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 LD.
 Scott L.J.

which he is relying. I express no opinion at all about that, but I do myself see that there is that degree of relevance. I think, therefore, that the order of this Court should be, not that inspection be given of the contents of the book as asked, but that if the defendant bank will answer the first of my questions, namely, the total of the half commissions earned by the bank on purchases and sales during those three years, then the plaintiff should not have inspection of the book. But inasmuch as I think that the book is to that limited extent relevant, if the defendant bank is not willing to answer that one interrogatory then liberty to inspect the whole book should be given. I limit it to the one interrogatory, because I feel quite clear in my own mind that that one fact does relate to the matter in question. On the number of customers or the number of transactions I have some doubt and, therefore, I do not add that.

CLAUSON L.J. I agree with my Lord's judgment. I must confess that while I am unable to say that the magnitude of these transactions is wholly irrelevant, I feel the gravest doubt whether the relevance is other than very slender. However, I do not see my way clear to differ from the view which my Lord takes, and I accordingly agree with the judgment as he has delivered it.

Appeal dismissed unless the defendant bank answers an interrogatory.

Solicitors for appellants: *Durrant Cooper & Hambling.*
 Solicitors for respondent: *Allen & Overy.*

R. F. S.

THE KING v. BOURNE.

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Criminal law—Procuring miscarriage—Defence that operation was to save life of mother—Probable effect of continuing pregnancy physical and mental wreck of mother—"For the purpose of preserving the life of the mother"—Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 58. July 18, 19.

On a prosecution under s. 58 of the Offences Against the Person Act, 1861, for using an instrument with intent to procure miscarriage, the burden rests on the Crown to prove that the operation was not done in good faith for the purpose only of preserving the life of the mother, and, if in the opinion of the jury that burden is not discharged, the accused is entitled to a verdict of acquittal. The words "preserving the life of the mother" must be construed in a reasonable sense. They are not limited to the case of saving the mother from violent death: they include the case where continuance of the pregnancy would make her a physical or mental wreck.

TRIAL at the Central Criminal Court before Macnaghten J.

At the July sessions of this Court an indictment was preferred against Aleck William Bourne, obstetrical surgeon at St. Mary's Hospital, alleging that he had used an instrument with intent to procure the miscarriage of a certain girl, contrary to the provisions of s. 58 of the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100). The material words of that section are "Whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony."

The indictment did not allege that the defendant had used the instrument "unlawfully"; and, before plea, counsel for the defendant objected that by reason of the omission of that word the indictment was bad, and that it did not charge any offence known to the law. Macnaghten J. ruled that in order to constitute an offence under s. 58 of the Offences Against the Person Act, 1861, it would be necessary for the Crown to prove that the defendant had unlawfully used an instrument

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with intent to procure a miscarriage, and that, therefore, the objection was valid. He accordingly directed that the indictment should be amended by the insertion of the word "unlawfully" before the words "used an instrument." This was done, and the defendant pleaded to the amended indictment that he was not guilty.

The evidence called on behalf of the Crown proved that on June 14, 1938, the defendant performed an operation on the girl in question at St. Mary's Hospital, and thereby procured her miscarriage. The following facts were also proved: On April 27, 1938, the girl, who was then under the age of fifteen, had been raped with great violence in circumstances which would have been most terrifying to any woman, let alone a child of fourteen, by a man who was in due course convicted of the crime. In consequence of the rape the girl became pregnant. Her case was brought to the attention of the defendant, who, after examination of the girl, performed the operation with the consent of her parents.

The defence put forward was that, in the circumstances of the case, the operation was not unlawful. The defendant was called as a witness on his own behalf and stated that, after he had made careful examination of the girl and had informed himself of all the relevant facts of the case, he had come to the conclusion that it was his duty to perform the operation. He had satisfied himself that the girl was in fact pregnant in consequence of the rape committed on her. He had also satisfied himself that she had not been infected with venereal disease; if he had found that she was so infected, he would not have performed the operation, since in that case there would have been a risk that the operation would cause a spread of the disease. Nor would he have performed the operation if he had found that the girl was either feeble-minded or had what he called a "prostitute mind," since in such cases pregnancy and child-birth would not be likely to affect a girl injuriously. He satisfied himself that she was a normal girl in every respect, though she was somewhat more mature than most girls of her age. In his opinion the continuance of the pregnancy would probably cause serious injury to the girl, injury so serious

as to justify the removal of the pregnancy at a time when the operation could be performed without any risk to the girl and under favourable conditions.

The evidence of the defendant was supported and confirmed by Lord Horder, and also by Dr. J. R. Rees, a specialist in medical psychology. Dr. Rees expressed the view that, if the girl gave birth to a child, the consequence was likely to be that she would become a mental wreck.

Sir Donald Somervell A.-G., L. A. Byrne and Henry Elam for the Crown.

Roland Oliver K.C. and Gerald Thesiger for the defendant.

MACNAGHTEN J., in summing-up the case to the jury, said: Members of the jury, now that you have heard all the evidence and the speeches of counsel, it becomes my duty to sum-up the case to you and to give you the necessary directions in law, and then it will be for you to consider the facts in relation to the law as laid down by me, and, after consideration, to deliver your verdict. In a trial by jury it is for the judge to give directions to the jury upon matters of law, and it is for the jury to determine the facts; the jury, and the jury alone, are the judges of the facts in the case.

The charge against Mr. Bourne is made under s. 58 of the Offences Against the Person Act, 1861, that he unlawfully procured the miscarriage of the girl who was the first witness in the case. It is a very grave crime, and judging by the cases that come before the Court it is a crime by no means uncommon. This is the second case at the present session of this Court where a charge has been preferred of an offence against this section, and I only mention the other case to show you how different the case now before you is from the type of case which usually comes before a criminal court. In that other case a woman without any medical skill or medical qualifications did what is alleged against Mr. Bourne here; she unlawfully used an instrument for the purpose of procuring the miscarriage of a pregnant girl; she did it for money; 2*l.* 5*s.* was her fee; a pound was paid on making the appointment, and

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she came from a distance to a place in London to perform the operation. She used her instrument, and, within an interval of time measured not by minutes but by seconds, the victim of her malpractice was dead on the floor. That is the class of case which usually comes before the Court.

The case here is very different. A man of the highest skill, openly, in one of our great hospitals, performs the operation. Whether it was legal or illegal you will have to determine, but he performs the operation as an act of charity, without fee or reward, and unquestionably believing that he was doing the right thing, and that he ought, in the performance of his duty as a member of a profession devoted to the alleviation of human suffering, to do it. That is the case that you have to try to-day.

It is, I think, a case, of first instance, first impression. The matter has never, so far as I know, arisen before for a jury to determine in circumstances such as these, and there was, even amongst learned counsel, some doubt as to the proper direction to the jury in such a case as this.

The defendant is charged with an offence against s. 58 of the Offences Against the Person Act, 1861. That section is a re-enactment of earlier statutes, the first of which was passed at the beginning of the last century in the reign of George III. (43 Geo. 3, c. 58, s. 1.) But long before then, before even Parliament came into existence, the killing of an unborn child was by the common law of England a grave crime: see Bracton, Book III. (De Corona), fol. 121. The protection which the common law afforded to human life extended to the unborn child in the womb of its mother. But, as in the case of homicide, so also in the case where an unborn child is killed, there may be justification for the act.

Nine years ago Parliament passed an Act called the Infant Life (Preservation) Act, 1929 (19 & 20 Geo. 5, c. 34). Sect. 1, sub-s. 1, of that Act provides that "any person who, "with intent to destroy the life of a child capable of being "born alive, by any wilful act causes a child to die before it "has an existence independent of its mother, shall be guilty "of felony, to wit, of child destruction, and shall be liable on

"conviction thereof on indictment to penal servitude for life : "Provided that no person shall be found guilty of an offence "under this section unless it is proved that the act which "caused the death of the child was not done in good faith "for the purpose only of preserving the life of the mother." It is true, as Mr. Oliver has said, that this enactment provides for the case where a child is killed by a wilful act at the time when it is being delivered in the ordinary course of nature ; but in my view the proviso that it is necessary for the Crown to prove that the act was not done in good faith for the purpose only of preserving the life of the mother is in accordance with what has always been the common law of England with regard to the killing of an unborn child. No such proviso is in fact set out in s. 58 of the Offences Against the Person Act, 1861 ; but the words of that section are that any person who "unlawfully " uses an instrument with intent to procure miscarriage shall be guilty of felony. In my opinion the word "unlawfully " is not, in that section, a meaningless word. I think it imports the meaning expressed by the proviso in s. 1, sub-s. 1, of the Infant Life (Preservation) Act, 1929, and that s. 58 of the Offences Against the Person Act, 1861, must be read as if the words making it an offence to use an instrument with intent to procure a miscarriage were qualified by a similar proviso.

In this case, therefore, my direction to you in law is this—that the burden rests on the Crown to satisfy you beyond reasonable doubt that the defendant did not procure the miscarriage of the girl in good faith for the purpose only of preserving her life. If the Crown fails to satisfy you of that, the defendant is entitled by the law of this land to a verdict of acquittal. If, on the other hand, you are satisfied that what the defendant did was not done by him in good faith for the purpose only of preserving the life of the girl, it is your duty to find him guilty. It is said, and I think said rightly, that this is a case of great importance to the public and, more especially, to the medical profession ; but you will observe that it has nothing to do with the ordinary case of procuring abortion to which I have already referred. In those cases the operation is performed by a

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 1938 no pretence that it is done for the preservation of the mother's
 REX life. Cases of that sort are in no way affected by the con-
 v. sideration of the question which is put before you to-day.
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Macnaghten J. What then is the meaning to be given to the words "for the
 "purpose of preserving the life of the mother." There has
 been much discussion in this case as to the difference between
 danger to life and danger to health. It may be that you are
 more fortunate than I am, but I confess that I have found it
 difficult to understand what the discussion really meant,
 since life depends upon health, and it may be that health is so
 gravely impaired that death results. A question was asked
 by the learned Attorney-General in the course of his cross-
 examination of Mr. Bourne. "I suggest to you, Mr. Bourne,"
 said the Attorney-General, "that there is a perfectly clear
 "line—there may be border-line cases—there is a clear line of
 "distinction between danger to health and danger to life."
 The answer of Mr. Bourne was: "I cannot agree without
 "qualifying it; I cannot say just yes or no. I can say there is a
 "large group whose health may be damaged, but whose life
 "almost certainly will not be sacrificed. There is another group
 "at the other end whose life will be definitely in very great
 "danger." And then he adds: "There is a large body of material
 "between those two extremes in which it is not really possible
 "to say how far life will be in danger, but we find, of course,
 "that the health is depressed to such an extent that life is
 "shortened, such as in cardiac cases, so that you may say that
 "their life is in danger, because death might occur within
 "measurable distance of the time of their labour." If that
 view commends itself to you, you will not accept the suggestion
 that there is a clear line of distinction between danger to health
 and danger to life. Mr. Oliver wanted you to give what he
 called a wide and liberal meaning to the words "for the purpose
 "of preserving the life of the mother." I should prefer
 the word "reasonable" to the words "wide and liberal." I
 think you should take a reasonable view of those words.

It is not contended that those words mean merely for the
 purpose of saving the mother from instant death. There are

cases, we are told, where it is reasonably certain that a pregnant
 woman will not be able to deliver the child which is in her womb
 and survive. In such a case where the doctor anticipates,
 basing his opinion upon the experience of the profession, that
 the child cannot be delivered without the death of the mother,
 it is obvious that the sooner the operation is performed the
 better. The law does not require the doctor to wait until the
 unfortunate woman is in peril of immediate death. In such a
 case he is not only entitled, but it is his duty to perform the
 operation with a view to saving her life.

Here let me diverge for one moment to touch upon a matter
 that has been mentioned to you, the various views which are
 held with regard to this operation. Apparently there is a great
 difference of opinion even in the medical profession itself.
 Some there may be, for all I know, who hold the view that the
 fact that a woman desires the operation to be performed is a
 sufficient justification for it. Well, that is not the law: the
 desire of a woman to be relieved of her pregnancy is no justifica-
 tion at all for performing the operation. On the other hand
 there are people who, from what are said to be religious reasons,
 object to the operation being performed under any circum-
 stances. That is not the law either. On the contrary, a
 person who holds such an opinion ought not to be an obstetrical
 surgeon, for if a case arose where the life of the woman could
 be saved by performing the operation and the doctor refused to
 perform it because of his religious opinions and the woman died,
 he would be in grave peril of being brought before this Court on
 a charge of manslaughter by negligence. He would have no
 better defence than a person who, again for some religious
 reason, refused to call in a doctor to attend his sick child, where
 a doctor could have been called in and the life of the child
 could have been saved. If the father, for a so-called religious
 reason, refused to call in a doctor, he also is answerable to the
 criminal law for the death of his child. I mention these two
 extreme views merely to show that the law lies between them.
 It permits the termination of pregnancy for the purpose of
 preserving the life of the mother.

As I have said, I think those words ought to be construed in a

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reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.

These general considerations have to be applied to the particular facts of this case; the verdict of the jury must depend on the facts of the case proved before them. The girl in this case was under the age of fifteen, for she has attained that age within the last ten days. It is no doubt very undesirable that a young girl should be delivered of a child. Parliament has recently raised the age of marriage for a girl from twelve to sixteen, presumably on the view that a girl under the age of sixteen ought not to marry and have a child. The medical evidence given here confirms that view; the pelvic bones are not set until a girl is eighteen, and it is an observation that appeals to one's common sense that it must be injurious to a girl that she should go through the state of pregnancy and finally of labour when she is of tender years. Then, too, you must consider the evidence about the effect of rape, especially on a child, as this girl was. Here you have the evidence of Dr. Rees, a gentleman of eminence in the profession, that from his experience the mental effect produced by pregnancy brought about by the terrible rape which Dr. Gorsky described to you, must be most prejudicial. You are the judges of the facts and it is for you to say what weight should be given to the testimony of the witnesses; but no doubt you will think it is only common sense that a girl who for nine months has to carry in her body the reminder of the dreadful scene and then go through the pangs of childbirth must suffer great mental anguish, unless indeed she be feeble-minded or belongs to the class described as "the prostitute class," a Dolores "marked cross "from the womb and perverse." (1) You will remember that the defendant said that if he had found that this girl was feeble-minded or had what he called a "prostitute mind" he would

(1) "Dolores" (Swinburne), stanza 18.

not have performed the operation, because in such a case the pregnancy would not have affected her mind. But in the case of a normal, decent girl brought up in a normal, decent way you may well think that Dr. Rees was not overstating the effect of the continuance of the pregnancy when he said that it would be likely to make her a mental wreck, with all the disastrous consequences that would follow from that.

I do not think it is necessary for me to recapitulate the evidence that has been given before you as to the reasons why Mr. Bourne in this case thought it right to perform the operation. You remember his evidence. The learned Attorney-General accepts his evidence as a frank statement of what actually passed through his mind. In view of the age and character of the girl and the fact that she had been raped with great violence, he thought that the operation ought to be performed. As I told you yesterday, and I tell you to-day, the question that you have got to determine is not are you satisfied that he performed the operation in good faith for the purpose of preserving the life of the girl. The question is, has the Crown proved the negative of that? If the Crown has satisfied you beyond reasonable doubt—if there is a doubt, by our law the accused person is always entitled to be acquitted—if the Crown has satisfied you beyond reasonable doubt that he did not do this act in good faith for the purpose of preserving the life of the girl, then he is guilty of the offence with which he is charged. If the Crown have failed to satisfy you of that, then by the law of England he is entitled to a verdict of acquittal. The case is a grave case, and no doubt raises matters of grave concern both to the medical profession and to the public. As I said at the beginning of my summing-up, it does not touch the case of the professional abortionist. As far as the members of the medical profession themselves are concerned—and they alone could properly perform such an operation—we may hope and expect that none of them would ever lend themselves to the malpractices of professional abortionists, and in cases of this sort, as Mr. Bourne said, no doctor would venture to operate except after consulting some other member of the profession of high standing.

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You will give the matter your careful consideration, and if you come to the conclusion that the Crown has discharged the burden that rests upon it, your verdict should be guilty. If you are not satisfied of that, then your verdict should be not guilty.

Verdict Not Guilty.

Solicitor for Crown : *Director of Public Prosecutions.*
Solicitors for defence : *Le Brasseur & Oakley.*

W. L. L. B.