

CHAPTER 3

ABORTION; CONCEALMENT OF BIRTH

Sec.

- 51. Penalty; attempts.
- 52. Mother's concealment of death of illegitimate issue.
- 53. Contraceptives; miscellaneous information for females.

§ 51. Penalty; attempts

Whoever administers to any woman pregnant with child, whether such child is quick or not, any medicine, drug or other substance, or uses any instrument or other means, unless the same was done as necessary for the preservation of the mother's life, shall be punished, if done with intent to destroy such child and thereby it was destroyed before birth, by a fine of not more than \$1,000 and by imprisonment for not more than 5 years; but if done with intent to procure the miscarriage of such woman, by a fine of not more than \$1,000 and by imprisonment for less than one year, and any person consenting and aiding or assisting shall be liable to like punishment.

R.S.1954, c. 134, § 9.

Cross References

Homicides—

- Manslaughter, see §§ 2551, 2552 of this Title.
- Murder, see § 2651 et seq. of this Title.

Notes of Decisions

- Admissibility against codefendant 14
- Burden of proof 11
- Common law 1
- Defenses 9
- Elements of offense 4
- Evidence 13, 14
 - Generally 13
 - Codefendant, admissibility against 14
- Felonies 5
- Homicides 7, 8
 - Manslaughter 8
 - Murder 7
- Indictments and informations 10
- Legislative intent 2
- Manslaughter 8
- Misdemeanors 6
- Murder 7
- Proof generally 15

- Verdicts 16
- Witnesses 12
- Words and phrases 3

Library references

- Abortion 1, 2.
- C.J.S. Abortion §§ 1 et seq., 13, 44 et seq.

1. Common law

At common law, it was no offense to perform an operation upon a pregnant woman by her consent, for the purpose of procuring an abortion, and thereby succeed in the intention, unless the woman was "quick with child". *Smith v. State* (1851) 33 Me. 48.

2. Legislative intent

Legislative intent must be derived from this section itself, and not from foreign statutes or decisions. *State v. Rudman* (1927) 126 Me. 177, 136 A. 817.

3. Words and phrases

Under this section, which punishes for use of medicine or instruments on pregnant woman, phrase, "unless same was done as necessary for preservation of mother's life," refers to acts enumerated rather than to subsequent clause requiring intent to destroy child or procure miscarriage. *State v. Rudman* (1927) 126 Me. 177, 136 A. 817.

Conjunctive "as", used in this section prohibiting abortion, unless done "as necessary" to preserve mother's life, means "because" or "since". *Id.*

4. Elements of offense

Offense of abortion is complete, when overt act is done with intent to destroy child or procure miscarriage, unless for preservation of mother's life. *State v. Rudman* (1927) 126 Me. 177, 136 A. 817.

Procuring abortion or miscarriage for any reason other than necessity of saving mother's life is absolutely prohibited. *Id.*

Procuring an abortion is an offense, whether with woman's consent or not; and it is not essential that the woman should have been quick with child. *Smith v. State* (1851) 33 Me. 48, 54 Am.Dec. 607.

5. Felonies

The using of any means, with intent to destroy the child of which a female is pregnant, and the destroying of the child thereby before its birth, unless done to preserve the life of the mother, constitutes a felony. *Smith v. State* (1851) 33 Me. 48.

6. Misdemeanors

The using of means, with intent to procure the miscarriage of a pregnant female, and the procuring of the miscarriage thereby, unless done to preserve the life of the mother, is a misdemeanor. *Smith v. State* (1851) 33 Me. 48.

7. Homicides—Murder

The using of any means, with intent to destroy the child of which a female is pregnant, and the destroying of the child thereby before its birth, unless done to preserve the life of the mother, constitutes a felony; and if, by the use of such means and with such intent, the death of the mother be occasioned, it is murder. *Smith v. State* (1851) 33 Me. 48.

8. —Manslaughter

The using of means, with intent to procure the miscarriage of a pregnant female, and the procuring of the miscarriage thereby, unless done to preserve the life of the mother, is a misdemeanor; and if, by the use of such means and with such intent, the death of the mother be occasioned, it is manslaughter. *Smith v. State* (1851) 33 Me. 48.

9. Defenses

Only exception to criminal responsibility for abortion or attempted procurement of miscarriage is necessity in fact of preserving mother's life. *State v. Rudman* (1927) 126 Me. 177, 136 A. 817.

Good faith of person procuring abortion or attempted miscarriage in believing same to be necessary is no defense. *Id.*

10. Indictments and informations

Under this section, which punishes for use of medicines or instruments on pregnant woman to procure abortion, unless necessary for preserving mother's life, indictment charging use of instrument in violation of statute, "it not being necessary for preservation of life" of mother to use said instrument, was sufficient to negative exception in statute. *State v. Rudman* (1927) 126 Me. 177, 136 A. 817.

Under this section, for destroying an unborn child by the use of an instrument, the indictment must allege an "intent to destroy such child." *Smith v. State* (1851) 33 Me. 48, 54 Am.Dec. 607.

It is not necessary to aver that the mother had quickened. *Id.*

Note 11

11. Burden of proof

State has burden of proving pregnancy beyond reasonable doubt in abortion case. *State v. Rudman* (1927) 126 Me. 177, 136 A. 817.

12. Witnesses

An experienced physician, after having made a post mortem examination of the body of a female, may, as an expert, offer his opinion whether she had been pregnant, and as to the cause of her death. *State v. Smith* (1851) 32 Me. 369.

13. Evidence—Generally

Statements to physician of one's bodily ailments, made for purpose of enabling physician to give proper medical advice and treatment by forming an opinion of cause of ailments, may be testified to by physician, not as evidence of actual cause of ailments, but in connection with testimony of opinion formed partly upon those statements. *State v. Donnell* (1930) 128 Me. 500, 148 A. 747.

In prosecution for attempted abortion causing death, it was competent for physician examining female after attempted abortion and before death, after testifying to condition of patient and complaints and symptoms, to give his opinion that they were such as might have been expected from incomplete abortion. *Id.*

Testimony by physician examining woman upon whom attempted abortion was made, and who died from incomplete abortion, that patient made remark that "she supposed if she went back to man who performed operation that he would take care of her", was hearsay and inadmissible in prosecution for attempted abortion producing death. *Id.*

Pregnancy may be proved by circumstantial evidence. *State v. Rudman* (1927) 126 Me. 177, 136 A. 817.

14. —Codefendant, admissibility against

Where trial of physician and one at whose house abortion was performed was joint, hearsay testimony of another physician examining woman after attempted abortion, as to remark she made that "if she went back to man performing operation she supposed he would take care of her", may have been prejudicial harm to owner of house, as it was to physician accused of performing operation. *State v. Donnell* (1930) 128 Me. 500, 148 A. 747.

15. Proof generally

Evidence that accused, for required fee, procured miscarriage of woman pregnant with child, by use of catheter, and that such use was not necessary to preserve life of mother, was sufficient to take question of defendant's guilt to jury. *State v. Alquist* (1943) 140 Me. 79, 34 A.2d 21.

Where the indictment alleges the act to have been done with a specified instrument, it is not necessary to prove that it was done with that particular instrument, but it is sufficient if the nature of the instrument and the kind of death occasioned by it were the same. *State v. Smith* (1851) 32 Me. 369, 54 Am. Dec. 578.

16. Verdicts

The using of means, with intent to procure the miscarriage of a pregnant female, and the procuring of the miscarriage thereby, unless done to preserve the life of the mother, is a misdemeanor; and if by the use of such means and with such intent, the death of the mother be occasioned, it is manslaughter; therefore, if upon such a charge in an indictment, a verdict be rendered of murder, it will be reversed for error. *Smith v. State* (1851) 33 Me. 48.

§ 52. Mother's concealment of death of illegitimate issue

If a woman is willingly delivered in secret of the issue of her body, which would be a bastard if born alive, and conceals the death thereof so that it is not known whether it was born

dead, or alive and was murdered, she shall be punished by a fine of not more than \$100 or by imprisonment for not more than 3 years. She may be charged with such offense and with the murder of such child in the same indictment, and convicted and punished for either, according to the verdict.

R.S.1954, c. 134, § 10.

Cross References

Murder, see § 2651 et seq. of this Title.

Notes of Decisions

Defenses 5
 Elements of offense 4
 Historical 1
 Purpose 2
 Words and phrases 3

der, except such mother can make proof by one witness at least that the child whose death was by her so intended to be concealed was born dead." See, An.Chrs. & Laws, Mass. Bay, c. 38; State v. Kirby (1869) 57 Me. 30.

Library references

Obstructing Justice ⇨1.
 C.J.S. Obstructing Justice § 12.

2. Purpose

The purpose of this section is to prevent infanticide, and to punish it where not prevented. State v. Kirby (1869) 57 Me. 30.

1. Historical

This section dates back to a provincial statute of 1696, in these words: "Whereas many lewd women that have been delivered of bastard children, to avoid their shame and to escape punishment, do secretly bury or conceal the death of their children, and after, if the child be found dead, the said women do allege that the said child was born dead, whereas it falleth out sometimes (although hardly it is to be proved) that the said child or children were murdered by the said women, their lewd mothers, or by their assent or procurement; Be it therefore enacted," &c., "that if any woman be delivered of any issue of her body, male or female, which if it were born alive should by law be a bastard, and that she endeavor privately, either by drowning or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof, that it may not come to light whether it were born alive or not but be concealed, in every such case the mother so offending shall suffer death as in case of mur-

3. Words and phrases

"So that it is not known", as used in this section, relates to any time, past or present. State v. Kirby (1869) 57 Me. 30.

4. Elements of offense

While the gist of the offense under this section consists in the concealment of the death of a child, it is such a concealment as prevents it being known that the child was born dead, or alive and was murdered. State v. Kirby (1869) 57 Me. 30.

If the child is proved to have been born dead, although the mother concealed its birth, she cannot be convicted. Id.

5. Defenses

Proof that child was born dead entitles mother to acquittal. State v. Kirby (1869) 57 Me. 30.

It is immaterial whether proof of stillborn child is introduced by prosecution or defense. Id.

§ 53. Contraceptives; miscellaneous information for females

Whoever publishes, sells or distributes by hand or otherwise any circular, pamphlet or book containing recipes or prescriptions for the cure of chronic female complaints or private diseases, or recipes or prescriptions for drops, pills, tinctures or other compound designed to prevent conception or tending to produce miscarriage or abortion shall be punished by a fine of not less than \$50 nor more than \$100, or by imprisonment for not more than 3 months.

R.S.1954, c. 134, § 11.

Library references: Abortion ↔1; C.J.S. Abortion §§ 1 et seq., 44 et seq.