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## Review Resources--Step Two in the Research Process

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### Recommended Citation

Review Resources--Step Two in the Research Process: Read the Entries and Analyze. Research in Virgil Hawkins' World of Print--Historical Print Research Project No. 1: Abortion. 5. <http://commons.law.famu.edu/hawkins-research-1/5>

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After finding the entry for abortion in the index, the student would then have gone to the volume and page, indicated by the index, to read the information provided. Studying the information contained in the entries, the student would have taken notes about statutes and cases that would be used to craft his or her legal analysis. The statutes on point that are listed by the encyclopedia's entry are F.S. § 782.10 and F.S. § 797.01. The entry also names *Eggart v. State* as a case that discusses when an individual could be charged with a crime for assisting a woman to seek an abortion. 40 Fla. 527, 25 So. 144 (1898).

# ABORTION

By J. C. ADKINS JR.

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## I. INTRODUCTORY.

### § 1. Scope of title.—

**Matters included:** This title includes the law relating to abortions and miscarriages, resulting death of woman or child, the advertising of medicants in causing or procuring a miscarriage, and the prosecution and punishment of such crimes. This includes a discussion of indictments and information and evidence as applied to these specific crimes.



**Related matters in other titles:** The general law in regard to indictments and informations, evidence, instructions, and other procedure in prosecution will be found in appropriate titles, such as Indictments, Informations, Presentments; Criminal Law; Homicide. The law as it relates to the revocation of a physician's license will be found under Physicians, Surgeons and Dentists.

## II. OFFENSES AND ELEMENTS.

### A. PERFORMING ABORTION.

#### § 2. General consideration.—

The Florida court has recognized well-defined differences between a miscarriage and an abortion.

Contrary to the apparent weight of authority,<sup>1</sup> the Florida court has preserved the technical distinction between a miscarriage and an abortion,<sup>2</sup> the latter term being used when the woman is "pregnant with a quick child."<sup>3</sup> At common law it was no crime to procure the miscarriage of a woman with her consent, unless she was in that advanced state of pregnancy known as "quick with child."<sup>4</sup>

#### § 3. Statutory provision.—

By statute it is unlawful to procure a miscarriage or perform an abortion.

It is provided by statute that whoever with intent to procure miscarriage of any woman unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, is guilty of felony.<sup>5</sup>

#### § 4. Advising or procuring commission of offense.—

The gist of the offense is the advising or procuring to commit with the necessary intent.

Under this law, if a party simply advises or prescribes the taking of any medicine, drug, or other noxious thing, unlaw-

1. 1 C. J. S., Abortion, § 1; 1 Am. Jur., Abortion, § 2.

Adkins, Crim. Law, §§ 46, 111.

2. *Weightnovel v. State*, 46 Fla. 1, 35 So. 856 (1903).

4. *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898).

3. See F. S. A. §§ 782.10, 797.01;

5. F. S. A. § 797.01; Adkins, Crim. Law, § 111.



fully, and with the criminal intent, the inhibited crime is complete, whether the advice be followed or prescription taken or not.<sup>6</sup>

### § 5. Pregnancy.—

Pregnancy is not an essential element of the offense.

F. S. A. § 797.01 denounces acts done "with intent to procure the miscarriage of any woman." It is, therefore, immaterial whether she is actually pregnant or not.<sup>7</sup>

### B. ADVERTISING DRUG FOR ABORTION.

#### § 6. Statutory provision.—

The dissemination of means of procuring an abortion is prohibited by statute.

It is provided by statute that whoever knowingly advertises, prints, publishes, distributes or circulates, or knowingly causes to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference containing words or language giving or conveying any notice, hint or reference to any person, or the name of any person, real or fictitious, from whom, or to any place, house, shop or office where any poison, drug, mixture, preparation, medicine or noxious thing or any instrument or means whatever, or any advice, direction, information or knowledge may be obtained for the purpose of causing or procuring the miscarriage of any woman pregnant with child, shall be guilty of a felony.<sup>8</sup>

### C. DEATH OF WOMAN OR CHILD.

#### § 7. Statutory provision.—

By statute the death of the mother or child resulting from an abortion may be manslaughter.

Every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever,

#### Construction of statute:

"Our statute . . . was designed to punish the attempt to procure the miscarriage of any woman by any of the means mentioned in the statute, whenever such attempt is made with an unlawful intent." *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898); *Urga v. State*, 155 Fla. 86, 20 So.2d 685 (1944). This statute has not been amended since its passage in 1868.

6. *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898).

7. *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898), *Weightnovel v. State*, 46 Fla. 1, 35 So. 856 (1903); *Urga v. State*, 155 Fla. 86, 20 So.2d 685 (1944).

8. F. S. A. § 797.02; *Adkins*, *Crim. Law*, § 112.



or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter.<sup>9</sup>

### § 8. Murder in third degree.—

The death resulting from an abortion may be murder in the third degree.

The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the commission of any felony, other than arson, rape, robbery, burglary, the abominable and detestable crime against nature, or kidnaping, is, by statute, murder in the third degree.<sup>10</sup> The Supreme Court of Florida has held that murder in the third degree may stem from death resulting from the felony of attempting to induce a woman to abort.<sup>11</sup>

## III. PROSECUTION AND PUNISHMENT.

### A. INDICTMENT OR INFORMATION.

#### § 9. In general.—

An information or indictment following the language of the statute is sufficient.

An information or indictment following the language of the statute is sufficient in charging the crime,<sup>12</sup> without the necessity of alleging that the woman was pregnant with child.<sup>13</sup> Where the information contains unnecessary allegations as to pregnancy of prosecutrix, but defendant, upon arraignment, does not object to surplusage by motion to quash, he waives the objection.<sup>14</sup>

9. F. S. A. § 782.10; Adkins, *Crim. Law*, § 46.

10. F. S. A. § 782.04; Adkins, *Crim. Law*, § 40.

11. *Grimes v. State*, 64 So.2d 920 (Fla. 1953), overruling the decision of the court in *Weightnovel v. State*, 46 Fla. 1, 35 So. 856 (1903), for the reason that since the *Weightnovel* decision the legislature has repeatedly re-enacted the statute defining mur-

der in the third degree without change. The statute was therefore interpreted as including death resulting from attempt to induce a woman to abort.

12. *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898).

13. *Urga v. State*, 155 Fla. 86, 20 So.2d 685 (1944).

14. *Urga v. State*, 155 Fla. 86, 20 So.2d 685 (1944).



### § 10. Joinder of counts.—

In information or indictment for procuring a miscarriage counts alleging separate offenses may be joined.

It has been held that, where the several counts of an indictment for procuring a miscarriage set forth separate offenses, the counts were properly joined in one indictment, and that it was competent for the jury to find the defendant guilty on one or more of them.<sup>15</sup> It is within the discretion of the court to require the prosecution to elect upon which count or counts it would proceed to try the accused.<sup>16</sup>

### B. EVIDENCE.

### § 11. Abortive effort.—

In prosecution for manslaughter through abortion proof of effort to cause abortion is essential.

The abortive effort is an indispensable factor in a prosecution for manslaughter through abortion. If there is no substantial proof to refute evidence that deceased went to defendant for treatment after producing miscarriage by her own acts, a conviction of manslaughter through abortion will be reversed.<sup>17</sup>

### § 12. Variance.—

An allegation of fictitious name of woman aborted is not a variance where proof shows that she was generally known by such name.

Upon the trial of a person for intending to procure miscarriage of a woman, although it appears that the name of the

15. *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898).

**Form of indictment or information:**

The information as quoted in the opinion of the court was held sufficient upon motion to quash. *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898). See also *Adkins*, *Crim. Law*, p. 691; *Sapp Fla. Fms.*, p. 3447.

16. *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898).

17. *Armstrong v. State*, 107 Fla. 494, 145 So. 212 (1933), where the written statement of the deceased girl was admitted into evidence and

such statement was "not refuted by anything more than the mere speculative possibility that it was a precautionary statement, demanded and obtained by the accused as a safeguard against likely unfortunite circumstances of a criminal abortion he was then about to commit . . ."

See also, *Robertson v. State*, 64 Fla. 437, 60 So. 118 (1912), where the Supreme Court of Florida, in affirming a conviction of manslaughter through abortion, said, "While the lacerations and wounds proven may not have been sufficient in and of themselves to produce the death

woman upon whom the abortion was intended to be performed, as alleged in the information, was a fictitious one, but that she was known by such name to those with whom she had dealings and to whom she had gone for relief and treatment, there is no variance.<sup>18</sup>

charged, yet they produced such sickness as to cause the female victim to miscarry and abort an unborn child, and all of this combined produced her death. And while some of the wounds and lacerations may have been caused, as the proofs show, not by the instruments used to bring about the miscarriage or abortion, but by the crushed bones of the head of the foetus being dragged

from its place in the womb, yet we think that there was sufficient proof to show that the death here charged was caused by procuring through the use of instruments the miscarriage or abortion of an unborn child, and that the conviction of the defendant must stand."

18. McDonald v. State, 70 Fla. 250, 70 So. 24 (1915).

## CROSS-REFERENCES

**ABSTRACTS OF TITLE**—See Vendor and Purchaser.

**ABUTTING OWNERS**—See Highways, Bridges and Streets.

**ACCESSION**—See Personal Property.

**ACCESSORIES**—See Criminal Law.

**ACCIDENT**—See Rescission, Cancellation and Reformation.

**ACCIDENT INSURANCE**—See Insurance.

**ACCOMPLICES AND ACCESSORIES**—See Criminal Law.