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ELOPING BROUGHT UNDER A KIDNAPPING STATUTE.—[Ga.] In *Allen* v. *State,* 3 S. E. (2nd) 780 (Ga. App. 1939), the court reversed a kidnapping conviction against a nineteen year old defendant, who had, for the bona fide purpose of marriage, taken a fifteen year old girl away from her parents, against their will and without their consent. The court based the decision upon two grounds: 1) that a valid common-law marriage had been consummated, thereby excluding the defendant from the scope of the kidnapping statute; and 2) that the common-law wife was incompetent to testify against her husband under the Georgia Code. The latter point, which obviously is dictum, will not be considered herein.

The Georgia statute concerned reads: "Any person who shall forcibly, maliciously, or fraudulently lead, take, or carry away . . ., any child under the age of eighteen years from its parent or guardian, or against his will, or without his consent, shall be guilty of kidnapping." Ga. Code, §26-1602 (1933). Not only does the literal meaning of the words lend itself to a broad construction giving the statute the effect of a "catch all", but also, the construction placed upon it in *Gravett* v. *State,* 74 Ga. 191, (1884), *Arrington* v. *State,* 3 Ga. App. 30, 59 S. E. 207, (1907) and reaffirmed in *Bryant* v. *State,* 21 Ga. App. 668, 94 S. E. 856, (1918) where the court said, "The object of the statute is twofold, to protect not only the rights of parents and guardians, but also those of children", seems to indicate that the statute was intended to be used as a "catch all". The courts of Georgia have held in these cases that if the act complained against is contrary to the will and without the consent of the parent, irrespective of the child's consent, this alone completes the offense. *Gravett* v. *State, supra,* and *Arrington* v. *State, supra.* However, two cases (*Hendon* v. *State,* 10 Ga. App. 78, 72 S. E. 522, (1911) and *Cochran* v. *State,* 91 Ga. 763, 18 S. E. 16, (1893) chisel into the broad construction given the Georgia kidnapping statute. The significant decision is the latter, for it was relied upon by the court in the instant case to sustain the assumption that a common-law marriage

is beyond the scope of the statute. The literal meaning of the statute and the court's interpretation in *Bryant* v. *State, supra,* and kindred cases permits no qualification of any sort; technically, a taking for marriage is no bar to a prosecution for kidnapping. In *Cochran* v. *State, supra,* the court relied upon §1699 of the Georgia Code which gives a girl of fourteen or more the legal right to contract marriage, and held that the defendant could not be made a felon for an act which the girl involved was authorized to make by statute, regardless of parental consent. However, the kidnapping statute does not recognize this defense of consent. Moreover, the *Cochran* case, being based on a statutory exception to the kidnapping statute is not binding authority for the holding in the instant case that the mere validity of a common-law marriage brings the case beyond the scope of the statute.

The rather strained attempts of both of these courts to exempt marriages from the kidnapping statute on the basis of consent and legality (which is not found in the statute) were probably prompted by the recognition that a broadly worded statute was technically being stretched to cover a situation never intended by the legislature. The tacit holding of both cases is that marriage is beyond the scope of the kidnapping statute. However, the court lays itself open to criticism for failing to place the decision upon the broad ground that because of the severity and inflexibility of the punishment, the kidnapping statute was not intended to cover elopement.

Clearly, some violations of a statute may be more flagrant than others. Many states, recognizing this fact, apparently have attempted in their kidnapping and abduction statutes to make the punishment fit the flagrancy of the violation. For instance, the abduction statute of Texas (Vernon's Tex. Stat., P. C., Art. 1180) provides the following punishment: abduction for the purpose of marriage, a fine not exceeding $2,000; when the female is forced into the marriage, a prison sentence of not less than two nor more than five years; and if the female is prostituted, a prison sentence not less than three nor more than twenty years in the penitentiary. This statute seems typical. Cf. W. Va. Code Ann. (1937) §5929 (14); Miss. Code Ann. (1930) 1938 Supp. §76. In all these statutes, not only is there a greater degree of flexibility in meting out punishment, but also, the minimum penalty in all of them is much less severe than in the kidnapping statute of Georgia, where the only sentence possible is four to seven years in the penitentiary.

Marriage, even though it may have been contracted against the will of the parents, or without their knowledge, is not placed by society in the same category of heinousness as concubinage, prostitution, or kidnapping for ransom. In fact, it is extremely doubtful whether elopements were intended by the various state legislatures to be prosecuted under either kidnapping or abduction statutes. However, where the statute provides a great flexibility of punishment, and a possibility exists that the defendant may not be punished severely, an assumption that the statute does apply may be warranted. Since society does frown

upon marriages contracted without parental consent, i.e., elopements resulting in child marriages, a judge may not feel constrained to prevent a conviction where the opportunity exists to invoke a light sentence; but where the punishment is so inflexible as to create a penalty entirely out-of-keeping with the heinousness of the crime, there is no excuse for such a conviction.

That the penalty of the Georgia statute is so stringent as to act as a bar to convictions for elopements is enhanced further by the Minnesota statute which states that one taking a female under sixteen years without parental consent, for the purpose of marriage, is guilty of abduction. The penalty for this crime is imprisonment in the state prison for not more than five years, or a fine not to be more than $1,000, or both. The Minnesota statute is worded to cover precisely the situation presented in the principal case. But Georgia does not possess an abduction statute; and only by applying the kidnapping statute to the predicament presented in the instant case could the state hope to convict the defendant. Admitting that the defendant in the instant case technically violated the kidnapping statute, nevertheless, the imposition of such a strict penalty not only would be unjust, but raises an inference that elopment was beyond the legislative intent in enacting the statute. That the punishment inflicted by the Georgia statute is too stringent for the crime committed is also supported by the fact that an Illinois statute for the abduction of females (§37.013, Jones' Ill. Stat. Ann.) in providing for two more heinous offenses (concubinage and prostitution) prescribes punishment less severe. The court should not have based its decision on the technical holding of *Cochran* v. *State, supra,* but should have achieved the same result upon factors of justice.

Obviously, the Georgia legislature did not have the instant situation in mind when it passed the kidnapping statute. Granting that it would be wise to discourage such marriages, the Georgia court was correct in refusing to allow the conviction of this defendant because of the heavy punishment involved. The legislature of Georgia is under a duty to pass appropriate laws, if it intends to obstruct such marriages; a four to seven year prison sentence is too rigorous and stringent as a penalty for an elopement—even though the state frowns upon the marriage of a nineteen year old youth to a fifteen year old girl.

GLENN W. ROSEN.

VACATING JUDGMENTS AFTER APPEAL [ARK.]. The case of Fletcher v. *State,* 128 S. W. (2d) 997 (Ark., 1939) raises the following question: has the trial court jurisdiction at the same term, to vacate prior judgment of conviction and grant a new trial where an appeal has already been perfected in the Supreme Court. The court answered the question in the negative, two judges dissenting, because of three prior Arkansas decisions: *Freeman* v. *State,* 158 Ark. 262, 250 S. W. 522 (1922); *Emerson* v. *Boyles,* 170 Ark. 621, 280 S. W. 1005 (1925); *Robinson* v. *Arkansas Loan Trust Co.,* 72 Ark. 475, 81 S. W. 609 (1904). None of these cases, however, were directly in point and since no binding precedent could be found in Arkansas, both the ma-

jority and minority were forced to argue by analogy.

While it is evident that the broad dicta in these cases favored the position of the majority, they were by no means controlling. In the *Freeman* case there were two grounds for decision: (1) that the term of court at which the judgment was rendered had terminated when the order vacating judgment was given, (2) that since an appeal had been perfected and the judgment affirmed when the order was given, the trial court acted in excess of its jurisdiction. By implication it may be argued that the second argument supports the dissent in the principal case in that here the judgment hasn't been affirmed, therefore the trial court had jurisdiction to make the order. In the *Emerson* case, the accused had partly executed his sentence in the penitentiary before the vacation of judgment was rendered, a situation obviously involving considerations other than those governing the instant case. In the *Robinson* case there had been no vacation of judgment whatsoever.

Since no previous authority bound the court, it should have felt free to decide the question on the basis of the law in other states and/or on the merits of the individual case. In perusing the law of other jurisdictions one finds there is a split of authority on the precise point in controversy. The traditional view has been that the perfection of an appeal lifts the case out of the lower court and divests the trial court of jurisdiction to vacate judgment. *Simmons* v. *U. S.*, 89 F. (2d) 591 (1937); *People* v. *Cruse*, 24 Cal. App. 497, 141 P. 936 (1914); *Ex Parte Johannes*, 213 Cal. 125, 1 P. (2d) 984 (1931); *Eggers* v. *Kreuger*, 236 Fed. 852 (1916); *United etc. R. Co.* v. *Corbin*, 109 Md. 52, 71 Atl. 131 (1908); *Combes* v. *Adams*, 150 N. C. 64, 63 S. E. 186 (1908). This holding is usually limited to cases, as in the principal case, where the subject-matter of the order vacating judgment is the same as the subject-matter of the appeal, and it has been held that where the vacation is based on a question other than the one involved in the appeal, the trial court does have jurisdiction to vacate judgment. *State* v. *Patterson*, 159 La. 765, 106 So. 296 (1925); *State* v. *De Grace*, 144 Ore. 159, 22 P. (2d) 896, 90 A. L. R. 232 (1933). The other line of authority holds that the mere fact that an appeal has been taken from the judgment does not divest the trial court of its inherent jurisdiction to vacate it under circumstances justifying that relief. *Chattanooga R. & C. R. Co.* v. *Jackson*, 86 Ga. 676, 13 S. E. 109 (1891); *Chambliss* v. *Haas*, 125 Iowa 484, 101 N. W. 153 (1904); *Blackburn* v. *Knight*, 81 Tex. 326, 16 S. W. 1075 (1891); *Patterson* v. *Hochster*, 21 App. Div. 432, 47 N. Y. 553 (1897). Most of these courts recognize an exception to the effect that after a judgment has been affirmed on appeal, the trial court loses jurisdiction to vacate it, since the judgment is in legal effect that of the appellate court. *McArthur* v. *Dane*, 61 Ala. 539 (1878). Kentucky has a statute on the particular point in controversy which seems to uphold this power of the trial court. See *Tillman* v. *Commonwealth*, 263 Ky. 488, 92 S. W. (2d) 755 (1936).

The grounds of support usually advanced in behalf of the traditional view are twofold: (1) that to follow any other rule would be

to put the defendant in jeopardy twice for the same offense, he having been tried once, reasoning by analogy from the situation where the accused has partly executed sentence (the *Emerson* case, supra); (2) it would be extremely inconvenient for two judicial tribunals to have conflicting jurisdiction over the same subject-matter at the same time. *United etc. R. Co.* v. *Corbin, supra.* It seems that insofar as the first ground is used by the majority in the principal case as support, it is not sound. It is obvious that were the appellate court to reverse and remand the instant case with instructions that there be a new trial, the same result would be obtained as here, except that here the trial court effected the result. No one would venture to say that the action of the appellate court placed the defendant in double jeopardy, so why contend so here. The second ground, however, embodies more justification for strict adherence to the traditional viewpoint. To institute such an innovation as practiced by the trial judge in the principal case would be to introduce a new retarding element in the appellate process contrary to the aims of reform, and in effect the result would be to withdraw a case from the scrutiny of the appellate court possibly after it has given study to the fact situation. A further argument might be advanced, namely, that to allow the trial court to vacate judgment after an appeal has been perfected would disintegrate the amount of certainty requisite for effective working of the judicial process, the theory being that if the trial judge is cognizant of the fact that he will have an opportunity to vacate judgment after an appeal has been perfected and correct his error there will be an incentive to perform his duties with more laxity.

The opposing trend of thought does not cite many arguments in support of its stand, merely following the rule that the trial judge retains jurisdiction at the same term to vacate judgment irrespective of the fact that an appeal has been perfected. But in the principal case the trial court vacated judgment on the basis of insufficiency of the evidence to sustain the conviction and the dissent advances the argument that since the trial court is more familiar with the facts, the trial, and testimony in the case it was proper for the trial judge to vacate judgment and grant a new trial even after an appeal had been perfected. A counter-argument would seem to be that since the trial judge has had ample opportunity to pass on the legal sufficiency of the evidence by directing a verdict, or at a later stage by setting aside the verdict and judgment before the appeal is perfected, it hardly seems necessary that he should retain it thereafter. Since, moreover, he has reversed his former position, the question is probably an equivocal one, and one perhaps properly left to the determination of the appellate court.

DAVID RICE, JR.

RIGHT OF JURORS TO EXAMINE AND EXPERIMENT WITH EXHIBITS IN JURY ROOM.—[Wyo.] The recent case of *Espy et al.* v. *State*, 92 P. (2) 549 (Wyo., 1939) revives the old question of just how much liberty a jury may exercise in examining and experimenting with exhibits. The point, though a minor one in

the whole judicial process, is often considered by courts in the review of criminal cases and frequently is the basis for reversal.

The defendants' theory in the instant case is that the blows which caused death were made with a club and were given in self-defense, and that any blow or kick made thereafter was not mortal, but was committed on a dead body. To overcome testimony of physicians for the state, who informed the jury that the bruises (evidently from kicking) alone might have caused death even though there had been no skull fracture, the defendant Chapman had his boots put into evidence, presumably to show that they were equipped with rubber heels which, even if they had been used in kicking, would not have caused the injury shown. At the close of the trial the jury requested and, with the consent of the defendants, received possession of the boots, which were taken into the jury room. To the motion for a new trial the defendants attached the affidavits of three jurors which stated that the jurors had removed the rubber heels "to ascertain whether or not there had previously been steel plates or caps thereon".

The Supreme Court of Wyoming overruled the defendants' contention that there was a reversible error due to the misconduct of the jurors in conducting an experiment without the presence of the defendant, basing its decision on the distinction between an experiment and an examination: "We do not think the removal of the heel caps from the boots can be called an *experiment.* It was a more critical *examination* which defendants should have anticipated when they consented that the boots be taken to the jury room."

Experimentation

Generally the decisions of courts do not favor the making of *experiments* by the jurors. One of the most important reasons for denying this procedure is that the defendant by being kept out of the jury room is deprived of his right to view all the evidence placed against him and to make objections whenever he thinks his case is being unfairly presented. In some jurisdictions the state constitution guarantees the defendant the right to "appear and defend" and "to meet the witnesses face to face". *People* v. *White,* 365 Ill. 499, 6 N. E. (2) 1015 (1937). In certain other states the defendant is given this right by statute. *Forhand* v. *State,* 51 Ark. 553, 11 S. W. 766 (1889).

To safeguard these rights of the defendant, courts have universally required that all exhibits, whether for experimentation or for examination, be first produced at the trial and be put into evidence before they can be taken by the jurors to the jury room. Most courts which allow any kind of experimentation at all require that the defendant give his consent, while a few courts consider it adequate enough merely if the defense voices no express objection. *Yates* v. *People,* 38 Ill. 527 (1865); *Henry* v. *Crook, et al.,* 195 N. Y. Supp. 642 (1922).

One difficulty which arises when jurors conduct investigations with exhibits is in the subjecting of the exhibits to exactly the same condition which existed when the original cause of action arose. In *Spires* v. *State,* 39 S. 181 (Fla., 1905) it was held that a darkroom

experiment to see if a person could be recognized in the flash created by firing the defendant's gun would be error, since the conditions of darkness, eyesight, size of shot, and amount of powder used would be too variable. The California Supreme Court states the test used by most states which allow jury experimentation: jurors "may carry out experiments within the lines of offered evidence; but if their experiments shall invade new fields, and they shall be influenced by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then the jury has been itself taking evidence without the knowledge of either party—evidence which it is not possible for the party injured to meet, answer, or explain". *Higgins* v. *Los Angeles Gas & Electric Co.,* 159 Cal. 651, 115 P. 313 (1911).

In cases where the jurors attempt to reenact the crime according to the testimony given on the trial, courts are lenient in allowing the use of articles which have been put into evidence. *Saunders* v. *State,* 4 Okla. Cr. 264, 111 P. 965 (1910); *Hoover* v. *State,* 107 Tex. Cr. 600, 298 S. W. 438 (1927); *State* v. *Elmers, et al.,* 198 Ia. 1041, 200 N. W. 723 (1924). However, in cases where bloody clothes, instruments of death, the skull of the deceased, etc., are taken into the jury room, it is the duty of the courts to make sure that the exhibit will be confined to the purpose for which it was introduced and not for some ulterior purpose. Surely it should be held error where such evidence is allowed in the jury room which sets off heated passions or makes jurors become sick. *Puryear* v. *State,* 50 Tex. Cr. 454, 98 S. W. 258 (1900); *People* v. *Morris,* 254 Ill. 559, 98 N. E. 975 (1912).

Courts which allow juror experimentation are continually faced with the problem of seeing that the jury doesn't overstep its bounds. The usual test employed is: Was there any substantial prejudice to the defendant, and were any new facts introduced by the jurors? *State* v. *Stapleton,* 155 Minn. 499, 193 N. W. 35 (1923); *Hoover* v. *State,* 107 Tex. Cr. 600, 298 S. W. 438 (1927); *Rehm* v. *State,* 128 Tex. Cr. 59, 78 S. W. (2) 983 (1935). To answer this question it is necessary for the court to get some information on what actually happened in the jury room. Affidavits by jurors seem the most logical answer, but many courts still cling to the old rule which the common law contributed that jurors may neither impeach their verdicts nor sustain them by the use of affidavits relating what did or what didn't influence their decisions. *Cohn* v. *Wyngarden,* 48 N. D. 344, 184 N. W. 575; *Dartnell* v. *Bidwell,* 115 Me. 227, 98 A. 743. The case of *Taylor* v. *Commonwealth,* 90 Va. 109, 17 S. E. 812 (1893) shows concretely how a court by applying this rule can sidestep the real issue. There, the jurors took apart the defendant's pistol and came to the conclusion that the gun had been tampered with between the time of the shooting and the time of the trial. Although the juror affidavits confessed that this experiment was the sole cause for doubting the worth of the defendant's courtroom demonstration, the Supreme Court of Virginia held that there was no error, since "there is no legal evidence in the record that the gun

was either taken to pieces or that the jury acted on what they saw". It seems clear that if this rule is allowed to prevail in all cases where experimentation is allowed, the innocent defendant with a meritorious defense is apt to become the unfortunate victim of the jurors' misunderstandings of the exhibits.

Examination

Originally the only exhibits which the common law allowed the jurors to take to the jury room were instruments under seal. 3 Wigmore, *Evidence* (1st ed. 1904) §1913. That limitation effectively prohibited any experimentation and also greatly curtailed the possibilities of examination. The statutory law of many states enlarged this rule to include all private records and public documents, but in a number of these states the courts have expanded the scope of allowed examination to such an extent that they have virtually ignored all limitation. In Washington, for example, one court held that the defendant's hat and shirt came within the statutory restriction of "papers" and therefore could be used by the jury. *Doctor Jack, an Indian,* v. *Territory,* 2 Wash. T. 101, 3 P. 832 (1882). Today most jurisdictions which have modified old legal procedure and custom to any great degree have allowed jury room examination of all the exhibits placed in evidence.

If the courts frown on jury room experiments, why do they allow jury room examination? The answer to that question lies in the fact that exhibits are necessary explanations of testimonial evidence —which "tend to give amid the mass of variable quantities that inevitably go to make up human testimony, certain trustworthy constants upon which the mind can lean"—and that usually the brief trial inspection is too superficial to be sufficient. *Doctor Jack* v. *Territory, supra.* When juries were first introduced into the legal process, jurors were chosen because of their knowledge of the matter under consideration. Today, however, jurors are chosen because they know nothing of the case at bar, and hence it is imperative that they be given every chance to become acquainted with the facts. Where further scrutiny and closer observation are necessary to gain a true understanding of the exhibits, courts will allow jury room examination, and in most cases will even allow the use of magnifying glasses and microscopes or models and facsimilies to achieve such an end. *Evans* v. *Commonwealth,* 230 Ky. 411, 19 S. W. (2) 1091 (1929); *Macklin* v. *State,* 76 P. (2) 1091 (1938); *Illinois Silver Mining & Milling Co.* v. *Raff,* 7 N. M. 336, 34 P. 544 (1893).

In the case under discussion we have seen that the court allowed what might well be termed an experiment by the simple expedient of calling it a "more critical examination" rather than an experiment. While well settled definitions distinguishing these terms do not exist, probably the most helpful explanation of *examination* is that which allows jurors to use all of their primary senses of perception and which excludes as *experimentation* that affirmative conduct which results in the discovery of facts not put into evidence at the trial.

The theory that jurors should be allowed to use all their sensory

organs in the examination of exhibits taken into the jury room was given great impetus during the reign of prohibition, when opinions contained such phrases as these: "It is proper to permit the jury to look at and smell the liquor alleged to be intoxicating for the purpose of determining its character. It is like shutting their eyes to the truth to do otherwise"—*Enyart* v. *People,* 70 Colo. 362, 201 P. 564 (1921); "In passing on questions of fact, jurors have the right to use all their senses or such of them as may be helpful in reaching a proper conclusion". *Troutner* v. *Commonwealth,* 135 Va. 750, 115 S. E. 693 (1923). Some of the courts, however, while extending examination to the olfactory sense, refused to allow jurors the privilege of exercising their gustatory senses, one of the grounds being the "exhibits' intoxicating qualities and the danger of members of the jury abusing the privilege while in their retirement," and another, that it "is not in keeping with an orderly and dignified administration of justice." *Troutner* v. *Commonwealth, supra; Gallaghan* v. *United States,* 299 F. 172, C. C. A. (8th) (1924).

The question of whether or not an exhibit should be taken by the jury for closer examination is up to the discretion of the court. If the exhibit is likely to be used in a manner inconsistent with the testimony or has suggestive qualities which would lead the jurors to improper conclusions, the court should refuse requests of jurors asking for custody of the exhibit. *People* v. *Morris,* 254 Ill. 559, 98 N. E. 975 (1912) (jurors took gruesome, bloody garments to jury room); *State* v. *Lindeman,* 64 N. D. 518, 254 N. W. 276 (1934) (only 1½ ounces of liquor were in evidence, and largeness of containers might suggest liquor traffic to jurors).

Some courts have consistently refused jurors permission to examine certain exhibits on the theory that examination other than that had during the trial, when the defendant was present, makes the jurors witnesses. In *State* v. *Lindgrove,* 1 Kans. A. 51, 41 P. 688 (1895), the court held that to prevent liquor-tasting jurors from becoming witnesses it would be necessary to ascertain if all were equally expert in taste and smell so that all could receive the same kind of evidence in the same manner. However, it seems that these courts, when dealing with *examination* by jurors (as opposed to *experimentation*), overlook the fact that jurors who use merely their eyes and ears would be subject to much the same criticism, inasmuch as by seeing and hearing they are forced to interpret the meaning of exhibits—just as they would be by smelling or tasting. Also, the lack of "equality of expertness" of jurors on the all-senses jury, which the court in *State* v. *Lindgrove, supra,* laments, is no greater than that of the jurors which are allowed only to look and hear.

Although the court in the principal case probably reached the correct result in holding the defendants guilty, its allowance of jury experimentation (although it called the jurors' act an "examination") was not the proper procedure and is not in accord with the general rule as followed by the majority of courts. The mere closer *examination* of exhibits by jurors in the jury room can be justified on legal principles and on practical procedure, but the allowance

of actual jury *experimentation* cannot be so justified.

If the equitable determination of the present case had required an experiment to reveal the true nature of the exhibits, the court should have granted a court room experiment, if such was agreed to by both parties. Then both parties would have had ample supervisory powers to preclude the occurrence of any reversible error. Perhaps some days the two parties to a suit will be allowed to enter the jury room and supervise the conducting of a juror experiment so that there may be a clear understanding of the evidence and yet no prejudice to either party. But at the present, it seems trial courts will best serve the interest of justice if they refuse all jury room experimentation.

THEODORE H. KROSS.

ABORTION-DYING DECLARATION—CORROBORATION.—[Missouri] The defendant was convicted of manslaughter committed by performing an abortion which resulted in the death of the woman. On appeal, the Supreme Court of Missouri reversed the conviction and held: first, the state did not prove that the operation for production of the abortion was not necessary to save the life of the woman; and second, there was insufficient corroboration to support the dying declaration which the state introduced in evidence. *State* v. *Smith,* 130 S. W. (2d) 550, (Mo., 1939).

The problem confronting the court in this case is unique to the state of Missouri. It is one of two states which has required corroboration to support a dying declaration in prosecutions for manslaughter based on abortions or attempted abortions. Wigmore, *Evidence* (2d ed. 1923), §1432 f. n. The other statute, in Pennsylvania, is worded differently and is therefore not in point.

Assuming that the state had proved the first point which caused the reversal of the conviction, what is the amount of corroboration which would be necessary to satisfy the statutory requirement? Section 3690, Rev. Stat. Mo. 1929 (enacted in 1907) provides, "In prosecutions for abortion or manslaughter occasioned by abortion or miscarriage or by an attempt to produce either . . . the dying declarations of the woman whose death is charged to have been caused thereby shall be competent evidence . . . provided . . . that no conviction shall be based alone upon such declarations unless corroborated as to the fact that an abortion or miscarriage has taken place. . . . " The court, in the principal case, based its holding on the decision of *State* v. *Keller,* 287 Mo. 124, 229 S. W. 203 (1920) which held that in a prosecution for manslaughter resulting from an abortion, it was necessary to corroborate a dying declaration by proving the deceased was pregnant at the time of the illegal operation. Outside of the dying declaration, there was no corroborating evidence that an operation had been committed, so it was held that pregnancy must be shown in order to corroborate the fact that an abortion had taken place. It is interesting to note the manner in which the court arrived at its decision. Section 4458, Rev. Stat. Mo. 1909 provides, "Any person who with intent to produce or promote a miscarriage or abortion . . . administers to a woman (whether actually pregnant or not) . . . any instrument or other method or

device to produce an abortion (unless same is necessary to preserve her life or that of an unborn child . . .) shall in the event of the death of said woman or any quick child . . . upon conviction be adjudged guilty of the felony of manslaughter . . . and in case no death ensue, such person shall be guilty of the felony of abortion." After stating this, the court quoted the dying declaration statute cited above. Then, instead of applying Section 4458 *supra,* which defined the crime of abortion as being possible whether the woman is pregnant or not, the court went to *Bouvier's Law Dictionary* which defined abortion as "the expulsion of the foetus at a period of uterogestation so early that it has not acquired the power of sustaining an independent life" and decided that a pregnancy must be proven. It is peculiar that the court should use *Bouvier* in light of the statutory definition of Section 4458. In *State ex rel. Gaston* v. *Shields,* 230 Mo. 91, 130 S. W. 298 (1910) the court construed the statute as showing a legislative intent "to make it a felony for any person to use any instrument upon a woman whether pregnant or not." It also stated that "Bouvier defines abortion as the expulsion of the foetus, but the word is not used in its ordinary sense in the statute. The word miscarriage (abortion) in its legal acception, does not necessarily include the destruction of the child before its birth." The court in the *Keller* case seems to have completely misconstrued the dying declaration statute in requiring that pregnancy had to be shown to corroborate the fact that an abortion had taken place. If other evidence can be found to show an abortion, it alone should be sufficient to corroborate a dying declaration.

If it were not necessary to prove a pregnancy, or if it were proved in the principal case as required by the court, what other evidence would be sufficient to satisfy the corroboration requirement? The principal case differs essentially from *State* v. *Keller* in that in the *Keller* case, no evidence as to how the deceased came by her death is given outside of the dying declaration. In the instant case, the physician who performed the autopsy testified that the immediate cause of the death was a hemorrhage caused by an abscess that spread from a rupturing of the vaginal wall. A jagged hole was found in the vaginal wall, which could have been made "by a blunt instrument like a curet" being inserted therein. This, the court held, was not sufficient corroboration because even if it might be inferred that an effort at an abortion had taken place, there was still no corroboration as to who had performed the operation and when it had been performed. In requiring such corroboration to be given, the court read words into the statute which a literal interpretation of the statute does not demand.

Moreover at common law, where a dying declaration was admissible, no corroboration of any sort was required in order to sustain a conviction. Wigmore, *Evidence* (2d ed. 1923) §1451. It is a well established principle, that where a statute is in derogation of the common law, the statute is to be strictly construed. *State* v. *Dalton,* 134 Mo. App. 517, 114 S. W. 1132 (1909); *Thomas* v. *Malone,* 142 Mo. App. 193, 126 S. W. 522 (1910). Under

this view, no change should be made in the common law other than expressly provided for in the statute. Although Missouri, in 1917, passed a law providing that statutes in derogation of the common law be liberally construed, (Laws of 1917, p. 324), this statute was held not to apply to existing legislation. *Taft* v. *Tallman,* 277 Mo. 157, 209 S. W. 471 (1919). Since Section 5240 was in existence before 1917, it should be given the strict common law interpretation. The statute requires only corroboration as to the fact that an abortion has taken place; this and nothing more should be required to be corroborated. The court seems to have gone too far in asking *who* performed the abortion and *when* it was performed. This ought to be left to the jury to be weighed from the facts set out in the dying declaration itself, as was done under the common law. Wigmore, *Evidence* (2d ed. 1923) § 1451. The court in requiring these facts to be corroborated, was actually weighing the sufficiency of the dying declaration in its entirety which was contrary to the intention of the statute.

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