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Criminal Law--Abortion--Woman Not Pregnant in Law Until Child Has Quickened (State v. Green, 53 S.E.2d 285 (N.C. 1949))

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(3) by a partner not to do anything to interfere, by competition or otherwise, with the business of the firm;[9] (4) by the buyer of property not to use the same in competition with the business retained by the seller;[10] and (5) by an agent, assistant, or servant not to compete with his master or employer after the expiration of his time of service.[11] However, these categories will be upheld only when they conform to the tests stated above.[12]

The covenant now under discussion is to be tested, then, on the basis of whether or not it is only such as is necessary to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interests of the public.[13] The manifest purpose of the lease under discussion is to transfer possession to the tenant and rent to the lessor. Was this purpose protected by the covenant which was to restrain the defendant from competing with the Newark Company? The proposition is self-explanatory. The intended beneficiary was not the lessor, but the co-plaintiff who had no such interest in the contract as would merit the exaction of this restrictive clause—no pertinent interest, property or otherwise, which demanded safeguarding.

J. J. F.

CRIMINAL LAW—ABORTION—WOMAN NOT PREGNANT IN LAW UNTIL CHILD HAS QUICKENED.—The defendant was convicted under a North Carolina statute[1] which makes it unlawful for any person to administer drugs to a woman "either pregnant or quick with child . . . with intent thereby to destroy such child." The complainant's testimony indicated that she was made pregnant by the defendant on June 14, 1948; and that the defendant, when informed of the pregnancy, purchased medicine and took her to a doctor for injections in order to destroy her unborn child. She also testified that she did not feel the movement of the child within her body until after August 25, the date of the indictment. The defendant based his appeal on the fact that the complainant was not quick with child, and therefore had not advanced to the required stage of pregnancy, within the meaning of the statute, at the time of his allegedly criminal acts. *Held,* judgment reversed. If pregnancy has not advanced sufficiently so that there is a living child, that is, a quick child, then

[9] Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981 (1893).
[10] Hodge v. Sloan, *supra* note 2; Dunlop v. Gregory, 10 N. Y. 241 (1851).
[11] Herreshoff v. Bontineau, 17 R. I. 3, 19 Atl. 712 (1890).
[12] United States v. Addyston Pipe and Supply Co., *supra* note 4.
[13] Fowle v. Parke, *supra* note 7; Gibbs v. Gas Company, 130 U. S. 393 (1889); Taylor Iron Co. v. Nichols, 73 N. J. Eq. 684, 69 Atl. 186 (1908).

[1] N. C. GEN. STAT. ANN. § 14-44 (1943).

the felonious destruction of the fetus would not constitute a destruction of the child within the meaning of the abortion statute. *State v. Green,* — N. C. —, 53 S. E. 2d 285 (1949).

The foetal child is not a subject upon which all crimes can be committed; the criminal law completely protecting only the living human being. Under ancient common law, ". . . if a woman be quick with child, and by a potion or otherwise, killeth it in her womb, or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprison and no murder." [2] Under decisional law today the courts are divided on the question whether the woman, whom the accused causes to miscarry, must be quick with child in order to render the miscarriage criminal. A number of states have observed that there was no criminal liability in aborting a child not yet quickened.[3] In the instant case the court similarly noted that, ". . . the child with which the woman is pregnant must be so far advanced as to be regarded in law as having a separate existence, a life capable of being destroyed." [4] In Pennsylvania, however, when deciding *Mills v. Commonwealth,*[5] the court came to the conclusion that, "It is not the murder of the living child which constitutes the offense, but the destruction of gestation, by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated." [6]

New York [7] and some other jurisdictions [8] are not troubled with this problem, for as long as the unlawful intent to procure an abortion is present, it is not required that the woman be pregnant at all.

A. B.

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[2] 3 Co. INST. 50 as quoted in Commonwealth v. Parker, 9 Metc. 263, 266 (Mass. 1845).

[3] Hunter v. State, 29 Ga. App. 366, 115 S. E. 277 (1923); People v. McDowell, 63 Mich. 229, 30 N. W. 68 (1886); State v. Forte, 222 N. C. 537, 23 S. E. 2d 842 (1943).

[4] State v. Forte, *supra* note 3 at —, 23 S. E. 2d at 843.

[5] 13 Pa. 626 (1850).

[6] *Id.* at 632.

[7] People v. Axelsen, 223 N. Y. 650, 119 N. E. 708 (1918). Here the defendant was convicted of the crime of attempt to commit abortion, the indictment and the proof affirmatively showing that the subject was not a pregnant woman. The conviction was affirmed on the ground that pregnancy is not a material element of the crime of abortion under N. Y. PENAL LAW § 80(2).

[8] Rinker v. State Board of Medical Examiners, 59 Cal. App. 2d 222, 138 P. 2d 403 (1943); Eggart v. State, 40 Fla. 527, 25 So. 144 (1898); Commonwealth v. Taylor, 132 Mass. 261 (1882); State v. Montifoire, 95 Vt. 508, 116 Atl. 77 (1922); State v. Russell, 90 Wash. 474, 156 Pac. 565 (1916).