THE AMERICAN
LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 51 O. S. / 42 N. S. } AUGUST, 1903. No. 8.

THE LAW AS TO CONSENT WHEN PLEADED AS A DEFENCE TO CERTAIN CRIMES AGAINST THE PERSON.

In the succeeding pages an attempt will be made to state concisely the law as to certain phases of the doctrine of consent, and while so doing, to ascertain how far it is consistent with sound logic and common sense.

At the beginning of any discussion it is well briefly, yet accurately, to define its limits.

In the present instance it is not my purpose to deal with the whole question of consent as a defence to a charge of crime, but merely to examine its general character and the questions presented when it is pleaded as a defence to indictments for rape, assault with intent to commit rape, and assault.

With regard to the three crimes above mentioned, it should be said that consent when pleaded as a defence presents a number of interesting and closely allied questions of the same general character.

Before going further let us examine the law as to consent when pleaded generally as a defence to alleged crime. A satisfactory statement of the general rule is, that "No

act shall be deemed a crime if done with the consent of the party injured," etc., with certain qualifications not affecting this discussion.[1]

Consent then, when proved, being, in most cases, an adequate defence to a criminal indictment, let us examine it in detail, in connection with its efficacy as a defence to the three specific crimes selected for examination, to-wit: rape, assault with intent, etc., and assault.

We shall first deal with rape, because the largest number of cases, and hence the greatest amount of discussion has arisen with regard to that crime.

I. Consent when Pleaded as a Defence to the Charge of Rape.

In considering this part of our subject, it is of primary importance to determine (1) the origin and development of the definition of rape at common law; (2) the nature of the crime in England to-day; (3) its nature in the United States; (4) to what extent it has been affected in America by the tendency, observable in many states, to codify the law.

1. As early as the thirteenth century we find Bracton writing thus: "There is amongst other appeals a certain appeal which is called concerning the rape of virgins, and the rape of a virgin is a certain crime, which a woman charges against a man, by whom she says that she has been violently overpowered against the peace of the lord the king," etc.[2] And later in speaking of the prisoner's defence: "Likewise he may except against her, that he had her and deflowered her with her will, and not against her will, and that she has lately appealed him in hatred of another woman, whom he keeps as a concubine, or whom he has taken to be his wife, and through the instigation of some of her relatives."[3]

The first statute on the subject seems to be the Statute of Westminster the First, 3 Edward I., 1275; the terms of

[1] Am. and Engl. Encl. of Law, Vol. 3 (1st ed.), page 662. Tit., "Consent." (Citing authorities.)

[2] Bracton, Lib. III, De Corona, Cap. 28, f. 147a.

[3] Bracton, Lib. III, De Corona, Cap. 28, f. 148b.

which were as follows: "And the King prohibeth that none do ravish, nor take away by force any maiden within Age (neither by her own consent nor without), nor any Wife or Maiden of full Age, nor any other Woman against her will; and if any do," etc.[4]

Ten years later, in 1285, we find the subject again dealt with in the Second Statute of Westminster, thus: "It is provided, That if a Man from henceforth do ravish a Woman married, Maid or other, where she did not consent neither before nor after he shall have Judgement of Life and of Member. And likewise where a Man ravisheth a Woman married, Lady, Damozel, or other, with Force, although she consent after, he shall have such Judgement as before is said, if he be attainted at the King's suit, and there the King shall have the suit."[5]

The difference in the wording of these two statutes was responsible for much of the difficulty in which the subject became involved in later years. This difference lies in the fact that in the St. 3 Ed. I., the phrase used is, "nor any Wife or Maiden of full Age, nor any other Woman against her will," while in the Second Statute of Westminster the apposite wording is, "where she did not consent neither before nor after," etc.

The question as to whether with respect to these phrases a real difference in meaning exists between the two statutes was fruitful of much controversy, and a little later we shall deal more particularly therewith.

To return to the definition: In Coke's Institutes this subject is thrice mentioned. In I. Inst., Sect. 190,[6] it is said: "Rape, Raptus, is, when a man hath carnall knowledge of a woman by force and against her will." Again in the second part of the Institutes,[7] Cap. XIII., in commenting upon the Statute of Westminster First,[8] Coke affirms the above definition, and recites at length the different punishments meted out at various times for this crime, it having been made a felony by the Statute of West-

[4] 3 Ed. 1, West. I., Cap. XIII. [5] 13 Ed. 1, West. II., Cap. XXXIV.
[6] Co. Lit. I. Inst., Sec. 190.
[7] Co. Lit. II. Inst. (Westm. primer, Cap. XIII), page *179.
[8] *Supra*, note 3.

minster II., dire results having ensued from weakening the punitive law with respect to it ten years previously. Finally, in 3d Inst., Cap. XI, p. 60,[9] a more lengthy definition is given: "Rape is felony by the common law, declared by parliament for the unlawfull and carnall knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will, or against her will, and the offender shall not have the benefit of clergy."

Hale[10] quotes the foregoing definition, with the omission of a few unimportant words, and Hawkins in his work on Crown Law[11] briefly describes the crime as follows: "It seems that rape is an offence in having unlawful and carnal knowledge of a woman by force and against her will." Coming to more modern times, we find a similar definition in East's Crown Law,[12] where it is said, that "Rape is the unlawful carnal knowledge of a woman by force and against her will."

The foregoing definitions have been recited at length to show that the leading English jurists, lawyers, and commentators, followed, in their definitions of the offence, the wording of the First Statute of Westminster, instead of that of the Second. It may easily be seen that such a course would be likely to cause trouble, and such was the case. In 1859, in a case[13] tried before Lord Campbell, C. J., it appeared that a feeble-minded girl had been violated. In deciding the case his Lordship said: "I am of opinion that the conviction must be affirmed. . . . The definition of rape may now be considered *res adjudicata*. The question is, what is the proper definition of the crime of rape? Is it carnal knowledge of a woman, against her will, or is it sufficient if it be without the consent of the prosecutrix? If it must be against her will, then the crime was not proved in this case," etc. He then goes on to say that

[9] Co. Lit., 3d Inst., Cap. XI, p. 60.

[10] Hale, P. C., *628. (Hale's Pleas of the Crown was not published before his death in 1676. Parliament requested its publication in 1680, but an authoritative edition did not appear until 1736.)

[11] Hawkins, P. C., Chap. XVI, p. 121, 1716.

[12] 1 East., P. C., 434, Sec. 1, 1806

[13] *R.* v. *Fletcher*, 8 Cox C. C. 131. (Ct. of Crim. App., 1859.)

under the statute of Westm. II., the vital question is whether the woman "consents either before or after," and such being the case, and it being clear that here the girl from lack of mental capacity never was able to consent, the prisoner was properly convicted. His Lordship also cited the case of *R.* v. *Camplin*[14] as a leading decision in support of his opinion, arguing that by holding in that case that a connection with a non-resisting drunken woman amounted to rape, the court had tacitly affirmed the definition of the crime contained in 13 Ed. I., Cap. XXXIV.

In the same case Martin, B., said: "I am of the same opinion. I am quite content to take the Stat. West. II, C. 34, and follow the definition in it, and apply it to the facts."

This exposition of the law was affirmed eighteen years later in the case of *Regina* v. *Flattery*,[15] Huddleston, B., saying: "The definition of rape as given in the statute of 13 Edw. I., C. 34, was adopted by this court in *Reg.* v. *Fletcher*. Generally speaking it is ravishing where the female does not consent before or after."

2. Therefore we may conclude that in England at the present time it is judicially held that while some difference may exist between the two statutes with regard to the synonymity of the phrases "against her will" and "without her consent," and though the statute Westm. I. may have been followed by many eminent text writers in their definitions of the crime, still the courts in their decisions, notably in *R.* v. *Camplin*,[16] have definitely adopted the statute of Westm. II. as controlling law. Consequently it follows that in England to-day rape is, legally speaking, the unlawful carnal knowledge of a woman had forcibly and without her consent.

3. Let us now consider the status of the definition at the present time in the United States.

It may be said with regard to the definition, that the various states having modeled their statutes on the English law, there is but little variance in wording from that employed in one or the other of the English acts. Hence in

[14] 1 Cox C. C. 220, 1845.
[15] 13 Cox C. C. 388. (Ct. of Crim. App., 1877.)
[16] *Supra*, note 14.

America, as in England, the main point of difficulty in the language of the definition is the same, namely, which phrase shall be used to express non-consent and whether the two phrases are alike in meaning.

The other principal difficulties of the definition, to-wit: the correct legal interpretation of its potential words, will be dealt with at length under a subsequent head.

The present question is reviewed in a masterly manner by the late Mr. Justice Gray. The point as to the synonymity of the phrases "against her will" and "without her consent" came before him in *Commonwealth* v. *Burke*,[17] which was the case of a woman violated during drunken torpor. The prisoner sought to take advantage of the fact that the words of the Massachusetts statute governing the offence charged were "against her will," claiming, of course, that the intoxicated woman had no will.

Judge Gray pointed out that in a formerly operative clause of the statute dealing with a somewhat different offence the term "without consent" had been employed, and expressed the opinion that the two terms were identical in meaning.

He carefully considered the English authorities upon the subject, and said in the course of his opinion: "The crime consists in the enforcement of a woman without her consent. The simple question, expressed in the briefest form, is: Was the woman willing or unwilling? The earlier and more weighty authorities show that the words 'against her will,' in the standard definitions, mean exactly the same thing as 'without her consent'; and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books is unfounded."

Further on he speaks of the leading English decision as follows: "Although in *Regina* v. *Fletcher, ubi supra,* Lord Campbell, C. J. (ignoring the old authorities and the repealing St. of 9 Geo. IV.), unnecessarily and erroneously assumed that the St. of Westm. II. was still in force; that it defined the crime of rape; and that there was a difference between the expressions 'against her will' and 'without

[17] 105 Mass. 376, 1870.

her consent' in the definitions of this crime; none of the other cases in England have been put upon that ground, and their judicial value is not impaired by his inaccuracies."[18] In conclusion the learned judge decided that connection under the circumstances then before him was clearly rape, saying, "If it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take, even by the defendant himself, would be unprotected from personal dishonor. The law is not open to such a reproach."

In marked contrast with the opinion expressed in the foregoing case are the views pronounced by Judge Cooley in the early Michigan decision of *Cornwell* v. *The People*.[19] The facts were peculiar. It was proved that the prisoner had had connection with an insane woman, of whose insanity he was not aware, and not only was there no evidence that she resisted the act, but it appeared to have been performed with her entire concurrence and probably at her solicitation.

Could such a connection amount to rape?

Judge Cooley first referred to the Michigan statute governing the crime,[20] and pointed out the fact that the phrase employed was "'by force and against her will." He then asked the plain question as to whether this phrase could be considered equivalent to "without consent," and answered it thus: "The word 'will,' as employed in defining the crime of rape, is not construed as implying the faculty of mind by which an intelligent choice is made between objects; but rather as synonymous with inclination or desire; and in that sense it is used with propriety with reference to persons of unsound mind. We are aware of no adjudged case that will justify us in construing the words 'against her will' as equivalent in meaning with 'without her intelligent assent'; nor do we think sound reason will sanction it." He next proceeds to solve the case along the following line: the woman

[18] It should be remembered that this utterance of Gray, J., was made seven years before the decision in *R.* v. *Flattery* (*supra*).

[19] 13 Michigan, 427, 1865.

[20] Sec. 5730 of Compiled Laws (Michigan).

though insane had a will, wild, ungovernable and perverted though it was. The prisoner's act was not only not contrary to such will but in accordance with it; therefore, the prisoner's act was innocent, since by the statute such an act must be "by force and against her will." The judge said, however, that in order to avoid the hardship incident to this theory, it should be held that in cases "where the woman from absence of mental action does not willingly acquiesce, that the physical force necessary to effectuate the purpose, however slight, is against her will."

It seems that Judge Cooley in this case was confused by the fact that the word "consent" has not always connoted "intelligence" when judicially defined. His idea of consent, right enough to our thinking, is an intelligent consent, and he argues that because "will" has not always been construed as an intelligent "will," it cannot be considered equivalent to "consent." This, however, does not follow, since we shall see later that both "consent" and "will" have been frequently defined in this connection so as to exclude intelligence as a necessary element. It is submitted that both "consent" and "will" should be so construed as to imply intelligence; yet such has not been the general rule with regard to either, and a difference cannot be found in the fact that the quality of intelligence has been judicially attributed to "consent" but not to "will." While Judge Cooley's doctrine may, if the judges be watchful, prove protective to total idiots or those whose bodies yield to the act as unresponsively as paper to pen, yet it is submitted that were it followed, a large class of the most unfortunate women alive, those whose natural passions have been unduly excited by some derangement of the mind, and who morbidly seek physical pleasure, the significance of which they do not know, and those imbeciles also whose minds are not so utterly blank but that the act of coition stirs within them responsive bodily desire; these wretched women are left defenceless under such a theory, the prey of any beast who may chance across their ways. How can it be asserted that the "will" intended by the statute was a "perverted will"? To hold so is to revert to mediævalism, and to place insanity among the punishments of

Heaven, to be carried into effect on earth. On this point, though I yield to none in respect for Judge Cooley's brilliant attainments, it seems to me that he is both illogical and unjust, for he first declares "against her will" and "without her consent" as of different meaning without giving satisfactory reasons therefor, and then he defines "will" so broadly that any wild impulse of a disordered mind may be considered as the "will" of its unfortunate possessor, though the consequence of such construction be that the protection of the law is withdrawn from her already mentally defenceless body, and she is thus left open to unpunishable pollution.

The last American case on this part of our subject which we shall consider is *The State* v. *Tarr*,[21] decided by the Supreme Court of Iowa in 1869. The Iowa statute was similar to that in Michigan, the words employed being the same.[22] The facts showed connection had with an imbecile girl who made little or no resistance. The court, after specifically approving the decision in *Cornwell* v. *The People*,[23] says that the facts in this case take it out of that class in which the woman though of unbalanced mind participates in the act, and that here there was really only that non-resistance due to imbecility. The peculiar doctrine of "animal desire," however, is approved of, and then the following method of reasoning is used to avoid the consequences of the theory espoused. Let us hold, says the court, in effect, that where the state proves imbecility of the prosecutrix and force on the part of the prisoner, that then if there is nothing to indicate her consent, it (the act) must have been, in legal contemplation, against her will. What is such a mode of reasoning but a legal quibble, what is the difference between holding the phrases synonymous and holding that failure to prove the negative of one supports the other affirmatively? The court, however, seems to adopt the view that the phrases are theoretically different. Cole, C. J., dissented flatly in this case, and in an opinion which, if faulty in logic, is at least clear and straightforward in statement, asserted that the phrases under discus-

[21] 28 Iowa, 397, 1869.

[22] Rev. Par. 4204, Iowa Statutes.

[23] *Supra*, note 19.

sion differed essentially in meaning, saying, "There is, it seems to me, a manifest difference between non-consent and against the will. There are very many things done without my consent, which are not, nevertheless against my will. A female may passively submit to intercourse with a man, and it may truthfully be said that she did not consent, although it was not against her will."

4. Having now reviewed the leading cases in the United States upon this point, let us see to what result they tend. Before attempting to state the law, it should be noted that in this country the subject is rendered more complex by the fact that in nearly every state an attempt has been made to settle it by statute.[24]

It is believed that a general examination of our statute law will show that the phrase employed to express non-consent is usually "against her will."

As a matter of course the decisions of the various courts have been influenced in great measure by the language of the controlling statutes, and it is thought that many of the decisions of our state courts, the practical result of which was an admission of legal inability to punish grievous moral wrong, had their origin in the fact that overhasty legislators had, in attempting to copy the *letter* of the English law, neglected to acquaint themselves with its *spirit*, and by a strange fatuity ignorantly embodied in a mailed code that expression of non-consent which is capable of a narrow interpretation and which in England has been judicially declared superseded by the comprehensive phrase, "without her consent."

No general definition of rape can be given as obtaining at this time in the United States. As we have seen, however, there are two lines of reasoning, by following which various courts have arrived at different conclusions.

In Massachusetts and states agreeing with her, "rape" is held to be the having of unlawful carnal knowledge of a woman forcibly and against her will or without her consent, the phrases being considered as equivalent in meaning

[24] See: 50 Barb. (N. Y.) 128; 2 Swan (Tenn.), 394; 6 Baxter (Tenn.), 614; 28 Iowa, 397; 4 So. Rep. 775; 13 Mich. 427; 25 Mich. 355; 15 Texas App. 275; 94 Ind. 96.

since earliest times. In those jurisdictions, however, where Judge Cooley's opinion in *Cornwell* v. *The People*[25] is followed, the phrases are held essentially different, and a narrower meaning accorded to "against her will." In such states, an effort is generally made, by special presumption as to the degree of force necessary to constitute the crime, to evade the hardship flowing from such a view.

In other states, such as Iowa,[26] the phrases, while considered theoretically different, are construed as practically the same.

In examining a case in this country, therefore, we must primarily ascertain how the crime is defined in the jurisdiction where it arises, and especially which phrase is employed in the governing statute and how it is construed.

It is true, however, that in both England and America the following definition, either in whole or in part, is universally accepted. Rape is the unlawful carnal knowledge which a man has of a woman forcibly and against her will or without her consent.

This definition when analyzed with reference to the purpose of this article presents three important questions, to-wit: (1) The difference, if any, between "against her will" and "without her consent," which we have discussed while tracing the origin and development of the definition; (2) the legal meaning of the word "forcibly"; (3) and, lastly, the legal meaning of the word "consent."

Let us now attempt to answer the two questions last stated.

2. And first let us ascertain in this connection the construction of the word "forcibly"; (*a*) in Great Britain and (*b*) in the United States.

a. During the Middle Ages, when the definition of "rape" was first placed upon the statute books, there was little or no question as to the construction of the term "forcibly." In those days, because of the lax enforcement of the laws incident to feudalism, this crime was nearly always attended by excessive "force." However, as years went on and the arm of the law grew stronger, it became increasingly difficult to deflower a woman in the open highway, and the

[25] *Supra*, note 19.

[26] See *State* v. *Tarr* (*supra*).

raptor accordingly changed his tactics and endeavored to gratify his lust, not as formerly by superior strength, but by means of fraud and stratagem and upon the defenceless bodies of the drugged, the intoxicated and the insane.

As a result of changed conditions, therefore, several new classes of cases presented themselves, and the courts were confronted with the problem of affording the remedy justly demanded by novel states of facts through the means of a criterion of criminality formulated in a past age when such states of facts never existed, and hence were not considered in its formulation.

That the courts were conspicuously successful in settling this difficulty cannot be claimed, but that they earnestly tried to do so is not denied.

An important class of cases in which the degree of "force" necessary for the completion of the crime presents itself as a delicate and vital question, is that class wherein connection is had with a married woman by the fraudulent impersonation of her husband. As we shall discuss these cases fully under another head, we shall merely dwell on that portion of them now which relates to the degree of "force" required to constitute the crime. In *Regina* v. *Jackson*,[27] an early and leading case, nothing was said directly on this point; the decision in fact was written by the reporters and is very vague; the result, *i. e.*, that the act was not a rape, being stated without the reasons therefor. In another case[28] sixteen years later Baron Gurney, while directing the jury to acquit the prisoner of the capital charge, instructed them that under a recent statute[29] they might find him guilty of an assault if the evidence warranted it. It is submitted that there could be no conviction of assault without the presence of unlawful force, and in the case in question the only force proved was that necessary to effect copulation. In a decision following closely after the foregoing case[30] the capital charge was held negatived by the evidence, and the trial continued as for an assault. The report says:

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[27] R. and R. 486, 1822. See also *R.* v. *Clarke*, 6 Cox C. C. 412, 1854, affirming *R.* v. *Jackson*.

[28] *R.* v. *Saunders*, 8 C. and P. 265, 1838.

[29] 1 Vict., C. 85, S. 11.

[30] *R.* v. *Williams*, 8 C. and P. 286, 1838.

"Price addressed the jury for the prisoner, and was stating that to constitute an assault there must be resistance in the party assaulted.

"Alderson, B. 'In an assault of this nature there need not be resistance—the fraud is enough. If resistance is prevented by the fraud of the man who pretends to be the husband, that is sufficient.'" Nothing is said with regard to the degree of force required to establish the capital charge.

The facts in *Regina* v. *Stanton*[31] were slightly different, but of the same nature as those in the foregoing cases. There Emma Brown had her physician indicted for an assault with intent to commit rape, with a count for a common assault, alleging that he had penetrated her person while pretending to administer an injection. In charging the jury Coleridge, J., said: "If there was force the full crime was complete. An assault with intent to commit a rape is very different from an assault with intent to have an improper connection. The former is with intent to have a connection by force; but here, according to the statement of the prosecutrix, the defendant desists the moment she resists, and at the most it could only be an attempt by surprise to get possession of the person of the prosecutrix, and that is not an assault with intent to commit a rape, but is an assault." In other words, the court says that while the evidence in this case, that the prisoner did not mean to perpetrate the crime if his fraud were discovered, might negative his guilt under the indictment for an attempt to commit, yet since the force employed was unlawful, he could be convicted of a common assault.

The three cases just discussed were all decided at *nisi prius*. The case of *R.* v. *Sweenie* was decided in 1854 by the High Court of Justiciary of Scotland, and, therefore, deserves greater consideration.[32] It appeared here that a woman had been violated while asleep by the prisoner, who fraudulently impersonated her husband. Lord Cowan, speaking for the majority of the court, disposed of several minor objections as immaterial, saying: "For still the act must have been perpetrated forcibly; and where is force charged

[31] 1 C. and K. 416, 1844.

[32] 8 Cox C. C. 223, 1858.

in this indictment? Nowhere, as an actual fact substantially alleged. Constructively it is said that in the absence of consent, which is assumed from the woman being asleep, there must have been force used in the act of connection. But this I apprehend cannot be viewed as the force which the law has declared necessary for the commission of this crime. That force is not the mere physical force required for the completion of the act of connection. What is requisite is the forcibly taking possession of the woman's person and having connection with her, her will resisting, or if not resisting, her will having been overcome by felonious acts of the assailer." His Lordship then goes on to state that he intends his last phrase to cover cases of stupefaction and unconsciousness produced by the prisoner; that the cases of children and insane women are not analogous, and that as to the case of a woman in syncope or in a state of intoxication, he would not deal with that until it arose, as it did not affect the point at issue.

On the other hand Lord President MacNeill in delivering the minority opinion adduced the following view: "Then as to the element of physical force or violence, that also must be subject to limitation and construction. The power of resistance must be removed without the application of any physical force, or it may be overcome by very little force. What degree of force or violence will be held to constitute rape must depend on circumstances. The degree of violence used may be expected to vary with the power of resistance. The law does not desiderate more force than is necessary to overcome the power of resistance, which may be greater or less according to the condition of the sufferer, who may be a robust, active woman, cool and self-possessed, or may be a poor cripple. I hold, therefore, that in considering what are the essentials of the crime of rape, the descriptive terms 'forcibly and against her will,' are to be construed with reference to the circumstances of the case, the physical and mental condition of the party injured."

The portions of the opinions just quoted show very well the conservative and the liberal treatment of the question. The majority adhered to the old idea that excessive "force"

was a necessary element of rape, while the minority recognized the fact that it is the first duty of a court of law to dispense justice, and finding that a strict construction of the word defeated their purpose, they construed it more liberally, in order to meet conditions comparatively novel in the law.

And as lately as 1884, in *R.* v. *Dee*,[33] Chief Justice May, of Ireland, in the Court for Crown Cases Reserved, said: "It is plain, however, 'forcibly' does not mean violently, but with that description of force which must be exercised in order to accomplish the act, for there is no doubt that unlawful connection with a woman in a state of unconsciousness, produced by profound sleep, stupor, or otherwise, if the man knows that the woman is in such a state, amounts to a rape."

Another kind of case in which the same question arises is where the facts show connection had with a non-resisting imbecile. Is such a connection "forcible"? In *R.* v. *Fletcher*,[34] Lord Campbell, C. J., held in terms that it is, and his decision was subsequently affirmed in *R.* v. *Barratt*[35] and in the analogous and leading case of *R.* v. *Camplin*,[36] where the facts showed that the prisoner had given the prosecutrix liquor for the purpose of exciting her, and then upon her becoming insensible, had violated her person, the point as to the degree of "force" necessary was raised and debated at length. In deciding the case Lord Denman, C. J., said, addressing the prisoner: "Your case, therefore, falls within the description of those cases in which force and violence constitute the crime, but in which fraud is held to supply the want of both."

In England, then, the law seems to be that in cases of fraudulent connection with a sane and conscious woman there is sufficient unlawful "force" in the act itself to amount to a common assault. It is not definitely held that the "force" employed is insufficient to maintain the capital charge; which, together with the charge of assault with intent, etc., is dismissed, on the ground that "consent" existed. The theory on which many of the cases go certainly is that

[33] 15 Cox C. C. 579, 1884.
[34] *Supra*, note 13.
[35] 11 Cox C. C. 498, 1873.
[36] *Supra*, note 14.

fraud supplies the want of force. In cases where imbecility or stupefaction exists, we have just seen that fraud being proved, no proof of additional force is required to sustain an indictment for rape.

In Scotland since *R.* v. *Sweenie* the term "forcibly" is strictly interpreted, and unless a woman has been rendered insensible by the prisoner, she is, unless specially protected by statute, open to violation by fraud or by anyone who may desire to possess her while unconscious and helpless.

In Ireland the decision in *R.* v. *Dee* sheds a ray of sunlight across this cobwebbed corner of the storehouse of the law, and taken in connection with the dissenting opinion in *R.* v. *Sweenie,* gives promise of better things to come. In Ireland since the foregoing case only so much "force" is required to support the charge of "rape" as the circumstances show to have been necessary to overcome the will of the prosecutrix, and if it appears that through the existence of fraud, imbecility, or stupefaction, no more force was necessary than that needed to perform the act, then such "force" is held unlawful and sufficient to support the capital charge. It is submitted that where there is no intelligent consent to the act, even the slightest touching of the parts in its performance is an application of unlawful force, and that the Irish rule is just, adequate and humane.

(*b*) Let us now see what the law upon this point is in the United States.

In *Bailey* v. *Com.*[37] the facts were that a stepfather stealthily gained his fourteen-year-old stepdaughter's room in the night when no help was near, and entering her bed, despite her frightened entreaties and protests, had his will, she not crying out nor physically resisting. In that case the court said: "Wherever there is a carnal connection, and no consent in fact, fraudulently obtained or otherwise, there is evidently, in the wrongful act itself, all the force which the law demands as an element of the crime."

In another case,[38] in sustaining a direction to a jury to the effect that the prosecutrix need not resist to the utmost

[37] 82 Va. 107, 1886.

[38] *State* v. *Shields*, 45 Conn. 256, 1877. See also *Osgood* v. *The State*, 64 Wis. 472, especially p. 474, 1885.

of her strength, but that the sufficiency of her resistance was for them to decide, Park, C. J., said: "The importance of resistance is simply to show two elements in the crime—carnal knowledge by force by one of the parties and non-consent thereto by the other. These are essential elements, and the jury must be fully satisfied of their existence in every case by the resistance of the complainant *if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force.*"

Wyatt (*a slave*) v. *The State*,[39] a Tennessee case, decided in 1852, dealt with an attempt to consummate the act by impersonating the husband. The court spoke decidedly as to this point as follows: "The current of authority is almost, if not entirely, unbroken on the subject. There is no respectable conflicting authority known to us. Fraud and stratagem then cannot be substituted for *force* as an element of this offence according to the existing law." *State* v. *Brooks*,[40] a North Carolina case, decided in 1877, is to the same effect.

In *Cornwell* v. *The People*,[41] Cooley, J., in dealing with the "force" required to constitute the crime, held, first, that infants were protected by statutory presumption, and that as to other women, both sane and insane, there must generally be proof of additional force. However, he went on to say: "But, though the definition of the offence implies the existence of a will in the woman, which has opposed the carnal knowledge, no violence is done to the law by holding, in any case where the woman, from absence of mental action, does not willingly acquiesce, that the physical force necessary to effectuate the purpose, however slight, is against her will. There are cases in which it has been held that if the woman's consent is obtained by fraud, she at the time supposing the man to be her husband, the crime of rape is not committed. But there are some cases in this country to the contrary, and they seem to us to stand upon much the better reasons and to be more in accordance with the general rules of criminal law. And in England where a medical practitioner had knowledge of the person

[39] 2 Swan (Tenn.), 394, 1852.
[40] 76 N. Car. 1, 1877.
[41] *Supra*, note 19.

of a weak-minded patient, on pretence of medical treatment, the offence was held to be rape. The outrage upon the woman and the injury to society is just as great in these cases as if actual force had been employed; and we have been unable to satisfy ourselves that the act can be said to be any less against the will of the woman when her consent is obtained by fraud than when it is extorted by threats or force."

In *State* v. *Tarr*,[42] though as we have seen *Cornwell* v. *The People* is approved as to another point, on the subject of "force" the court seems to entertain a far more rigid view than the Michigan tribunal, saying: "That while *proof of the intercourse without more,* with one of unsound mind will not establish force, this force may be found if there was an assault, violence or injuries." The necessity for excessive force was also insisted upon in *Bloodworth* v. *The State*,[43] a Tennessee case, affirming *Wyatt* v. *The State*. There it appeared that connection had been fraudulently obtained with a weak-minded girl by means of a fictitious marriage. In the course of the opinion Freman, J., said, referring to the Wyatt case: "It was settled in that case, that the language of our statute defining rape to be 'the unlawful carnal knowledge of a woman forcibly and against her will,' necessarily included force as an essential element of the crime, and that to attain the result by fraudulently obtaining consent to the act would not make out the offence."

With regard to the "force" necessary in cases of stupefaction and drunkenness, it was held in New York in 1867, in a case[44] so controlled by the criminal code of the state as to be of little general authority, that even where the prosecutrix is senseless from drugs or liquor, there must be additional "force" to constitute the crime, and the decision in *R.* v. *Camplin,* while referred to, is evaded on the ground that there the liquor was given to the woman with the object of exciting her, and that till she became unconscious she refused assent to the act, while in the case at bar the

[42] *Supra*, note 21. [43] 6 Baxter (Tenn.), 614, 1872.

[44] *People* v. *Quin*, 50 Barb. (N. Y.) 128, 1867. See also *Walter* v. *People*, Id. 144, especially p. 147.

evidence merely went to show intoxication resulting from a mutual drinking bout. In this case "forcibly" is construed with unusual strictness.

On the other hand, upon a similar state of facts, an opposite decision was rendered in *Com.* v. *Burke*,[45] Judge Gray holding that the crime of rape is committed when connection is forcibly had with an insensible woman whether or not such insensibility results from an act of the prisoner, and that the only force requisite under such circumstances is "such force as was necessary to accomplish the purpose." In *Don Moran* v. *The People*,[46] decided in 1872, the Supreme Court of Michigan receded from its position in *Cornwell* v. *The People*[47] and took narrower ground. It appeared that the prosecutrix had been placed under the medical care of Don Moran, and that by threatening her with an alternative operation dangerous to her life and involving much pain and suffering, he had induced her to submit to sexual intercourse with him for the alleged benefit of her health. On the question of the "force" present in this case, Christiancy, C. J., insisted that there must be a greater degree of "force" than that necessary for the act of copulation, and declared this so in all cases where the woman's mind is not unbalanced. He specifically deprecated the court's previous dicta in *Cornwell* v. *The People*, to the effect that in cases involving the personation of the husband, fraud should be held to supply the place of force, and in an elaborate opinion defended a strict construction of the term "forcibly"; curiously, however, when he came to the character of the force required, he adopted a liberality of construction totally at variance with his conservatism regarding the *degree*, for he held that "force" may consist of threats and falsehoods if they are of a nature calculated to scare the prosecutrix into submission.

In Texas it has been held in two cases[48] that the "force" required by statute is additional, and hence since no special protection is given by law to women of unsound mind over ten years of age, such unfortunates are liable to pollution,

[45] *Supra*, note 17. [46] 25 Mich. 355, 1872. [47] *Supra*, note 19.

[48] *Baldwin* v. *The State*, 15 Texas App. 275, 1883, and *Rodriguiz* v. *The State*, 20 Texas App. 542, 1886.

because frequently their violation cannot be construed as "forcible." And in his celebrated treatise on Criminal Law[49] the late Mr. Bishop says, that while "consent," even though fraudulently obtained, negatives rape; yet "were such consent void as consent, still where it exists there is probably not the force which is an ingredient in rape." Then in the same words used in *Bailey* v. *Com.*[50] he asserts that where there is no consent (fraudulent or otherwise) the act itself comprehends all the force required to constitute the crime.

If we sum up the American law we shall find that in nearly, if not all, jurisdictions the term "forcibly" is construed as including a degree of force *additional* to that necessary for the consummation of the act in all cases where the submission of a mentally competent prosecutrix is obtained, even though fraud be employed. The only thing opposed to this view seems to be the dicta of Judge Cooley in the Cornwell case, which was afterwards expressly reconsidered and disapproved by the same court in *Don Moran* v. *The People.*[51]

With regard, however, to cases of imbecility, stupefaction and drunkenness, there seems to be a wide difference of opinion, and while some courts hold that in such cases that degree of "force" comprehended in the act itself is sufficient, others insist that there must be some *additional* force to constitute the crime, even in cases where the prosecutrix has not the full use of her faculties at the time the act is committed.

The significance of the construction of the word "forcibly" is, that if it is strictly construed, *i. e.*, as implying additional force, then in cases of submission through fraud, even though such submission be held as not amounting to consent, the act not having been "forcibly" committed, cannot be "rape."

Therefore, before passing to the consideration of what legally constitutes "consent," it is submitted that the position of the law with regard to the construction of the term "forcibly" is archaic and narrow, illogical and inhumane.

[49] "Bishop on Criminal Law," Vol. II, Sec. 1120

[50] *Supra*, note 37.

[51] *Supra*, note 46.

Is there any sufficient reason why connection with an imbecile should be held forcible; but connection with a woman who thinks the man her husband not forcible? In both cases there is just the same degree of force employed, and in both the submission arises from precisely the same cause, ignorance of the nature of the act, for a woman deceived into believing that the man embracing her is her husband is as ignorant of the real nature of the transaction as an idiot, whose clouded brain fails to comprehend the mere physical significance of the connection.

As a first step then towards a much-needed reformation in this branch of the law, let all jurisdictions agree that where there is, as it is said, "no consent fraudulently obtained or otherwise," no additional force shall be required to constitute the crime. Then let them go farther, and hold that in all cases save those where intelligent consent is actually proved, the term "forcibly" shall be considered satisfied by proof merely of that force necessary for coition, for where the prosecutrix is unaware of the true nature of that to which she submits, it is unjust in the extreme to expect her to resist, and if she does not resist there will be no necessity for the exercise of any additional force. True it is, that in many jurisdictions the law on this subject may be regarded as settled, and in such jurisdictions the duty of changing the law will devolve on the legislatures. Where there is so, statutes should be promptly passed to remedy this defect; for defect it is, and one which every day of civilizing thought and progress renders more patent and more deplorable.

3. Let us now take up that portion of our subject which concerns the ascertainment of the legal meaning of the word "consent." And it should be here stated that there is no difference in meaning between "consent" and "assent," they being used concurrently and interchangeably by the most learned jurists.

Webster defines "consent" as meaning "to accord in mind," and certainly to the layman such is the only meaning which the word conveys, it being a compound derivative from two Latin words, for which Webster's definition might serve as a translation. Such, then, being

the literal significance of the word, let us see if the same or a different meaning attaches to it when legally construed in connection with the definition of "rape."

In pursuing this investigation we shall find it necessary to discuss as briefly as is consistent with the attainment of our object (*A*) the distinction between "consent" and submission and (*B*) those classes of cases actually, including both consent and submission, in which, whether rightfully or wrongfully, the doctrine of "consent" has been invoked as a defence to the charge of rape, to-wit: (1) Cases of intelligent and express consent; (2) Cases of intelligent submission through fear; (3) Cases of unintelligent submission through lack of mental capacity, stupefaction, or drunkenness (often inexactly termed "cases of unintelligent consent"); (4) Cases of submission obtained through fraudulent representations (sometimes incorrectly known as cases of consent obtained by fraud).

(*a*) As to the nature of the act.

(*b*) As to the consequences likely to ensue from its non-performance.

(*c*) As to the identity of the person performing the act.

A. It has often been definitely held that submission, while it negatives the idea of physical resistance, in no way implies mental acquiescence. Thus where a prostitute, finding herself surrounded by a crowd of rough men, and the door of the house, to which she had fled for refuge, barred against her, submitted without a struggle to repeated acts of violation, during all of which she was held against the door, it was charged that if she merely submitted, but did not consent, the capital charge might be sustained.[52] And in the famous decision of *R.* v. *Case*,[53] which we shall examine subsequently, Patterson, J., said in the course of the opinion: "Mr. Horn confounds active consent and passive non-resistance, which, I think, the learned recorder has very accurately distinguished. Here the girl did not resist; but still there was no consent."

In a later case it was charged that non-resistance or submission on the part of a sleeping woman could not be

[52] *R.* v. *Hallett et al.*, 9 C. and P. 748, 1841

[53] 4 Cox C. C. 220, 1850.

pleaded as a defence, such a woman being incapable of resisting.[54] In this country perhaps the leading case on this point is *Bailey* v. *Com.*,[55] where it was held that though the girl submitted without struggle or outcry to her stepfather's embraces, still the attendant circumstances were sufficient to free her submission from any suspicion of consent.[56]

B. Turning now to those cases in which "consent" has been pleaded as a defence to rape, we shall examine:

1. Cases of intelligent and express consent.

Cases of express consent seldom if ever come before the courts, because where the defendant can make such a defence he is not generally compelled to do so.

2. Cases of intelligent submission through fear.

As under (*A*) the most important American case is *Bailey* v. *Com.*, of which nothing more need be said. In *Iowa* v. *Cross* it appeared that a fifteen-year-old girl was ravished by the prisoner, who, after locking her in a room, had forcible connection with her. She made no violent outcry, however, and her clothes were not torn. The verdict at the trial was guilty of an assault with intent to commit, etc. The verdict was sustained on appeal, the court saying, "In this case, differing from that of Tomlinson, *supra*, the prosecutrix is a mere child, was in the hands of a strong man, and may have been overcome by fear and submitted, without consenting. This the jury may have found, and we are by no means prepared to say they were not justified in so doing."

It is clear, therefore, that proof of submission through fear is fatal to the maintenance of "consent" as a defence.

3. Cases of unintelligent submission through lack of mental capacity, stupefaction, or drunkenness.

This class of cases, more than any other, seems to have troubled the judicial mind, because, if the law as to "consent" promulgated in cases where the submission, or as it is termed "consent," was obtained by fraud, is consistently applied to cases of this character, the result is simply that

[54] *R.* v. *Mayers*, 12 Cox C. C. 311, 1872. [55] *Supra*, note 37.

[56] See also *Iowa* v. *Cross*, 12 Iowa, 67, 1861, and *McQuirk* v. *The State* (*supra*).

the purity of womankind is made entirely dependent on their mental capability, the mantle of legal protection being scornfully withdrawn from those whose brains for what cause soever are either temporarily or permanently unbalanced. But let us see how the courts have coped with this difficulty.

The case of *R.* v. *Richard Fletcher*[57] showed by its facts the violation of a thirteen-year-old girl of weak intellect, incapable of distinguishing right from wrong, and unable to even "distinguish the house in which she lived from that of any of the neighbors." A conviction was had, which was affirmed on appeal, Lord Campbell, C. J., holding that here not only did the prosecutrix not consent to the connection, but that because of her mental incapacity she was incapable of consenting. His Lordship concludes: "It would be monstrous to say that these poor females are to be subjected to such violence without the parties inflicting it being liable to be indicted. If so, every drunken woman returning from market and happening to fall down on the roadside may be ravished at the will of the passers-by."

In the case of *R.* v. *Charles Fletcher*[58] it seemed that the prosecutrix, a weak-minded girl of sixteen years, was not absolutely devoid of perception. The evidence, though circumstantial, was held by the jury to establish the fact of connection. The prisoner set up "consent" in defence. Verdict guilty. The case was reserved by Keating, J., on the question as to whether it should have been left to the jury at all, there being no evidence against the prisoner, except the fact of connection and the imbecile state of the girl. On appeal it was held that it could not be said under the evidence that the connection was either against the girl's will or without her consent. As to the crown's contention that an idiot is incapable of consenting, it might be said that in this respect an idiot stands in the same position as very young children, and since it took an act of Parliament to establish their incapacity, it would require another act to extend the same presumption to those of feeble mind. The conviction was quashed.

[57] *Supra*, note 13.

[58] 10 Cox C. C. 248.

Both of the foregoing cases were reviewed in 1873 in the case of *R.* v. *Barratt*.[59] The prosecutrix was one Mary Redman. It was proved by her relatives "that she was fourteen and a half years old, and that ever since she was six weeks old she was blind and wrong in her mind; that she was hardly capable of understanding anything that was said to her, but that she could go up and down stairs by herself; that if placed in a chair by anyone she would remain there till night; that if told to lie down she would do so; that she could not communicate to her friends what she wanted; that she could feed herself a little, but that she was obliged to be dressed and undressed, and that she was unable to do any work; that the prisoner had known Mary Redman and her family about two years, and knew that she was not right in her mind."

In reserving the case the learned trial judge said: "I told the jury that if the prisoner had connection with the girl by force, and if the girl was in such an idiotic state that she did not know what the prisoner was doing and the prisoner was aware of her being in that state, they might find him guilty of rape; but if the girl from animal instinct yielded to the prisoner without resistance, or if the prisoner from the girl's state and condition had reason to think the girl was consenting, they ought to acquit him." A verdict of guilty was found. The question on appeal was whether or not the jury should have been given binding instructions to acquit.

It was decided that the conviction was proper, on the ground that the evidence showed a case of extreme imbecility, a circumstance implying incapacity to "consent." Such was the case, also in *R.* v. *Richard Fletcher*[60] but not in *R.* v. *Charles Fletcher*,[61] where, in the absence of complete idiocy, affirmative evidence was required to negative "consent" when pleaded defensively. It was, therefore, clear that the Fletcher cases were perfectly consistent in theory, different results having been attained because of dissimilarity in their facts.

From these cases the law in England seems to be that where the facts show such idiocy or imbecility that the mind

[59] 12 Cox C. C. 498, 1873. [60] *Supra*, note 13. [61] *Supra*, note 58.

of the prosecutrix is a blank, unresisted connection amounts to rape; but that where the prosecutrix, though so enfeebled in intellect as to be incapable of reasoning, has yet some power of perception and is not insensible to animal passion, an unresisted connection cannot amount to rape, because in the absence of proof that she was coerced by the prisoner such non-resistance is evidential of "consent."

On the subject of "stupefaction" an important decision is that of *R.* v. *Mayers*,[62] where the evidence showed that the prisoner either had or attempted to have connection with his sister-in-law, the prosecutrix, while she was asleep.

"Consent" and lack of "force" were pleaded in defence.

Lush, J., in charging the jury instructed them that if they believed the prisoner attempted to have connection with the prosecutrix while she was asleep, they should find him guilty of an attempt; the law being that a sleeping woman is incapable of consenting to the act.

The Queen v. *Camplin*[63] is the principal authority with regard to connection had with a drunken woman. It there appeared that the prisoner had administered liquor to a thirteen-year-old girl for the purpose of exciting her into complying with his desires. In this he had failed, she continuing to resist his importunities so long as she remained conscious; becoming, however, insensible from intoxication, the prisoner took advantage of her condition and violated her.

On appeal it was held that the offence amounted to rape, for though the liquor was administered with another intent, still the prosecutrix, so long as she was able, had refused the prisoner her assent, and at the time he gave her the liquor he was well aware that its probable result would be to render her senseless, and when he committed the act he knew by reason of her own recent expressions that it was directly contrary to her conscious will. Since, therefore, he knowingly did that which he knew to be without her consent, in consequence of an act of his which he knew would probably afford him the opportunity to do so, he was properly convicted of the crime.

As to stupefaction and drunkenness, then, the English

[62] 12 Cox C. C. 311, 1873.

[63] *Supra*, note 14.

law would seem to be that a sleeping woman is incapable of consent, and that a woman rendered insensible by an act of the prisoner will be presumed not to consent if her actions prior to becoming insensible are such as to reasonably support the presumption.

Now as to the same kind of cases in the United States.

In *Cornwell* v. *The People*,[64] already frequently referred to, Cooley, J., decided that since the Michigan statute said "against her will," and since that phrase differed materially from "without her consent," any connection with a weak-minded woman to amount to rape must be entirely without concurrence of her disordered mind. If she had sufficient "will" to cause her to stand on her head in an effort to simulate an hourglass, it followed that she had sufficient "will" to permit sexual intercourse, which being in accordance with that animal desire for coition often strongly present in the insane, could scarcely be held against her "will," unless there was some evidence that she resisted the act.

In *State* v. *Tarr*,[65] however, a somewhat more liberal rule was laid down, it being held that in cases of connection had with an idiotic or imbecile woman, the presumption is that the connection was "against her will" in the absence of affirmative proof that she consented. The court, however, approves of the Cornwell case and of the doctrine of "animal desire," explaining this decision on the ground that the facts here showed a blankly idiotic mind and not an active, though perverted, mentality.

In *Bloodworth* v. *The State*[66] this question was incidentally touched upon. It was testified that the prosecutrix "was a woman of very weak mind and almost an idiot." Referring to which testimony the court said: "This is, as we have said, very unsatisfactory evidence as to the capacity of the party; and from it we could hardly be justified in concluding that she was an idiot, wholly incapable of consenting to the act complained of," etc.

And in *McQuirk* v. *State*[67] it was said by Sommerville, J.: "The mere fact that a woman is weak-minded

[64] *Supra*, note 19.
[65] *Supra*, note 21.
[66] *Supra* note 43.
[67] *Supra*, note 24.

does not disable or debar her from consenting to the act. It has been said that a woman with a less degree of intelligence than is requisite to make a contract may consent to carnal connection, so that the act will not be rape in the man; but, if she is so idiotic as to be absolutely incapable of consent, the connection with her is rape." 2 Bish. Crim. Law, p. 1121. The principle as expressed by another high authority is that "carnal intercourse with a woman incapable from mental disease (whether that disease be idiocy or mania) of giving consent is rape." 1 What. Crim. Law, p. 560. "The evidence tends to show that the prosecutrix was weak-minded merely, not that she was idiotic or so *non compos* as to be incapable of giving consent to the act of carnal connection with the defendant. In view of this fact and the principles above announced, we are of opinion that the circuit court erred in refusing the second and third charges requested by the defendant."

The same question arose in Texas in *Baldwin* v. *The State*,[68] where it appeared that the prosecutrix, "Big Sis Turner," was an epileptic, whom the prisoner was alleged to have pushed down on a plank and had intercourse with. The evidence was very loose and contradictory. The prisoner was found guilty and sentenced to death. On appeal it was held: that in Texas mental incapacity did not relieve the state from the necessity of proving lack of consent obtained by force, threats or fraud, the only exception as to consent being expressly limited to children under ten years of age. In concluding the opinion the court called the attention of the legislature to the serious defect in the code, made apparent by this case, and suggested the passage of a remedial act.

No attention being paid to said suggestion, the same tribunal three years later, in the case of *Rodriguiz* v. *The State*, which in other respects is merely an affirmation of *Baldwin* v. *The State*, spoke as follows: "So profoundly impressed was this court with the radical deficiency of our law in this particular, that it was respectfully suggested in the Baldwin case that the legislature should pass an act which would supply this serious defect in the law. And

[68] *Supra*, note 48.

again it was recommended to the nineteenth legislature that they amend Article 520 so as to cure this defect. (Rept. of Atty.-Gen., 1884, p. 17.) But the legislature seems to have thought it unnecessary. At all events they have not acted upon the suggestion or recommendation. Meanwhile one of the most revolting and heinous crimes against humanity can be perpetrated with impunity, because it is no crime under our law."

Nor are these the only instances in which the judicial conscience, revolting from that decision which the state of the law seemed to render inevitable, has found expression in an appeal for legislative aid to cure the wrong. Similar appeals are contained in both *Bloodworth* v. *The State*[69] and *Lewis* v. *The State*,[70] and it would be indeed strange were the fact otherwise, for what man with a heart in his body can calmly contemplate, much less administer, a system of law which permits the unresisted violation of a weak-minded woman to go unpunished, on the ground that unless she is as insensible as a lump of clay, she must resist or else she can obtain no redress; but must, in effect, be punished, for following like a rudderless ship a mighty current of irresistible power.

On the point as to the degree of the offence committed by having connection with a drunken woman, it was held in *People* v. *Quinn*[71] that since by the New York code such an act had been removed from the category of rape and made a separate offence, proof of an attempt to perpetrate such a connection would not sustain an indictment for an attempt to commit rape. In the course of the opinion the court expressed the idea of non-consent which obtains in New York and which was really causative of this decision, as follows: "And so it has been held by our courts, since the Revised Statutes, that to constitute the crime of rape the connection must be absolutely against the will of the female, and that there should be the utmost reluctance and the utmost resistance by her."

Opposed to this case on this ground, as well as with regard to the construction of the term "forcibly," is *Com.*

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[69] *Supra*, note 43. [70] 30 Ala. 54, 1857. [71] *Supra*, note 24.

v. *Burke*,[72] the leading Massachusetts decision, the court holding there that connection with an intoxicated woman was rape, whether or not the intoxication was caused by the act of the prisoner, because no woman in such a condition was capable of consenting.

It would thus appear that while there are few cases with regard to "drunkenness" in the United States, their decision, like those involving similar points, depends on the definition of consent prevailing in the particular jurisdiction where they arise.

There is, it seems to the writer, one class of cases which so far has not been dealt with directly by the judges, in which though the connection is had with a non-resisting insane woman, it would be most unfair to convict the prisoner of rape; that is to say, cases in which the conduct of the prosecutrix induced a *bona fide* belief in the mind of the prisoner that she had intelligently consented.

It is submitted that much difficulty might have been avoided had *Cornwell* v. *The People*[73] been solved along this line. It will be remembered that there the prosecutrix was insane, one of the features of her mental derangement being a morbid desire for sexual intercourse; that her insanity was unknown to the prisoner, and that the evidence went to show that the connection had taken place at her solicitation. Under such facts it is clear that it is unreasonable to convict a man of rape. But that being admitted, the important question remains, how shall he be acquitted without endangering the chance of convicting others less deserving of clemency?

It is suggested that it might logically be said in such a case, here is no rape, because in order to have a crime there must be an intent coupled with an act. The act doubtless is present but not the intent; the only intent is to have carnal knowledge of a consenting woman, and such an intent is aroused and encouraged by the very acts of the prosecutrix. These facts really present the opposite of the argument herein contained for the insistence upon intelligence as an element of "consent," for no man can be said to intend rape, which is a connection against the will of the

[72] *Supra*, note 17. [73] *Supra*, note 19.

woman, when unaware of her mental deficiency he proceeds towards the consummation of the act with her apparent approval and active co-operation.

Would it not have been better to have treated the Cornwell case in such a way, than to have arrived at a similar result by an illogical treatment of the meanings of "forcibly" and "consent"; a treatment, too, which, as has been pointed out, leaves a large class of unfortunate women who, unlike the prosecutrix, furnish no provocation for the crime, an easy prey for the heartless and the lustful?

The theory suggested is not without authority. As far back as A. D. 1221 we find the following case[74] which came before the justices in Eyre at Worcester in that year: "Margery, daughter of Aelfric, appeals Reginald, son of Aunfrey of Coventry, for that in the King's peace on the Vigil of St. Paul, he raped her; and this she offers to deraign against him as the Court shall consider."

"And Reginald comes and defends the King's peace and the rape and all of it, as the Court shall consider, and puts himself upon a verdict for good and ill, and gives the King one mark that he may have a verdict, for which mark Walter of Coventry is pledge. The jurors say that he is not guilty of rape, because a long time before this he had her of her own free will and again two years afterwards in the house of her father, and they say that no cry was raised. And so it is considered that he go thence quit and she be in mercy for her false appeal let her be in custody."

In "Hawkins' Pleas of the Crown"[75] the same thought may be traced in the statement that anciently it was considered that a man could not be guilty of rape with his own concubine, the idea evidently being that her previous acts were quite sufficient to negative any act of non-consent she might subsequently employ, and that her lover would be excusable if he put such act down to mere caprice or coquetry and refused to treat it seriously or to allow it to deter him from accomplishing his purpose.

And in *R.* v. *Flattery*,[76] Denman, J., said: "There is one case where a woman does not consent to the act of

[74] Select Pleas of the Crown. Sel. Soc. 166. (Page 109.) (1887.)
[75] Hawkins, P. C. Tit., "Rape."
[76] *Supra*, note 15.

connection and yet the man may not be guilty of rape, that is where the resistance is so slight and her behavior such that the man may *bona fide* believe that she is consenting; but that does not apply to the present case."

The following significant passage is also quoted from *McQuirk* v. *The State*,[77] a case decided by the Supreme Court of Alabama in 1888. "The consent given by the prosecutrix may have been implied as well as expressed, and the defendant would be justified in assuming the existence of such consent if the conduct of the prosecutrix towards him at the time of the occurrence was of such a nature as to create in his mind the honest and reasonable belief that she had consented by yielding her will freely to the commission of the act, any resistance on the woman's part falling short of this measure would be insufficient to overcome the implication of consent." While the soundness of the last sentence seems open to question, it is submitted that several of the cases under this head could have been decided with equal justice under such a theory as under that employed, with the great advantage that their decision would not, through the straining of non-applicable rules, have been fraught with danger to women whose cases were only partly analogous.

3. We now pass to cases of submission obtained through fraudulent representations, of which the first sub-division is: (*a*) As to the nature of the act.

In cases of this kind the rule has always been that the submission thus obtained did not amount to consent. In *R.* v. *Case*,[78] the leading case on the subject, it appeared that "the defendant was a medical practitioner. Mary Impitt, who was fourteen years old, was placed under his professional care by her parents in consequence of illness arising from suppressed menstruation, and on the occasion of her going to his house, and informing him she was no better, he observed, 'Then I must try further means with you.' He then took hold of her and laid her down in his surgery, lifted up her clothes, and had carnal connection with her, she making no resistance, believing (as she stated) that she was submitting to medical treatment for

[77] *Supra*, note 24. [78] 1 Den. Cr. Cas. 582.

the ailment under which she labored." The indictment was for assault, the verdict was guilty. The judge charged that if the jury believed that the prosecutrix was ignorant of the nature of the act, they must find the prisoner guilty, since in that case her submission could not amount to consent. On appeal the above instruction was held correct and the conviction affirmed.

And in *R.* v. *Flattery*[79] a like decision was rendered on similar facts as recently as 1877. And in connection with this case it should be noted that a desire was therein judicially expressed for the reconsideration of *R.* v. *Barrows,*[80] which will be dealt with under the last subhead of this part of our subject.

In this country *Pomeroy* v. *The State*[81] is the leading authority in this class of cases. There the usual facts appeared, namely, the violation of an innocent woman by a "quack doctor" under the pretence of medical treatment.

The decision was the same as in the cases above mentioned; indeed, they were both specifically mentioned and approved of, the court saying: "The case is exactly within the words of Wilde, C. J., in *R.* v. *Case,* 1 Den. Cr. C., at p. 582: "She consented to one thing, he did another materially different, on which she had been prevented by his fraud from exercising her judgment and will."

Let us now consider: (*b*) Misrepresentation as to the consequence likely to ensue from non-performance of the act.

The case under this head to which it is desired to direct special attention is that of *Don Moran* v. *The People.*[82] Here it appeared that the prosecutrix had been sent to reside at the house of the prisoner for medical treatment. He told her that he could cure her easily by having sexual connection with her in order to enlarge her parts so that her "whites," which were inverted, might come away, and that her father had consented to his having connection with her for such a purpose. If she did not consent to this, he said, he would be obliged to enlarge her "parts" with instruments, an operation which would probably result

[79] *Supra,* note 15.
[80] 11 Cox 191.
[81] 94 Ind. 96, 1883
[82] *Supra,* note 46.

fatally to her. Thus artfully frightened and skilfully importuned, the girl *consented* to the act. It is submitted, though the case was decided differently, that she did consent, for here, unlike the cases in the preceding section, she knew the nature of that to which she submitted, and no fear of subsequent ill-health can purge a woman of the shame attached to active co-operation in her own dishonor. It is admitted that such cases are on the border line of those where submission cannot amount to consent because obtained through fear; but it is thought that where the danger threatened is of an indirect nature and does not necessarily involve the loss of life, that a woman should not be excused if she intelligently barters her honor for her physical betterment.

In *Clark* v. *The State*,[83] a case similar in theory, it appeared that the prosecutrix submitted to sexual intercourse on being promised some candy. Counsel for the prisoner requested the court to charge: "That if the prisoner procured the consent of the party ravished by promises, the jury could not find him guilty." This instruction was refused and the refusal was sustained on appeal, on the ground that the woman having intelligently submitted to the sexual embrace, no misrepresentations or fraudulent promises as to either what would or would not happen as a result of such submission could alter the fact that her submission, having been obtained without fraud, as to the act or the person committing it, amounted in law to consent, and hence absolved the prisoner of the crime charged. It is believed that *Clark* v. *The State* should be followed in principle in deciding cases relevant under this sub-head which may arise in the future.

We now come to our last sub-division: (*c*) Misrepresentation as to the identity of the person performing the act.

We have already examined many of the authorities on this subject under the head of the "force" necessary to constitute the crime, and now we shall see how they deal with the other horn of the dilemma, namely, the sufficiency of "consent" as a defence under the facts which they present.

[83] 30 Texas, 448. See also: *People* v. *Brown*, 47 Cal. 447; *People* v. *Bransby*, 32 N. Y. 525, and *Hull* v. *The State*, 22 Wis. 553.

The leading English case on this subject is *Rex* v. *Jackson,* decided in 1822 by the Court for Crown Cases Reserved. The case is very poorly reported, no written opinion being given; but merely a rough digest of the result by the reporters themselves. It appeared that the prisoner penetrated a married woman by fraudulently inducing in her mind the belief that he was her husband. The jury found that it was his intent to have connection with her, if possible, by means of said fraudulent personation; but to desist if discovered and not to force her. The following is the digest of the opinion: "The case was considered by The Judges in Trinity term, 1822, when four Judges thought, that the having carnal knowledge of a woman whilst she was under the belief of its being her husband would be a rape, but the other eight Judges thought that it would not; and Dallas, C. J., pointed out forcibly the difference between compelling a woman against her will, when the abhorrence which would naturally arise in her mind was called into action, and beguiling her into consent and co-operation; but several of the eight Judges intimated, that if the case should occur again, they would advise the jury to find a special verdict."

How much better it would have been for the logic of those cases in which *R.* v. *Jackson* has been followed, if this "difference" so forcibly pointed out by the learned judge had been spread upon the face of the report, instead of being held in solution, as it were, and never precipitated.

It will also be noticed that one-third of the court dissented, and of the majority several confined their decision to the case in hand.

For some inexplicable reason, however, the majority opinion in this case was regarded as having definitely settled the law on this point, a view of the case which would probably have surprised none more than the learned gentlemen who decided it.

In *R.* v. *Saunders*[84] it appeared that Mr. and Mrs. Cleary retired one evening, and that during the night Mrs. Cleary felt a hand pass around her and turn her over, to which, believing it was her husband, she made no resistance,

[84] *Supra,* note 28.

nor did she resist the connection which immediately took place. While the connection was going on, however, she perceived from the man's breathing that he was not her husband, and immediately pushed him off. The poor woman was then so overcome with shame and mortification that she ran downstairs and hung herself, being cut down only in time to save her from death by strangulation. Mr. Cleary it seemed had been obliged, unknown to his wife, to leave the room some minutes before the occurrence and was absent while it was taking place.

On this state of facts Gurney, B., instructed the jury that the offence of rape had not been committed, "as the crime was not committed against the will of the prosecutrix, as she consented, believing it to be her husband"; he instructed them, however, that they might find the prisoner guilty of an assault (which was done), concluding his charge in these words: "Although in point of law this is not a rape, I consider it one of the most abominable offences that can be committed."

In *R.* v. *Williams,*[85] which is reported in the same volume with the Saunders case, the facts were substantially the same, and on its being made clear that the connection had ended before the prosecutrix discovered the imposition, Alderson, B., said: "That puts an end to the capital charge. The case of *Rex* v. *Jackson* is in point, but the case must proceed as to the assault."

R. v. *Clarke*[86] is a very definite affirmation of *R.* v. *Jackson.* In reserving this case for the Appellate Court, Crowder, J., stated the facts as follows: "It appeared in evidence that Jane Murgatroyd went to bed at half-past nine o'clock in the evening, leaving the outer door of her house unfastened, in the expectation of her husband's return home. Having fallen asleep, she was awakened at about half-past two o'clock by a man whom she believed to be her husband passing over her and getting into bed on the opposite side from that on which she was lying. She then fell asleep again, and in about ten minutes was awakened by the man in bed with her drawing her towards him and having connection with her. She assented to the

[85] *Supra,* note 30. [86] *Supra,* note 27.

connection in the belief that the man was her husband. She afterwards fell asleep again and awoke in about twenty minutes, and then first discovered that the man in bed with her was the prisoner at the bar, who, as soon as he found himself detected, jumped out of the bed and went away." Verdict guilty, with the further finding that the prisoner's intent was to have connection with the prosecutrix fraudulently, but not by force. The case was reserved because of the dubious character of the decision in *R.* v. *Jackson.*

On appeal, however, the matter was settled in short order, to-wit: "Jervis, C. J.: 'We cannot permit this matter to be opened now. We have spoken to several of the other judges upon the subject, and they all think that the decision in *R.* v. *Jackson* is conclusive.' Alderson, B.: 'Most of us think it right.' Coleridge, B., Martin, J., and Crowder, J., concurred. Conviction quashed."

In 1868 the question arose in the case of *R.* v. *Barrow,*[87] in which case the prosecutrix, one Harriet Geldart, testified as follows: "I and my husband lodge together at William Garner's. We sleep upstairs on the first floor and were in bed together on the night of Saturday the twenty-first of June. I went to bed about twelve o'clock, and about two o'clock on Sunday morning I was lying in bed and my husband beside me. I had my baby in my arms and was between waking and sleeping. I was completely awakened by a man having connection with me and pushing the baby aside out of my arms. He was having connection with me at the moment when I completely awoke. I thought it was my husband, and it was while I could count five after I completely awoke before I found it was not my husband. A part of my dress was over my face, and I got it off, and he was moving away. As soon as I found it was not my husband I pulled my husband's hair to awake him. The prisoner jumped off the bed."

Verdict guilty and the case reserved.

On appeal Bovill, C. J., said: "We have considered this case. It does not appear that the prosecutrix was asleep or unconscious at the time when the first act of connection took place. What was done was, therefore, with her con-

[87] *Supra*, note 80.

sent, though that was obtained by a fraud. We are of opinion that this case comes within that class of cases in which it has been decided that where, under such circumstances, consent has been obtained by fraud, the offence does not amount to rape."

Such was the state of the law in England when the Court for Crown Cases Reserved in Ireland decided *R.* v. *Dee*[88] in 1884. In that case the evidence showed that the prosecutrix, Judith Gorman, had gone to her bedroom on the evening of June 9, 1884, about nine o'clock, her husband just before that having left the house on a fishing excursion. On entering her room she lay down on the bed without undressing and fell asleep. Later she heard someone enter the room and, thinking it was her husband, said: "You came in very soon." She received no answer. The man then threw himself upon her and had connection with her; but while the connection was going on she discovered by feeling the man's hair that he was not her husband, as she had believed he was, and she then ran downstairs and called a neighbor to her assistance. The verdict was guilty. In reserving the case the judge advised the court above that all the evidence of the prosecutrix should be treated as true.

On appeal the conviction was affirmed by an unanimous court, and so clearly and comprehensively are the reasons in support of the decision expressed by May, C. J., in the course of his very able opinion, and so adequately does he express the views of the writer upon the subject, that it is felt that a somewhat extended extract from his opinion may very profitably be inserted at this point. His Honor said: "The question arises now for our consideration, are we bound to follow the decisions in England to which I have referred? The series of cases to which I have drawn attention appear to be an echo of the first case of *Rex* v. *Jackson*. The others followed, no further argument being treated as necessary. Nevertheless, if the doctrine thus established had been adopted by the judges in England without objection, I do not think that this court should establish a different legal determination, unanimity on such points being of great importance. In its inception, how-

[88] *Supra*, note 33.

ever, the original case of *Rex* v. *Jackson* was dissented from by four of the twelve judges who heard it, while of the majority several apparently doubted the doctrine there contended for. In the case of *Reg.* v. *Flattery* all the judges desired that this doctrine should be re-considered. In Ireland, until the present case, no similar question seems to have arisen; and it appears to me, under all the circumstances, that it is competent for us, and it is our duty to consider the doctrine of those English decisions upon their merits. Now, rape being defined to be sexual connection with a woman without her consent, or without, and therefore against, her will, it is essential to consider what is meant and intended by consent. Does it mean an intelligent, positive concurrence of the will of the woman or is the negative absence of dissent sufficient? In these surgical cases it is held that the submission to an act believed to be a surgical operation does not constitute consent to a sexual connection, being of a wholly different character; there is no *consensus quoad hoc.* In the case of personation there is no *consensus quoad hanc personam.* Can it be considered that there is a consent to the sexual connection, it being manifest that, had it not been for the deceit or fraud, the woman would not have submitted to the act? In the cases of idiocy, of stupor, or of infancy, it is held that there is no legal consent, from the want of an intelligent and discerning will. Can a woman, in the case of personation, be regarded as consenting to the act in the exercise of an intelligent will? Does she consent, not knowing the real nature of the act? As observed by Mr. Curtis, she intends to consent to a lawful and marital act, to which it is her duty to submit. But did she consent to an act of adultery? Are not the acts themselves wholly different in their moral nature? The act she permitted cannot properly be regarded as the real act which took place. Therefore, the connection was done, in my opinion, without her consent, and the crime of rape was constituted. I, therefore, am of opinion that the conviction should stand confirmed."

The best evidence of the way in which the foregoing case was regarded in England is afforded by the following paragraph of the so-called "Criminal Law Amendment Act,"

passed by Parliament in 1885, to-wit: "Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape."[89] This legislation righted a great wrong, and though it is thought the same result might have been accomplished by overruling *Rex* v. *Jackson* when a similar case next arose, still in view of the known conservatism of the English Bench with regard to precedents, it is probable that the wiser course was adopted.

In the United States there have fortunately not been many cases of this kind, and in those which have arisen the absence of "force" has been made the principal ground of decision. In *Lewis* v. *The State*,[90] however, it was clearly held that connection obtained by fraudulent personation of the husband was had with the consent of the prosecutrix, and a similar decision was reached in *Bloodworth* v. *The State*,[91] where the fraud consisted in the performance of a fictitious marriage ceremony. It is true such decisions were disapproved in general terms in *Cornwell* v. *The People*,[92] but that disapproval was reversed as insufficiently considered dicta in *Don Moran* v. *The People*.[93] The only bright spot in the American cases is a brief comment, by the wayside as it were, which fell from the lips of Howk, C. J., in *Pomeroy* v. *The State*,[94] to this effect: "The case is, therefore, not within the authority of those cases which have decided, decisions which I regret, that where a man by fraud induces a woman to submit to sexual connection, it is not rape."

It seems then from the above indications that future cases of this character arising in this country, if they are not decided adversely to the prosecutrix on the ground of insufficient "force," will be so decided on the theory that her submission to the fraud amounts to consent. If this article accomplishes nothing else, the writer hopes that it

[89] 48 and 49 Vict., C. 69. See also Chitty's English Statutes, Vol. III. Tit., "Criminal Law," p. 195.
[90] *Supra*, note 70.
[91] *Supra*, note 43.
[92] *Supra*, note 19.
[93] *Supra*, note 46.
[94] *Supra*, note 81.

will cause those jurists who may in the future be obliged to declare the law in this regard to examine the British decisions with care and discrimination, to notice the instability of opinion which is manifest in *Rex* v. *Jackson,* the blind way in which for years its sum total was copied, the final triumph for clear reason and natural justice marked by *R.* v. *Dee,* and finally, and most important of all, the intervention of the legislature, by which all the errors of the past were expunged from the records of the law. In few states it is thought would a similar line of decisions make so drastic a measure necessary, but whether by adjudication or legislation it matters little, so long as the desired result be obtained and one more pitfall is removed from the path of virtuous womanhood.

We now come to the second main division of our topic, to-wit:

II. "Consent" as a Defence to an Indictment for an Assault with Intent to Commit Rape.

Assault with intent, etc., is a less offence than rape, being supportable on evidence going to show that some degree of force was applied by the prisoner to the body of the prosecutrix in the course of an attempt to consummate the crime of rape.

Thus in *R.* v. *Mayers*[95] it seemed that the prisoner had made an unsuccessful attempt to have connection with his sister-in-law while she was asleep, and the court instructed the jury that if they believed the foregoing to be true, they should find the prisoner guilty of an attempt, which was done.

In accordance with the general rule, "consent," where proved is a good defence to a charge of assault with intent, etc. It will be found that pretty much the same theories obtain with regard to this offence as to the preceding one. For instance, it has been definitely held in a number of cases that in the absence of evidence of *additional* "force," a conviction of an attempt or an assault with intent, etc., cannot be obtained. We also meet with cases like *People*

[95] *Supra,* note 62.

v. *Quinn*,[96] where though the crime would have been clearly constituted at common law, yet since, by reason of statutory alterations of the definition of the capital crime, the attempt, if successful, would not have amounted to "rape"; therefore, the acts themselves were held insufficient to justify a conviction of an assault with intent to commit rape.

While perhaps not strictly germane to this head, it may be well to notice a class of cases in which the evidence is considered insufficient to warrant a conviction either for rape or for assault with intent to commit, etc., but where the prisoner was found guilty of a common assault. This is not infrequent in the early English decisions (see "force," etc.), but in this country it has not been of frequent occurrence; and when it has happened there have generally been unusual facts. For instance, in *Richie* v. *The State*[97] the facts were that the prisoner entered the house of the prosecutrix (a prostitute) late at night in company with three other men, and that they then and there, in a rude, insolent and beastly manner, performed the sexual act upon her six or seven times, while her little nine-year-old daughter lay awake beside her. It was decided that though rape was not proved, the prisoner was rightfully found guilty of an assault, because though the prosecutrix might have consented to the act itself, still she did not consent to the violent and humiliating manner in which it was performed. See also *Regina* v. *Hallett*.[98]

Closely connected in theory with the foregoing cases is a class of decisions in which, though the defendants were convicted of assault with intent to commit, etc., the same idea of separability of consent prevails.

In *Iowa* v. *Cross*[99] it appeared that the prisoner had chased the prosecutrix into a room, locked the door, thrown her on the bed, and had connection with her. It did not appear that she had either cried out or offered any serious resistance. In affirming the conviction of an assault with intent, etc., the court said: "Of course if there was consent on the part of the prosecutrix, there could be

[96] *Supra*, note 44.
[97] 58 Ind. 355, 1877.
[98] *Supra*, note 52.
[99] *Supra*, note 56.

no such violence in legal contemplation as to render the prisoner guilty, for if the liberties were taken with her consent, there could be no rape nor yet an assault with that intent. But where the assault is made by the prisoner with the intent to commit the offence, and this is clearly shown, the jury might convict, though not satisfied that at the time he consummated his purpose there was such want of consent as to constitute the higher crime." And in *State* v. *Atherton*[100] it was also said (affirming and citing *Iowa* v. *Cross*): "There is evidence to show that the defendant in the outset used some force, and that the prosecutrix made some resistance. Now the use of force, in an endeavor to have carnal knowledge of a woman, tends to show an intent to commit rape, and such intent may exist consistently with the fact of a subsequent consent. A person then may be indicted for rape, and if the conviction for that offence is prevented by reason of evidence of the woman's consent, yet if, before the consent was given, it appears that the defendant used such force as to evince an intention to commit rape, the defendant may be convicted of an assault with an intent to commit rape."

These cases stand for a slightly different principle than those before mentioned, in that they only permit a conviction of assault, etc., on evidence of force used and unconsented to prior to the commission of the act of copulation, and do not permit a conviction on proof of excessive force employed in the performance of the act, as was the case in *Ritchie* v. *The State*. However, the main point in both is the same, namely, that the consent of the prosecutrix does not necessarily cover the whole transaction, but is separable, and hence while she may have consented to the act itself, she may not have consented to previous or incidental violence, and hence the prisoner, though innocent of the capital charge, may be guilty of an assault with intent to commit rape.

Leaving the above topic, we come to the last division of our subject, to-wit:

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[100] 50 Iowa, 189.

III. "Consent" when Pleaded in Defence to an Indictment for Assault.

There are many kinds of assault, but we are concerned with only one of them, namely, assault by the administration of poison. Whether or not the administration of poison can under any circumstances amount to assault seems to be still a mooted question. In England it was held, in 1838, in the case of *R.* v. *Button*,[101] that such an act was an assault; but this decision does not seem to be sustained by the subsequent cases.[102] However, the same point arose in Massachusetts in *Com.* v. *Stratton*,[103] which resulted in a clear-cut determination that the administration of poison constitutes an assault, the court saying: "Although force and violence are included in all definitions of assault, or assault and battery, yet where there is physical injury to another person it is sufficient that the cause is set in motion by the defendant, or that the person is subjected to its operation by means of any act or control which the defendant exerts." It is submitted that the view of the Massachusetts court is the better, since unless the necessity of "force" to constitute an assault be liberally construed, numerous cases in which the cause and effect are consistent with aggravated assault must fail, because at the moment of commission no actual violence is employed. This question, however, will arise again in the cases.

R. v. *Bennett*[104] was a case in which the prisoner was indicted for an indecent assault upon his niece, aged thirteen. It appeared that on two occasions the parties had slept together, that the prisoner had given his niece liquor on each occasion just before retiring, and that though she could not remember that her uncle had done anything to her, a medical examination to which she was subjected a week later had revealed the fact that she was then suffering from a venereal disease.

In charging the jury Willes, J., after instructing them

[101] 8 C. and P. 660, 1838.

[102] *R.* v. *Dilworth*, 2 Mo. and Ro. 531, 1843; *R.* v. *Hanson*, 2 C. and K. 912, 1849; *R.* v. *Walkden*, 1 Cox C. C. 282.

[103] 114 Mass. 303. See also 25 Mich., p. 355.

[104] 4 F. and F. 1105.

that there was no evidence of a rape, continued: "But although the girl may have consented to sleep and, therefore, to have connection with her uncle, yet if she did not consent to the aggravated circumstances, *i. e.*, to connection with a diseased man, and a fraud was committed on her, the prisoner's act would be an assault by reason of such fraud. An assault is within the rule that fraud vitiates consent, and, therefore, if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent which she may have given would be vitiated, and the prisoner would be guilty of an indecent assault." The verdict was guilty and a sentence of two years' imprisonment at hard labor was imposed.

This case was followed in 1867 in *R.* v. *Sinclair*,[105] where the evidence, though insufficient to establish rape, showed that while free from disease prior to the connection, within a week after it took place the prosecutrix was found to be suffering severely from gonorrhea, with which the prisoner was also afflicted.

This was also a case at *nisi prius*, and in his charge to the jury Mr. Justice Shee merely went over the same ground which Willes, J., had traversed in *R.* v. *Bennett* and arrived at the same result, namely, that under such circumstances "fraud vitiates consent." *R.* v. *Bennett* was specifically approved of.

A severe shock, however, was given to the theory of the foregoing decisions by *Hegarty* v. *Shine*,[106] which was determined on appeal in the Queen's Bench Division of the High Court of Justice for Ireland in 1878. The case arose from a civil action for breach of promise and damages for an assault arising from the infection of the plaintiff and her unborn child, with syphilis, by the defendant, at some time during a period of concubinage, during which the plaintiff had at no time refused her consent to the sexual act. The action for breach of promise was withdrawn in the court below, and the only question on appeal was as to the plaintiff's right to recover damages for an assault. The court was divided. Fitzgerald and Barry, JJ., held (1)

[105] 13 Cox C. C. 28, 1867.

[106] 14 Cox C. C. 124, 1878.

that the maxim *ex turpi causa non oritor actio* applied to the case, though in support of this finding they cited a number of contract cases with the possible exception of *Fivaz* v. *Nicholl,* whereas this action was founded in tort. (2) With regard to *R.* v. *Bennett,* they held that it should not be followed, because the rule that "fraud nullifies consent" being a doctrine of contract, could not be imported into an action for a tort.

It must be said that the findings of the majority seem inconsistent, though it is thought that the second point is sound.

May, C. J. (dissenting), held that there was no need to invoke the aid of the rule adopted in *R.* v. *Bennett* in order to recover, for no fraud is needed to nullify a consent which has never been given, and in a case of this kind the woman's consent is clearly separable, extending no further than the act of connection and not including the incidental infection with disease, a fact of the probability of which had the plaintiff been aware she would unquestionably have refused her assent to the whole transaction. As to the applicability of the other doctrine, the Chief Justice said: "Nor do I think that the maxim *ex turpi causa non oritor actio* is applicable to the present case. That principle, I think, governs cases of contract. A promise cannot be supported, on the contrary is vitiated, by an immoral consideration, nor can a contract be enforced if its object be to promote and encourage immorality or illegality. But the present case is founded on tort. The defendant has done an act injurious to the plaintiff and has done it wilfully and intentionally. Upon the authority of the case referred to, I think it must be held that this wrong was done to her without her consent. It does not occur to me that the court, if it hold the defendant liable in damages to the plaintiff in this case, would be sustaining immorality. It seems to me, on the other hand, that the imputation of injustice would rest upon a decision holding that a defendant who has inflicted a lifelong injury upon his victim by depriving her of her bodily health should escape with impunity because he had previously deprived her of her chastity and obtained possession of her person."

The significance of the various theories advanced in *Hegarty* v. *Shine* will be better appreciated after an examination of the next case, *R.* v. *Clarence*,[107] which, since its decision in 1888 by the Court for Crown Cases Reserved in England, has been considered the leading authority on this branch of the law.

The facts in this case were particularly revolting. It appeared that the prisoner, who knew that he was suffering from gonorrhea, had marital intercourse with his wife without informing her of the fact, with the result that he infected her, and from such infection she suffered grievous bodily harm.

The indictment was drawn under 24 and 25 Vict., C. 100, S. 47, and contained two counts, one of which charged the prisoner with "an assault" upon his wife, "occasioning actual bodily harm," and the second count, drawn under section 20 of the same statute, charged him with "unlawfully and maliciously inflicting" upon her "grievous bodily harm." A conviction having been had in the court below, the question on appeal was whether he was properly convicted upon either count. The conviction was reversed by a vote of nine to four, Wills, Smith, Stephen, Manisty, Mathew and Grantham, JJ., and Pollock, B., and Huddleston, B., and Coleridge, C. J., composing the majority, while Hawkins, Field, Day and Charles, JJ., were in the minority. Six judges delivered opinions against the conviction and two wrote in support of it; but since space forbids an extended examination of this voluminous case, we shall confine ourselves to the consideration of the opinions of Wills, J., and Hawkins, J., which adequately discuss the various theories involved in the decision.

Judge Wills first adverted to the fact that the prosecution had been brought under a statute, and then stated that the conviction might be sustained on three theories, to-wit: (1) That the existence of fraud nullified consent on the part of the wife; (2) that, because of her ignorance of her husband's physical condition, the wife's submission without knowledge of the facts is no consent at all, and (3) that inasmuch as under the divorce law of Great Brit-

[107] 16 Cox C. C. 511, 1888.

ain the act done amounted to "legal cruelty," it could not be considered as within the consent implied by the marital relation.

He then states his objections to all three theories. As to the first, he reiterates the assertion that it is an effort to apply to criminal law a doctrine belonging only to contracts, and he cites as an example of what would follow its adoption, the supposed case of a man knowingly purchasing the consent of a prostitute with a counterfeit coin, and says that such a man would, under such a theory, be guilty of rape. As to the second theory, he admits that it is by far the strongest, but he seems afraid to adopt it, because of certain results which he thinks would necessarily flow from it. If this view is correct, he argues it applies equally to the married and to the unmarried, and a greater difficulty is that a man so infecting a woman, even his own wife, is guilty not only of assault, but rape. On this point he says: "To separate the act into two portions, as was suggested in one of the Irish cases, and to say that there was consent to so much of it as did not consist in the administration of an animal poison, seems to me a subtlety of an extreme kind. There is, under the circumstances, just as much and just as little consent to one part of the transaction as to the rest of it. No one can doubt that in this case, had the truth been known, there would have been no consent or even a distant approach to it."

The rest of his opinion is taken up with a discussion of the third theory and the applicability of the statute in question, and since said discussion is of merely local importance, we need not enter into it. What we may see from his opinion is that there are two broad grounds on which such a conviction may be supported, and the whole case really gains its significance from the manner in which those grounds are either affirmed or denied by the different judges.

In his dissenting opinion Hawkins, J., freely abandoned the first ground as untenable, saying: "In dealing with this case my judgment is not based upon the doctrine that fraud vitiates consent, because I do not think that doctrine applies in the case of sexual intercourse between husband

and wife." His affirmation of the conviction is based entirely on the theory that since the wife did not consent to the administration of the poison, the husband was guilty of an assault. As to her consent to the act of connection, he holds that was given once for all and irrevocably at the time of marriage. Such consent, however, only applies to an ordinary, natural and healthy coition, and the wife is entirely within her rights in refusing to permit any other. With regard to Judge Wills' contention that consent must be given to the whole transaction or to none of it, he answers it thus: "My reply to this argument is that if a person having a privilege of which he may avail himself or not at his will and pleasure, cannot exercise it without at the same time doing something not included in this privilege and which is unlawful and dangerous to another, he must either forego his privilege or take the consequences of his unlawful conduct." An answer which is practically the same as Portia's famous invitation to Shylock to take his pound of flesh without spilling a drop of Christian blood.

As has been pointed out, the conviction in this case was quashed; and by a majority of nine to four the court announced the astounding fact that a man could infect his wife with a foul disease during marital intercourse and yet walk the streets guiltless of crime.

In concluding this topic, it is submitted that the result of the cases is unsatisfactory, and it is suggested that in the future, decisions should be along the following line: In cases of unmarried women, consent to the act of coition should, for reasons of public policy, be held to imply consent to the risk of venereal infection and where such a result follows to the infection itself. In cases of married women, however, the general consent given at marriage should be held to cover the *act* of connection with a diseased husband but not the *infection* probably resulting therefrom, and where such infection does result, the husband should be held guilty of an assault upon the wife by the administration of poison.

This doctrine of the separability of consent is perfectly reasonable, and is directly in line theoretically with the

cases of *Iowa* v. *Cross*[108] and *State* v. *Atherton*,[109] which have been dealt with under another head. Unless such a line of reasoning is adopted, it is to be feared that *R.* v. *Clarence* must be followed, and even those judges who composed the majority in that case were appalled at the result which they felt obliged to reach, a result which liberated a moral criminal, loathsome, heartless, and mean enough to use the result of his own faithlessness to pollute the body of his innocent wife.

We have now reached the end of this article, and in conclusion the writer merely desires to assert that its whole purpose is to insist upon a construction of the word "consent," which is in accordance with common sense. Unless "consent" necessarily implies intelligent appreciation of the thing consented to in all its bearings, it is not consent but merely submission, and submission is no defence, but generally an aggravation to crime.

This subject is in many respects a most unpleasant one, and many of the facts herein recited would soil the page were they not adduced in support of a worthy cause. But the cause is worthy, and the writer need offer no apology for anything said in its support. It is for the better protection of female purity that this article has been written, and no cause could be more noble or inspiring.

That the law should be so inadequate in this the twentieth century after Christ to protect unfortunate women from pollution is a disgrace to our manhood and to our reason, and it is earnestly hoped that the courts and legislatures will join hands in the near future and overcome those technical difficulties which in this department of the law so seriously impede the administration of justice.

Theodore J. Grayson.

[108] *Supra*, note 56.

[109] *Supra*, note 100.