Culbertson (H)

A PROSECUTION FOR INFANTICIDE:

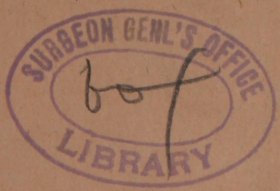
WITH REMARKS.

BY H. CULBERTSON, M.D.,

ZANESVILLE, OHIO.

[Reprinted from the CINCINNATI LANCET AND OBSERVER, April, 1862.]

STATE OF OHIO *vs.* VIRGINIA ANN DAN. Presiding Judge, L. P. MARSH, Esq. John Hanes Esq., Dr. V. Hanes, for the State John O'Neal, W. H. Ball, Esqs., for defense.



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The prisoner was indicted for murder and infanticide. The defense set up the plea of insanity; also that the child might have been born while the mother was laboring under puerperal convulsions; that under the circumstances the woman might have been maniacal and in that state destroyed the child; that the sex of the child was not proven; and, as the mother, if she had the child, gave birth to it in the semi-standing position, that therefore the fall might have killed it.

The object we have in publishing this case is to consider several points: 1st. The true value of the hydrostatic test as an evidence of breathing: 2nd. The proper duty of the physician in investigating these or other medico-legal cases; 3d. To consider the legal doctrine of live birth; 4th. To consider the mental status of the prisoner.

In order to condense as much as possible, we will premise, that the State showed beyond a reasonable doubt this child was born in a certain woods, near to a specified lane, some sixty rods from a particular house; and that the defendant was at that house two or three days before her expected confinement, and afterwards,—and in the neighborhood some two days, after which she left and walked in all some six miles.

WITNESSES FOR THE STATE.

JANE S.—Saw prisoner on Sunday, the 15th of September, 1861, (some two days after the alleged infanticide had been committed,) at the end of a lane. When the prisoner saw her, she avoided, and on coming to her prisoner remarked, "I did not expect to meet you." When witness said, "I was going to Mr. ——'s house," she replied, "You need not go up there, as they are not at

home." Saw some hogs coming toward us in the lane, one of which had a child in its mouth; I got it from the hog, and placed it on the limb of a tree, and raised the alarm. Was a hole in child's throat; left arm off, and right leg; mouth wide open, and tongue drawn back; face bluish color, more so than body; no appearance of having been cared for. Saw prisoner the Wednesday week before 4th of September; appeared like a woman going to be confined. Saw the bed in which prisoner had laid; looked like a childbed.

Cross-examination.—When first saw prisoner she was fifty or sixty feet from me; she was coming out of lane into woods; woods were fenced on both sides. I spoke first and said, "I would as soon expect to meet one out of the grave," etc. Said "she had been at Mr. S.'s house two or three days." I thought she had been at the poor-house or with her brother; thought she would not be running around in her situation. Told me, when I saw her at my house, "she would have to leave from the talk there was about her." Did not see her after we first met in lane. Bed did not look as though a child had been born in it, but as though she had stayed there until near the last.

Re-examined.—On Sunday prisoner looked pale, death-looking; took no notice f her person. Was a male child.

Susannah S.—Prisoner slept in room on porch next to the road. Thursday evening (Sept. 12, 1861,) we went to bed about 8 o'clock; she complained of headache and backache; looked quite bad; she blowed out candle before she undressed. My sister, 12 years old, slept with her next night. I thought she got up Friday night (13th), for heard door shut; asked her if she was up; said she was. Friday noticed bed; it looked *pretty bad.* She got up about 10 o'clock Friday morning. On Friday, after got up, said "she would go out to orchard for peaches:" went in direction where they found child. Thought she stayed too long; went to look; could see peach-trees; she was in orchard by *lane fence;* she was gone about an hour. Was sewing for herself. No one else slept in *that bed* after Mrs. S. and me examined it.

Cross-examined.—Thursday she was up and ate her meals; after supper she was in sitting-room until bed-time, I in kitchen. Porch one step from ground; house on hill. When she came back from orchard, had sewing in her lap, but did not sew much; sat on carpet. Looked paler than day before; looked *very pale* on *Friday.* Bed was all bloody on Friday; did not change bed until next day. I did not want to sleep with her. Prisoner got up after me and ate breakfast. I told my sister to put clean sheet on bed, after she went away on Sunday.

Thomas R. H.—Was one of the coroner's jury on Sept. 15th, 1861. Saw the child hanging in a dogwood-bush; head mashed into a jelly; one arm off at shoulder, the other at wrist, one leg at knee; head and face black; balance of it looked natural. Examined lane; found blood where child had been dragged by hogs. Saw where child had been placed inside R.'s rail-fence. In fence corner in woods there was blood; was blood in another fence-corner. Were leaves, blown or gathered together, which had been displaced, scratched away to the ground; blood was on ground where child lay. Sixty rods or more, by the road, from where I found the marks to Mr. ——'s house. Know prisoner, and saw her on road Saturday before child was born; had suspicions, from her appearance, she was with child.

Cross-examined.—Found puddle of blood in one corner of fence; the two corners where blood was found were adjoining. Leaves had been pulled back into the woods from the fence; surface of ground scratched off.

Re-examined.—This surface not larger than hand; ground *soft* and *loose.* In the other corner of fence blood was *piled up.* The crack in fence between the first and second rail, next to pile of blood, was three inches wide. Scratch on fence as if done by hog. I traced back, to within three or four rods of where we found the blood in fence-corner, marks where the child had been dragged.

John E. H.—Know prisoner; saw her on Sunday, 15th September, 1861; was on Coroner's Jury; said to her, "there has been a child found, and people think

it is yours!" She replied: "It is not mine, as I have been on my feet every day," and roused up quick; looked pale.

Cross-examined.— She stayed Sunday night, and left Monday morning, after breakfast.

The testimony of several of the witnesses is here omitted, as it only corroberates that already stated.

DR. CULBERTSON.— Practiced eleven years; made post-mortem of child found near Adamsville, Ohio, September 17, 1861. Found child somewhat decomposed; lungs and abdominal organs undecomposed; some limbs gone; head injured and decayed; ancle bitten through; abdominal organs large and perfectly developed; lower bowel filled with meconium; peritoneum of a bright red color; stomach somewhat distended; liver large; bladder well developed. On opening chest, (there had been an opening made in left side of chest, probably bitten,) found lungs fully expanded, of a bright pink color, marbled; on edges of lung, immediately under breast bone, air-bubbles on the surface, limited, not general, or in the substance of lung. On incising the lung, frothy mucus, tinged with blood, exuded; lungs and heart together floated high on brook-water; separated from heart, still higher; small portions of lungs all floated; on pressing small pieces between linen and fingers until structure was destroyed, they still floated; heart nearly empty and not putrefied, and sank in water; a darkness over the neck and chest, and blueness over the abdominal surface; skin and all organs in perfect form, except head; umbilical cord two inches long, and withered. Examination enabled me to determine child had breathed; have no doubt respiration was complete; lungs may be inflated in part by a single respiration; would not expect complete respiration before birth; the child was fully developed, large-sized, was full-termed, and presented no congenital defect; breathing before birth mostly occurs in tedious or instrumental labors, or where the hand of the physician has been introduced.

Saw and examined the person of the prisoner on the 18th of September: Breasts much enlarged, showing tortuous veins, dark areola, enlarged nipples, and, on pressure, a drop or two of milk came out; external genital swollen and tender, vaginal rugæ effaced, vagina tender; os uteri open, and could have admitted two fingers; uterus three by four inches in size, and from it issued the same muco-purulent secretion, tinged with blood, as from the vagina; on abdominal surface were the usual marks of pregnancy, from ruptured veins, and linea albicantes; I believe she had given birth to a child; think, from the examination, five or six days before. She admitted to me that she had given birth to a child, that she heard the child breathe after it fell on the ground; also, that it was born near Mr. S——'s house, in a lane; also, that she had went to bed, had pains, but did not complain, got up, went out, was not out long until child was born; that she placed a rail as long as a bed on child's neck, and went into house. She stated that Mr. —— was father of child; that he had been with her on numerous occasions while living at his father's house; that she was induced by the father of this young man to make an affidavit that his son was not the father of the child; that she did this deed because she had no home, and did not know how she could take care of the child, as she had no means to do the same.

Cross-examination.—Post-mortem not made in house; made in day time, in presence of two other persons, one of which was the Prosecuting Attorney; was fifteen or twenty minutes in making examination; saw prisoner next morning, about 9 o'clock, at Mrs. A——'s, two miles from Adamsville, from whence she had walked two miles the previous day, having walked four miles to Adamsville, and then, resting all night, came to where I saw her; uncommon for child to breathe before birth; not uncommon for child to breathe and cry after head is born, and before the remainder of body is. A well-developed child may die in birth by tedious labor. The hydrostatic test is what enabled me to

determine that the child had breathed; the whole of the tests taken collectively together, are safe and positive proof of breathing. There may be cases in which the hydrostatic test is safe in itself. The whole symptoms and tests of the case have been considered in forming my opinion. In September last, putrefaction would commence in fifteen or twenty-four hours; was about an hour obtaining her consent to permit an examination, in making the same, and in persuading her to make a confession, and receiving same; Rachel A—— was there, Prosecuting Attorney and an old gentleman; told her if she was innocent, the examination would prove it; did not tell her if she was guilty it would disclose it; did not threaten her; used ordinary language; was taken to make these examinations at the instance of the Prosecuting Attorney, under the authority of the County Commissioners; she was taken from Rachel A——'s to Adamsville, thence to Zanesville; I next saw her in the jail; was sent for to attend her, as she was sick—had ovarietis.

I may here state, that in these examinations the genitals were not exposed, relying here on touch. So careful of exposure were we, that the bed-clothes were drawn up over her body, and her clothes beneath these before the former were folded down, to expose the surface of the abdomen. Her breasts were exposed but to a limited extent, sufficient to determine that they contained milk; also, that this confession was obtained at the suggestion of the Prosecuting Attorney, (and on reflection I deemed it my duty to obtain the same if I could,) not by threats or promise, but by stating I was confident she had recently had a child, and that it was useless for her to attempt to deceive me; by reciting the enormity of the crime, and urging her repeatedly to confess. The Prosecuting Attorney was present during the recital of a part of the confession, and she displayed a natural anxiety to know if it would be wrong for that gentleman to hear the confession, and on being told it would make no difference in the case, she hesitatingly and carefully continued to confess.

The Prosecuting Attorney, Rachel A—— and myself had to persuade her for a considerable length of time ere she would permit a physical examination; she averring that she could not have had a child, as she had been on her feet all the time, and therefore there could be no necessity for an examination. Finally, before consenting, she went out, took off her petticoat (which was very bloody), and returning, went into the room and hesitatingly permitted the examination. She did not wish to return to Adamsville, refusing to go at first, then reluctantly consenting. When she was told she must go to Zanesville, she shed tears, and said she did not want to "go to jail."

EVIDENCE FOR THE DEFENSE:

George W. W.—First knew prisoner in 1852; lived with my family six years; consider her quite deficient in intellect; could not teach her; could not give her instruction; children would make sport of her; could not teach her to put a guard on her tongue; could be persuaded to tell many things not

true; could keep no secrets; when we sent her for errands, had to rely on the honor of those with whom we dealt; could not tell price of anything; had to send notes and get bills; could not count money; could not tell if a *quarter* would or would not pay for fifteen cents worth.

Cross-examined.— Don't think she is insane; good girl to work when has some one to superintend; went two years to school; can read, but not cipher; don't know right from wrong in every instance; mean by deficiency of intellect, not a good mind; think she is not capable of taking care of herself; told my wife, on being asked the question, that a young man had intercourse with her; has been away from our house since 1858; rumors have reached me that her reputation and conduct have not been good, that she received the visits of men of low repute; think she can't tell the difference between a quarter and fifteen cents.

Henry R.—Have known prisoner two years; never thought she was insane; thought she was a weak-minded girl; have had a little dealing with her (a merchant); thought she had a poor conception of money or the value of articles.

Cross-examined.— This is not an isolated case; would not consider *this* as a safe criterion of intellect; can't say she is incapable of taking care of herself; saw nothing wrong in her conduct in my store.

Dr. ——.— Have known prisoner five or six years, not sufficient to tell whether she is sane or insane; general report says she is of very inferior reputation.

Cross-examined.— Insanity a disease; weakness of intellect a disease also; general reputation is that she is insane; heard that she was pregnant and joined church; if she had sufficient intellect, she would have known Dr. Culbertson's examination would have exposed her guilt; judged was deficient from her physiognomy; is not very intellectual; never heard anything which would impeach her *good sense* or moral honesty until recently.

Dr. —.— Have been practicing near thirty years; lung hydrostatic test not safe; mere proof that lungs have been inflated; decomposition may make lungs float; test not reliable of *live birth*; child may be born alive and not breathe; may die a few minutes or hours after birth from injuries received, or defects of constitution; women have convulsions from severe labor; may give birth in convulsions and not know it; various presentations, face presentations, child may breathe; can't say that air is received by infant without artificial aid; can not cry without air; may cry in womb; woman standing in labor, *fall* of child might kill it, or cord break, and child bleed to death; child's head will bear a great deal of compression; puerperal convulsions are generally of short duration, may get over them in few hours, generally requires a much longer time; head may be born, child breathe, and child die before body is born; would class her as idiotic, or partially so; every grade of intellect; she would be in a fair condition for puerperal convulsions.

Dr. ——.— Hydrostatic test decides that lungs have been inflated; not reliable test; if much decomposed may float, although uninflated with air; decomposition in twenty-four hours inwardly; cause of puerperal convulsions, mental emotion, congestion, etc.; result, memory commonly deficient in relation to child; may breathe and die before birth; child falling on its head, as narrated, might cause its death; torn umbilical cord not so likely to bleed; discoloration of face may be caused by hard labor, a fall on ground, or cord around child's neck; a slight sense of shame *might* produce insanity or monomania; a clergyman became insane from a typographical error; Geo. W. W——'s testimony might affect prisoner's strength of intellect, but not as to her insanity; is not an idiot, but an imbecile; she would not come under the range of common sense.

Cross-examined.—Not imbecile because she does not know the value of money; because she did not keep approved company; nor because she had a tarnished character.

Re-examined.—A fence-rail, could it be placed on child's neck, would leave a mark; no complete inflation of lungs of child born dead.

THOMAS H.—Did not see fence-rail or part of one; leaves three or four inches thick where blood was found; known prisoner two or three years; "*have seen people with no more intellect go through the world straight, and others, of more, have trouble.*"

Dr. ——.—Hydrostatic test usually not reliable of itself, less as decomposition advances; cord around neck, and tedious labor may discolor face and neck of child; child may breathe before birth freely; puerperal convulsions obliterate memory a few hours, or for a much longer time; pressure on nerves during birth a cause; mental anxiety a predisposing cause.

Dr. ——.—Have been practicing thirty years; may breathe before birth without artificial aid; hydrostatic test tolerably reliable; should not put much confidence in her mind; might be classed as idiotic.

MR. R.—Would consider her rather mentally deficient; in buying goods in my store, would give me half-dollar to pay twenty-five cents worth.

Cross-examined.—"Have known smart people to buy things to the amount of their money, and go in debt for more;" thought she made bad selections; on Tuesday evening, 17th September, bought candy; said she was going to Mr. W——'s, and wanted it for his children; think she could not distinguish between good and evil to the same extent as others; don't think she would know it was wrong to kill a person if left to herself.

JOHN E. H.—Prisoner lived at my house; has sufficient intellect to know right from wrong in the ordinary transactions of life; knows it is wrong to commit murder.

DR. ——.—Imbecility affects memory more than any other faculty; if prisoner was not acting under instruction, "she showed a fair intellect."

DR. CULBERTSON.—I attended prisoner two or three weeks while she was in jail; I do not think her a person of strong mind, but that she possesses a mind of medium capacity; I think she is not an imbecile; that she is capable of distinguishing right from wrong in the ordinary transactions of life, and of appreciating her daily duties, and have no doubt of her ability to determine that it is wrong to kill a human being.

Believing that in this condensation we have faithfully detailed the evidence in this case, so far as is necessary for our readers, we now ask attention to division —

I. What is the true value of the hydrostatic test as a proof of breathing?

The principal objections to this test are: (*a.*) That lungs may be artificially inflated; (*b.*) that they may be inflated by the gas of decomposition; (*c.*) that children may live for a time after birth without the intervention of apparent respiration; (*d.*) that emphysema may cause lungs to float; (*e.*) that hepatization and tuberculation of lungs are objections; (*f.*) that pneumonia is an objection; (*g.*) that atelectasis is an objection.

We will briefly consider these points:

(*a.*) It is now established beyond a doubt that lungs may be partially inflated while *in situ*, and float on water on removal from the body. That lungs may be partially inflated when removed from the

body, is too well known to need mentioning; but that they may be fully expanded artificially when *in situ*, is disproved by the researches of the most modern and reliable writers. It is even, as is well known by nine physicians out of every ten, extremely difficult to restore a still-born child artificially, with all the skill that the practitioner may exercise, and the no-inconsiderable vitality of the recently born child. It seems, too, that artificial inflation may be confounded with partial natural respiration; and here lies one of the greatest objections to the hydrostatic test. Imperfect respiration may be mistaken for artificial inflation, because by the latter the lungs are never fully expanded. But this source of error is fortunately removed by remembering the fact that even the partial inflation of lungs *in situ* requires great skill in its accomplishment; and, furthermore, it is the height of improbability that in cases of infanticide restoration will be attempted, much less completed, by the suffering mother. On this point Taylor justly remarks: "One might be led to suppose that every woman tried for child-murder had made the praiseworthy attempt to restore a still-born child, although circumstances may show that she cut its throat, severed its head, or strangled it while the circulation was going on."

From these considerations we may then conclude that, if lungs are *fully expanded*, they are inflated from natural respiration, and have no fears of the objection of artificial inflation. But if lungs are partially inflated, we must look well to the condition of the child for other proof of live birth; and if there are no marks of violence, and no suspicious important circumstances attending the case, we may with the assistance of the other lights of the case—as the color and marbled state of the lungs, the development of the child and amplitude of the mother, the place in which the birth occurred, the consideration of the social relation of the mother after the child shall have been born, and the absence of any congenital defect in the child—these will aid us in determining that artificial respiration was not performed, and the cause of the inflation. It, too, is improbable that any mother, good or bad, would think of restoring her child by artificial inflation, in her ignorance of such process, even if she desired most earnestly to preserve the life of the infant.

The next objection is — (*b.*) That decomposition of lung-structure which, producing a gas, may cause these organs to float on water, is a well known fact, and it is equally true that this is an objection to the hydrostatic test. As a natural consequence, when putrefaction is advanced in the lungs we can not depend upon this test. But if decay is merely upon the surface of the lung, especially if it is limited to a

few points upon the superfices, and does not extend to the substance of these organs, and if, added to this, the substance of the lung is yet of natural consistence, not softened, we may safely conclude that putrefaction will not interfere with the value of the hydrostatic test in the case. We may still further be assured this view is correct, if, on firm pressure between cloths and thin boards, or between the fingers and cloths, the gas can be so far removed, without destroying the substance of the lung, as to cause the portion to sink in water. For it has been found, by actual experiment, that the gas of putrefaction can be so far removed from the lung by compression as to cause it to sink in water, while the air of respiration can not be forced from the lung so as to make it sink by any pressure short of that which would completely break down its structure, and often not then. The reason for this is obvious. The gas of decomposition is outside of the air-cells, in the cellular structure of the lung, while the air of respiration is within the air-vesicles, and can not be forced out except through the bronchioli, which result is not probable, as the latter, too, are compressed in the experiment; or by rupture of the air-cells, which must be a rare result in an undecomposed lung. While the gas of decomposition being around, the air-cells can be readily compressed out, as the cells of the cellular tissue more or less communicate with each other, and these with the external air.

Again, the objection of decomposition is considerably removed by the fact that decay takes place with great tardiness in the lungs,—later than in any other organ, excepting the heart, uterus and bones. To illustrate this I may cite one of my own experiments:

Nov. 12, 1861.—A small pig was placed in a manure-pile, that decay might proceed as rapidly as possible. On the 15th, three days, it was half rotten. The lungs were not softened; the heart on surface showed some putrescent vessels. The lungs and heart together floated; on separating them, lungs sank (the animal never had breathed) and heart floated. On compressing the heart, it too sank.

This case not only illustrates how slowly decay progresses, but affords proof of the value of the hydrostatic test.

With these limitations and facts in view, we may consider the hydrostatic test safe, so far as limited decomposition is concerned; if decay be general through the lungs, the test is useless.

The next objection urged is—(*c.*) That life can long exist without respiration may well be doubted; that the new-born infant's heart may pulsate for a few moments, and there be no apparent respiration, is admitted as true. But what, we ask, have such cases to do with the true value of the hydrostatic test, since the pulsation of the heart

must be shown by the mother or by another to have taken place? It follows, therefore, that if some party does not prove it, the evidence of life can not be shown in the case, and, consequently, life *being proven*, the hydrostatic test is not needed in such a case. The question then turns, not on the point, *Did* the child *breathe?* but, *Why did it not breathe?* To determine this, the state of the lungs and other organs are generally competent. This head will be again considered under atelectasis.

The next point is—(*d.*) It is asserted by certain writers that emphysema of lungs may be an objection to this test, but more modern authority believe that it can not be, since those who consider it a source of error probably mistake the gas of putrefaction for the air of emphysema; and moreover it is difficult to imagine how we can have established the pathological condition of emphysema, without the lungs having been previously inflated with air. We may, then, with others, safely dismiss this objection.

Our next point is—(*e.*) That hepatization or tuberculation of lung is a well constituted negative objection to this test may be doubted, because either of these conditions can be detected and distinguished from those evidences denoting breathing. Hepatization is rarely general; and if partial, some portion of the lung will float if breathing has been performed. If it is general, the child could not have breathed and the *hydrostatic test is relieved*, as the child could live but for a moment with such lungs. Tuberculation of lung is a structural disease that in its very nature will prevent the new-born infant living but for a few moments, and may be easily distinguished after death on examination. And if it be not in proof, no man in his right mind would presume such child could have supported independent life. We may narrate a case in point: We were recently called to a case of miscarriage at the seventh month, a natural labor. The surface of the child's feet and hands were discolored, and the cuticle upon the sides of its feet and on the back of several of its fingers separated on being handled. The abdomen was tumid and the scrotum distended with gas. The face and surface generally were dusky in color; but further than this we observed no marks of putrefaction. Notwithstanding these evidences of decay, this child was seen to breathe, but was not heard to cry. It breathed several times (jerking respirations) without aid, and eight or nine times by blowing in its face. When the cord ceased to pulsate it was tied and divided, and the child enveloped in cotton, excepting its face, after which it breathed several times by blowing in its face, when death took place.

Post-Mortem.—Twelve hours after death. Lungs unexpanded, of a dark liver color, containing points of hard white tissue. On placing heart and lungs on water together, and separate, and also a number of small portions, all sank.

Microscopic examination of these hardened points showed oil globules, colestrine, granules, epithelial cells, the surface of which were granulated, and tubercle corpuscules, which showed round nuclei with and without the aid of acetic acid.

Here then is a case in which a child was born and respiratory acts were observed, and yet the lungs showed no evidence of respiration, for the simple reason that they were so diseased as to obstruct the entrance of air into the air cells. It follows, therefore, that in strictness there was no respiration, and consequently the hydrostatic test can not settle the question of life. It is clear, too, that this infant had only negative, dependent life, and under the law would be ruled out as a case beyond its province. This subject will be indirectly referred to again under the head of atelectasis.

The next objection is—(*f.*) Pneumonia has also been urged as a negative objection to this test. It is well known, however, that this disease is extremely rare in new-born infants, and that when present in the very few exceptional cases, it can plainly be detected by its limitation and by the fact that portions of the lung are inflated. For my own part I have always believed that the use of an organ, as well as its disuse, may lead to corresponding diseases, and hence feel that the introduction of air into the lungs of the new-born infant may be a cause of disease, and consequently that the comparative state of rest of the intra-uterine lung is highly unfavorable to inflammatory disease of this structure before birth. We feel, therefore, that pneumonia is intimately associated with the presence of external air, and consequently doubt the accession of this disease without respiration having been established. We may, too, doubt its instantaneous production after birth, so speedily as to be a source of error in investigating cases of infanticide.

The next objection is—(*g.*) Atelectasis being simply a state of unexpanded lung, with no positive lung disease, we naturally conclude that the general system or some other organ of the infant must be at fault. It may be that the general powers of the infant's system are so weakened that the nervous influence is not sent down from the nervous centres with sufficient force to expand the chest, and therefore the lungs are not inflated ; or it may result from a partial obstruction in the air passages. If this state result from partial obstruction, it may possibly

be removed by the acts of inspiration and expiration, but if it be from lack of nervous power, or other than lung organic vital defect, the difficulty can not be removed, and soon, a few hours at most, the child must die. It would seem, then, in these cases, that if on examining the air passages we find no obstructions, the possibility of such children assuming an independent state of existence is improbable. And if such can not assume independent life, we can not perceive how infanticide can be committed upon such infants, they being inevitably destined to perish for lack of respiration. It would be a misdemeanor to take the life of such cases, but not murder. But if the obstructions (as mucus) in the air passages were of such nature as to be removed by the effort of respiration, then infanticide could be inflicted on such infants, and it would seem that the criminal, if guilty, should be held strictly accountable in such cases for the death of the particular child.

It is a fact, I believe, that children with atelectasis never recover, and can it be that our law will condemn the culprit for the murder of that which has no independent existence, and is destined never to possess such independence ? But we do not know that a child laboring under this disease ever recovered, and until we can prove that they may recover, we feel that when the presence of this disease is shown we are bound to conclude the child could not have lived.

What are the obstructive causes which may prevent the expansion of the lungs and simulate atelectasis ? 1st, strangulation by various means ; 2d, hanging ; 3d, suffocation; 4th, drowning.

It must be determined whether these (except hanging) are accidental or homicidal, by a careful examination of each case and the attendant circumstances. Strangulation offers the greatest prospect of success, and suffocation next, for obvious reasons. The other means may be the homicidal measure.

The subject of atelectasis has lately been incidentally developed in the trial of Brock *vs.* Kellock, before Vice Chancellor Stewart (see January number of *London Lancet*, 1862), in the course of which trial Drs. Lee and Ramsbotham gave it as their opinion, that proof of respiration was, and Drs. Taylor and Tyler Smith that it was *not*, necessary to establish live birth ; the last two gentlemen believing that circulation can, for a short time, proceed without respiration. Dr. Anstie, in commenting upon these opinions before one of the London medical societies, takes the still higher ground that *consciousness* in the infant commences with the process of respiration, and that until the infant has become *conscious* it can not be deemed to possess

an independent existence ; and that therefore consciousness should be one of the great evidences of independent life in the new-born child. That consciousness follows respiration is a fact which most physicians have observed. The child must breathe, then we hear the cry.

This doctrine we must believe is correct, but we doubt its practical application in these cases ; for who, but the mother, in many such cases could say whether or not the child had cried ? Yet if it be kept in view as a leading principle, it will certainly, so far as we can perceive, lead to truth.

The presence or absence of consciousness should be one of the tests in these cases, and the fact should be discovered if the *unconsciousness* could have been produced from other than lung disease, which may enable the inquirer to determine the probable viability of the child irrelative to respiration.

The doctrine of proof of respiration being required to substantiate live birth is, it seems to us, far more safe in law than the ordinary doctrine of live birth, and it merits the closest scrutiny of the medico-legal professions. The question must be closely considered in all its bearings. A large class of cases must prove beyond a reasonable doubt that so soon as respiration has been established, consciousness is a necessary sequence, before this doctrine can be adopted with safety. It, however, will not be correct to maintain because a new-born child is unconscious that it did not breathe, for other causes may render it unconscious. If such are not detectable on inspection, and if no proof can be afforded of respiration in the case, we are left without data, and should give the culprit the benefit of the uncertainty.

The condition of atelectasis may be readily detected on inspection, by the dark color and uninflated state of the lungs, by their sinking in water, and by being readily inflated after removal from the chest, when they will readily float on water, thereby showing no organic changes in the lung structure.

Under this head of our subject we conclude—

1st. If during the performance of the hydrostatic test the lungs float high, especially if they are large, marbled and of a bright pink color, and if decomposition is not, or but to a limited extent is, present on the surface of the lung, we may consider this test reliable of breathing ; and if of breathing, it is one thousand chances to one in favor of live birth.

2d. If decomposition is present in the substance of the lung, or over the entire surface, the hydrostatic test is useless.

3d. If the lungs are partially inflated and there is no lung decay,

the hydrostatic test may become useful in connection with the other phenomena of the case.

4th. That emphysema, pneumonia and lung tuberculosis can not be serious objections to the validity of *this test.*

It seems, then, that the hydrostatic test stands at the head of all of our means for detecting breathing in the new-born child ; and that it has not lost its ancient value, but has rather increased in importance, by the efforts of able persons, whose object has been to qualify and show the true value of the objections to the test. I need hardly say that we can not generally depend on this test alone ; but there are cases so palpable from this test alone, as to force the conviction of breathing. However, it is our duty as physicians to avail ourselves of every phenomenon of the case, considering this test as the most important, but remembering not to neglect any of the evidences.

It will be noticed that no use was made of the *static tests* in this case. This apparent neglect was not an oversight, but was omitted because we think but little dependence can be placed on either the positive or relative test. 1st. Because the weight of lungs before and after breathing differ largely in new-born infants ; and 2d. Because the weight of the lungs to the body, before and after respiration is established, vary so intimately as to dictate the non-predication of any facts from this source.

By reference to the testimony in this case it will be seen that the physicians differed as to the value of the hydrostatic test. This may have been caused by some of these gentlemen understanding this test as simply referring to the fact of the lung floating on water ; when in reality the test includes all those changes which are produced in the chest and lungs by respiration ; as the enlargement of the chest, in depth and latterly, and of the lungs ; the change in color and consistency of the latter, and the exudation of frothy mucus tinged with blood from incision of lung structure. The changes effected in the heart by respiration partially belong to this test ; but the *static tests*, as they essentially differ in their nature from the *hydrostatic tests*, do not.

We now ask attention to the next division :

II. What is the proper duty of the physician in investigating these or other medico-legal cases ? How far should he exert himself to obtain the truth relating to a particular case ?

It must be evident that every sane man is interested in the maintenance of the public welfare, and therefore in furthering the ends of the law. No man can tell when he may need the protection of the law ;

when he least expects it he may be obliged to call for its magisterial aid. Society is but a unity for the development of good and happiness, and in order that it shall progress in the true sense of the term, each member must aid in the establishment of truth. The physician as a member of society has special duties to perform, as well as those of the citizen, and under no circumstances should he avoid these, provided the act will not conflict with his duties elsewhere, and he is competent, and he believes it will confer a benefit upon the community of which he is a member. No one will deny that, for a time, the physician may lay off his professional robes to act as the citizen, and again resume them ; and I do not think any candid man will deny that a physician making a post-mortem examination, for and in behalf of the State, may for a time leave his profession, to inquire into extra-medical matter pertaining to a case. Why ? Because he is both citizen and physician. Community expect of him, as his profession has given him additional mental power and scope, that he will use the same for their protection against social evils. And is it possible that we have among us a single physician who would not ferret out crime in any of its hydra forms, with all the ability he may possess ? Is there one of us, feeling our true position and our ability to act, that would shrink from aiding the law, from a fear that his motives might be questioned ? Where, if not from the observing physician, would many legal cases derive their support in open court ? The physician may be cognizant of *extra*-professional facts as well as professional, and shall he not observe and report such ? And if he may observe such facts without the pale of his calling, is it not his duty also to follow up the case and make suspicions reality, if they are " worthy the name of reality ? " Nay, more, is there a physician, seeing suspicious circumstances in connection with a case, that would *dare* to make no effort to discover if they were not reality ? How could such a man balance his account with society, if, turning on his heel, he left such a case to be developed as it might be ? There is no half-way : the physician either owes a full duty to society, to eradicate crime to the utmost of his ability, or he owes no duty at all. He is either a member of the social sphere, or he is not.

In the performance of these duties, if he should be obliged to resort to cunning means to obtain his information, is he not the better qualified for his duty ? But, to particularize, if called upon as a physician to examine a case of alleged infanticide, after having made a post-mortem, would he not properly endeavor to obtain further light in the case, by obtaining a physical examination of the supposed mother,

that he might connect the one inquiry with the other; and if, after proceeding thus far, the thought of obtaining a confession should occur, or be suggested, should he not endeavor to obtain the same, not by threats or promises, but by persuasion? And when he saw by the manner and actions of the suspected party there was good prospect of obtaining such confession, he should continue his efforts, should he not be applauded as a faithful witness and honest citizen? Such then are the circumstances of this case, and these remarks show all that we have to say under this head.

The spirit of these conclusions may be found in Dean and Taylor's *Medical Jurisprudence*. And a still more rigid course is pursued in some of the German courts (see *North American Review*, late No.) in the search of criminality.

Our next division is—

III. A consideration of the legal doctrine of "live birth."

It will be perceived that none of the medical witnesses in this case testified that the hydrostatic test was an evidence of live birth in the legal sense.

Strange as it may appear, most legal authorities hold that the child must be entirely without the mother's parts to constitute birth, and this is qualified by some that the child must be capable of supporting an independent existence. One authority, we remember, holds that the child will be considered "born," although the cord may not have been divided after delivery. Physicians can not see the propriety of this definition. Doubtless it had its origin in a desire to be on the merciful side, ere punishment was inflicted, in a truly laudable attempt to give the prisoner the benefit of "*a doubt.*" But this principle of justice, however meritorious it may be, has, we fear, remotely favored the production of infanticide, for it is a notorious fact that but *very* few criminals are convicted of this offense.

It is, too, a dangerous position, because a child may be born *in part*, and murdered, and no *adequate* law can reach the case. Even were it shown by the admission of the mother, or other party present, that at such a stage of the labor the child was murdered, it would constitute no *capital* offense against the law.

But, it is maintained, the law must set a fixed line where labor ceases and external infant life begins; and this her edicts say is when the child shall have been expelled from the mother entirely. But this fixation is objectionable, knowing that we can not determine the nature of the child's vitality, by showing the stage of the mother's

labor; but hoping rather to demonstrate the stage of labor by showing the *vital character* of the child.

It is proved beyond controversion, that a child may, in some few cases, breathe before it is born in the legal sense, but these cases are exceptional. In such we have evidently an independent life commenced, yet not fully protected by the law. Take a case: a child's head is born, and a blow on that part feloniously kills it; the child is murdered, yet the law can not punish for murder, because it is not born in law.

The question soon turns practically to the point, Was *the* particular child criminally destroyed, or did it die naturally after such partial birth? How can we determine this question? We answer, if with the respiratory signs present we have those of asphyxia, and there are no marks of violence on the child, and the history of the case evinces a tedious labor, and its circumstances show no homicidal intention, we can but say that in all probability the death was accidental, and no fears need be entertained of conviction in such a case. It is not to such cases of infanticide that we refer, but to those not fully born, in which the child evidently breathed, and was plainly murdered, and yet the legal definition of live birth will effectually prevent adequate punishment. But there is yet another class of these cases that dictate the removal of this definition, viz., those negative examples where the child has been entirely born, but respiration so imperfectly established as not to be perceptible during infant life, or proven after death, and where the circulation proceeds at a feeble rate. According to *this* definition such infants live, when in reality they have no *independent life whatever*. It is true that such cases generally are in proof by other parties than the mother, and that they mostly die; but examples may occur unwitnessed, and the physician be called to prove that this child never lived, which he can not do, for the legal definition of live birth stares him in the face; for he is aware that although he can discover no respiratory signs of life, the child may yet have been "born alive" in the legal sense. These defects would seem to dictate a change in the law on this point, and what should this be? With great deference to what may be the opinions of others on this point, we suggest we have already alluded to it under the head of atelectasis, there holding that no infant can be deemed responsible, or to possess independent life, until *consciousness* has been established; and as we know this is not shown until respiration has begun, therefore the presence or absence of respiration in these cases should be the great test of live birth.

This certainly is safe doctrine for the mother in this class of cases, because we can conceive of no cause which will arrest birth and destroy the child, which would not show in or about the mother or child after the birth. According to this view, if the child does not breathe, it can not require the protection of the law so far as infanticide is concerned; the question then turns to the crime of fœticide, which we are not considering. But to illustrate: If a child present with a wound upon its head, and the attendant circumstances show that in all probability the *mortal wound* could not have resulted from accident, and there are evidences of respiration having been established, and no congenital defects of the child which could produce *unconsciousness*, it is evident that consciousness following respiration was established, as this state is the known effect of respiration; and the criminal should be held responsible in such a case after it had been sifted in all its bearings.

In the fixation of this doctrine we have advanced in principle, yet it still remains to be shown in each case of alleged infanticide that the perils of labor may not have destroyed the child after consciousness was established, or that the want of consciousness may not have been produced from disease of the mother or child, or from accident. But these objectable cases are rare, and if their rarity be insisted upon by the defense, and the *non-existence* of such be not proven by the prosecution, the exception does not prove the incorrectness of the principle, but only that it was not useful in the particular case, or that the prosecution did not properly develop the case.

The law claims that any motion (and crying includes motion) of the child is an evidence of life; but if the child should move its head ere the body was born, and it was observed, it would be no evidence of independent life, although obviously it might have been born alive and was murdered. The law, however, does not hold that crying is any more than an infantile motion, showing life, and does not point to its denoting the establishment of consciousness, which act ninety-nine times in a hundred brings the conviction to us in the new-born infant of independent infantile life.

From these considerations we believe that consciousness should be the great test of the independent life of the child: prove this and the infant may be murdered and the criminal be responsible *or fmurder*; and if the principle is not established, we can not see how murder of an independent being can be inflicted. From this it follows that the removal of the old doctrine of "live birth," and the substitution of that of "independent vitality," and the keeping in view that *without*

respiration we can not have *independent* infantile life, would further the ends of justice, and be more safe, because more effectual, than the present law.

Our last head remains to be considered :

IV. Was the prisoner sane or insane ; and first of the evidences of insanity—

The fact that she allowed a physical examination and made a confession ; that a witness—Geo. W. W.—who had known her since 1852, and at whose house she had lived six years, thought her quite deficient in intellect : that she could not be taught to keep secrets ; to keep a guard on her tongue ; that witness could not give her instruction ; that she could be persuaded to tell many things not true ; that she could not tell the price of any thing ; that they had to send notes and get bills for things ; that she could not tell a quarter from fifteen cents ; that she told witness' wife, on being asked, that a young man had had intercourse with her ; that Henry R——, who had known her for two years, thought her insane, that she was a weak-minded girl, that she had a poor conception of the value of money, or of articles ; that G. W. S—— thought she never was a girl of very strong mind ; that Dr. —— thought she was deficient from her physiognomy ; that Dr. ——, who had never seen her, but judging from the evidence, thought she was idiotic or partially so ; that Dr. ——, who only saw her at the trial, thought she might be an imbecile, but not an idiot ; that Mr. R—— thought she would not know it was wrong to kill if left to herself, that she could not distinguish between good and evil to the same extent as others : I believe these are substantially the evidences of insanity. We ask attention to them for a short time. It will be noticed that the opinions of several non-professional witnesses are cited who thought her insane, weak-minded, etc., though it may well be doubted if they knew the import of the terms they used. It is not to be supposed that such persons' opinions can be of much value, but their reasons for so believing may be of great importance. We propose now to consider their reasons :

The fact that she allowed an examination and made a confession can not be considered evidence of insanity, for her actions and words in relation to these subjects convincingly develop a just sense of her guilt, and a desire to conceal her pregnancy and labor, and what took place subsequently, and to deceive every one in relation thereto. But as we shall consider this point under *sanity symptoms*, we need not now. Again, that it was stated by Geo. W. W. that she could not keep secrets, can not be considered an evidence of insanity, as but few

women can do this ; neither can a majority of men or women "keep a guard on their tongue." Or is it an evidence of insanity that "she could be persuaded to tell many things not true ?" for how many are there that can lie without persuasion ; neither is it a sign that because her instructors could not teach her to cipher, but could to read, that she was *non compos mentis*, for this may have arisen from a disinclination to study, and to figures in particular ; not from *a want*, but from an excess of love for other pursuits. Again, that they had to send notes and get bills for things may arise from the fact that her memory was not retentive ; but does it follow that because she could not remember such things as she was sent for, she would not know the nature of the crime of murder ? Again, it is said she did not know a quarter from fifteen cents. Perhaps the truth of this may be doubted, and from the hesitating manner of the witness and what I have seen of the prisoner, I can not believe but that the witness was mistaken. But, grant it to be true, it may be that the girl never had occasion to know the value of money, as she had so little of it, and it seems she knew that money would purchase goods and also candies for the children. That on being asked, she told a *certain wife*, who had partially raised her, and with whom she was intimate, that she had intercourse with a particular man, only went to show that she could not keep a secret, and that she was no more communicative on such subjects than such women generally are. But, however, she said nothing about her intercourse with other men, or her pregnancy. That Dr. —— thought she was *deficient* from her physiognomy, and from her having confessed and allowed a vaginal examination, is softened by the fact that the Doctor only recently heard of her being thought insane, and his not being familiar with her face, and also by his uncertainty as to what constitutes insanity, and his assigning to her several different grades of insanity, and also by the fact that her actions while the confession and examination was being obtained, rather show intellect than a want of it. That Dr. ——, who had never seen the prisoner, thought she was partially idiotic, is to be qualified by the fact that the Doctor had no opportunity of conversing with her, and during the hurry of business did not hear all the evidence, and had no time to reflect calmly on what he did hear. That Dr. —— thought she might be an imbecile is qualified by his statement, that "if the prisoner was not acting under instructions, she certainly showed a fair intellect." That a Mr. R—— thought she would not know it was wrong "to kill," is contradicted by the testimony of John E. H——, and is but the opinion of a man who

would not claim to be a judge in such matters, and is qualified by his statement that "she could not distinguish between good and evil to the *same extent* as others."

Secondly, What are the evidences of *sanity?*

That Jane S—— states, on the Sabbath morning the child was found in the lane, that the prisoner tried to avoid her, and on coming up to witness said "I did not expect to meet you," and when witness said she was going to Mr. S——'s house, the defendant replied, "You need not go up there, for they are not at home." This conversation on its face is sensible, and certainly thus viewed would not be evidence of insanity; but there is a deeper view to be taken of it. It will be remembered that the prisoner was coming out of the lane, and that *this witness* was going into it, to Mr. S——'s. It appears shortly that several pigs came running toward them, one with a child in its mouth. Now it appears reasonable that the prisoner knew of the child being in the possession of these pigs, being mutilated by them, and that she was at first surprised at the unexpected proximity of witness, and further, that she desired to prevent witness from going toward the pigs, fearing she might see the child, and hoping, too, that these animals might eat it up, as they probably had the after-birth, and certainly several of its limbs; and thus all traces of her crime be effaced. And this would seem to be corroborated by her shortly leaving the spot.

Again, she told the same witness some time previous to this Sunday, that "she would have to leave from the talk there was about her." Here she did not state the cause of this talk, keeping this to herself. Her remark indicates caution, a feeling of shame, and a perception of the opinions of others about her.

Again, Susannah S—— says: That on Thursday evening, on going to bed, prisoner complained of headache and backache, but said nothing about the cause of these pains, (and we know that women in labor are generally confiding to females as to the cause of their sufferings.) Before undressing, she blew out the light, no doubt for the express purpose of preventing her bed-mate discerning her condition; thus showing caution and design. On the next night she arose, said nothing about having arisen until questioned, and even then kept back for what purpose she was up, which beyond a reasonable doubt was to give birth to a child, in a secluded spot, where no one in the house could know of the birth. She then having destroyed the child, returned into the house, laid abed in the morning, does not eat, gives no reason for this, says nothing relating to the birth; and when she

arose, stated she would go out after peaches into the peach-orchard; and when she had staid some time, was seen near the spot where the child was born. No doubt she was then secreting the child in the leaves, as well as obtaining peaches.

Again, after returning, she had sewing in her lap, but *she did not sew*, because her mind was absorbed with the nature of her crime. She therefore knew and was conscious of the criminal character of the act she had committed. These acts show determination, caution, and no low order of design.

Again, on the following Sunday, she being in the neighborhood at the house of John E. H——, made the following reply to his remark, "There has been a child found and people think it is yours." *Startled* by the remark, she replied, "It is not mine, for I have been on my feet every day," showing a logical design instituted to deceive.

Again, she stated to me that she made the affidavit as to the paternity of the child under the promise of a home, etc. This looks as though it might be an evidence of insanity; but it must be remembered that her situation was desperate, and probably that she did not care what she swore to, provided she gained a home.

Again, while we were endeavoring to procure an examination, assisted by the several persons before mentioned, she assumed the most astonished air, and said "she was not the woman; that it must be some other person; that it could not have been her, as she had been on her feet all the time." And a long and systematic course of persuasion and argument had to be entered into in order to obtain the physical examination; and during that examination, in its various steps, we had still to urge her to allow the proceeding, for the reason she was fearful that it would detect that she had recently had a child; and before she permitted the examination at all she went out and removed a bloody petticoat, that this might remove an evidence of suspicion. During her confession, which had to be obtained portion by portion, by well-directed inquiries, she exhibited the utmost hesitation and caution; and when the Prosecuting Attorney wished to come into the room, she desired to know if that were proper,—and when he entered, it was still more difficult to get her to answer leading inquiries. It will be remembered that this confession was mostly obtained by the remark that it was useless for her to attempt to deceive me, as I knew she had recently had a child. When she was requested to go to Adamsville, she declined going, wished to see some one else first, and then consented to return when she saw it was no use to resist; and at Adamsville, when told she must go to Zanesville, she

anticipated, shed tears, and said "she did not want to go to jail"—thus showing an appreciation of her crime and one of its effects, imprisonment.

During her sickness in jail I saw no signs, words or actions denoting insanity. She comprehended my medical inquiries, and answered them promptly; and her eye did not denote insanity. I also may state here that her counsel in open court consulted her, and she them; and at no time was her veil removed that the jury might see her face. One would think, too, that, were she insane, it would be a fixed condition, to be certainly observed by those about her immediately after the infant was found, or at least by some of those about her while she was imprisoned, but we do not hear of any such information. And finally, there is no testimony to show that the prisoner labored under any insane delusion, propensity or determination that could have produced such a dire result as the murder of a helpless infant.

As to the other pleas presented in this case, we can not believe it important to show that the prisoner had not at the time or shortly afterward puerperal convulsions; and as to the other, that the sex was not proven, the testimony of Jane S. shows that it was a male child.

The judge charged as follows:

The indictment charges the prisoner with the crime of murder in the first degree, but under this indictment you may find the prisoner not guilty, guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter. You must say in your verdict which of these you find..... The prisoner is *not guilty* of any crime charged in this indictment unless the child was *born alive*. Whether it was, or not, is a question of fact for you. By "born alive" is meant that the child must have been withdrawn from the mother having an existence, a life, freed from and wholly independent of the life of the mother. To constitute such life, the child must breathe, and must have a circulation of its blood propelled by its own organs..... Had the child such life? did it breathe? All this, as I have said, is a question of fact for you.

Something is said of insanity, of imbecility, etc., various terms being used and applied to the condition of the prisoner's mind, from which it is claimed she is not responsible for her acts, whatever they were. If the prisoner did what is charged, whatever may have been the strength of her intellect or the state of her moral culture,—if she comprehended this much, and realized it at the time, that it was wrong, she is guilty, however much she may been wrought upon by others, or by a sense of shame and degradation at the condition in which she found herself. The law only measures her intellect to the extent of ascertaining this fact: did she know and realize at the time that the act was wrong in itself?....

She is charged with the three degrees of homicide already named. Murder in the first degree is a homicide where the killing was done *purposely* and of *deliberate* and *premeditated malice*. The concurrence of all these elements is necessary..... *Purposely:* She must have intended to take life; that must have been an object which she sought to accomplish..... *Deliberate and premeditated malice:* "Malice" is not here used in the restricted, limited sense in which it is ordinarily applied. She may not have had any ill will towards the infant: if she was regardless of social and moral obligations, and fatally bent upon mischief, her act was malicious. If she purposely killed the child, the

law presumes the malice. By "deliberation" and "premeditation" it is meant that the act done was first thought upon, revolved in the mind, and the malice fostered with the thinking. To accomplish this implies time: no given length of time is requisite; it is sufficient if this is done, though done while in the commission of the act itself and before its final consummation.

Murder in the second degree differs from murder in the first degree only in this, that it lacks the deliberation and the premeditation. . . . .

Manslaughter is . . . .

Did the prisoner *purposely* kill — did she intend to take life? In the absence of any declarations of hers as to her intentions, you will look to her acts, — what she did; and the law is, that one is *presumed to intend* what are the natural consequences of his act. . . . .

Her guilt must be proved beyond a reasonable doubt; that is, the evidence must remove such doubts as are *reasonable*,— not captious doubts, but such doubts as ordinarily induce men to act or to refrain from acting; or, in other words, the proofs in the case must be inconsistent with any other hypothesis than that of her guilt. . . . .

The jury returned the verdict of "not guilty."