

COMMONWEALTH v. ISAIAH BANGS.

October Term, 1812.

9 Mass. 387

Supreme Judicial Court of Massachusetts.

****1 *387** An indictment for administering a potion with intent to procure an abortion, must contain an allegation that an abortion ensued, and that the woman was quick with child.

THE defendant was indicted, October term, 1810, for assaulting and beating one *Lucy Holman*, and administering to her a certain dangerous and deleterious draught or potion, against her will, with intent to procure the abortion and premature birth of a bastard child, of which she was then pregnant, and which the defendant had before that time begotten of her body, *et alia enormia*, &c., to the great damage of the said *Lucy*, against good morals and good manners, in evil example to others in like case to offend, *contra pacem*, &c.

The *Solicitor-General*, at the trial, entered a *noli prosequi* as to the assault and battery charged in the indictment. A verdict was found, at the same term, that the defendant was guilty of all the several matters charged in the indictment, excepting that the said potion was taken by the said *Lucy* voluntarily.

After the verdict was returned, the defendant moved the Court to arrest the judgment, on the ground that no indictable offence was described in the indictment, except the part *non pros'd* by the *Solicitor-General*, and the cause stood over to this term for the consideration of that motion.

Attorneys and Law Firms

Fay, in support of the motion, contended that the principal charge in the indictment, amounting to no more than an aggravated assault and battery, as to which the *Solicitor-General* had entered a *noli prosequi*, and of which there was no evidence at the trial, there remained nothing against the defendant but the administering, with the patient's consent, some potion, with intent that the same should produce an abortion. No abortion was produced; and if there had been, there is no averment that the woman was quick with child; both which circumstances are ***388** necessary ingredients in the offence intended to be charged in the indictment.

The Solicitor-General argued that any overt act, perpetrated with the intent to procure a misdemeanor to be committed, was itself a misdemeanor, and the patient's consent to take the deleterious draught did not make the administering of it lawful.¹

Opinion

By the Court.

There can be no sentence upon this verdict. The assault and battery are out of the case, and no abortion is alleged to have followed the taking of the potion; and if an abortion had been alleged and proved to have ensued, the averment that the woman was quick with child at the time is a necessary part of the indictment.

****2 Judgment arrested.**

All Citations

9 Mass. 387, 1812 WL 1295

Footnotes

¹ 3 *Inst.* 50.--*Staunf.* 21.--1 *Hale's P. C.* 433.--1 *Hawk. P. C. c.* 31, § 16.--4 *Black. Comm* 198.--1 *East's P. C.* c. 15, § 14.

^a [Note by Professor Russell: this is a comment by the editor of the reporter not a footnote by the Court.][An attempt to procure abortion, even when the pregnant woman is not quick with child, is a misdemeanor at the common law.--3 *Chitty, Crim. Law*, 798.--1 *Russell on Crimes*, 2d. Eng. ed. 553.--And it is made felony by recent *English* statutes when the woman is quick with child, and highly penal in other cases.--43 *Geo. 3, c??* 58.--See 1, 2, 1 *Geo. 4, c.* 31, § 13--10 *Geo. 4, c.* 34, § 16.--ED.]