

Whereupon the following colloquy occurred:

Mr. Arnold: There's not a word of evidence as to that, that's a grossly improper argument, and I move that that be withdrawn from the jury.

Mr. Dorsey: I don't state it as a fact, but I am suggesting it.

Mr. Arnold: He has got no right to deduct it or suggest it, I just want your Honor to reprove it, reprimand him and withdraw it from the jury; I just make the motion, and your Honor can do as you please.

Mr. Dorsey (resuming): I am going to show that there must have been something besides the training of these men, and I'm going to contrast them with our doctors.

Mr. Arnold: I move to exclude that as grossly improper. He says he's arguing that some physician was brought here because he was the physician of some member of the jury, it's grossly unfair and it's grossly improper and insulting even, to the jury.

Mr. Dorsey: I say it's eminently proper and absolutely a legitimate argument.

Mr. Arnold: I just record my objection, and if your Honor let's it stay in, you can do it.

Mr. Dorsey: Yes, sir; that wouldn't scare me, your Honor.

The Court: Well, I want to try it right, and I suppose you do. Is there anything to authorize that inference to be drawn?

Mr. Dorsey: Why, sure, why the fact that you went out and got general practitioners, that know nothing about the analysis of the stomach, know nothing about pathology.

The Court: Go on, then.

Mr. Dorsey: I thought so.

Mr. Arnold: Does your Honor hold that is proper, "I thought so?"

The Court: I hold that he can draw any inference legitimately from the testimony and argue it, I don't know whether or not there is anything to indicate that any of these physicians was the physicians of the family.

Mr. Rosser: Let me make the suggestion, your Honor ought to know that before you let him testify it.

The Court: He says he don't know it, he's merely arguing it from an inference he has drawn.

Mr. Dorsey (resuming): I can't see any other reason in God's world for going out and getting these practitioners, who had never had any special training on stomach analysis, and who have not had any training with the analysis of tissues, like a pathologist has had, except upon that theory.

Movant shows that the Court erred is not rebuking the Solicitor-General for making such improper argument which was not authorized by the evidence, and in not stating to the jury that there was not a particle of evidence to the effect that any of the physicians were family physicians of any of the jurors, or that any of the physicians were put upon the stand for the effect it might have upon them for such reason; and the Court erred in allowing the Solicitor-General to proceed with such improper, unwarranted and highly prejudicial argument, and erred in allowing the Solicitor-General to comment, as the foregoing colloquy shows, upon the well-merited interruptions by defendant's counsel; and for such erroneous actions, and failures to act, by the Court, and for such illegal, unfounded and prejudicial argument, the defendant says that a new trial should be granted.