

Medico-Legal

CHARGE OF PROCURING ABORTION

Mr. Bourne Acquitted

On July 18 and 19 Mr. Aleck William Bourne, F.R.C.S., was tried at the Old Bailey for unlawfully using an instrument with intent to procure the miscarriage of a woman. (The police court proceedings were reported in the *Journal* of July 9, p. 97.) The indictment as first drawn did not contain the word "unlawfully." This appears in the Offences against the Person Act, 1861, sect. 58, on which the charge was based, and the word was added to the indictment on the motion of Mr. Roland Oliver, K.C., leading counsel for the defence, who maintained that nearly the whole of his case rested on the interpretation of the word. Mr. Bourne pleaded Not Guilty.

Mr. Oliver also asked that any member of the jury who might consider on religious grounds that there were no circumstances in which a pregnancy ought to be terminated should withdraw. The Attorney-General, Sir Donald Somervell, K.C., associated himself with the request, and Mr. Justice Macnaghten warned the jury that if any of them by reason of any preconceived view felt in a difficulty about giving a verdict according to law and evidence, it was desirable in the interests of justice that he or she should retire from the trial. None of the jury, however, left the box. Two members were women.

Case for the Crown

The Attorney-General, who appeared with Mr. L. A. Byrne and Mr. Henry Elam, in opening the case, read the words of sect. 58 of the Act:

"Whosoever with intent to procure the miscarriage of any woman, whether she be or not with child . . . shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony."

He explained that the girl had been criminally assaulted and raped, and a man had been convicted of the offence. At that time she had been under 15 and a virgin. On May 21 she was taken to see Dr. Joan Malleison, who came to the conclusion that the girl was pregnant, and wrote to Mr. Bourne a letter which, after introduction, stated:

"Dear Mr. Bourne,

"I have been consulted by the organizer of the Schools Care Committee about a girl of 14 called —. It is possible that you saw in the paper some three weeks ago that this girl was assaulted in Whitehall by some soldiers. The actual facts were that she was with two girl friends, who ran off and left her, and she was held down by five men and twice assaulted. It appears that she is free of venereal infection, but the Z.A. test has just come back positive.

I gather from the lady who brought her that everybody connected with the case, *i.e.*, the police surgeon, the doctor at her work, the school doctor, etc., all feel that curettage should be allowed her; and I understand that Dr. —, and possibly some other psychiatrists of good standing, would be prepared to sponsor 'therapeutic abortion.' I presume they must mean on grounds of prophylaxis, because there does not appear to be any nervous disorder present. All this, of course, gets us nowhere unless someone of your standing were prepared to risk a *cause célèbre* and undertake the operation in hospital.

Many people hold the view that the best way of correcting the present abortion laws is to let the medical profession gradually extend the grounds for therapeutic abortion in suitable cases, until the laws become obsolete, so far as practice goes. I should imagine that public opinion would be immensely in favour of termination of pregnancy in a case of this sort.

If there is any chance that, given adequate professional backing, you feel prepared to consider this, I would take

a lot of trouble to get people of high standing to see this girl, and should of course feel that it was most valuable if the case was conducted publicly in hospital.

I am told that a rather grim twist is added to this case by the fact that the girl's parents 'are so respectable that they do not know the address of any abortionist'; and are, I gather, having to set about to find one, for they 'could not possibly let her go through with this.' She seems a normal, healthy girl, and on medical terms there is obviously nothing to be said.

I hope you will forgive me for troubling you about this.

With kind regards,

Yours sincerely,

JOAN MALLEISON.

PS.—Unfortunately the matter is made a little more difficult by the fact that the girl was admitted to St. Thomas's Hospital under Mr. —, who I think from the report of his attitude must be Catholic. He took the conventional standpoint that 'he would not interfere with life because the child may be the future Prime Minister of England,' and 'that anyhow, girls always lead men on.' But she is not any longer under his care, nor is it yet public that the Z.A. test is positive."

On May 27 Mr. Bourne had replied:

"I am interested in the case of rape which you describe in your letter. I shall be delighted to admit her to St. Mary's and curette her. I have done this before and have not the slightest hesitation in doing it again. Therefore please let me have the girl's name and address or ask her parents to send her to see me. I have said that the next time I have such an opportunity I would write to the Attorney-General and invite him to take action."

On May 31 the girl's mother had taken her to see Mr. Bourne, and on the same day the father had written to him saying that he gave his consent to "the correction to be done for his daughter in St. Mary's Hospital" as arranged with his wife, on condition that no publicity of any sort was given to the case. On June 2 Mr. Bourne wrote to Dr. Malleison telling her of this request to keep the operation entirely secret, and said that he must respect their wish and that the operation would be done next week. To the father he wrote assuring him that no effort would be spared to keep the matter secret. Sir Donald added that the matter had been brought to the attention of the police authorities, but he did not suggest that this had been in any way due to any act by the defendant, or that he had done anything inconsistent with the undertaking given in his letter. The operation had been performed on June 14.

In conclusion the Attorney-General said that the jury would have to decide, subject to the judge's ruling and on the facts, whether there had been an unlawful use of an instrument to procure a miscarriage. He also admitted that, on the construction of the statute, if it were necessary in order to save the life of a mother to use an instrument to procure a miscarriage he would not submit that that would be an offence under the section.

Evidence for the Prosecution

Giving evidence for the prosecution, the girl said that on April 27 she had been raped by a soldier, and that at that time she had been 14 years and 9 months old. The defendant had performed an operation on her. Her father gave evidence of the correspondence with Mr. Bourne, and said, in answer to Mr. Oliver, that he had given no one permission to publish the case.

Dr. Joan Graeme Malleison said in cross-examination that there was very great variation of opinion among obstetricians and medical people generally about what was lawful in regard to the procuring of abortion. Some went so far as to say that it was not permissible in any case even to save life, and others took the view that it was lawful in the interests of the health of the mother. She shared that view, and held that it was better to perform an abortion than that a woman should be physically, mentally, or nervously broken down by having a child, particularly conceived in such circumstances. She believed that was also Mr. Bourne's view. Many doctors

thought that miscarriage should be permissible upon what might be called "humanitarian" grounds alone, but not many used that term actually for procuring an abortion. She did not know any who thought that was legal. She knew some doctors, however, who would produce a miscarriage when the child was likely definitely to inherit a bad trait. She had heard of doctors who had taken pity on a woman who had been raped, and she thought that right. In answer to the judge, she said she meant pity for a woman where there had been a prosecution for a rape in a court of justice, and not where the woman complained that she had not consented to sexual intercourse. She agreed that danger to a woman's life was increased by the fact that she was only 14, and also that she had been injured in the process of a rape; that her mental condition would be such that she might be in grievous danger, and that her nervous system stood a good chance, or might stand a good chance, of being shattered. She considered that a proper case.

Mr. P. C. F. Wingate said he had been resident at St. Mary's Hospital until the end of June. Before the girl was admitted Mr. Bourne had told him he had been asked to see the girl, that she was pregnant as a result of rape and under the age of consent, and that he had been asked to admit her in order to terminate pregnancy, and also asked to report his action to the appropriate authorities in the hope of making a test case of it. He had understood Mr. Bourne to say that the parents were objecting to the publicity that must follow such a case, but the defendant had not said whether he would report his action to the authorities. A test for pregnancy had been made and the result was positive. He had been there when Mr. Bourne operated on June 14.

Cross-examined by Mr. Oliver, he said that it was proper that before performing such an operation the girl should be kept under observation for a considerable time, and that it was quite proper for Mr. Bourne to do so for eight days. It was careful and proper treatment to repeat the tests for pregnancy and venereal disease which had been done before her admission, to verify both results. If she had had venereal disease the operation would not have been performed because of the fear of infection. He had been present when Mr. Bourne had taken the swab for the venereal test. This would not hurt her; it would be uncomfortable. She had been a little distressed and cried. He had not heard Mr. Bourne say anything that he could remember. Her behaviour had not particularly impressed him; he had rather expected her to be distressed, as the circumstances were very unpleasant for her. He agreed that the girl was a proper subject for curettage.

Chief Inspector Walter Bridger, examined by Mr. Byrne, said that he had called on Mr. Bourne on June 14. The defendant asked whether it was about the girl, and, hearing that it was, he said, "I emptied the uterus this morning; I want you to arrest me." The witness cautioned him and said the facts would be reported to the proper authorities. The defendant said that the girl had been brought by her mother to his house, admitted to St. Mary's Hospital, and placed in his ward under his care, and since she had been in she had been waiting for a pregnancy test, which was positive, and tests for gonorrhoea, which so far had been negative. As an obstetric surgeon, in his opinion it might be dangerous for a girl of her age to bear a full-grown child.

Cross-examined, witness said he wrote down Mr. Bourne's statement in his book as the defendant dictated it. He had wished to warn Mr. Bourne that in no circumstances could an operation be consented to, but as it had already taken place his visit was useless.

Mr. Oliver: Was he rather nettled at that, and did he say that he had his duty as a surgeon and his responsibility, and could not be dictated to by you on a matter of that sort?—No, but I will accept it if he says it.

I gather that you will accept anything he says?—I would, Sir.

This closed the prosecution's case.

Counsel's Submission on the Law

Mr. Roland Oliver said that, as much of the case would turn on the form of the learned judge's direction to the jury, and the law of the case was what his Lordship declared it to be, he invited the judge to direct the jury on the law at that stage. He could not, he said, address the jury and put forward a view of the law unless he knew what the judge held that law to be: he must not put before the jury a different view of the law from that of the judge. The case was not covered by any authority at all. It turned on what the judge decided was the meaning of the word "unlawfully": whether it meant, as the Attorney-General said, that nothing was lawful except for the purpose of saving the life of the mother—he did not know where his learned friend had got that definition from!—or whether, as he himself contended, anything was sufficient justification for an abortion which, in the view of a responsible and skilled surgeon, was for the benefit of the mother's health in the sense that her health would probably be seriously impaired if it was not done. Anything, he continued, which would induce a competent surgeon to remove a limb or an eye for the sake of the patient's health should be sufficient justification for abortion; the same standards should apply. It was fantastic to suggest that a major operation was only justified for the purpose of saving life. In other sections of the Act the words "unlawfully and maliciously" occurred: it was a felony punishable, like abortion, with penal servitude for life to give an anaesthetic or to cause grievous bodily harm "unlawfully or maliciously." It could not be said that an anaesthetic could only be used in a case of life and death. Surgeons who took off arms and legs would be committing the criminal offence of mayhem, or maim, if they were not justified by the benefit to the patient's health. The test should be the same through all sections of the Act. He submitted that a doctor was entitled to induce a miscarriage where, if he did not, there was a danger to the girl's health—using that word in the broadest sense. The jury should be asked: "When Dr. Bourne used the instrument on June 14, was he acting in the honest and reasonable belief, based on adequate knowledge and experience, that it was in the best interests of the girl's health that her pregnancy should be terminated?" Russell on *Crimes* said that the word "unlawfully" excluded from the section acts done in the course of proper treatment in the interest of the life or health of the mother. That statement had stood unchallenged since 1909.

The Judge's Direction

Mr. Justice Macnaghten, addressing the jury, said:

This section contains the word "unlawfully." Counsel are agreed, and it is my opinion, that the word "unlawfully" is not a meaningless word in this section, and it necessarily follows that there may be a procurement of abortion which is lawful. The procuring of abortion was an offence long before 1861. It was an offence by the Common Law of England before ever Parliament existed. It was only in the reign of George III that it was made a statutory offence. Apparently there was some question under the Common Law whether the procuring of abortion by the administration of poison was an offence, and an Act was then passed making it clear that it was an offence. This section was merely a re-enactment of the previous statutory provisions.

The section begins by making it unlawful for a woman to procure her own miscarriage. That undoubtedly has been the law of England from the earliest times. A woman is not entitled to procure her own miscarriage, and the fact that she desires urgently to be relieved of her trouble does not justify the procurement of an abortion. It is true that there is no authority on this matter so far as I am aware. The issue that you will have to try is an issue that has never before been raised, but it is obvious that where the act is done—anyhow in modern times—by a skilled person, without any risk to the

patient, for purpose of saving her life, it must be lawful. We have not had any medical testimony so far—it may be that we are going to have some—but laymen know that there are cases where it is reasonably impossible for a woman to be delivered of her child and survive. In such cases an operation for terminating pregnancy plainly becomes lawful. I have no doubt that has always been the view of the judges of this country, and of the great men who sat in Westminster Hall on the King's Bench.

To-day the position is greatly simplified by an Act of Parliament passed in the year 1929. If, after a child has been delivered and has an existence independent of its mother, the mother or the accoucheur kills the unwanted baby, that is murder, and always has been murder, by the law of England. There arose a case in which it was thought that provision had to be made: where an accoucheur, while a woman was being delivered of a full-term child—because the child was not wanted—killed it before it had an existence independent of its mother, and yet in circumstances that did not amount to the procurement of abortion, because the child was being delivered at full time in the ordinary course of nature. Parliament thought right to provide for that case. Of course it is a case that would very rarely arise, and even much more rarely ever be known of. A Bill was passed through the House of Lords in the year 1928 and sent down to the House of Commons bearing what might be thought the somewhat misleading title of the "Infant Destruction Bill"—a title which might give rise to the idea that it was a Bill for the destruction of infants. The House of Commons never gave it a second reading under that title, and in the following year it was introduced again and passed into law with the more illuminating title of the Infant Life Preservation Act, 1929. It is of tremendous value in throwing light on the law of this subject. Section I enacts:

"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 . . ."

And here are the words which require your close attention:

"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."

You will observe that by that proviso it is not for the accused to prove that it was done in good faith for the purpose of preserving the life of the mother; it is for the Crown to prove that it was not done in good faith for that purpose. The burden of proof rests upon the Crown.

The direction which I propose to give you is this. If you are satisfied by the evidence, when we have heard it all, that Mr. Bourne did not terminate the pregnancy of this girl in good faith for the purpose of preserving the life of the girl; if you are satisfied that the Crown have proved that negative, you should find him Guilty. If you think that the Crown have not proved the negative that the law requires them to prove, then you should find him Not Guilty.

What is the meaning of preserving the life of the mother? That is a matter which must depend on the circumstances of the case and on the evidence produced before you. It must be obvious that it may be perfectly lawful to perform the operation if the doctor is of opinion that the continuance of the pregnancy is certainly going to result in the death of the mother. Of course it may be—we may hear, we do not know—that if the operation has to be done, the sooner it is done the better. There are many considerations which influence the decision of the doctor on what should be done in the particular case. If the Crown fail to satisfy the jury that it was not done for the purpose of preserving the life of the mother, then my direction to you here is that your verdict should be a verdict of Not Guilty. If, on the other hand, the Crown do satisfy you that they have discharged the burden placed upon them under the section, then your verdict should be Guilty. I give you that direction in law because of my view that the proviso to Section 1 of the Act of 1929 ex-

plicitly states what always has been implicitly in the section under which Mr. Bourne is charged here.

Mr. Roland Oliver: I cannot altogether separate the questions of what is necessary to preserve life and what is necessary to preserve health.

Mr. Justice Macnaghten: I quite agree with you, and it is for the jury, on the facts, to say if they think that the Crown have discharged the burden put upon them. It is a question of fact in each particular case, and nobody can say without knowing the facts of the case whether the abortion was lawful or unlawful.

Case for the Defence

Mr. Roland Oliver then addressed the jury. He said that probably never before had a man stood in the dock in that court because he had acted from a motive of purest charity, and could say that he had believed that he was carrying out his duty under the law, which was to look after his patient to the best of his ability: to guard her health and protect her from mental or nervous breakdown. Mr. Bourne was at the head of his profession, and altogether above the suggestion that he wanted advertisement. There was probably no one in court who would not at least give him praise for his courage; he had done that which he believed to be right.

For various reasons women would always demand abortion merely because they did not wish to bear children, and professional abortionists would always be forthcoming. Those, of course, were persons against whom Section 58 was directed. There was no wonder that the gravest misgivings had always beset and horrified medical men in dealing with the question of what cases were legitimate and proper for this operation. Their views ranged from persons who thought that it should never be performed at all to those who would do it merely because an unfortunate child had been raped. As the law stood, this was not a legitimate ground. Between those two extremes came the views of a great body of medical men and women who said that the operation could not be limited to cases in which the mother's life was in immediate danger, but that a reasonable view must be taken. The operation must be done, they said, by a person of skill, knowledge, and experience, and he must balance the ordinary risk of the operation against the danger to health in its widest sense if the operation were not performed.

Mr. Bourne had spent his life in that controversy, and had experience of cases in which the operation ought, in his view, to have been performed and had not been, with disastrous results. He had been prepared to make a martyr of himself for the purpose of having the law declared, his view being that if the general interests of the patient's health were endangered by having a child it was the surgeon's duty to operate. He had not courted publicity but had been willing, when the proper case came along, to have the matter dealt with. That this had happened in the particular case had been none of his doing. The wisdom of his attitude did not concern the Court. It was a thoroughly gallant thing to do, and no one would suggest that his motives had been anything but the highest from beginning to end. The whole thing was a work of the purest charity.

Mr. Bourne in the Witness-box

Mr. Aleck Bourne then went into the box and was examined by Mr. Roland Oliver.

He said that he had devoted much attention to the question of when the termination of pregnancy was justified. To him, in common with all gynaecologists, it was a constant problem. The views of his professional brethren varied enormously. In October, 1935, he had been about to terminate pregnancy in a child of 15, and his house-surgeon had declined to assist him and, on Mr. Bourne's invitation, had walked out of the operation theatre. That doctor had only recently been qualified, and had objected on religious

grounds. This refusal had led Mr. Bourne to think very hard, and he had determined to obtain the ruling of the Court on the next occasion—that was why they were there. He felt very deeply about the matter. If there were adequate medical reasons in the widest sense, on his interpretation of the law based on the everyday practice of reputable members of the profession, he considered it justifiable to terminate pregnancy, and he could not draw a line between danger to life and danger to health. If a doctor waited for danger to life, the woman was past assistance. He regarded abortion as a major operation, speaking in terms of other branches of surgery. He thought that 99 per cent. of his colleagues would be agreeable to have abortion performed on such patients as those on whom he had done it. He most emphatically included the preservation of mental health and the health of the nervous system among his indications. He did not think that such physical injuries as the girl had received would have caused a direct difficulty in her delivery. The circumstances of her conception were, however, such as to implant in her mind seeds of terror. Those who had clinical insight knew that terror and fear were the most serious deterrents to the unfolding of the whole process, whereby assistance might be needed which would in its turn do damage. The fact that she, a virgin, had been raped and treated in that way was a very strong element to him in making up his mind. Her age was another; the chief bones in the pelvis were not united. Her temperament and nervous make-up would be an important factor. He had naturally felt that some process of observation should be carried out, but frankly admitted a bias in the direction of relieving the child when he heard that she was connected with the crime.

Believing that the operation would be essentially necessary, he had first had to exclude at least three factors. He had felt practically certain from the first that she was no mental defective; he would not have operated if she had been, because she would not have suffered mental distress in the pregnancy, and the quality of the child was no concern of his. If she had belonged to the prostitute type he would probably, though not certainly, have decided against operating, for similar reasons. Thirdly, if she had been infected with venereal disease, an operation might have spread the infection up the birth canal and caused really serious illness. On the contrary, he had decided that she was emphatically suitable to have her uterus emptied. The ward sister had reported with surprise that the girl had not appeared to be worried at all, and was unusually cheerful considering the circumstances. This had at once made him suspicious that her cheerfulness was a façade of courage erected as a defence against her feelings. He had not made any kind of examination before taking the swab for the infection test and had been as careful as possible not to cause pain then. He had watched her demeanour when it had been first brought home to her by this procedure that she was really pregnant and the memory of the assault had come back to her. Instead of her bearing the trifling discomfort with fortitude, she had broken down and cried. That had confirmed his decision, and later in the day he had operated, after seeing the pathologist himself about the swab. The mischief he had feared for her if the pregnancy had proceeded included as its least important factor the possibility of physical injury, which could to some extent have been repaired. He had, however, learnt from the many young children of this kind he had seen that much more important was the mental and nervous injury, for it was extremely difficult to cure. It would have been a source of nervous, psychoneurotic, and other troubles, and there would perhaps have been secondary physical illnesses all her life.

In answer to cross-examination by the Attorney-General, Mr. Bourne said that he had never intended to operate on the girl before observing her and carefully considering whether she was a suitable case. He had admitted her with a bias in favour of operation, because in his experience a large number of similar cases required it. His record of abortion would stand any examination. He was ordinarily much stricter than many of his colleagues, but when there was a case with definite indications he would not hesitate in ter-

minating pregnancy. Statistical experience showed that young children were subject to a much higher proportion of physical disorders and serious dangers than adult women.

The Attorney-General: "I suggest to you that there is a perfectly clear line of distinction between danger to life and danger to health."—"No; I cannot agree to that without qualifying. I cannot say just Yes or No. I can say that there is a large group whose health would be damaged but whose life almost certainly would not be sacrificed. There is another group at the other end whose life would be definitely in very great danger; and there is a large body of material between those two extremes in which it is not really possible to say how far life would be in danger, but we find, of course, that health is depressed to such an extent that their life is shortened, as in cardiac cases. Therefore you can say that life is in danger because death might occur within measurable distance of the time of their labour."

The operation, said Mr. Bourne, had certainly not been necessary to preserve her immediate life, but to say that her nervous system would probably be adversely affected would be a very mild term. He could not recall personally any instances of nervous or mental damage, but he had had many brought to his knowledge by reading and by conversation in the general way of collecting experience by contact with medical men. Such a point could be appreciated by one even with rudimentary knowledge of the elements of psychological medicine. Asked whether it was not usual for a gynaecologist in such a case to take a second opinion, he answered that he was usually appealed to himself, and had considered himself in this case as a second opinion.

Further Evidence for the Defence

The defence then called Dr. Jacob Arthur Gorsky, divisional police surgeon, who described how he had examined the girl on the night of the rape, and had found her very distressed, though giving a rational and coherent story. He said that his examination had revealed a physical condition consistent with the story of violence and rape which she had told to him then and subsequently at the trial of the guardsmen.

Dr. J. R. Rees testified to Mr. Bourne's professional reputation, and said that things of the mind were bound up with physical well-being. He was from time to time consulted professionally as to the advisability of terminating pregnancy, and had often considered carefully the grounds on which he would advise such treatment. The terror likely to be produced in this case, and the age of the child, would strongly predispose him towards advising it. He did not think that Mr. Bourne was putting it too high when he said that these two facts alone would give him a strong bias in favour of operation; they would have just the same effect on his own mind. In this case he would certainly have advised the termination of pregnancy. There would have been no question about it, because he was sure there would have been trouble in the future. Asked what the danger was, he replied that from his angle, which was the mental one, the results to be expected were rather comparable with shell-shock. This girl had been in fact wounded, one might say that she had been blown up, and he did not see why she should go on and be buried by having to continue pregnancy. She was almost certain to get some form of mental breakdown. He knew personally of two cases where intercourse had taken place under the age of consent; one was by rape and the other by incestuous relationship with the father. Both the patients had carried a child to term, and had been grown-up when he first saw them. Both had suffered from varying neurotic difficulties which had crippled them; neither had made a successful marriage, both were terrified at all matters connected with sex, and were anxious and unstable in every way. Had the pregnancies been terminated he thought that without question the mental state would have been better. His colleagues had related to him a number of similar cases, in some of which there had been definite mental breakdown—schizophrenia—as well as all sorts of abnormalities. He could not find any case in which the mother had remained mentally normal, though in two cases she had been physically normal.

The Attorney-General asked Dr. Rees if it were not impossible to assign specific portions of the mental disturbance

to the original rape and the subsequent child-bearing respectively. Dr. Rees replied that it was not entirely impossible. A recent research on child-assault had produced some evidence to show that the dramatic episode was not so important as the continued strain and the general emotional atmosphere. For some years he had been collecting data about cases of rape in which conception had not occurred. Symptoms certainly might appear in such cases, but he definitely thought that the danger of mental disturbance was reduced if pregnancy was terminated when it occurred. Preserving life to him meant preserving health: it was not possible to let a person drift into a mental breakdown in the future and say one was preserving life. The same symptoms might arise from other causes, but he thought that the resentment, the immense crushing sense of inferiority and the interference with instinctive life, in the degree in which they were found in these cases, constituted a syndrome which was in some sense unique.

Mr. William Gilliatt declared that Mr. Bourne, in the view of those who knew him, was a very competent obstetric surgeon, well qualified to form an opinion on the desirability of operation. After hearing Dr. Rees's views, he would himself undoubtedly have terminated pregnancy in this case. He described to the Court the additional risks run by young girls in childbirth, both from the toxæmias of pregnancy and from the incomplete ossification of the pelvis. The maternal mortality of the 15-20 age group was one per thousand higher than the average. He had collected from the reports of two maternity hospitals three cases of delivery between 13 and 14, four cases between 14 and 15, and 35 cases between 15 and 16; this girl would have been 15½ at the time of delivery. The percentage of abnormality in labour in these children was 45-50, and the figure was borne out by a German paper on the same subject. The principal difficulty which arose was ineffective action of the uterus and delay, so that interference was necessary and sepsis was likely to result. This did not pass off; if infection occurred in childbirth it remained for life.

Lord Horder, examined by Mr. Roland Oliver, said he was not infrequently consulted in cases where severe mental or nervous breakdown seemed likely to occur if pregnancy were not terminated, and that he considered the operation was justifiable in such cases. The facts of the child's age and the rape would have led him to the same conclusion as Mr. Bourne had come to, so far as he could judge without seeing the patient. It was not his opinion that the operation should only be performed to save life from immediate danger.

Concluding Addresses by Counsel

Mr. Oliver, in his final address to the jury, said that Mr. Bourne's attitude was that what he had done was lawful, right, and honest, and he had committed no offence. The statute of 1929, which dealt with the killing of a child at the point of birth, dealt with a case in which obviously immediate danger to life would excuse the destruction of the child. Applying it to the present case, one could speak properly of the preservation of the life of the mother in speaking of preservation of her health, for her life ultimately depended on her health. A wide and liberal view should be taken of the words "to preserve the life of the mother." The proposition that a doctor could only terminate pregnancy if the girl would otherwise die was a very extravagant one, and to say that he must not operate even if he were faced with the practical certainty that she would have a complete nervous and mental breakdown revolted one's sense of justice and every other sense. Mr. Bourne was not responsible for the views of Dr. Malleison. The prosecution had called no medical evidence and there was no evidence to throw doubt on the honesty and competence of the defendant, or upon the proposition that the mental health of the girl for the rest of her life was likely to be greatly prejudiced. "If you say," he concluded, "that the defendant had committed a felony, one will be left reflecting gloomily on the sense and reasonableness of one branch of English law."

The Attorney-General, in his concluding address for the Crown, said that the prime reason why abortion was a

grave offence under the law, and perhaps always had been, was that the law was based on the sacredness of human life. The destruction of an unborn child was the destruction of a potential human life. He suggested that there was a fundamental difference between preserving life and preserving health. In any given set of circumstances a doctor or surgeon would be able to say, "I did this to preserve the life of my patient." He would then mean something different from when he said, "I did this to preserve the health of my patient." Mr. Bourne's letters showed that he took a very wide view of the cases in which the operation was proper to be performed. The evidence showed that the Crown had succeeded in proving that the operation had not been done for the purpose only of preserving life. Sir Donald Somervell did not minimize, he said, the possible mental effects of which Mr. Bourne and the other doctors spoke. The question was whether those mental effects, grave as they were, justified the termination of the pregnancy.

The Judge's Summing-up

Mr. Justice Macnaghten, in summing up the case to the jury, said that the offence was regarded by the law as a grave one. The punishment might be penal servitude for life, and the charge was only triable by a judge of the High Court. As a rule a case would only come before the Courts when something had gone wrong, because the crime was committed secretly, but, judging by the cases that came before the Courts, the crime was by no means uncommon. This was the second case at the present sessions in which a charge had been preferred for an offence against this section. He only mentioned the other case to show how different the present case was from those of the usual type. A woman without any medical skill or qualification had done what was alleged against Mr. Bourne: she had unlawfully used an instrument for the purpose of procuring the miscarriage of a pregnant girl. She had done it for money: £2 5s. had been her fee. She had come from a distance to a place in London to do it, and a pound had been paid her on making the appointment. She had used her instrument, and within an interval of time measured not by minutes but by seconds the victim of her malpractice had been dead on the floor. She had been paid the rest of her fee and had gone away. That was the class of case which usually came before the courts.

Mr. Bourne's case was very different. A man of the highest skill had openly, at one of our great hospitals, performed the operation—whether it was legal or illegal the jury would have to determine—as an act of charity, without fee or reward, unquestionably believing that he was doing the right thing and that he ought, in the performance of his duty as a medical man, devoted to the alleviation of human suffering, to do it. That was the case which the jury had to try.

The matter had never, so far as he knew, arisen before for a jury to determine in circumstances such as these. Even among learned counsel there had obviously been some doubt as to the proper expression of the law. Certainly one of the medical witnesses, Dr. Malleison, had shown uncertainty as to the law. It appeared from her letter that her views about the law were erroneous, and it was only fair to her to say that her last statement in the witness-box had been that she was a doctor and not a lawyer. On the previous day, in response to a request by Mr. Oliver, he had indicated to the jury his view of the law. The jury would take the law from him; if he erred and they found the accused guilty the Court of Criminal Appeal would put the matter right. He saw no reason to modify his earlier directions. The question the jury had to determine was, "Has the Crown proved to your satisfaction, beyond reasonable doubt, that the act which Mr. Bourne admittedly did was not done in good faith for the purpose only of preserving the life of the girl?" If the Crown had failed to satisfy them of that Mr. Bourne was entitled to a verdict of acquittal. On the

other hand, if they were satisfied beyond all real doubt that Mr. Bourne had not done the operation in good faith for the purpose only of preserving the life of the girl the verdict should be "Guilty."

"I fully agree," said his Lordship, "with the criticism of Mr. Oliver that the Infant Life Preservation Act, 1929, is dealing with the case where the child is killed while it is being delivered from the body of the mother. But the proviso in that Act—that no one is to be found Guilty unless it is proved that the act was not done in good faith for the purpose only of preserving the life of the mother—expressed what has in my view always been the law with regard to the procurement of abortion. Although that proviso was not expressed in the Act of 1861, the use of the word 'unlawful' implies the same thing: that no person ought to be convicted under section 58 of the Act of 1861 unless the jury are satisfied that the act was not done in good faith for the purpose only of preserving the life of the mother.

"This is a case of great importance to the public, and more especially to the medical profession. It has nothing to do with the ordinary cases of procuring abortion which I have had before me here. Those cases concern persons with no skill and no medical qualifications, with no pretence of being able to say that they were acting for the preservation of the mother's life. Cases of that sort are in no way affected by consideration of the question that is put before you. It has always been the law that the Crown have to prove the offence beyond reasonable doubt, to prove that the act was not done in good faith for the purpose only of preserving the life of the mother. In the ordinary case no question can arise: it is obvious that that defence could not be available to the professional abortionist.

"We have had a great deal of discussion about the difference between danger to life and danger to health. It may be that you are more fortunate than I am. I confess I have a great difficulty in understanding what the discussion really meant. Life depends on health, and it may be that health is so gravely impaired that death results. The Attorney-General suggested to Mr. Bourne that there was a clear line of distinction between danger to health and danger to life [his Lordship read the Attorney-General's question]; and he assumes that it is so. But is it? Of course there are things that are obviously a danger to health without being a danger to life. Rheumatism, I suppose, is not a danger to life, but it is certainly a danger to health. Cancer is plainly a danger to life, according to experience as it exists to-day; maybe a time will come when cancer will not be a danger to life. There are maladies that are a danger to life and maladies that are a danger to health, but is there a clear dividing line, a perfectly clear line of distinction? I should have thought not. I should have thought that impairment of health might reach a stage where it was a danger to life." [His Lordship read Mr. Bourne's answer, stating that there was a large body of patients between the two extremes, of whom it was not possible to say how far life would be endangered but whose health was depressed to such an extent that life was shortened, and death might occur within measurable distance of labour.] The learned judge continued: "If that is the view that commends itself to you: that you cannot say that there is this division into two separate classes with a dividing line between them, then it may be that you will agree with the view that Mr. Oliver put forward when he invited you, in construing those words 'for the purpose only of preserving the life of the mother,' to take a wide and liberal view of their meaning. I myself prefer the word 'reasonable' to the words 'wide and liberal.' I do not think it is contended that those words mean merely 'for the preservation of the life of the mother from instant death.' There are cases, as I expect you know from your own experience, where it is reasonably certain that a woman will not be able to deliver the child of which she is pregnant. In such a case, where the doctor anticipates, basing his opinion on the experience and knowledge of the profession, that the child cannot be delivered without the death of the mother, in those circumstances he is entitled—and indeed it is his duty—to perform this operation with a view to saving the life of the mother.

If knowledge and experience teach that that is going to be the result, obviously the sooner the operation is performed the better. It is not necessary that the doctor should wait until the unfortunate woman is in peril of immediate death, and then at the last moment, if he is successful, snatch her from the jaws of death. He is not only entitled, but it is his duty, to perform the operation with a view to saving her life.

"You have heard of the wide variations of opinion which exist within the medical profession. Some there may be who hold the view that the fact that the woman desires an operation to be performed is sufficient justification for it. That is not the law. On the other hand, there are others who, for what are said to be religious reasons, object to the operation being performed at all in any circumstances. That is not the law. On the contrary, a person who holds such an opinion ought not to be a doctor—practising, anyhow, in that branch of medicine. Indeed, in a case where the life of a woman could be saved by performing the operation, if a doctor refused to perform it on the ground of some religious opinion and the woman died, he would be in grave peril if he were 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, refuses to call in a doctor to attend to his child. Where, if a doctor had been called in, the life of the child would have been saved, and a person for a religious reason—a so-called religious reason—refuses to call in a doctor, he is also answerable to the criminal law for the death of his child. I mention those two extreme cases merely to show that the law, which is a reasonable law, lies between those two. It does not permit of the termination of pregnancy except for the purpose of preserving the life of the mother. But I think myself that those words ought to be construed in a reasonable sense: if the doctor is of opinion on reasonable grounds, on adequate knowledge, that the probable consequences of the continuance of pregnancy would indeed make the woman a physical wreck or a mental wreck, then he operates, in that honest belief 'for the purpose only of preserving the life of the mother.'

"These general considerations have to be applied to the particular facts of this case. Everything that has been said here tends to confirm the view that each case must depend upon its particular facts, and the circumstances of each case must vary infinitely. It is very undesirable that a young girl should be delivered of a child. Parliament has recently raised the age of marriage of a girl to 16; the opinion of Parliament is that it is very undesirable that a girl below 16 should marry and have a child. The medical evidence here establishes that view: that it is undesirable that a young girl should go through the stage of pregnancy and finally of labour. Then, regarding the effect of rape upon a child under the age of 15, Dr. Rees has said that from his experience and his knowledge the mental effect produced by pregnancy brought about by rape has a most prejudicial effect upon the mind of the girl. It is the merest common sense that if a girl is feeble-minded or belongs to the class that is described as the prostitute type, for her it is a different matter. But for an ordinary decent girl brought up in an ordinary decent way, by parents without any knowledge—as Dr. Malleon observed—of where they could look for a professional abortionist, you may think that Dr. Rees was not understating the probable effects on her life of having to bear this child.

"All this, of course, depends upon your opinion. As far as danger to life is concerned, of course you cannot be certain that there is danger to life unless you wait until a person is dead. Nobody asserts that the operation only becomes legal when the patient is dead. It is all a matter of opinion. The example of acute appendicitis was mentioned. It is a matter of common knowledge that the surgeon prefers to operate when the appendicitis is not active. Take this case. A child is suffering from symptoms which a doctor diagnoses as appendicitis. The symptoms subside, and the doctor says: 'The symptoms have subsided and she will probably get quite well again, but at the same time it may be merely a temporary lull and to-morrow the condition may be much worse. If you let me prepare the patient and operate to-day

I can guarantee the life of your child, and the operation will be performed in perfect safety.' If, as probably happens when there is appendicitis, the child gets worse, the appendicitis becomes acute and the doctor has to operate, as he may have to, in such circumstances that he cannot guarantee the life of the child, the child may die. Suppose that choice is put to the parents: 'Will you have the operation to-day, or will you wait until to-morrow to see whether the disease becomes acute?'—what answer is there to that question but to say, 'Do it now; do it while you are still safe; do not wait to see whether she is near death.' The operation may be performed and it may be found that the appendix was quite all right; but is the surgeon blamed for performing the operation? He used his best judgment. The surgeon can only base his opinion on knowledge and experience, and if he in good faith thinks that it is necessary for preserving the life of the child in the real sense of the words, not only is he entitled to perform the operation but it is his duty to perform it.

"In regard to any other operation on the human body obviously no difficulty arises. The only difficulty that arises in the case of abortion is that the law of this land has always held human life to be sacred, and the protection that the law gives to human life extends to the unborn child in the womb. The unborn child must not be destroyed except for the purpose of preserving the yet more precious life of the mother."

In conclusion, the judge repeated the question on which the jury had to return their verdict. He added that so far as the members of the medical profession themselves were concerned they alone were the persons who could properly perform such an operation. It was to be hoped and expected that none of them would ever lend himself to the malpractices of the professional abortionist. No doubt they would act only in consultation with some other member of the profession of high standing, so as to confirm the view that the circumstances were such that an operation had to be performed and was legal.

The jury were absent for forty minutes and returned a verdict of "Not Guilty."

Mr. Aleck Bourne's defence was conducted by Messrs. Le Brasseur and Oakley, solicitors to the London and Counties Medical Protection Society.

AN ACTION WITHDRAWN

At Leeds Assizes on July 12 an action brought by a patient against a hospital house-surgeon was withdrawn. The plaintiff was John Neville Newmarch, a Hull rivet-heater, and he sought to recover damages for alleged negligence from Dr. Martin Fleischer, house-surgeon at Hull Royal Infirmary, who performed an operation on him in October, 1936. Mr. H. Hylton-Foster, counsel for Newmarch, said: "On behalf of the plaintiff I unreservedly and in the most unqualified manner withdraw every allegation of negligence made against the defendant in this case, and I ask for an order for the payment out of court of the sum paid into court to the defendant's solicitor." Mr. Justice Goddard made an order that all proceedings should be stayed on terms endorsed on counsel's briefs, and added that there would be a judge's order if necessary.

Universities and Colleges

UNIVERSITY OF OXFORD

In Convocation on July 16, the Vice-Chancellor, Mr. A. D. Lindsay, presiding, the honorary degree of D.Sc. was conferred on Dr. Harvey Cushing, C.B., Emeritus Professor of Surgery at Harvard University.

The Public Orator, Mr. Cyril Bailey, presented Professor Cushing as an illustrious surgeon who had performed more than 2,000 successful operations on the brain. He was descended from a long line of doctors and obtained his medical degree at Yale. After studying in Europe he returned home, and maintained in his writings and proved by his actions the value of the very difficult operation on the brain which he

himself once called "The North-West Passage of Surgery." The fine services he had rendered during the great war were well known to all. For nearly thirty years he was Professor, first at Yale University and then at Harvard, and many of his pupils were to-day famous. An expert with the pen as well as with the scalpel, he had written many technical treatises on the nerves, the structure of the brain, and the pituitary gland, and for the layman the great life of Sir William Osler.

The following medical degrees were conferred in Congregation presided over by the Vice-Chancellor:

D.M.—A. D. C. Bell; R. R. Bomford.
B.M.—T. R. Savage, J. M. Teasdale, W. E. Young, J. B. Atkins, R. H. Mole, E. B. G. Reeve, M. A. Slee, A. Shannon, R. A. Shwyer, J. C. Hewetson, O. I. Green, C. W. M. Whitty, J. S. Astbury, W. M. Gibson, D. R. Cargill, C. Exell, C. R. B. Welford, J. G. Jamieson, T. E. Ooi, Celia K. Westropp.

UNIVERSITY OF LONDON

Brown Animal Sanatory Institution Committee

The Senate has received the report of the Brown Institution Committee for 1937, which records that the superintendent has continued his research on viruses, and Dr. Nathan Raw has continued his research in human and bovine tuberculosis. Five lectures on "A Comparative Study of Filter-Passing Bacteria and Viruses" were delivered as required under the will of the late Mr. Brown. At the hospital during the year 1,298 cases were treated as out-patients, thirty-two as in-patients, and the number of operations performed was 311.

Graham Legacy Committee

Dr. A. M. H. Gray has been elected chairman of the Graham Legacy Committee for the year 1937-8. The Senate has received the annual report of the Committee for the year ending August, 1938, which states that the general purpose for which the Graham Fund was founded was to aid research in the school of advanced medical studies connected with University College Hospital. The Graham Scholar is Mr. C. H. Gray, and Drs. C. Bolton, G. R. Cameron, M. Maizels, and F. H. Teale have received grants in aid of research from the Graham Fund. Professor C. R. Harington, F.R.S., was reappointed Director of Research under the Charles Graham Medical Research Scheme for a period of one year from October 1.

Regulations relating to exemption from the internal intermediate examinations in arts, science, engineering, economics, and commerce, and from the first examination for medical degrees, through the higher school examination of other universities (*Red Book*, 1937-8, pp. 89, 345, 489, 556, 575, 269), have been approved.

In and after 1939 the examination for the academic post-graduate diploma in bacteriology (*Red Book*, 1937-8, p. 610) will begin on the Thursday following the third Monday in June instead of the first Tuesday in July.

Mr. Philip H. Mitchiner has been appointed a Governor of the West London Hospital Medical School for 1938-9.

The syllabuses in inorganic chemistry, physics, and general biology for the first examination for medical degrees for internal and external students (*Red Book*, 1937-8, pp. 264-7; *Blue Book*, September, 1937, pp. 809-12) have been amended, and copies can be obtained from the Academic and External Registrars.

Geoffrey E. Duveen Travelling Studentship

Applications are invited for the Geoffrey E. Duveen Travelling Studentship, of the value of £450, for research in any aspect of oto-rhino-laryngology. The studentship is normally tenable in the first instance for one year, part of which shall be spent in study abroad, in accordance with a scheme to be approved by the Studentship Board, but it may be extended for six months or for one or two years, and during the extended period the student may be allowed to undertake research at the Royal Ear Hospital or some other laboratory approved for the purpose. Full particulars can be obtained from the Academic Registrar, University of London, W.C.1, and prescribed forms of application must reach him not later than December 31.

William Julius Mickle Fellowship

Applications for the William Julius Mickle Fellowship are invited and must be sent in by October 1. The Fellowship is of the value of at least £200, and is awarded annually by the Senate to the man or woman who, being resident in London and a graduate of the University, has in its opinion done most to advance medical art or science within the preceding five years, and has therein shown conspicuous merit. Further particulars can be obtained on application to the Academic Registrar.