigned thereon (p. 433, l. 30; p. 455, l. 34). It can be demonstrated that not only was there no suggestion of doubt during the trial as to what instruments were used by Dr. Young, but that it was taken for granted by everyone that those presented in court, and marked as exhibits, were used; and hence, of course, any inquiry based upon any other supposition—in the absence of doubt or suggestion that possibly others were used—would have been irrelevant and improper. When a defendant produces his kit of surgical instruments, and offers and has marked in evidence those which he swears

were used, and no one suggests anything to the contrary, or intimates that he might be prevaricating, is he to be found guilty on the hypothesis, suggested for the first time in the summing up to the jury, that they could conclude upon this point he was prevaricating, and that possibly it might have been accomplished with other instruments? This inquiry makes it important that we direct the Court's attention to all the evidence in the record with reference to the instruments that Dr. Young used during the operation. On p. 212, l. 38, Dr. Young testified that he took his "obstetrical outfit with him," and at the top of p. 213, he describes what they consisted of. At line 29 of the same page he swears he handed over the instruments to the nurses for sterilization, and left the house to return later to perform the operation, and on p. 216, at l. 30, his counsel says, concerning this large kit which was in court and at the witness' hands:

"I do not care to have you produce all these things, doctor, it isn't worth while. They are there for inspection if anybody wants to see them."

On pp. 217, 218, 219 and 220, he describes the use of the several instruments and selects those he actually used. After describing the curet which he used in place of the uterine probe, on p. 220, at l. 20, he says:

"I haven't carried the other probe in my kit for three or four years."

and gives the reason, whereupon Mr. Mott says (*Id.*):

"If you are not going to introduce it you ought to put it down."

and the curet was then offered in evidence and marked Exhibit D. 4. There is no question about the curet, and no pretense that the evis-

ceration could have occurred with it. If it were done at all it would have had to be done with some kind of forceps. The Court then said:

“Your counsel asked you to produce the bi-valve dilator that you had there?”

*Witness.* Yes, sir.

Q Let us see the dilators again? A This is the bi-valve dilator.”

At the top of p. 221 the following colloquy appears:

“*Mr. McCarter* I do not want to actually offer these unless the State desires me to do so.

*The Court.* You refer not to the first dilator?”

*Mr. McCarter.* The first three dilators.

*The Court.* You are not referring to the bi-valve, you are going to offer that.

*Mr. McCarter.* I am in a moment. These are in constant use by the doctor and I would rather not leave them here.

*The Court.* All right.”

Concerning the dilator which he was describing, on p. 221, l. 38, he was asked:

“Now, is that a regular instrument regularly used for that purpose?”

and he replied: “Yes, sir.”

On p. 222, at l. 12, the dilator is offered in evidence, marked Exhibit D. 5, and on p. 224 after describing the use of the sponge forceps, they are offered in evidence and marked Exhibit D. 6.

On p. 243, at l. 25, Dr. Young swears that Dr. Simmons, the Assistant County Physician, looked at his instruments as they lay there. At p. 244, at l. 12, Dr. Young reiterated that he had with him the usual and ordinary instruments for the proposed operation, but noth-

ing for a laparotomy or opening of the abdomen. At the bottom of p. 250, Dr. Young, in describing a previous operation, in which he had encountered fetal intestine, the experience of which was before him during this operation, said:

“The case was the same, fetus in arrested development, and on opening—after opening—dilating the mouth of the womb in the manner and the same instruments.”

He was interrupted, the Court saying:

“Do not go all through that. Come to the point.” On p. 264, upon cross examination, Dr. Young was asked, at line 18:

“Q When you went over to Dr. Truesdell’s house on the 15th, did you take your full surgical equipment with you? A Yes, sir.

Q What did that consist of generally? A Why, it consisted of everything that I found necessary in the case of an obstetrical case.

Q Well, what beside instruments would that include? A Well, my suture material, ergot, package or two of sterile sponges, the iodine, umbilical tape—

Q What is suture material? A Cat gut.

Q And what is umbilical tape? A That is used in tying off the umbilical cord.”

The examination then referred entirely to the question of thread, and nothing further was asked concerning the instruments.

The foregoing embodies everything there is in the case down to the time that the surgical witnesses were interrogated by the defense, with reference to the possibility of Dr. Young having caused the evisceration shown by the autopsy of March 4th to have occurred at some time. Naturally, therefore, when these witnesses were examined, the question that was addressed to them was based upon the hypo-

thesis of the use of these instruments. Indeed, no one at this time suggested there was any question about them. Hence, Dr. Sutphen, on p. 315, was asked:

“Q It has been proved in this case, Dr. Sutphen, that in the course of the operation that was performed by Dr. Young previous to the death of Mrs. Truesdell on the 15th of last February, in which operation he was engaged in removing what he believed to be a dead fetus from the womb of the patient, he, in separate stages of the operation, used the three instruments I show you—could a patient under anesthetic with a tear of any size through the wall of the womb, the womb measuring at an autopsy held later four and a half inches in length—using instruments as shown there, or the hand and fingers—in your opinion is it possible to extract twenty-one feet of the small intestine and approximately two feet of the large intestine, with their mesenteries, through the rent in the womb? A I do not think it is possible.”

The next medical witness is Dr. Banks (p. 331). The same question was put to him, with the same answer, and he was not cross examined. Next came Dr. Frank C. Bunn, who at the bottom of p. 337, was asked the same question, and he replied that it was absolutely impossible. At the bottom of p. 338, he, like Dr. Sutphen (p. 316) was asked if the instruments were the proper and regular instruments which should have been used for such an operation as was undertaken, and his reply, as was Dr. Sutphen's, was—“they are.” Dr. Bunn (p. 340) was further interrogated as to the proper procedure by a surgeon in the event of the discovery of a dead fetus, and replies that the neck of the womb should be dilated with the use of curets and forceps, and the

fetus removed. The following then took place (p. 341, l. 9):

“Q What have you to say with reference to the propriety of the use in such case of the three instruments, four, five and six, which are before you? A Only one criticism of them. They are hardly of sufficient size and strength for the work that we find to do in some cases. This is a much lighter dilator than is usually used and this sponge forceps is hardly the size and strength for handling good sized fetal parts. I think the doctor’s instruments would have been better if they had had a little more strength to them.

Q Better, doctor? A Yes, sir. This dilator—I don’t know the name of it—the one that is ordinarily used—the Goodell dilator is a much more powerful dilator than this. Much more powerful.”

It is this evidence that prosecutor relies on as justifying his insistence to the jury. It will be remembered that Dr. Bunn had already testified that they were the proper and regular instruments used in operations of this kind, and all that can be concluded from the last quotation is that there are more powerful instruments, particularly a dilator—which no one suspects would have been used in pulling out the intestines—than those which concededly were used. Dr. Bunn was cross examined but not a suggestion was made with reference to the character of the instruments. The same question was put to Dr. Davidson (p. 349). He, too, was cross examined, but upon another subject entirely. Dr. Lowy (p. 351) was asked:

“Please look at the three instruments that are before you there on the table, being the same ones that we have so frequently referred to in other inquiries, given a patient under an anesthetic with a tear of any size—any size—through the wall of the womb, the

womb measuring at an autopsy four and a half inches in length, using those instruments or the hand and fingers, is it possible to extract twenty-one feet of small intestines and approximately three feet of large intestine, with their mesenteries through the rent in the womb?"

and his reply was in the negative. He was not cross examined. Dr. Doremus, on p. 352, l. 32, was asked the same question. He was not cross examined. The same questions were put to Dr. Bond Stow, an eminent surgeon of vast experience, residing in New York (pp. 368-369), and he was not cross examined.

The Court now has every bit of evidence there is in the case with reference to these instruments, and you will fail to find a suggestion of doubt as to the fact that they were the genuine instruments. Dr. Truesdell, though not a surgeon, had studied anatomy. He was present at the operation, and throughout the trial, and he saw the doctor use the instruments. He never suggested those he used were not those he produced at the trial. Dr. Simmons, the Assistant County Physician, saw the instruments lying on the table at the close of the operation. He was present at the trial, and called even in rebuttal. He never intimated that there was any doubt as to the instruments, and there was no suggestion in the cross examination of Dr. Young with reference to the authenticity of the instruments. The nurses, who could have corroborated him, were, naturally, not interrogated upon that subject. When, at the bottom of p. 250, Dr. Young was describing a previous operation of the same character, and referring to the use of the same instruments, he was interrupted by the Court, and requested not to go through all that, but

to come to the point. What justification, therefore, was there for the State's attorney to make an impassioned appeal to the jury that all the medical testimony was to be disregarded upon the hypothesis that other and different instruments were, in fact, used; and that "ingenious counsel" had been very careful to confine his questions to the instruments that were offered in evidence? And what justification was there for the Court to refuse the request (p. 433)?

"There was no duty to examine the witnesses with respect to any other instruments than those which the evidence disclosed were used. No inference can be drawn from the fact that the question was confined to the instruments which the evidence disclosed were used, there being no evidence whatever to show that any other instruments were used."

It is insisted that the refusal of the Court to charge as immediately requested, was harmful error, and should result in a reversal. The conviction of a surgeon of high character of the crime of manslaughter, based upon his performance of so dastardly an act as is here alleged, should be founded upon evidence, and not wholly upon surmise, and the jury should have been instructed as requested.

As we have already seen, there is absolutely nothing in the evidence of Dr. Bunn to justify the claim of the State. Under such circumstances the failure of the Court to correct the impression conveyed by the prosecutor was erroneous.

*State v. Biango*, 74 N. J. Law, 284, affirmed 79 *Id.* 523;

*See v. Public Service Ry. Co.*, 53 *Id.* 144;

*Young v. The State*, 65 Ga., 525;

*State v. O'Neal*, 7 Iredell, 251;

*Commonwealth v. Richman*, 207 Mass., 240; 93 N. E. Rep. 816;

*Sayles v. Quinn*, 195 Mass., 82; N. E. Rep. 713;

*State v. Clark*, 74 N. J. Law, 33;

*State v. Hernia*, 68 N. J. Law, 299, 304, (E. & A.).

In the State's brief below, appeared the following:

"If the testimony of Dr. Sutphen, Dr. Bunn and the other medical witnesses for the defense was true, it necessarily follows that the instruments produced in court were not the instruments actually used; and if the instruments produced in court were not the instruments actually used at the operation, again it necessarily follows, under the form of the hypothetical question put to the medical witnesses for the defense, that these witnesses had expressed no opinion as to whether the intestines could have been so drawn down and removed by the use of ether and more powerful instruments, or, as Dr. Bunn expresses it, instruments usually used and of proper size and strength for handling good sized fetal parts."

The opinion of the Supreme Court says with reference to this point:

"This request embodies two ideas: First, a statement as to the duty of counsel in examining the witness for the defense, and second, it ignores *all the other evidence and testimony in the case, except that of Dr. Young, as to what instruments were used and the inferences to be drawn* from all the testimony. Surely this was for the jury. It was not error for the Court to refuse this request."

The trouble with the State's contention as well as that of the court below, is that there was absolutely no evidence or testimony except Dr. Young's with reference to the identity of

the instruments that were used. You will search in vain throughout the record for a suggestion of doubt upon the subject, and hence there was no basis for an inference to the contrary.

## II.

**Injustice and harm were done the defendant in the Court's permitting the witness Truesdell to be asked by The State: "You are under indictment in this Court jointly with Dr. Young for performing a criminal abortion on your wife, are you not?"**

It will be recalled that Dr. Truesdell was the main and only reliance of the State, to prove the exposing of what was claimed to be intestine at the time of the operation. During his examination he dramatically described how during the operation, and after he had left the room, he, although not a religious man, had fallen to the floor in prayer, and on p. 403 he was called again in rebuttal, and gave further evidence for the State, whereupon he was cross examined as follows (p. 403):

"Q You are under indictment in this Court? A I am.

Q You have been promised or your counsel has been promised by the State if you testified in this case you will be relieved from that indictment, haven't you? A I believe that is the understanding, is it not, Mr. Mott?

Q That is all."

The prosecutor on re-direct then asked the following questions, to which objection was made (p. 404):

"Q You are under indictment in this Court jointly with Dr. Young for performing a criminal abortion upon your wife, are you not? A Yes, sir.

*Mr. McCarter.* I object as immaterial.  
*The Court.* That is proper."

This question was plainly incompetent and harmful. There was only one purpose in asking it and that was to prejudice the jury against the defendant because of some other accusation against him. The fact that Dr. Truesdell had been offered immunity upon some indictment against himself was relevant to show his interest, and only relevant for that purpose. It in no way detracted from, or affected that interest, to show that the defendant was included in that indictment. It is not legal to discredit a person, whether he be a defendant or a witness, by proving that he is under indictment. The State could not have asked Dr. Young the question it was permitted to ask Dr. Truesdell. Why does the fact that Truesdell was promised immunity from some indictment justify the inquiry as to whether or not Dr. Young was a co-indictee for abortion with him? We think this was harmful error, and while occurring at the very end of the case, and no exception was taken, nevertheless, the whole record being here under Section 136 of the Criminal Procedure Act, the Court must consider the incident, and if satisfied that wrong and injustice has been done, act in the premises.

Counsel for the State and the Court below, while tacitly admitting that the question was erroneous, refer to *Clark v. The State*, 47 N. J., p. 558, as holding that the objection appearing on the record came too late. The record (Case, p. 404) shows immediate answer in the affirmative, and the notation of an objection with a comment by the Court, "that is proper."

It was a physical impossibility to have gotten the objection in before the question was an-

swered, so glibly did Dr. Truesdell respond to the prosecutor's earnest inquiry. *Clark v. The State*, was before this court on strict writ of error, and the legal principle there announced in such a case is a healthy one. The situation is quite different in the case at bar. The very purpose and object of the legislature in enabling this court by Section 136 of the Criminal Procedure Act to reverse, if it is satisfied that wrong and injustice has been done, was to relieve clients of the strict necessity of application of legal rules. Here the Court's attention was immediately called to the impropriety of the question. The Court deliberately concluded that it was a proper one. Is there the slightest reason to suppose that if a motion had been made to strike out the illegal answer, or if an exception had been asked, they would have been refused? If not, should not this court intervene, in a case of this importance, involving not only the personal liberty, but the life work and professional standing of a physician, who until this occurrence had never had the slightest trouble, if it feels, as obviously it must, that wrong and injustice have been done. The Court below says:

"If the Court had been asked to exclude the name of Dr. Young from the question, doubtless the Court would have done so."

What warrant is there for this conclusion? The record shows that the Court considered, under objection, the question proper.

Nothing could have been more detrimental, just at the close of this exciting and protracted trial, wherein the character and standing of a defendant was at stake, then to have thus surreptitiously gotten before the mind of the jury the fact that he had been indicted for this other

heinous offense. The conduct of the prosecutor in asking the question, and the Court in allowing it, is, in my judgment, incomprehensible.

### III.

**The Court erred in its refusal to permit the defendant to give evidence as to what was said by him when he left the spool of thread with the prosecutor.**

During the trial the question as to the material used by Dr. Young in sewing up the abdominal incision after the autopsy with Dr. Simmons became a storm center. Dr. Simmons at the bottom of page 56 swore that he saw the defendant sew up the orifice. He swore he did it in the regular way with a continuous stitch. Nothing was said at that time by him about the material used in the sewing. Roemmele, the undertaker, swore (p. 135, l. 40), that he found at least three separate catgut stitches, which he cut and re-sewed the orifice with a baseball stitch. He was very minute in his description of the separate stitches. Dr. Young (p. 241, l. 40) said that he sewed up the incision "with a continuous through and through suture of cotton—the cotton that Miss Speicher brought me." On page 242 at line 18, he further described the operation:

"The needle is put through—that (indicating) would represent the opening in the abdomen. You go in this side and out. You tie that first loop. Then, you go on and on and on until you finish—get close to the end—and then there is another knot at the end. From end to end it is continuous without any knot.

Q And the material you used for sewing was what? A Was cotton."

Miss Speicher, the nurse summoned by Dr. Truesdell, who arrived in the midst of the operation, and who was an entire stranger to Dr. Young, testifies that after the death of the patient, and she had tidied up the room:

“Q Were you later sent out for any purpose? A I was.

Q By whom? A Dr. Young.

Q For what purpose? A A bottle of milk and a spool of thread.

Q You got them both? A I did.”

She then describes where she procured both the milk and the thread, is shown the spool that was produced by the prosecutor and identifies it. On p. 311 she stated she saw Dr. Young sew up the incision, and at line 19 was asked:

“Q Yes. What did he use to sew up the abdomen? A This white thread.

Q Are you sure of that? A Sure of it.

*The Court.* Referring to the spool that has been referred to.

*Mr. McCarter.* Yes, sir; Exhibit D. 7.

Q And what kind of stitches or sutures did he make? A What is known as a continuous suture.

Q Was it in three separate sutures or threads or knots; were they knotted at the end of each? A They were not.”

There is evidently some omission of Miss Regan's testimony on p. 326, due to carelessness of the printer. What there, and following, appears to be direct evidence, is evidently the cross examination of Miss Regan. She testifies as follows (p. 327):

“Q When you were asked, Miss Regan, with what Dr. Young sewed up the wound after the autopsy with Dr. Simmons what did you say? Do you recall? What was your answer? A The question that Mr. McCarter asked?

Q Yes. A Why linen thread.

Q Didn't you say, 'As I can remember, to the best of my recollection it was white linen thread?' A Yes, sir.

Q Well, have you a recollection about the matter? A I remember that she brought the linen thread in positively and that was what it was brought there for.

Q All right. You remember positively that Miss Speicher brought in a spool of thread? A Yes, sir.

Q But have you any recollection of your own as to what was used to sew up this cut? A Yes, sir; I believe I have, Mr. Mott.

Q And what is that recollection? A White linen thread.

Q You saw the doctor use that? A I did not; but we washed that wound off after he had finished sewing it up, and as I remember it was white linen thread.

Q Now, then, you have no recollection, Miss Regan, as to what the doctor used at the time that he sewed up the wound? A No.

Q Subsequently you saw the body—you washed it off? A Yes, sir.

Q And your recollection is that you then saw that it was sewed with— A Linen thread.

Q Linen thread. Was there anything to direct your attention to the kind of suture that was used to sew up the wound at that time? A I don't exactly understand the question, Mr. Mott."

As has already appeared, Adler, the undertaker's assistant, was not called by the State, but was called for the defense, and (p. 373) to their surprise, contrary to what he told Creamer (p. 376), he swore (p. 373, l. 40):

"A I think it was a continuous stitch, I think, I am not sure."

and (p. 376, l. 8) in reply to the question, "What material was used?" he said:

"A Why, I would say it was catgut, the same as Mr. Roemmele said."

The Court charged the jury (p. 407) that the effect of Creamer's contradiction of Adler left the situation exactly as if Adler had not testified—it wiped the slate clean of his evidence.

Dr. Young (p. 213) on his direct examination, in describing his obstetrical outfit, mentioned (l. 10) "suture material," and on p. 264, *et seq.*, was subjected to a severe cross examination as to why, if he had suture material—catgut—he went to the trouble of sending out for thread, and great point was made of the apparent lack of necessity for his having so done.

At the top of p. 242, in the direct evidence of Dr. Young, it appears that he later gave the spool of cotton to the prosecutor, and the prosecutor (l. 40) produced the spool, and (p. 243) it was marked in evidence as Exhibit D. 7. On page 385, at l. 35, the following appears:

"Q Turning now to another subject. Reference has been made by someone to the fact that a spool of thread that has been referred to was taken by you to the prosecutor? Will you tell us how you happened to do that? A The newspaper men told me—

*Mr. Mott.* I object.

*The Court.* Objection sustained. The prosecutor said he voluntarily came, and you have accepted it as I understand it.

*Mr. McCarter.* The question is about the thread, not his going to the prosecutor.

*The Court.* You asked him how he came to go.

*Mr. McCarter.* How he came to take the thread down.

Q Now, had you any conversation with the prosecutor before you took the thread down? A On the preceding day.

Q Tell us what occurred? A On the preceding day, as the prosecutor left the room, Dr. McKenzie and Dr. Washington told me of the horrible mutilation of this body; how that I knew that something had happened to that body from the time I left—

*Mr. Mott.* I object.

*The Court.* Objection sustained, and motion to strike out granted.

Q Never mind what you know. You heard that? A Yes, sir.

Q Go on. A Then I wanted—then I took the thread to him the next day.

Q What did you say to the prosecutor, if anything?

*Mr. Mott.* I object.

*The Court.* How is that competent?

*Mr. McCarter.* What he said to the prosecutor in handing him this thread.

*The Court.* Yes, he took it to him and handed it to him.

*Mr. McCarter.* I think what he said when he handed it to him—

*The Court.* This is long after what happened, if anything did, on the day we are making our inquiry about.

*Mr. McCarter.* I offer to prove what he told the prosecutor with reference to the thread—why he brought it there.

*The Court.* It is not a denial of anything, is it?

*Mr. McCarter.* I don't know whether it is denial or in furtherance of I offer to prove what he said to the prosecutor when he took down the thread the day he took it and left it.

*Mr. Mott.* I object.

Objection sustained.

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

The same allowed and it is signed and sealed accordingly.

WM. P. MARTIN, (Seal)  
Judge."

The fact, therefore, that the spool was voluntarily left by the defendant with the prosecutor after the exhumation, being an admitted fact, the object or purpose of the defendant in so leaving it is of the greatest moment. If, on the one hand, he at the time expressed the hope that he could thereby convince the prosecutor that he had not been guilty of the evisceration—the second autopsy disclosing the catgut and not thread—he should have been permitted to explain what was said by him at the time of the delivery of the spool. Without this explanation the situation is capable of a construction that he was endeavoring to make evidence for himself by leaving the thread—a construction of which the prosecutor readily availed himself in summing up, calling specific attention to the fact that no possible reason could exist for the defendant to have left the thread with the prosecutor other than a desire on his part to throw the inquiry off his trail, and effective use was made of the Biblical quotation, “The evil flee when no man pursueth.”

We contend that the offered and rejected testimony was plainly admissible as part of the *res gestae*, and directly within the ruling of the Supreme Court in *State v. Kane*, 48 Vr. 244, following *Hunter v. State*, 11 Vr. 538. There it was sought to prove by a witness a declaration of the defendant Kane, as to the reason for his having been at a certain place at a certain time. Chief Justice Gummere, in disapproving of the exclusion of the evidence, and ordering a new trial, says:

“The act which was the subject of judicial scrutiny was the going by Kane to a particular place at a particular time. If he went there for the purpose of meeting

Gerry, as was claimed by the State, that fact tended, to some extent, to support the charges laid against him. If on the other hand he was there merely for the purpose of keeping an appointment, previously made, to attend church with a friend, it had no tendency to show his guilt of the crime charged against him. In order, therefore, to determine the value of this fact as bearing on the question of his guilt or innocence, the motive with which he went there was vital, and where the *state of mind, or motive*, with which any particular act is done is the subject of inquiry, declarations made by the person prior to the doing of the act, and which illustrate or explain its character, are admissible in evidence. *Lund v. Inhabitants of Tyngsboro*, 9 Cush. 36."

The principle has recently been affirmed by the Court of Errors & Appeals in *Jennings v. Okin* (March 6, 1916), 97 Atl. Rep. 249, where a judgment was reversed because the Court had excluded a declaration of the son of the defendant as to his destination, the action being for damages caused by defendant's automobile, and brought against the father, the acute question being whether at the time, the son was engaged on the father's business. The Court quoted with approval the statement in 1 *Greenleaf on Ev.* 124:

"*But whenever what he did was admissible in evidence, there it is competent to prove what he said about the act while he was doing it.*"

We have already seen that the act of the defendant in leaving the spool of cotton at the prosecutor's office was admitted in evidence, and the storm center of testimony and comment by the State. This fact being in evidence, it was undoubtedly competent to prove,

as part of the *res gestae* of that act, what the defendant said about it while in the act of doing it.

#### IV.

**The Court erred in refusing to charge the defendant's eighth request, which read: "8. In ascertaining what was the cause of the patient's death, due attention must be paid to the certificate of Dr. Simmons, the assistant county physician; if the jury believe that that truly expressed the cause of death then the jury must find proof in the case that a death resulting from the causes set forth in the certificate was the product and result of gross negligence on the part of the defendant."**

(See the 14th assignment of error, p. 454.)

We have already seen that Dr. Simmons, the Assistant County Physician, after participating in an autopsy, filed an official certificate of death, giving causes entirely consistent with innocence and careful treatment. See the certificate, p. 426. He testified (p. 59, l. 1) as follows:

"Q So that in your opinion, after that autopsy, the primary cause of this woman's death were hypodermic injection of H. M. C., four ounces of ether and shock, is that correct? A Yes, sir.

Q And the contributory causes were, rupture of the uterus and injury to the soft parts of the uterus from curetting? A Yes, sir."

He in no way testified to a change in his opinion, or that he at present entertained a different view. Inasmuch, therefore, as he was the only witness for the State who attended the first autopsy, the basis whereon he had filed an official certificate of death, to which he still,

so far as the evidence discloses, adheres, I think that the defendant was entitled to have the above request charged, and that the Court's failure to comply with the request was harmful error.

## V.

**The Court erred in its attitude with reference to the effect of a previous operation, in which fetal intestine had been observed, upon the mind of the defendant at the time of the operation.**

This matter is involved in the 4th, 5th and 6th Assignments of Error (p. 452). On p. 225, Dr. Young, after proving that he had some previous experience with an evisceration of a fetus, was asked:

“Q What was that experience and what relation did that experience bear to the conclusion you reached at that time?” (p. 225, l. 38)

The question was objected to and not permitted to be answered. On p. 223 the defendant testified, that after using the curet, he concluded that the inside of the uterus measured over six inches (l. 10) and that he had been mistaken as to the extent of the pregnancy in his abdominal examination of February 3d. In other words, that the fetus was further advanced than he had then concluded. On p. 252, l. 18, he says his conclusion was that the fetus was in the sixth month. The diagnosis on the 3d of February had been an interruption of pregnancy between the third and fourth month (p. 209, l. 10). Now, the inference that Dr. Young drew at the time of the operation, as to the nature of the piece of tissue or flesh that presented itself—whether it was a piece

of fetal or maternal gut—would, of course, depend largely, if not altogether, upon his conclusion with reference to the age of the fetus. While conceding that the intestine of a fetus not over four months advanced would not have been the size that was here presented, what we desired to show, and what the Court prevented us from showing, was his previous experience (with a six months' fetus), of having come in contact with fetal intestine, to account for his conclusion as to the nature of the then present presentation, and how his mind operated in reaching that conclusion. Hence, at the bottom of p. 225, referring to this former experience, the doctor was asked:

“What was that experience and what relation did that experience bear to the conclusion you reached at that time?”

The question was not permitted to be answered. Again (p. 348) the State, against the defendant's objection, was permitted (p. 346, l. 18) to ask Dr. Bunn:

“Q Do you think, doctor, that a very able and skillful physician and surgeon would be able to distinguish maternal intestine from fetal intestine, the fetus being from four to six—five to six months' development but life having been arrested at about the third or fourth month?”

(It may be noted, in passing, that this question is meaningless, for it is impossible for a fetus to be of from five to six months' development with life having been arrested at the third or fourth month. A fetus cannot develop and be dead at the same time.) Objection was made to this upon the ground that after the curet measurement of the uterus, the doctor had concluded that it was a six months' development and not less, and hence that his conclusion with reference to the presented intestine being fetal

should be premised upon that important belief, and that the question in the form submitted to Dr. Bunn, overlooking that distinction, confined itself to a fetus of the size of the original diagnosis, when necessarily the fetal intestine would have been much smaller than the size here presented. It is quite evident that two months would make a great difference in the size of the fetal intestine, and by depriving Dr. Young of the benefit of the conclusion he had reached as to the length of pregnancy, he was put, by the answer of Dr. Bunn to the above question, in the position of not being skillful enough to distinguish between maternal and fetal intestine, on the assumption that the pregnancy was much shorter than he then, for the reason indicated, believed.

## VI.

### **The Court erred and did manifest wrong and injustice to the defendant in its resume of the evidence.**

The charge, among other things, states (p. 412 *et seq.*):

“The State contends that the evidence shows that the dilator must have been used with great force and that it caused the tear; that on no other theory of the evidence in the case can the tear in the uterus be accounted for; that the loop which the defendant admits came down was not the intestine of the fetus because the rest of the fetus was never found, either by the defendant or by Dr. Simmons, or at the second autopsy; that the defendant knew the difference between fetal and maternal intestine and knew the loop was maternal intestine; that he was the only person who opened the body before *rigor mortis* set in and that he was the only person who operated on the body, the con-

tention is that he removed the intestines; that this is supported by the evidence that the defendant told Dr. Simmons he thought he had ruptured the uterus; that Dr. Truesdell said the loop that came down was half an inch in thickness; that the defendant told Dr. Richman that he punctured the uterus, split the bowel and had a very difficult time, describing it in very emphatic language, to get into the uterus; that Dr. Washington said defendant stated to him that he tore the womb and part of the intestines came down, that the part of the intestines he removed he put in the pail; that when the incision was made in the presence of Dr. Simmons, that Dr. Simmons said he looked into the opening and saw the uterus; that the intestines which apparently should have been there were not noticed by Dr. Simmons; and defendant admitted to Mr. Hargan later that he was satisfied that he had got hold of the intestines instead of the fetus; that while the expert for the State denied the ability of a person with his fingers to pull out so much of the intestines, it could be done with instruments; that Dr. Simmons saw the incision sewed up by defendant with catgut; that Roemmele and Adler saw this same catgut apparently, and Roemmele removed it, sewing up the incision tightly with a white thread, which in turn was apparently found by Drs. Washington, Hicks and Richman at the second autopsy on March 4th.

The State therefore contends that its charge is fully supported by the evidence that the intestines were not removed after death and from the time the defendant left the body that fatal afternoon until Roemmele saw it no one touched it and that the intestines could not have been removed, without some evidence of mutilation on the body, at least up to the time that *rigor mortis* set in."

Several manifest inaccuracies are included in this excerpt from the charge, which have no basis whatever in the evidence, and which could not, falling as it did, from the lips of the Court, but have influenced the jury. There was no evidence whatever to sustain the statement that "he (Dr. Young) was the only person who opened the body before *rigor mortis* set in."

The only evidence in the case as to the time after death when *rigor mortis* appears is that of Dr. Doremus, at the top of p. 356, to the effect that it is from six to twelve hours after death. The patient died at one-quarter after two o'clock (p. 300). Roemmele, the undertaker (p. 129, l. 15) says he reached there about five-thirty. No one swears that *rigor mortis* had set in when he cut the stitches in the incision, re-sewed it and embalmed it. The next sentence (p. 413, l. 1) to the effect—

"that as he was the only person who operated on the body the contention is that he removed the intestines."

is inaccurate, because the undertaker admittedly opened and closed the incision, and the testimony of Dr. Doremus (p. 355, l. 25) that at such a time the intestines could all have been removed through the abdominal incision with either the fingers or an instrument was uncontradicted. The statement is also unfair, in that it leaves the jury to infer something from the assumed fact that Dr. Young was the only person who operated on the body—as if any presumption of guilt arose therefrom.

So, too, the reference to the admission by Dr. Young to Mr. Hargan, and to Drs. Richman and Simmons, that he was satisfied he had punctured the uterus and gotten hold of the intestines, stated in the manner they are in

the excerpt from the charge, is unfair, as overlooking the fact which plainly appears from a careful study of Dr. Young's evidence, both on direct and cross examination, that while at the time he was operating he was in doubt as to his having punctured the uterus; that after the first autopsy and after thinking about the matter he later concluded, and frankly stated to both Richman and Hargan, that his then later conclusion was that he had, in fact, gotten hold of maternal intestine. Stating it in the way the charge does, overlooking the change of mind the doctor underwent after he saw the uterus at the first autopsy, and calmly deliberated upon the whole subject, had the effect of creating in the minds of the jury the fact that the doctor had prevaricated, when, on the stand, in both his direct and cross examination, he stated that at the time he was operating (and not later) he thought it was fetal intestine, and did not believe he punctured the uterus.

Again, the statement:

“that Dr. Simmons saw the incision sewed up by defendant with catgut; that Roemmele and Adler saw this same catgut apparently, and Roemmele removed it, sewing up the incision tightly with a white thread, which in turn was apparently found by Drs. Washington, Hicks and Richman at the second autopsy on March 4th.”

is unfair and inaccurate. Adler's statement was out of the case, as if he had not made it. Roemmele concededly did not find a continuous suture, but three separate distinct stitches, each one tied with a knot. The suture, therefore, that Roemmele saw, assuming the jury had a right to believe that the defendant used catgut and not thread, was not “the same catgut”

which Simmons saw, for he twice swore the suture he saw the defendant make was continuous and not separate (p. 57, l. 1; p. 396, l. 40). Nor did Drs. Washington, Hicks and Richman swear that they found a white thread when on March 4th they made their autopsy. Dr. Washington (p. 145, l. 40) says:

“I could not tell you what it was composed of but it was light in color.”

Dr. Hicks (p. 105, l. 20) was utterly unable to say anything with reference to the stitch or character of the supposed thread. Dr. Richman (p. 89, ll. 20-40) is unable to say definitely whether he found continuous suture, or what material was used in the sewing.

The further statement—

“and that the intestines could not have been removed, without some evidence of mutilation on the body, at least up to the time that *rigor mortis* set in.”

was also inaccurate and unfair. Not only was there no evidence that the intestines could not have been removed by the undertaker, and positive evidence that they could (Dr. Doremus, p. 355, l. 22), but the case is entirely devoid of any suggestion that such removal could not have taken place without “mutilation on the body.”

A more inaccurate and unfair resume of what is said to be the evidence in the case it would be impossible to imagine, and after four days of testimony, parts of which were of a highly technical character, such a review of the evidence by the Trial Judge, full of false and mistaken assumptions, could not but influence the jury, and the evil effects thereof are not overcome by a caution at the outset of the charge, that the jury in so far as he, the Court, departs from the record, are to be governed by the latter and not by the charge. Not only are the foregoing

inaccuracies, which were so harmful, found in the charge, but it is harmfully and significantly silent with respect to one undisputed fact, which a fair and frank review of the evidence should not have omitted. The incision made by Dr. Young in the presence of Dr. Simmons was, according to Dr. Simmons (p. 50, l. 11) five, six or seven inches in length. He did not measure it, but it extended (p. 54) from the pubis, over the bladder or uterus up to somewhere around the navel.

“Was it all the distance between the pubis and navel? A Why, I wouldn't say it was all the distance but I didn't measure it.”

On cross examination (p. 54, l. 15) after stating he does not know how long it was, he concludes:

“It may have been five or six inches.”

Roemmele swears he found the incision (p. 130, l. 15) between five and six inches in length. Dr. Young (p. 238) describing the incision says it originally was probably from three and one-half to four inches in length, and that Dr. Simmons told him to make it longer, whereupon he extended it from the navel down to the pubis, making an opening of about four and one-half to five inches in length. The important point is that the navel delimited the upper end of the incision. This was a fixed monument. Dr. Washington (p. 145) thus describes the incision that was found at the autopsy (p. 145, l. 30).

“The next was an incision in the center of the abdomen extending from about one inch above the navel down to the bottom of the abdomen. This incision was about nine or ten inches in length. \* \* \* Dr. Hicks began the work by not re-opening the old incision but cutting down beside it, extending

it clean down as far as he could at the bottom, and up as far as the bottom of the breast bone, exposing the inside of the abdomen."

The doctors may not accurately recollect the length in inches of an incision, but neither Dr. Young nor Dr. Simmons could possibly be mistaken in locating the incision below the navel. It is significant that the incision that Washington and his associates found extended an inch or so above the navel, and inasmuch as the undertaker undoubtedly undid the old stitching and reseeded it, the enlargement of the incision was a matter of great importance, and the Court in passing it by, without referring to it, although so careful a review of all the other evidence was made, did, I think, a harmful act to the defendant. Not only does the defendant (p. 441) insist upon the manifest injustice done by the whole charge of the Court, and (p. 420, l. 12) enter a general exception to the charge of the Court, but the 16th to 20th causes for reversal, and the 17th to 19th assignments of error, set out in one form or another, most, if not all, of the matters above referred to.

It is confidently believed that a careful reading of this record will show that this conviction should be set aside. It is based upon a surgical impossibility, and was only rendered possible by the assumption of an unproven hypothesis. In the face of the matters in this brief contained, a new trial should be ordered. Not only is the conviction erroneous, and the punishment by imprisonment for a year severe, but no one can measure the harm and injury done to a professional man who, up to the time of this unfortunate incident, had borne an unscathed reputation.

It is not for him, as the learned Trial Judge by an inference suggested, to account for the disembowelment of this woman. Many things point to the fact that the undertaker was the guilty party. He certainly had an opportunity to do this.

In this connection, observe the testimony of Mrs. Swartz (p. 379):

“Q At the request of Mrs. Truesdell, did you the day after her death go to the apartment? A I did; two days after.

Q The day after the body was taken away? A I did; two days after.

Q Did you go into the kitchen? A I did.

Q What did you find the conditions of affairs there? A I found blood on the floor, blood on the side of the tubs and blood on the side of the sink.

Q Did you notice any coal scuttle? A The coal scuttle was there but I think it was empty.

Q Did you see any sheets around? A I did.

Q Where were they? A They were in the tubs.

Q What condition were they in? A The tub was full of blood.”

This related, of course, to a time after the two hours during which the undertakers were alone with the corpse. There was every reason for the undertaker to have disemboweled the body. An incision six inches in length had already been made in the abdomen by Dr. Young in the presence of the county physician. The undertaker admits that he cut the material which sewed together this incision and reseeded it. He therefore admits that he had the body open by his own hand. It must be remembered that successful embalment involves as far as possible the deprivation of the body of its blood

and the cleansing of the stomach and bowels of fecal matter, the object of the latter being to prevent as far as possible fermentation which would otherwise arise and distend the body. The stomach and intestines are the seat of vegetable matter whose decomposition causes fermentation and distension. The thorough cleansing of the stomach and bowels is all the more important in autopsied cases such as this had been, because the general circulation which is necessary for successful embalmment is more or less impaired by the autopsy. Speaking upon this subject, Dr. Henry W. Catell, demonstrator of morbid anatomy in the University of Pennsylvania, in his book on Post-Mortem Pathology, says:

“The mesentery is ligated, and the intestines, from the beginning of the jejunum to to the end of the sigmoid flexure, are removed, opened, washed out, and put in a one per cent. solution of bichloride of mercury, and later replaced in the abdominal cavity, wrapped in sublimated cotton, *or, where practicable, disposed of by cremation.*”

Common sense assures us that the undertaker could not have had so successful an embalming as he claims he procured with so little effort—success depending upon the integrity of the circulation system—had there been an interruption thereof by the previous removal at the hands of Dr. Young of the superior mesentery artery, which is next in size to the aorta. It is significant that the State failed to corroborate Roemmele's evidence (p. 131) by calling Adler, his assistant, who was with him alone in the death chamber.

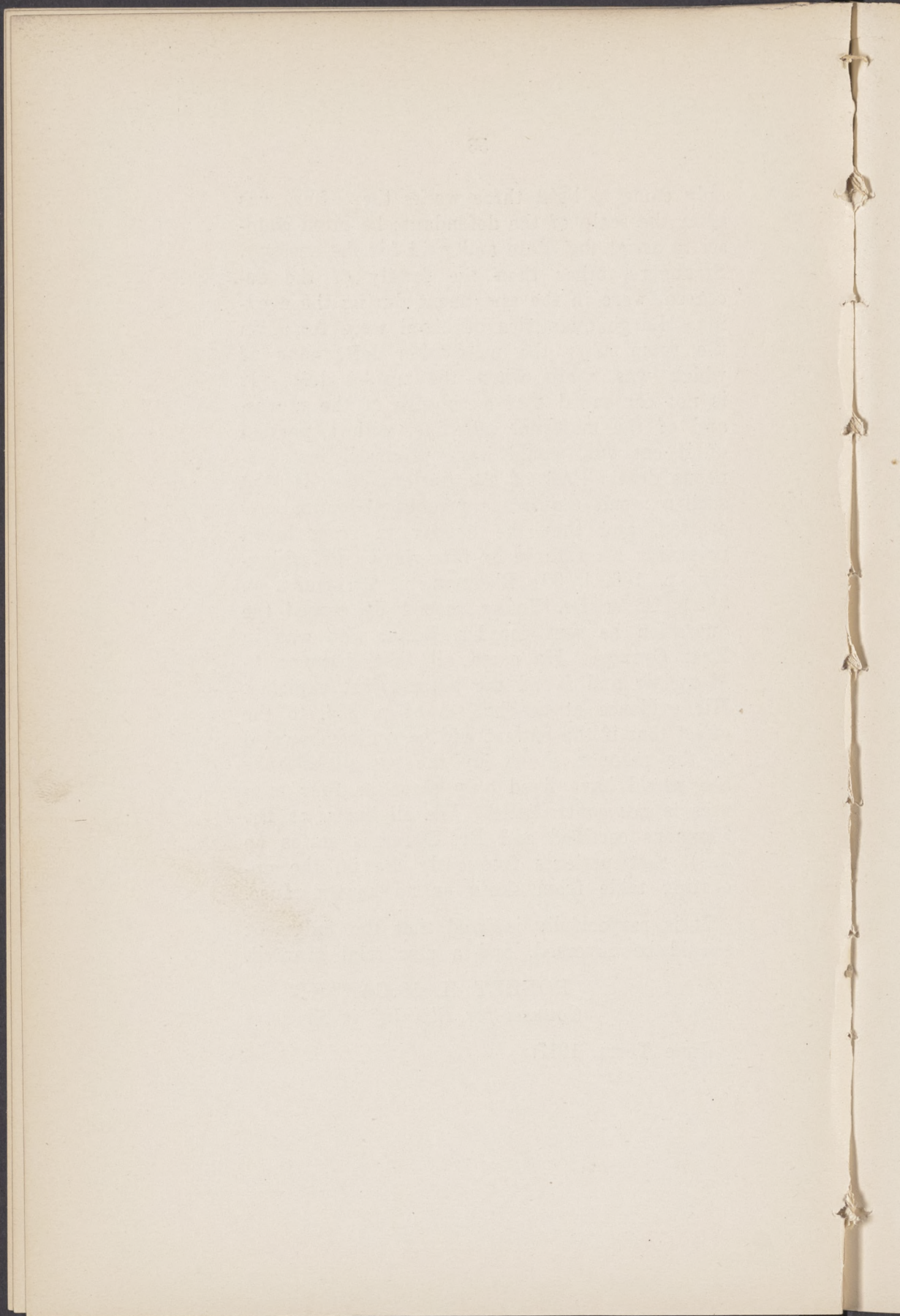
The brother of the deceased, from the moment of his sister's death, without the slightest knowledge of the disembowelment, which

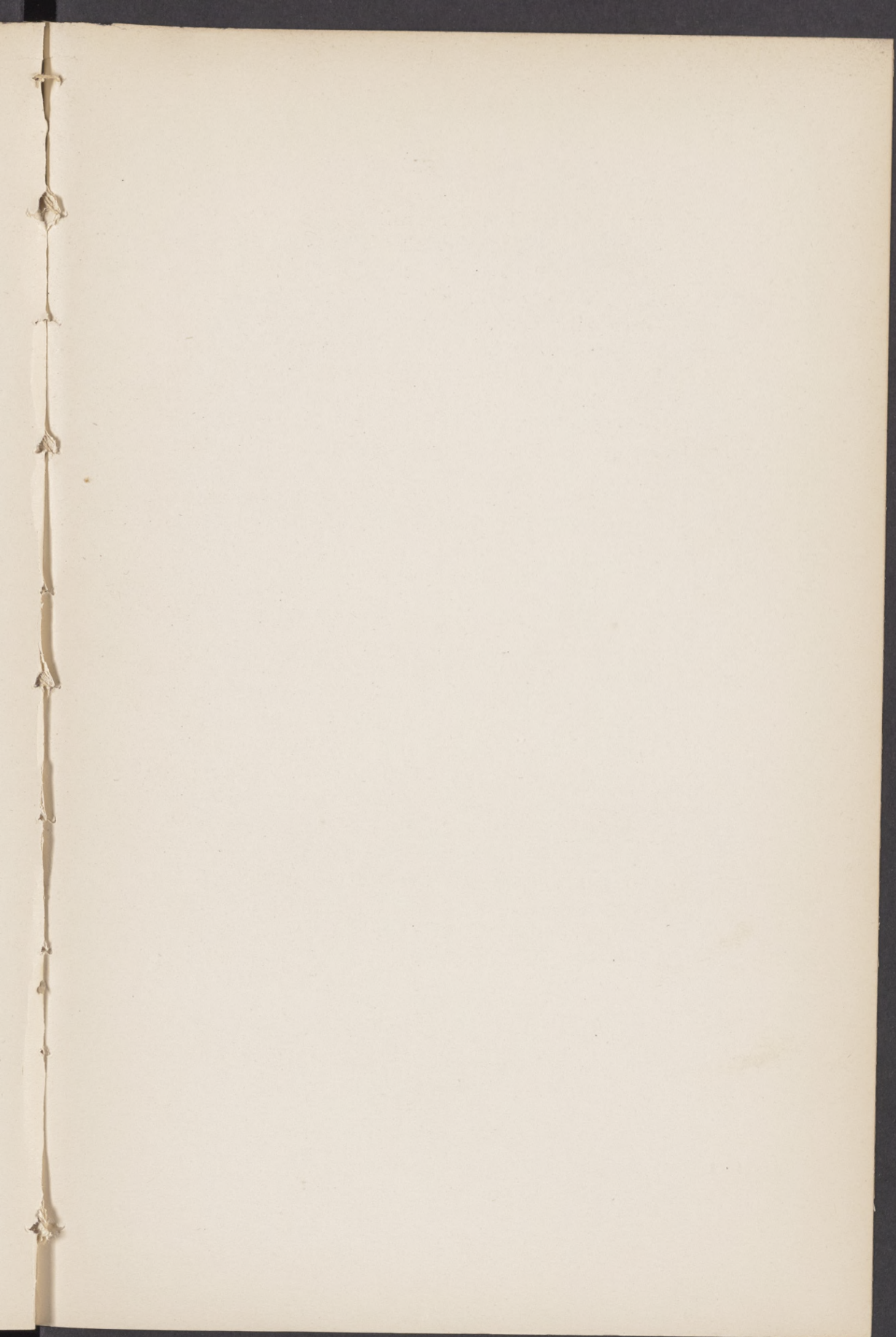
only came to light three weeks thereafter, was after the scalp of the defendant; he hired counsel to assist the State and paid for the autopsy. Strangers, other than the family of the deceased, were in the apartment during the evening. Large quantities of blood were found in the room after the undertaker left, none of which was there when the nurses left. It is not contended that a rupture of the uterus, and of the maternal intestine, with a portion of it cut out, would have produced instantaneous death. All of the doctors concede that such a result requires a prompt abdominal operation, and that the danger is from blood poisoning after three or four days. (Washington, p. 163, l. 30; Richman, p. 99; Bunn, p. 342.) After Dr. Young concededly ceased the operation he sent for Dr. Bunn, who was in East Orange. He came all that distance to Montclair and found the patient just expiring. His evidence at the bottom of p. 336, to the effect that if the patient had been disemboweled in the manner shown by the second autopsy she would have lived only three or four minutes is not contradicted. We all know, as Dr. Simmons certified and Dr. Doremus states (p 358), that patients frequently die on the operating table from shock or no known cause.

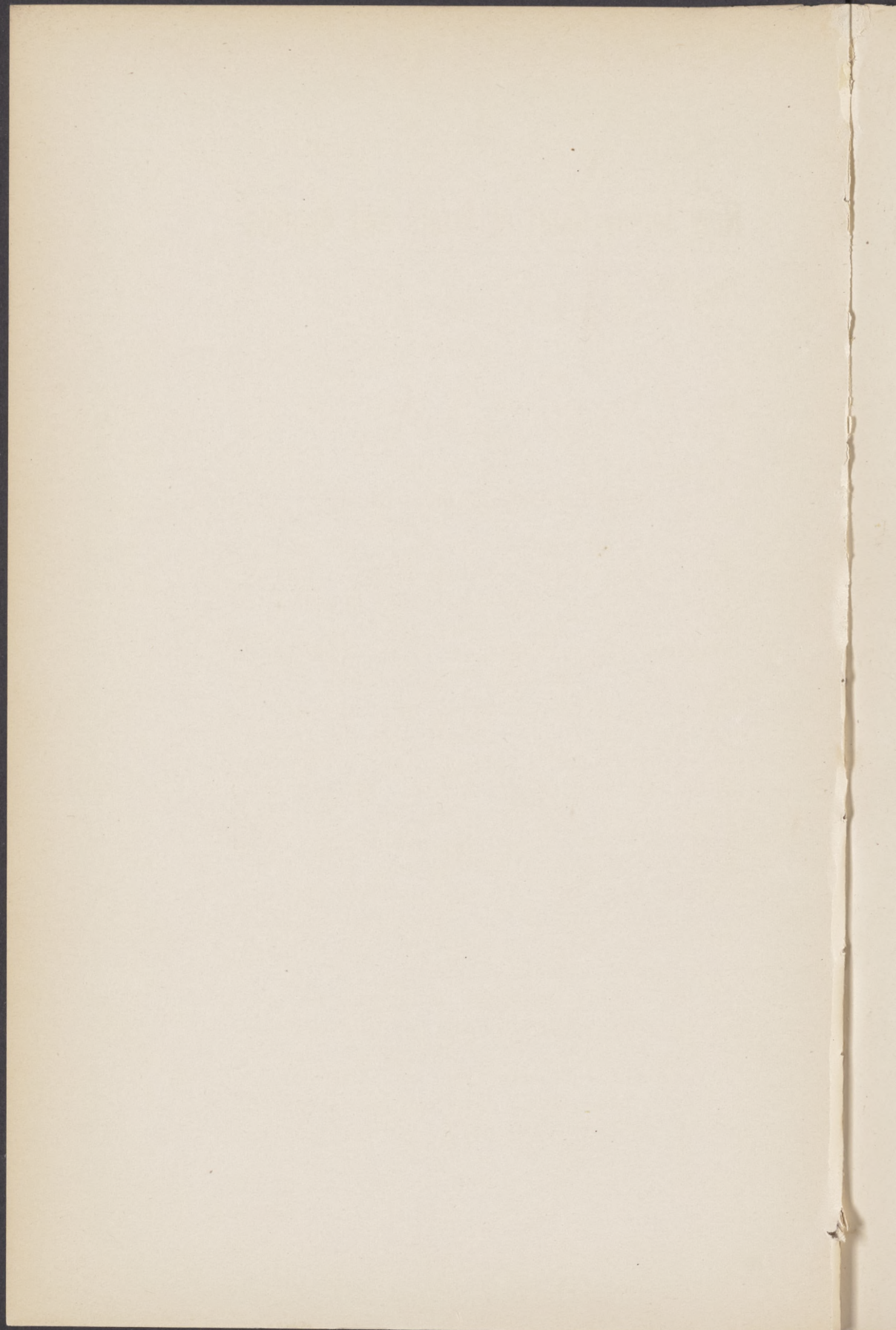
It is respectfully insisted that the judgment should be reversed, and a new trial granted.

ROBERT H. McCARTER,  
*Counsel for Plaintiff in Error.*

June Term, 1917.







## New Jersey Court of Errors and Appeals

THE STATE, <i>Defendant in Error,</i>	} <i>On Error to Essex Quarter Sessions.</i>
<i>vs.</i>	
JOHN H. YOUNG, <i>Plaintiff in Error.</i>	

### Brief for Defendant in Error.

From the affirmance by the Supreme Court of the conviction of Dr. Young in the Essex County Court of Quarter Sessions, he has appealed to this Court.

On February 15, 1915, Dr. Young performed an operation on Emma C. Truesdell, the wife of Dr. Paul E. Truesdell. She died on the operating table which was improvised in the kitchen of her own home in Montclair, on the morning of the operation (p. 214, l. 10). The body was buried a few days later. On March 4th the body was exhumed and the autopsy was performed by Doctors Hicks, Washington and Richman (p. 67, l. 24). The result of the autopsy, as testified to by Dr. Washington disclosed facts which will be found on pages 145, l. 21 and 154, l. 31, part of which is as follows:

“The first noticeable thing was the open end of the intestine. It was hanging loose in the upper part of the abdomen, about an inch in diameter, the rest of the duodenum being attached by the peritoneum to the posterior wall of the body. The other two parts of the small intestine, that is, the jejunum and the ilium, together with all

of the large intestine except the lower part of the sigmoid flexure and the rectum, all of the mesentery, all of the various mesocolons, which act in a similar capacity for other parts of the intestines, were gone, with the exceptions of some loose fringes left where their site had been."

Subsequent to these disclosures, Dr. Young, plaintiff in error, was indicted for manslaughter, tried and convicted. The various points raised and discussed in the brief for counsel for the plaintiff in error, include only those which were raised in the Supreme Court. These will be considered in the same order in which they are discussed in his brief.

Before proceeding, however, with the argument of the points raised, it becomes necessary to reply only to that bit of comment of counsel for the plaintiff in error (p. 21), in which he implies that Dr. Washington's testimony was influenced by the fact that he received a private retainer for making an autopsy at the request of the family of the deceased. While we appreciate that such a comment will have no weight with the Court, as it did not with the jury, yet it is such a flagrant criticism voluntarily offered concerning a witness of such unquestionable integrity that by our silence, it might be inferred that we do not resent it. With the observation that the criticism is entirely unwarranted by the evidence, we think the suggestion is sufficiently answered.

### Point I.

The State, in summing up, without any proof whatever, claimed that the impossibility of the evisceration having been done through the uterus was shrewdly based upon the hypothesis that the instruments which Dr. Young testified to having used were, in fact, used; that none of the medical witnesses for the defense deny the possibility of its having been done with some instruments, and that the jury could conclude that other instruments were, in fact, used.

The exception was upon the refusal of the Court to charge as follows:

“There was no duty to examine the witnesses with respect to any other instruments than those which the evidence disclosed were used. No inference can be drawn from the fact that the question was confined to the instrument which the evidence disclosed were used, there being no evidence whatever to show that any other instruments were used.”

The point arose in the following manner:

DR. YOUNG testifying in his own behalf, produced some instruments and said these were the instruments which he used at the operation.

Several physicians and surgeons were called to testify for the defense. A hypothetical question was put to each one of these physicians as to whether it was possible to draw down through the tear in the womb twenty-one inches of small intestine and approximately two feet of the large intestine with their mesenteries, “using instruments, as shown there.”

The first physician called was Dr. SUTPHEN, and the question put to him will be found on page 315. In reply to the hypothetical question he said he did not think it was possible.

It will be observed that the hypothetical question limits his answer to "Using instruments as shown there."

DR. SUTPHEN says (page 316, line 3):

"My experience in trying to pull the intestine out of other wounds, such as operations on the rectum and so forth—it is a very difficult thing to pull the intestine down to that extent *and if one did it with such instruments as this*, or the hand, he would do it without the entire mesentery and all its attachments."

It will be observed that all that Dr. SUTPHEN says is, "It is a very difficult thing to pull the intestines down to that extent, and if one did it with *such instruments* as this, or the hand, he would do it without the entire mesentery and all its attachments."

Dr. SUTPHEN expresses no opinion at all as to what could be done with other or more powerful instruments.

The second witness called was Dr. Bunn.

Dr. BUNN testified (page 341) as follows:

"Q What have you to say with reference to the propriety of the use in such case of the three instruments, four, five and six, which are before you? A Only one criticism of them. They are hardly of sufficient size and strength for the work that we find to do in some cases. This is a much lighter dilator than is usually used and this sponge forceps is hardly the size and strength for handling good sized fetal parts. I think the

doctor's instruments would have been better if they had had a little more strength to them.

Q Better, doctor? A Yes, sir. This dilator—I don't know the name of it—the one that is ordinarily used—the Goodell dilator is a much more powerful dilator than this. Much more powerful."

Dr. BUNN here expressly declares that the instruments shown him are hardly of sufficient size for the work that we find in some cases; that the dilator shown him was much lighter than is usually used, and the forcep was hardly the size and strength of handling good sized fetal parts; that the instruments would have been better if they had had a little more strength; that the dilator that is ordinarily used is a much more powerful dilator than the one shown him—much more powerful.

In every case the hypothetical question put to the medical witnesses for the defense limited their testimony to the use of the instruments produced in court, and in not a single case was a witness asked whether the intestines could have been drawn down as alleged by the State by the use of other and more powerful instruments.

It was because of this situation that the prosecutor did not cross examine any of the medical witnesses as to the opinion they expressed.

Counsel for the plaintiff in error is no novice in the trial of cases. It is absurd to suppose he did not appreciate what the effect of his limiting his hypothetical question to the use of the particular instruments produced in court was. The fact that he did so limit his questions compels the conclusion that he did so because

he knew if he broadened his question so as to include other and more powerful instruments, or to use the expression of Dr. Bunn, instruments of proper "size and strength for handling good sized fetal parts" he could not get the answers he desired.

Dr. Washington was not asked at any time whether in his opinion the intestines could have been drawn down with the instruments produced in court. His testimony that they could have been so drawn by proper instruments, remains absolutely uncontradicted.

Turn, now, to the stipulation. Let us see what the prosecutor did say:

He referred to the testimony of Dr. Bunn with reference to the size and strength of the instruments. He argued that the testimony of the defendant that the instruments produced and offered in evidence were those which were used in performing the operation, was, in fact, under all the facts and circumstances in the case, as disclosed by the evidence, incredible.

Under the express terms of the stipulation the prosecutor's argument was confined to the facts and circumstances of the case as disclosed by the evidence. The argument of the prosecutor was that the evidence showed that the defendant had in fact, at the time of the operation, removed the intestines from the body of Mrs. Truesdell.

If the testimony of Dr. Sutphen, Dr. Bunn and the other medical witnesses for the defense was true, it necessarily follows that the instruments produced in court were not the instruments actually used; and if the instruments produced in court were not the instruments actually used at the operation, again it necessarily follows, under the form of the hypothetical question put to the medical witnesses for the defense, that

these witnesses had expressed no opinion as to whether the intestines could have been so drawn down and removed by the use of other and more powerful instruments, or, as Dr. Bunn expresses it, instruments usually used and of proper size and strength for handling good sized fetal parts.

We are not now concerned with the question of whether or not the prosecutor's argument was in fact sound, but the question is, was it an argument based on the facts and circumstances of the case as disclosed by the evidence.

In *Blackman v. R. R. Co.*, the Court says:

"The jury system would fail much more frequently than it now does if freedom of advocacy should be unduly hampered, and counsel should be prevented from exercising within the four corners of the evidence the widest latitude by way of comment, denunciation or appeal, in advocating his cause."

*Blackman v. R. R. Co.*, 39 Vr., at p. 4.

In the *Barker* case the Court says:

"Where counsel in his summing up to the jury confines himself to the evidence of the case, what is said by him in its discussion by way of comment, denunciation or appeal, affords no ground of exception."

*State v. Barker*, 39 Vr., p. 27.

In the *Biango* case, and other cases cited by counsel for the plaintiff in error in his brief, counsel, in addressing the jury, went outside the "four corners of the evidence" and commented on matters and things entirely outside the evidence.

We respectfully submit that in the case at bar the stipulation shows that counsel in addressing the jury confined himself to the evidence

and did not refer to any matter or thing that was not in the record.

No suggestion was made at the trial to either the prosecutor, or the Court, that any improper remark or comment had been made by the prosecutor in his summing up. No judicial action of any kind was sought or invoked other than that involved in the request to charge.

The request does not request the Court to give the jury any instructions regarding any remarks or argument of the prosecutor, but does request the Court to instruct the jury as to what the duty of counsel in examining his witnesses was. No question of law is involved in this request. Counsel had a right to put to his witnesses such questions as he saw fit. He chose to confine his questions solely to the instruments produced in court. It was for him to determine, and not the Court, whether he should ask his witnesses as to other instruments.

We respectfully submit that it is not true, as a matter of law, that no inference can be drawn from the fact that the question was confined to the instruments which Dr. Young said he used. Nor is it true that there was no evidence whatever to show that any other instruments were used. The facts and circumstances adduced by the State in its direct case in connection with the testimony of the medical witnesses for the defense, demonstrate that other instruments were used.

The vice of this request to charge is, that it ignores all the other evidence and testimony in the case, and makes the case turn on the single question of the veracity of Dr. Young when he testified that the instruments which he produced were the instruments which he used. This was a question for the jury.

The counsel for the plaintiff in error has taken considerable pains to make a computation to the effect that "Mrs. Truesdell lived somewhere between fifty and sixty minutes after Dr. Young stopped operating." (Plaintiff's brief, p. 18.) He argues from this fact that a patient who had been eviscerated could not possibly survive for any such period.

The fact is, however, that Dr. Young continued to operate until Dr. Bunn arrived about eight minutes after Dr. Young telephoned to him (p. 334, l. 24). When Dr. Bunn reached the house the patient was dying (p. 335, l. 10). This is admitted by Dr. Young (p. 261, l. 21). Certainly there can be no doubt that Dr. Young continued to operate until he called for Dr. Bunn. "Q What did you then do? A Stopped immediately." (P. 232, l. 28.) All that he did after that before he telephoned to Dr. Bunn was to take off his gloves, procure some camphor from his medicine case and put the patient's head a little lower than her feet (p. 232, l. 25; p. 233, l. 5). It is difficult, in view of this testimony, to follow counsel's computation or ascertain the basis for the assertion "that Mrs. Truesdell lived somewhere between fifty and sixty minutes after it is conceded Dr. Young stopped operating." (Plaintiff's brief, p. 18.) No such concession has been made and certainly none can be deduced from the evidence. Moreover, the conclusion is irresistible that the evisceration could have occurred at some time during the operation. This is clearly demonstrated by the following testimony:

The State proved that between the time Dr. Young left the house and the arrival of the undertaker, there were present in the house Dr. Paul Truesdell, Mrs. Wolf, the mother of the

girl, Fred Wolf, her brother, and Mrs. Truesdell, the mother of Dr. Truesdell. (Page 401.) See testimony of Fred K. Wolf (page 401), Paul Truesdell (page 403), Anna Wolf (page 397).

The State further proved that during that time none of the persons then in the house in any way mutilated the body or removed anything from it.

When the undertaker, or embalmer, Roemmaele, arrived at the house there were present Mrs. Wolf, Dr. Truesdell and Fred Wolf. (Page 129.)

Roemmaele testifies (p. 131, l. 20), that he did not remove any organs or part of the body, nor did anyone else while he was embalming the body. (Page 131.)

DR. SIMMONS testifies (page 50), that at the time the incision was made in the body by Dr. Young, in his presence, that neither he nor Dr. Young removed anything from the body.

AUGUST MAIER, the undertaker, removed the body from Dr. Truesdell's house to the Wolf home, 318 Elm street, Newark (page 45), and he buried the body in Fairmount Cemetery. He testified that he did not remove anything from the body (p. 182, l. 35). He did open and close the incision, but it is evident from the verdict that the jury did not believe that he disemboweled the deceased as plaintiff's brief seems to indicate (p. 51).

EDNA N. SWARTZ, a witness sworn on behalf of the defense, testified as follows: (Page 379.)

“Q You live where? A Forty-seven Orange road, Montclair.

Q Do you know Mrs. Truesdell, the mother-in-law of young Mrs. Truesdell? A I do.

Q Did you know her daughter-in-law, Mrs. Truesdell? A I did.

Q At the request of Mrs. Truesdell, did you the day after her death go to the apartment? A I did; two days after.

Q The day after the body was taken away? A Yes, sir; the day after it was taken away.

Q Did you go into the kitchen? A I did.

Q What did you find the condition of affairs there? A I found blood on the floor, blood on the side of the tubs and blood on the side of the sink.

Q Did you notice any coal scuttle? A The coal scuttle was there but I think it was empty.

Q Did you see any sheets around? A I did.

Q Where were they? A They were in the tubs.

Q What condition were they in? A The tub was full of blood."

MRS. WOLF testifies (page 399), that she was in the kitchen after the body was removed; that she looked in the laundry tub; it was filled with towels and sheets; they looked as if blood had been on them.

DR. RICHMAN tells of a conversation he had with Dr. Young.

On page 87, line 18, he says:

"Well, I asked him how it came to happen and he said, 'Oh, he had a hell of a time to get into the uterus.'"

On page 263, line 9, Dr. Young says he did make that remark.

On page 269, line 20, DR. YOUNG testified as follows:

“Q Well, now, it is your judgment, doctor, that you removed at that time about sixteen inches of intestine and put it in the pail? A Yes, sir.

Q Of course you would not say that that is the correct length, would you? A No, sir.

Q It may have been considerably more than that? A Not much more than that.

Q Well, of course, doctor, the removal of sixteen inches of maternal intestine means certain death unless the damage is repaired, doesn't it? A Yes, sir.

Q Did you tell Dr. Simmons that you had thrown into the pail some sixteen inches of intestine? A No, because I didn't know that there was absolutely sixteen inches there.

Q Did you tell Dr. Simmons that you had thrown into the pail a piece of intestines which was approximately sixteen inches? A I cannot remember that I gave him any figures at all, or that I told him—

Q Did you tell him— A I don't remember that.

Q Did you tell him that you had thrown any of it into the pail? A I don't remember.

Q Why? Wasn't that an important fact that you should have revealed to the county physician? A I may have told him. I do not remember that part.”

On page 267, referring to the loop of intestine which he pulled down, whether it was fetal or maternal, DR. YOUNG testified as follows:

“Q Then you were in doubt about it, were you not? A Yes, sir.

Q Are you in doubt about it still? A Yes, sir.

Q Then it may have been maternal intestine? A Yes, sir."

On this state of the testimony the State insisted that it had proved beyond a reasonable doubt that Dr. Young, the day he performed an operation on Mrs. Truesdell, had removed the organs which the autopsy, made by Drs. Washington, Hicks and Richman revealed were absent from the body.

There is another view of the matter which is entitled to deep consideration. It is based upon the theory that the jury having determined that Dr. Young was responsible for the death of the deceased, and there being evidence in the case that the operation could ~~not~~ have been <sup>more</sup> properly and successfully performed with ~~the~~ <sup>larger</sup> instruments *than those* which Dr. Young said he used, that it would be a legitimate inference that Dr. Young testified falsely when he asserted that these were the instruments with which the operation was performed.

Then again the jury may have not believed the testimony of the defendant upon the principle and material points of his defense, under the doctrine laid down in *Addis v. Rushmore*, 45 Vroom, 576, and *State v. Dugan*, 55 Vroom, 603, viz: "False in one thing, false in all." This is particularly true of the testimony of the defendant with reference to that part of the fetal intestine which formed a loop, and which was about sixteen inches (page 257, l. 26), "Q What did you do with it? A I let the loop alone." "Q You never restored the loop? A No, sir." This testimony does not square with the doctor's testimony (page 267, ll. 20-30). "Q Did you not say to me or rather not to me but in my pres-

ence to Dr. Washington and Dr. McKenzie that the intestine which came down in the loop was put in the pail? A Yes, sir." It is readily apparent that here is a direct contradiction in the defendant's testimony upon a very material fact. Therefore on the principle of the cases just cited, the jury would have been entirely justified in not accepting Doctor Young's statement that the instruments produced were the instruments actually used by him at the time of the operation.

We respectfully submit that the refusal to charge this request was not error.

### Point II.

This point is stated in the brief of counsel for the plaintiff in error, as follows:

**"Injustice and harm were done the defendant in the Court's permitting the witness Truesdell to be asked by the State: 'You are under indictment in this Court jointly with Dr. Young for performing a criminal abortion on your wife, are you not?'"**

Dr. Truesdell was a witness sworn on behalf of the State, and he was recalled for the State in rebuttal. (Page 403.)

On cross examination counsel for the plaintiff in error asked Dr. Truesdell the following questions:

"Q You are under indictment in this court? A I am." (Page 403.)

"Q You have been promised, or your counsel has been promised by the State if you testify in this case you will be relieved from that indictment, haven't you? A I believe that is the understanding, is it not, Mr. Mott?"

These questions were admissible on cross examination only for the purpose of affecting the credibility of the witness.

In his brief counsel for the plaintiff in error says, in discussing this point:

“It will be recalled that Dr. Truesdell was the main and only reliance of the State to prove the exposing of what was supposed to be intestine at the time of the operation.”

As the only purpose for which this testimony could lawfully have been introduced was to affect the credit of the witness or to show bias on his part, we respectfully insist that it was proper for the State to show the nature of the indictment pending against him, and also the fact that he was jointly indicted with Dr. Young.

The record shows that the question was not objected to until after it had been answered. After the answer was in, objection was made in the following words: “I object as immaterial.” (Page 404.)

No motion was made to strike out the answer, and as the answer was in before objection was made, no judicial action was invoked. No exception was taken at the trial.

If the question was “immaterial,” the defendant was not harmed.

In the case of *Clark v. State*, the Court says:

“In the first place, the testimony of Carter, so far as the record informs us, was all in before the objection to it was taken. It does not appear that there was not an opportunity afforded to the counsel for the defendant to have made his objection earlier. The rule is established that counsel cannot take the chance of testimony making in his favor, and if it happens to be adverse, then interpose his objection. There

is nothing to show that the defense here was not apprised of the point upon which the witness was about to speak, before his testimony relative to the sale to himself was delivered. The testimony being so in without objection, it cannot be said that the Court erred in not striking it out." *Clark v. State*, 18 Vr., p. 556.

The assertion is made in counsel's brief "It is not legal to discredit a person, whether he be a defendant or a witness by proving that he is under indictment. The State could not have asked Dr. Young the question, but was permitted to ask Dr. Truesdell. Why does the fact that Truesdell was promised immunity from some indictment to satisfy the inquiry as to whether or not Dr. Young was a co-indictee for abortion with him?" The allegation is then made that admission of this testimony was harmful error and that while no exception was taken to it that nevertheless under Section 36, the Court should be justified in considering the incident and if satisfied that a wrong and injustice had been done, to act in the premises. The answer to this is three-fold:

1. The matter of an indictment was brought out on cross examination. The witness thereupon became the witness for the cross examination.

2. The question was entirely proper. "The pendency of an indictment may also be evidence of interest." *Wigmore on Evidence*, page 536.

3. Counsel could not have considered that any wrong or injustice would follow from the admission of the question, otherwise some motion for its exclusion would have been urged.

It might be just as well to allude here as well as anywhere to the numerous references made by the counsel to the importance of the case

to a defendant of the standing of this defendant; *i. e.*: "In a case of this importance", "involving not only the personal liberty but the life work and professional standing of a physician," and again, "wherein the character and standing of a defendant was at stake."

"A surgeon of high character, and unsullied reputation, etc., etc." Our view is that every case is important both to the State and to the defendant. This fact is always in mind. We know of no legal principle, however, that is to be gauged or altered by the reputation of the defendant.

We respectfully insist, first, that the question was proper, and, second, that the objection being made after the answer was in and no judicial action having been invoked by way of motion to strike out, or otherwise, no error was committed.

### Point III.

**"The Court erred in its refusal to permit the defendant to give evidence as to what was said by him when he left the spool of thread with the prosecutor."**

This point is based on the exclusion of a question asked Dr. Young on his direct examination.

The question will be found on page 386, line 35, and is as follows:

"Q What did you say to the prosecutor, if anything?"

Dr. Young testified on his direct examination (page 242) that on one occasion when he went to see the prosecutor he gave the prosecutor the spool of thread which he said he used in sewing up the incision that he made in the abdomen.

At the request of counsel for the defendant the prosecutor produced the spool of cotton (page 242, line 40) and it was offered in evidence.

The defendant's act in taking the spool of thread or cotton to the prosecutor was his voluntary act, and his testimony that he did take the spool of thread to the prosecutor was competent only for the purpose of identifying the spool of thread.

We respectfully submit that what he said to the prosecutor at the time he handed him the spool of thread was incompetent, because it was long after the offense was committed, and was clearly a self-serving declaration.

In his brief counsel for the plaintiff in error says:

“The fact that the spool was voluntarily left by the defendant with the prosecutor after the exhumation, therefore, being an admitted fact, the object or purpose of the defendant in so leaving it is of the greatest moment.”

Counsel then proceeds to argue that the act of Dr. Young in taking the spool to the prosecutor after the exhumation and autopsy, was a part of the *res gestae*, and therefore it was proper to show what he said when he gave the spool to the prosecutor.

As authority for this proposition he cites the case of the *State v. Kane*, 48 Vr., 244.

The facts involved in the *Kane* case are not at all analgous to those involved in this case.

In his opinion in the *Kane* case, Chief Justice Gummere, who read the opinion, says:

“The plaintiff in error was jointly indicted with one Lester Gerry for the crime of breaking, entering and larceny. Gerry

pleaded guilty and as produced by the State as a witness against Kane upon the trial of the latter. The crime was committed late on Saturday night, August 26, 1906. Kane was arrested about ten o'clock the following morning in the neighborhood of Gerry's home. On the witness stand Kane accounted for his presence in the locality by saying that he went there to meet a friend named Lamont, who lived on the same street as Gerry, and only a short distance away, and with whom he said he expected to attend church that morning. On rebuttal the State produced testimony tending to show that the purpose of Kane in going to the place where he was arrested was to meet Gerry, his alleged partner in the crime which was charged against him. Kane then called Lamont as a witness and attempted to prove by him the making of an appointment with him on Saturday evening to attend church on Sunday morning."

*State v. Kane*, 48 Vr., 245.

On the above state of facts, the Chief Justice proceeds to point out that if Kane went to a particular place, at a particular time, for the purpose of meeting Gerry, as claimed by the State, that fact tended to some extent to support the charge laid against him. If, on the other hand, he was there merely for keeping an appointment previously made, to attend church with a friend, it had no tendency to show his guilt of the crime. Therefore, the Court held that the excluded testimony should have been admitted.

The rule under which the defendant in error defends this position that the Court should not have admitted the evidence is set down by Wig-

more (p. 1240), as "Utterances forming a part of the issue." The issue was the charge laid in the indictment. The date of the alleged crime was February 15, 1916. The incident relating to the spool of cotton occurred three weeks *subsequent* to that date. An attempt is made to apply the principle in the case of *Jennings v. Okin*, 97 Atl. 249. The distinction between that case and the case at bar is clear. The words there spoken preceded the act which resulted in the suit for damages, and tended to show the authority for the operation of the automobile. Moreover, the quotation in the counsel's brief contains only a part of the principle of law announced by that decision. The entire principle is as follows: "It is because it is a verbal act, and part of the *res gestae*, that it is admissable at all; and therefore it is not necessary to call the agent himself to prove it; but whenever what he did was admissable in evidence, there it is competent to prove what may be said about the act while he was doing it." It will be seen, therefore, that the entire quotation puts an entirely different light on the matter than that part of it which is cited in the plaintiff's brief, and that squared by the true rule the exclusion was proper.

From all of these facts it must appear that the voluntary act of Dr. Young in bringing to the prosecutor the spool of cotton after the exhumation (three weeks after the commission of the crime), presents a situation in no way parallel to that involved in the Kane case. Certainly that act was not a part of the *res gestae*, and, therefore, what he then said to the prosecutor was inadmissable.

**Point IV.**

**This point is based on the refusal of the Court to charge the eighth request of the charge.**

DR. SIMMONS, the Deputy County Physician, testified (p. 49) that he went to the house and after he got in the kitchen where the body was, Dr. Young asked him if he (Young) should make the incision. Simmons told him he could, whereupon Young "cut down over the uterus and exposed the uterus." Simmons further says (p. 50): "He opened the laceration in the uterus and exposed a large gaping wound. He exposed the uterus and the laceration which showed a tear across the top and down the side of the uterus, with a piece of gauze in the uterus—in the neck of the uterus. \* \* \* As soon as that was done he asked if he should sew up the wound and I said yes and he sewed it up. \* \* \* That was all. After he had sewed it up he followed me out into a room just at the head of the stairs and we talked there a few minutes and I went home."

On page 51, Dr. Simmons testifies, as follows:

"Q When the incision was made did you look at the body at all—examine it? A Certainly I looked at it.

Q What did you see? A I saw the uterus.

Q Anything else? A Looked at the uterus and ovaries, that is all.

Q That is all you examined? A That is all I examined."

On page 52, Dr. Simmons testifies, as follows:

"Q You conduct autopsies yourself? A No, sir, not complete autopsies.

Q I suppose you have made complete autopsies? A No, sir.

Q Never have, eh? A I don't remember ever making a complete autopsy."

On page 54, Dr. Simmons testifies, as follows:

"Q Did you examine in there? A No, sir.

Q Eh? A No, sir.

Q Didn't look in there? A I looked in there but I did not touch the parts."

On page 55, line 35, Dr. Simmons testifies as follows:

"Q Well, you do not say you did not see the intestines, do you? A *I didn't observe the intestines, no, sir.*"

On page 64, line 25, Dr. Simmons testifies as follows:

"Q Upon what do you base your statement of the cause of death? A Well, from the fact that the doctor told me that he got very little out of the uterus, that he had used the H. M. C. and that I did not see blood enough to cause hemorrhage. \* \* \* Blood enough to cause death. I don't think there was enough that you could attribute it to hemorrhage; *and what the doctor said.*"

We respectfully submit that the Court properly refused to charge this request in the form in which it is made.

On this branch of the case, the Court charged as follows, page 408, line 30:

"If the jury finds that Emma C. Truesdell came to her death by reason of the gross neglect of this defendant with regard to a plain duty that rested upon him under the law, evincing a reckless disregard of human life, the defendant is guilty. The State must

show (1) that Emma C. Truesdell came to her death by reason of the injuries which she received at the hands of the defendant; (2) that there was some plain duty resting upon the defendant at the time. A physician or surgeon undertaking the treatment of a patient is not required to exercise the highest degree of skill possible; he is only required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members of his profession, in good standing, practicing in similar localities, and it is his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning and to act according to his best judgment, and he is not responsible for a mere error of judgment or a mere mistake. (3) That the plain duty resting upon the defendant was grossly neglected by the defendant—not merely neglected in a manner giving rise to a civil action for damages, but in a gross and criminally negligent manner, a manner evincing reckless disregard of human life, and, (4) that as a result of this gross and criminal negligence, if the jury finds such existed on the part of this defendant, Emma C. Truesdell received injuries from which she died.”

The question before the jury was, did Emma C. Truesdell come to her death by reason of the gross and criminal negligence of the defendant? That question was to be determined not by a single fact or circumstances, but upon the whole evidence in the case. The vice of this particular request to charge is that it segregates a single fact and makes the whole case turn on that. It is solely within the province of the Court to

determine what evidence it will comment upon, and the Court cannot be required to segregate a single fact and comment upon that. The question before the jury was not whether death resulted from the causes set forth in the certificate of death of Dr. Simmons, but was the broad question, did her death result from the gross and criminal negligence of the defendant? This latter question is to be determined not alone by the opinion of Dr. Simmons as expressed in the certificate of death or as a witness at the trial, but by all the facts and circumstances as disclosed by all the evidence adduced at the trial.

“While a trial judge may be properly asked to charge the legal rules pertinent to such facts as the jury might find upon all the evidence, he cannot be required to direct the jury to the testimony of a single witness and on their belief of it to instruct for a verdict. Moreover it would have the tendency to improperly lead the jury to believe that the evidence of that witness might be received and relied on without reference to the testimony of other competent witnesses.”  
*Weinberger v. North Jersey Street Railway Co.*, 44 Vroom, 694.

Then, again, if there was a discrepancy between the statement contained in the certificate and the oral testimony of Dr. Simmons at the trial, the question of determining which of the two was true was for the jury, although we do not understand that it is seriously contended that there was any discrepancy. The testimony at the trial was merely an elaboration of the facts set out in the certificate.

**Point V.**

**“The Court erred in its attitude with reference to the effect of a previous operation, in which fetal intestine had been observed, upon the mind of the defendant at the time of this operation.”**

The question on which this point is based will be found on page 225, line 35:

“Q Have you had any experience previous to this occasion with evisceration of the fetus? A Yes, sir.

Q What was the experience and what relation did that experience bear to the conclusion you reached at that time?”

This latter question was objected to, and the objection was sustained.

On page 226, line 20, counsel for the plaintiff in error, made his offer as follows:

“*Mr. McCarter.* I offer to show that on the previous occasion, perhaps a year or so anterior to this operation, in a similar situation, and under similar conditions, the defendant, Dr. Young, found something protruding which he found and ascertained to be fetal intestine, and I make that offer for the purpose of having him draw on that experience any conclusion and diagnosis he may at this time.

*The Court.* He does not say that.

*Mr. McCarter.* That was within my offer, your Honor.

*The Court.* He does not say that he based any opinion that he entertained at this particular stage of the operation upon anything that happened previously.

*Mr. McCarter.* If your Honor will listen to the question—

*The Court.* I have listened.

*Mr. McCarter.* You will find that that is involved in the question.

*The Court.* He may go on and state his diagnosis. You have got him up to the point where he says he did not know what it was. Now go on and ask him his opinion about it. He has got a perfect right—he is an expert—to state his opinion, and he can state his reason for his opinion.

*Mr. McCarter.* May I have my question read? I do not think your Honor has understood it. I may be wrong.

*The Court.* I understand it. You may read it if you think there is any mistake about it.

*Mr. McCarter.* I would like to have it read.

(Question read.)

*The Court.* That assumes that it did bear some relation. He has not said that yet. You are putting the cart before the horse. If he says that anything he did or made up his opinion about at this particular time is based upon something else he can state his reason, as I understand it.

*Mr. McCarter.* That was what I was trying to get.

*The Court.* You are not doing it. You are going ahead and asking for his experience first.

*Mr. McCarter.* Your Honor overrules that question, and I have made an offer and your Honor overrules that?

*The Court.* Yes.

Q Go and describe the situation.

*The Court.* I do not overrule your offer. I limit your offer. When it is shown to be connected with the subject matter.

*Mr. McCarter.* I pray an exception to what your Honor does to my offer."

On page 267, line 3, Dr. Young testified as follows:

"Q Doctor, was this fetal intestine that came down the size of your finger not of sufficient size to have put you immediately upon your guard to have discovered whether or not in fact it was fetal or maternal intestine? A I did my best to determine that.

Q What did you do? A I broke my technic by putting my sterile hand up over the abdomen of my patient in an area that had not been disinfected; I used the index finger of the right hand up in through the mouth of the womb trying with the bimanual method to again determine the size of that uterus.

Q And to determine what else? Whether—  
A The nature of that—the intestine.

Q Whether it was fetal or maternal? A Yes, sir.

Q Then you were in doubt about it, weren't you? A Yes, sir.

Q Are you in doubt about it still? A Yes, sir.

Q Then it may have been maternal intestine? A Yes, sir."

On page 251, Dr. Young testified as follows:

"Q Doctor, this previous occasion in which you say you brought down some fetal intestine was how long ago? A That is two or three years ago.

Q And then you were performing what sort of an operation? A The same as I have described here.

Q You were then performing what kind of an operation? A To deliver the uterus of a dead fetus.

Q How far advanced in your judgment at that time was the dead fetus that you were delivering on the previous occasion? A About six months.

Q And in the course of cureting did you draw out the— A No, sir.

Q How did you come to do it? A After the use of the dilator, the manual dilator.

Q Then on the previous occasion by the use of the dilator you brought out the fetal intestine? A Yes, sir.

Q On the previous occasion? A Yes, sir.

Q No doubt about that? A No doubt about that, no, sir.

Q How old did you think the fetus in the case of Mrs. Truesdell was at the time you performed the operation? A By my measurement of the depth of the uterus I concluded it was in the sixth month.

Q That is about the same age as the other case, is it? A Yes, sir.

Q Would you call that disemboweling the fetus? A Yes, sir."

It will be found on examining the record (pages 226, 227 and 228) that the Court overruled the particular question asked, because the defendant had not said that the opinion he formed at the time of the operation was in any way based upon any previous experience.

The question assumes that the previous experience bore some relation to the opinion which the doctor formed.

The Court says (page 226, line 35):

“He does not say that he based any opinion that he entertained at this particular stage of the operation upon anything that happened previously.”

Again, on page 227, line 5, the Court says:

“He may go on and state his diagnosis. You have got him up to the point where he says he did not know what it was. Now go on and ask him his opinion about it. He has got a perfect right—he is an expert—to state his opinion, and he can *state the reason for his opinion.*”

After the question was re-read, the Court says (page 227, line 22):

“That assumes that it did bear some relation. He has not said that yet. You are putting the cart before the horse. *If he says that anything he did or made up his opinion about at this particular time is based upon something else, he can state his reasons, as I understand it.*”

And again, on page 228, line 12, the Court says:

“I do not overrule your offer. I limit your offer; when it is shown to be connected with the subject matter.”

We respectfully submit that the Court did not rule that Dr. Young could not state his previous experience. The Court, however, did rule that before he could state what that experience was, he must say that it bore some relation to the opinion he formed at the time of the operation.

The Court expressly says that it does not overrule the offer, but limits it by requiring that it be first shown to be connected with the subject matter.

We have already shown, that on his cross examination, Dr. Young stated in detail what his experience was, and the attention of the Court is directed to the very next question which was put to Dr. Young.

“Q Please proceed. Just describe now, your thoughts, your conclusions, your actions.” (Page 228, line 22.)

We respectfully submit that there was no error in this ruling.

Dr. Young testified that at the time he pulled the intestine down he was in doubt whether it was maternal or fetal intestine and he expressly said that it may have been maternal intestine. What relevancy to the situation that presented itself to Dr. Young at the time of the operation did previous experience with fetal intestine have so long as he was in doubt whether the intestine which he drew down in this case was fetal or maternal? It would seem to us that it was necessary for Dr. Young first to determine that he was dealing with fetal intestine at the operation, and not maternal intestine, before his previous experience with fetal intestine could have any relation to the situation that presented itself at the time of the operation. He would have been guilty of gross and criminal negligence if he had been guided and influenced in his methods by his previous experience with fetal intestine without first determining that the intestine with which he was then dealing was not maternal intestine.

Under this point, counsel for the plaintiff in error discusses the question which the prosecutor was allowed to ask Dr. Bunn on cross examination over objection (page 346, line 18):

“Q Do you think, doctor, that a very able and skillful physician and surgeon

would be able to distinguish maternal intestine from fetal intestine, the fetus being from four to six—five to six months development but life having been arrested at about the third or fourth month?"

Dr. Bunn had testified (page 345, line 40) that he considered Dr. Young to be a very able and skillful physician and surgeon. Dr. Young had testified (page 267, line 35) that he was in doubt whether the intestines he drew down were maternal or fetal.

We respectfully submit that this question was proper for two reasons:

First: Assuming that Dr. Young's testimony that he was in doubt as to whether the intestine was maternal or fetal was true, then the question was proper because it tended to discredit Dr. Bunn's statement that Dr. Young "was a very able and skillful physician and surgeon."

Second: Assuming that Dr. Young was a very able and skillful physician and surgeon, then the question was proper because it tended to impeach Dr. Young's testimony that he was in doubt as to whether the intestine he pulled down was fetal or maternal.

It may be noted that counsel contends that the question is meaningless (p. 43 of his brief). It apparently did not seem so to Dr. Bunn because he answered in the affirmative. It does not appear in a medical sense that the word "arrested" and the word "dead," as counsel contends, are synonymous.

**Point VI.****The Court erred and did manifest wrong and injustice to the defendant in its resume of the evidence.**

The Court charged the jury as follows, p. 405, l. 30:

“The function of the Court is to instruct the jury in reference to the principles of law governing the case. The principles of law as charged should be accepted as a correct statement of law.

The jury, however, is the sole judge of facts, weight of testimony, credibility of witnesses, inferences to be drawn from the evidence and the ultimate conclusions to be reached upon all of the facts. The Court in referring to the evidence is not to be understood as deciding any fact but merely as attempting to illustrate or explain the application of the principles of law. If the Court errs in its statement of any evidence or assumes the existence of evidence that is not actually before the jury, the jury is to rely upon its recollection and not upon the recollection of the Court. If any part of the evidence is referred to, seemingly giving it particular emphasis, the jury is not to disregard other evidence which it may deem of equal or greater importance. It is the duty of the jury to consider and weigh all the evidence and pertinent proof bearing upon the question of the guilt of this defendant, not only the evidence that is mentioned by the Court but all of the facts which may appear by the testimony.”

Under this point counsel specifies several alleged inaccuracies or misstatements of the evidence made by the Court in its charge. The

record shows that the attention of the Court was not called to any misstatement of fact in the charge.

In the *Lovell* case, the Court of Errors and Appeals, says:

“This Court has also held that a misstatement of fact in the instructions by the Trial Court, not in any way binding on the jury, cannot for the first time be objected to in the Supreme Court. *State v. Kroll*, 93 Atl. 571. 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.”

*State v. Lovell*, 96 Atl. 38.

In all of the excerpts from the charge complained of the Court was not undertaking to state the facts in proof, but merely the contention of the State.

There is nothing objectionable in the Court referring to the State's contentions.

*State v. Loomis, et al.*, 97 Atl. 896.

*State v. Venzio*, 55 Vr., 418.

After having stated the contentions of the State the Court proceeds to state with great detail and fairness, the contentions of the defendant.

“It is to be noted in the excerpt of the charge complained of the Court was not undertaking to state any facts in proof but merely the contention of the State. It is not suggested that the Court was in error in this statement, and of course, there was nothing objectionable in so stating the contention of the State.”

*State v. Loomis*, 97 Atl. 896.

Under these well settled principles the statement of the Court was entirely proper. It is, moreover, desired to refute the alleged inaccuracy in the Judge's charge as alleged on page 46 of plaintiff's brief where use is made of the following quotation: "that as he was the only person (referring to Dr. Simmons) who operated on the body, the contention is that he removed the intestines." Here again it becomes necessary to ask the Court to refer to the preceding words which are joined to this excerpt by the conjunction "and," so that the meaning may be entirely clear. Although it is claimed time and again that the charge of the Court was unfair and inaccurate, a careful reading of the charge will show such criticism to be unfounded. There is not a single word or a single inference that can be drawn from the words of the charge to sustain the contention that the review of the evidence by the Trial Judge "was full of false and mistaken assumptions." The statement is particularly unfair, in view of the fact that the Trial Court specifically stated six of the principal points of the defense, and laid considerable emphasis upon their importance to the defendant.

We respectfully submit that there is no error in the record and that the judgment under review should be affirmed.

Respectfully submitted,

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

WILBUR A. MOTT,  
*Assistant Prosecutor of the Pleas.*