for the protection of the physician on whom the responsibility rests. But what are the safeguards to be established to protect the physician who is called to attend a woman on whom a criminal abortion has been done and who may be in a critical condition? The position of the physician in these cases is disagreeable; it is embarrassing and may prove disastrous to him if he fails to fortify himself with moral safeguards. He is charged with the double responsibility of doing all that can be done for his patient and of protecting himself against unjust accusation. He cannot afford to disregard the gossip, neither should he fail to protect himself against the real offender who would eagerly embrace the opportunity of shifting the responsibility for the misdeed. To this end, it would be a good rule, in such cases, to call a consultant for the initial examination and to witness the statement of the patient. The statement of the patient should best be in writing and should comprise a recital of her known condition prior to the abortion; when the operation was performed; where it was performed; how it was done, and by whom. If the patient is unwilling to divulge this information, then the physician would be justified in declining to assume the responsibility of the case. It is common experience that the patient will tell all she knows when made to realize her danger and a double purpose is attained—the physician in charge is protected and the guilty party is revealed.

BRANDEIS THEATRE BUILDING.

(For discussion, see p. 81.)

LEGAL ASPECT OF ABORTION*

BY ERNEST F. OAKLEY, JR., PROSECUTING ATTORNEY, ST. LOUIS, MO.

IT IS my desire at the outset to express to your Association the appreciation I entertain in accepting the honor you conferred by inviting me to address you. My subject as assigned is "The Legal Aspect of Abortion." Much has been written and still more will be contributed by pens mightier than mine on the several phases of this subject, approaching as it does, in my opinion, more intimately into the everyday practice of the physician and surgeon than any other single element of the ethics which guide you. I say, "In my opinion," and I might add that my opinion is based on experience acquired while an assistant State's attorney assigned to the office of the Coroner of the City of St. Louis; I formed the conviction that the majority of medical men are strongly imbued with the principles of the ethics of their profession, but I was impressed, however, with their lack of practical application of the principles of ethics, due, not to their desire

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to thwart the administration of justice, but rather to their professional hesitancy to divulge, under any conditions, matters between themselves and their clients, which they held sacredly privileged.

There has existed the necessity of informing your profession in this regard, to the end that greater cooperation may exist between you and the law-enforcement officials. To what extent you are privileged and what is your particular duty under the circumstances of a case presenting evidence of abortion, I shall endeavor to present the legal side.

State v. Shields, 230 Mo. 9, defines abortion as the delivery or expulsion of the human fetus prematurely or before it is yet capable of sustaining life. The same case is authority that the terms "abortion" and "miscarriage" do not of themselves import a crime.

Abortion has been made a crime by statute. At common law it was generally recognized as no offense to produce an abortion on a woman with her consent and before she was quick with child. It was not even murder at common law to take the life of the child at any period of gestation, even in the act of delivery. Today the several states have enacted laws holding the commission of an abortion a felony and punishable as such. The reason is obvious. Regardless of the law and the attendant opprobrium and ruin of exposure, abortion in its unlawful sense is practiced extensively in our country. It is with regret and an expression of condolence to the great majority of your profession, that I state the abominable and nefarious practice is not confined to those outside your ranks. There are renegades among you—as indeed exist in all circles—who for one motive or another, lend their skill to the commission of this crime.

The Statute of Missouri may be taken as a fair example of the law of the several states on the subject, and I quote and discuss Section 3239, Revised Statutes of Missouri, 1919.

"Sec. 3239. Manslaughter—producing miscarriage. Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take, any drug, medicine or article, or uses upon her, or advises to or for her the use of, any instrument or other method or device to procure a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose) shall in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue, such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail not exceeding one year or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked, by the state board of health in its discretion."

You will note that the gravamen of the offense is the intent to produce a miscarriage or abortion by administering drugs or using instruments. Also that the acts included within the statute coupled with the intent, constitute the offense. That when either the woman or quick child dies, the party responsible is chargeable with manslaughter. That when neither dies, the crime is designated "Felony of Abortion." The punishment in the former ranges from two to ten years in the penitentiary; in the latter, from three to five years in the penitentiary. In either case, the act is a crime whether the woman is pregnant or not, and in either case, the intent to produce miscarriage or abortion must be present.

The exceptions are where it can be shown beyond a reasonable doubt that the abortion was necessary to preserve the life of the expectant mother or unborn child; (a *prima facie* case of nonnecessity is complete by proof of the fact that the woman was in good health or her ordinary condition of health immediately prior to the abortion); or where the act has been so advised by a duly licensed physician. To this extent, is abortion as such, lawful, and would seem to be the rule generally. The moment the womb is instinct with embryo life and gestation has begun, the crime may be committed.

A Texas case in agreement with the Missouri law, holds that it is not necessary that the means employed should produce the effect desired. A physician's testimony is sufficient to show that the means employed are capable of producing an abortion. *Cave v. State*, 33 Texas Crim. 335.

A New Jersey case holds in point that the intent to produce the abortion may be present without knowledge or even strong belief that the woman is pregnant. *State v. Poe*, 48 N. J. Law 34.

Should the woman recover, she is a competent witness against the accused. In the event of her death, her dying declaration is equally competent. In *State v. Stapp*, 246 Mo. 338, defendant asked for an instruction to the effect that the fact that the prosecuting witness was implicated in the alleged transaction, be taken into consideration by the jury in determining the credibility to be given her testimony. The refusal of the trial court was one of the assignments of error. The Appellate Court held this instruction should not have been given, considering such an instruction useless, containing no legal proposition, and purely a comment on the evidence.

In this connection, Bishop on Statutory Crime declares:

"An accomplice swears under the temptation of earning thereby his own immunity, while the witness does not. She discloses her own disgrace, and where no evil motive appears for it, this fact may in reason strengthen her credibility."

State v. Jones, 197 S. W. (Mo.) is authority that a woman involved in a case of this character is not an accomplice.

The Missouri law regulating the admission in evidence of dying

statements, and found in Section 4034, Revised Statutes, 1919, announces the principles of the general rule.

“Sec. 4034. PROSECUTIONS FOR ABORTIONS—DYING DECLARATIONS. In prosecutions for abortion or for manslaughter occasioned by an abortion or miscarriage, or by an attempt to produce either, or attempted abortion, or for any crime of which abortion or miscarriage may be a part of the essential facts to be proven, the dying declarations of the woman whose death is charged to have been caused thereby shall be competent evidence on trial of any person charged with such crime, with like effect and under like limitations as apply to dying declarations in cases of felonious homicide: PROVIDED, that the party offering such declarations shall first satisfy the court by competent testimony that such woman was of sound mind when such declarations were made: AND PROVIDED FURTHER, that no conviction shall be based alone upon such declarations unless corroborated as to the fact that an abortion or miscarriage has taken place, and in all such prosecutions aforesaid any physician or medical practitioner who may have attended or prescribed for such woman shall be a competent witness in said cause to testify concerning any facts relevant to the issue therein, and shall not be disqualified or held incompetent by reason of his relation to such woman as an attending physician or surgeon.”

A dying statement made by the deceased is competent as evidence and admissible under certain conditions.

State v. Craig, 190 Mo. 339, announcing a rule generally followed, holds it must appear that the declaration was made under a sense of impending and immediate death, and that the declarant at the time believed that she had no hope of recovery.

State v. Walter Lewis, 264 Mo. 420, follows State v. Craig, *supra*, holding the admissibility of the declaration is dependent upon the declarant's belief of her impending dissolution at the time it is made, and not on the length of time that intervened between its making and her death.

In the several dying statements made to me, I adopted a rule to put two questions to the declarant, in the presence usually of the nurse. “Do you know that you are about to die?” “Have you abandoned all hope of recovery?” Receiving an affirmative answer, in each instance the declaration would be taken in shorthand, immediately transcribed and read to the declarant for her approval. She would be asked if that was her statement, and if her physical condition permitted, she would sign it.

A dying declaration in proper form, supported by the autopsy physician's testimony that an abortion had been performed, and that *causa mortis* was peritonitis superinduced by the criminal operation, constitute a *prima facie* against the accused.

As you gentlemen well know, a statement made by deceased to one of you in your professional capacity, is not admissible as evidence in a court of law. Such a communication is held as privileged. There are well-founded reasons for the existence of this rule, and no one would

wish to disturb the confidential relation which exists, and necessarily so, between the medical man and his patient.

But the physician must not consider that he is without obligation in the premises. There is incumbent on him a strong moral duty common to all good citizens—a duty to assist in the investigation and punishment of crime. When it is ascertained by the physician that an illegal operation has been performed, he should at once inform the proper authorities of his findings, to the end that a statement, competent as evidence, can be secured from the woman, and introduced at the trial of the accused, in the event she herself is not produced as a living witness.

A medical man may be a recognized expert in his own field; but when he encounters a situation that partakes of a legal nature, he is apt to seek refuge in the accepted ethics of his profession, without first considering the question and possible consequence to himself. You can readily see that this attitude may lead to grave suspicion. I have in mind the following statement of facts as an illustration.

At an inquest into the cause of death of Mrs. ———, it developed as a finding of the postmortem doctor, that an abortion had been produced. The family physician, who was in attendance on the case testified that when he was called, the woman was running a temperature, and suffering acutely from abdominal pains. On information elicited from her in private inquiry, he diagnosed the case as “probable blood-poisoning” and prescribed accordingly. The woman did not respond to treatment and died.

Asked whether or not she had told him that a criminal operation had been performed, he refused to answer. Asked whether he had determined from his own examination of her, that a criminal operation had been performed, he again refused to answer. Asked whether he had reported the case to the authorities, he replied, “Not until the woman died.”

Here, you see the palpable inconsistency of the physician's position. Although he had full knowledge of the circumstances, both from the woman herself, and his examination of her, he hesitated to notify the authorities, because he feared that thereby he would be violating a professional confidence; yet, rather than certify the cause of death, actuated by the same ethics, he considered it his duty to apprise the Coroner of the case; with what results? The facts which he had in good faith suppressed were brought out and made public at the inquest; the lips of the woman sealed in death could no longer speak the name of the person criminally responsible; the verdict—“Peritonitis—resulting from abortion, at hands of parties unknown to jury.”

The physician, who in his heart, despised and condemned the wrongdoer, had, in fact, protected him. Justice had not been served.

Whatever qualms or misgivings the medical man may entertain in divulging such confidences, I submit to you, they must be subordinated to his natural desire and duty to assist the State in the apprehension and prosecution of the criminal.

(For discussion, see p. 81.)