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CONSENT IN CRIMINAL ASSAULT

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Criminal assault, like rape, is a crime in which the consent of the prosecutor will remove the criminality of the act.² It therefore becomes necessary to examine what classes of facts will constitute such consent. In the present article the scope of the search will be still further narrowed, as force or duress, as affecting an otherwise valid consent will not be taken up. The sole point here to be considered is as to how far the defendant's assertion that the prosecutor "consented" may be overthrown by showing that the prosecutor's failure to make objection was due to ignorance of some fact or to mistake or to unconsciousness, etc. The question then is, what is the minimum amount of correct information which the victim must have in order to enable the defendant successfully to assert that his act was understandingly allowed? In the following pages the attempt will be made to ascertain the boundary line below which the victim's understanding of the true situation is so restricted, either by ignorance or by erroneous beliefs, that he cannot be said legally to understand what the defendant is about to do to him, and above which, on the other hand, he does have just enough correct information as to defendant's plans so that significance can be attached to his failure to object. The statement that there was or was not a valid

1. [Professor of Law at the University of Chicago. This article consists of the application to criminal assault cases of the same analysis applied to rape cases, in an article, "Consent in Rape," printed in the February issue of this REVIEW.]

2. It is, of course, true that the act involved may be so harmful to the individual concerned, or may be so likely to lead to a breach of the peace that despite the consent of the alleged victim it will remain a crime. This, however, is not because the consent is defective or incomplete. It is because the crime is committed regardless of consent, hence its presence and its constituent elements are immaterial and need not be discussed. It is a presupposition of the present discussion that the act done is such a one in its intensity, surrounding circumstances, etc., as might be validly consented to.

consent is, then, merely the conclusion that the victim's understanding did or did not rise to this minimum necessary.³

In determining what this necessary minimum of knowledge shall be legal logic has been only one of several factors. Other factors are at least as important. That this is true will be made apparent by looking at several other crimes in which also consent is a defense. Thus the amount of abhorrence felt for the crime in question would insensibly exert a powerful influence. Similarly with the severity of the punishment. So, for instance, in larceny it is obvious that the excessive mass of refinements involved concerning the taking of possession was a direct reflection of the excessively severe penalties imposed by contemporary law, on acts which were already felt not to deserve such a measure of punishment. The particular circumstances surrounding each crime would therefore be of great, and even of paramount, importance in defining the point which the knowledge of the victim must reach to enable him to give valid consent, and one kind of crime supplies little or no information concerning the solution of the same question in another kind. In fact, if the limits of minimum knowledge for two separate offenses were definable in precisely the same way, it would be nothing short of a remarkable coincidence. Doubtless there might be such a coincidence, but it would be so unlikely as to be practically negligible. Perhaps the point will be best brought out by a homely instance. A. and B. are adjoining house-owners and each decides to paint his house. The houses differ in size, they also differ in the time which has elapsed since the previous painting. A. and B. have different views regarding the number of coats necessary. They employ different painters to do the work. No one would contend that what was exactly 'sufficient paint' for A. would therefore also be 'sufficient paint' for B. So, too, as to knowledge by the victim, regarding the crime alleged to have been committed on him. What may be sufficient knowledge to exculpate the defendant in a case involving capital punishment may by no means be sufficient in another act involving a slighter punishment. Ordinarily this has been clear enough to courts and writers. There has been no tendency, for instance, in a rape case to use precedents discussing consent in a kidnapping case. Nor have kidnapping cases been decided by refer-

3. Much of the preliminary discussion applicable to this analysis in general and regardless of whether the crime charged is criminal assault or some other will be found in the previous article already referred to and will be omitted here.

ence to rape cases.⁴ Although in both the discussion is as to what constitutes 'consent,' it is clearly seen by these courts that this one word covers concepts which have no bearing on each other and no relation to each other, just as the meaning of the word 'act' and the definition given it in homicide have no bearing on the meaning and definition of 'act' in, let us say, forgery or automobile speeding.⁵

Accordingly, when the charge is assault, the minimum knowledge needed to validate the defense can only be ascertained by an examination of the assault cases and the principles lying back of them. Although the label 'consent' is the same here and in rape, only confusion will result from the assumption that therefore the content of the label is also the same. Yet there has been a particularly determined effort to show that what was consent in rape must also be consent in assault. With equal logic it might be held that what constituted the 'overt act' in rape must also determine what constitutes the 'overt act' in assault. If identity of descriptive word requires identity of substance in one case, it requires it in another also, and the two crimes would at once coalesce. But, if 'act' and 'guilty intent' mean one thing for one crime and another thing for another, then 'consent,' too, may be, and is, a variable term, the significance of which depends on the crime under discussion. Nor is this any the less true because many (if not most) of the assaults raising questions of consent involve situations similar to those in rape cases. Rather the surface similarity of the problems should make one more keenly alive to the risk of improperly combining and confusing inferences and conclusions that belong to one of the two crimes only. The two most important cases in which just such a confusion took place are *Reg. v. Dee*⁶ and *Reg. v. Clarence*.⁷ So in

4. Cases involving consent secured by fraud, in a charge of kidnapping, and whose discussion of the significance of such fraud illustrates effectively their complete indifference to rules laid down for a like investigation in a rape charge, are: *Hadden v. People* (1862) 25 N. Y. 373; *Beyer v. People* (1881) 86 N. Y. 369 (in this case it was held that where the defendant had persuaded the prosecutrix to come to a certain house in the belief that she was to get employment as maid in a respectable family, but where the house actually was a brothel, he had taken her there "against her will"); *People v. De Leon* (1888) 109 N. Y. 226, 16 N. E. 46; *Moody v. People* (1858) 20 Ill. 315; *Reg. v. Hopkins* (1842 N. P.) Carr. & M. 254.

5. Instances will readily occur to the learned reader further illustrating how completely different concepts may be enclosed in one word. 'A sound mind' means one thing in judging contractual capacity, another in testamentary capacity, yet another in criminal capacity. 'Acceptance' has three distinct meanings in the law of sales. 'Delivery' as used by the conveyancers will hardly throw light on delivery questions arising from the Statute of Frauds, etc.

6. (1884 Ir. Cr. Cas. Res.) 15 Cox C. C. 579.

7. (1888 Cr. Cas. Res.) L. R. 22 Q. B. Div. 23.

the former case *May, C. J.*, says (at p. 586): "If the consent of the woman prevented the crime being rape, it would seem that it *would also* prevent it being an assault, which consent excludes."^{7a} Now it may very well be that in any particular situation there would be valid consent whether it be looked at from the rape angle or the assault one. We are not yet considering the boundary line of consent in assault. The point here is the fallacy of *May's* assumption that a given decision in one necessarily involves a like decision in the other, or indeed, that it has any bearing whatsoever on the other.⁸ In *Reg. v. Clarence* the defendant was charged in one of several counts with an assault on his wife "occasioning bodily harm," an offense created by a statute then in effect. Therefore in passing on this count it was necessary to determine whether the facts showed an assault or not. It appeared that the defendant, being infected with a venereal disease, had intercourse with his wife, who was not aware of his condition and would not have permitted his act had she been aware of it. By his act he infected her, which was the alleged assault. The case was argued before thirteen of the judges of the Queen's Bench Division, and has since been uniformly regarded as of great authority. By a vote of nine to four it was decided that the convictions could not be sustained. Of the majority group the most powerful opinion is that of *Wills, J.*, who commences by showing that this was not rape and therefrom infers that it was necessarily also not assault.⁹ The other majority opinions treat the present problem in only a cursory way.

On the other hand, a number of English cases have found no difficulty at all in deciding that different conclusions may be reached

7a. Italics are the present writer's.

8. *Palles, C. B.*, in the same case attempts to create a paradox by saying (p. 590) that a contrary holding would mean that "there may be a consent to carnal connection (which involves physical contact) consistently with an absence of consent to such physical contact." The answer is that in both cases there is consent in one sense of the term; that is, the prosecutrix is raising no objections. To that extent they are alike. But in one crime the cause of the failure to object is regarded as irrelevant, while in the other the cause is considered so important that if it is an unsatisfactory one (e. g. the defendant's fraud), the failure to object has been explained away by the prosecution and will no longer avail the defendant. Much the same point is made by *Murphy, J.*, and the same answer applies.

9. Space will not permit a detailed discussion of *Wills's* argument. In saying, however, that "There is just as much and just as little consent to one part of the transaction as to the rest of it," he is going on the same ground as did *Palles, C. B.*, in *Reg. v. Dee* (see *supra* note 8). Here, too, it may be answered that through her "consent" (*viz.*, her frame of mind) may be the same, its effectiveness and significance need not be the same for different purposes.

in the two crimes.¹⁰ Thus in *Reg. v. Saunders*,¹¹ a rape case, Gurney, B., informed the jury that "the evidence in this case does not establish the charge contained in this indictment as the crime was not committed against the will of the prosecutrix, as she consented, believing it to be her husband; but if you think that that was the case, and that it was a fraud upon her, and that there was no consent as to this person, you must find the prisoner guilty of an assault." Again in *Reg. v. Williams*,¹² there being such consent as put an end to the rape charge, Alderson, B., directed that the case proceed as to the assault. So, too, in *Reg. v. Bennett*,¹³ where the charge was indecent assault. These three cases were all prior to *Reg. v. Clarence*, but they are directly supported by a case subsequent to it, *Reg. v. O'Shay*,¹⁴ where it was said that though it was no rape yet, "If the prisoner by pretending to be a doctor, induced the prosecutrix to let him go as far as he did because she thought he was a doctor, the jury may find him guilty of indecent assault."

Accordingly, since the circumstances giving rise to or destroying consent in assault may differ from those so operating in rape, it becomes necessary to examine the question anew for the former crime, without assumptions carried over from the latter.^{14a} The first, and simplest, case is where the prosecutor was unconscious (from sleep, intoxication, drugs, illness, or any other cause) when the blow was struck, or was so weak or diseased mentally as to have no knowledge at all that a blow impended.¹⁵ No authorities will be needed for the proposition that this unconsciousness does not

10. There seems to be very little American authority, but see *Nichols v. State* (1883) 72 Ga. 191.

11. (1838 N. P.) 8 Carr. & P. 265.

12. (1838 N. P.) 8 Carr. & P. 286.

13. (1866 N. P.) 4 Fos. & Fin. 1105. Here the prisoner had infected his niece with venereal disease, under circumstances which, according to Willes, J., made it impossible to establish rape. Despite her consent to connection, "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 the prisoner would be guilty of indecent assault."

14. (1898 N. P.) 19 Cox C. C. 76.

14a. No discussion will be attempted (nor would it be pertinent) on what constitutes an overt act sufficient to amount to a battery. It will be assumed that the act is sufficient, leaving only the question of consent for decision.

15. Loose statements may be found saying that in such a case the defendant is "committing a fraud" on the injured person, and that "his act is an assault by reason of such fraud." (See *Reg. v. Bennett*, supra note 13.) Of course, this is a complete misuse of the word fraud. Fraud connotes thought (though mistaken) by the defrauded person. It has nothing to do with a complete absence of thought on his part.

signify the prosecutor's consent to any blow, whose fall he does not attempt to prevent simply because of his unconsciousness.¹⁶

Where the prosecutor is not totally unconscious of the impending blow, but, on the contrary, is aware that a force is about to be applied to his body, he may nevertheless be lacking in intelligent understanding either of the nature of this force and its immediate effect upon him, or of the consequences directly or indirectly destined to result from it. In the first case he does not correctly appreciate the events then occurring about him—it is not the future situation which these events are to produce that is distorted in his mind, it is the then present one. In the other case his misconception relates to just such later results flowing out of the present situation, and he may correctly appreciate the present situation, except in so far as his error regarding the future can be called a then-present error.¹⁷

The most obvious situation is where the prosecutor expected a light application of force, for instance, where he believes he sees a small bamboo cane and agrees to take a blow from it, but where the force is instead a severe one, the cane being in reality made of steel in imitation of bamboo. Whether we shall say that he never consented to be struck by a steel rod, or shall put it that he did consent to be struck by that rod, but was in error regarding the true nature of the rod, is a choice of words hardly enlightening to a jury and merely obscures the element of true importance, viz., that the defendant has not overcome the *prima facie* wrongfulness of his conduct by showing an intelligently assenting recipient of his blow. Whether there never was consent at all to this act, or whether there was consent to the act due to mistake, is only a question of the breadth of meaning given to the word 'act,' and cannot be settled on a priori grounds based simply on reasoning from the word 'consent.' Closely connected with the example just used is the case where defendant is given a full and intelligent permission to apply

16. An exception to the foregoing must be made in favor of the surgeon who is forced to make an emergency operation on an unconscious patient. It might be argued that there is a reasonable inference of 'implied' consent here, because the patient would have consented expressly had he been conscious. But the fact remains that, whatever the cause, he did not give any assent, and was simply a blank mentally, which is not in general sufficient to give protection to the defendant. Hence it seems better to put the surgeon's exemption from criminal pursuit frankly on the obvious desirability of encouraging, and not discouraging, conduct of this kind.

17. Whether on closer examination a real difference will be found between these various groups, or whether they will be found to merge by imperceptible degrees, will be left uncertain for the moment. There is, however, some convenience in grouping the cases in this manner for the purpose of discussion, and in taking them up in succession.

one kind of force, and under cover of this and without informing the victim he adds another force to the one assented to. There is no understanding of the new force, and hence no approval of it. The leading case is *Commonwealth v. Stratton*,¹⁸ where the defendant was shown to have placed a quantity of harmful powder on some figs, which he then offered to the prosecutrix. Not knowing of the powder, she ate the figs, and became seriously ill. The court did not attempt to decide whether she should be said to have assented only to a wholesome fig, or whether she assented to that specific object, although solely under the erroneous idea that it was nothing more than a wholesome fig. In the one view there would be no consent, in the other an invalid one, being based on a mistake. In neither is there the necessary intelligent assent.¹⁹ Exactly the same reasoning applies where the defendant, while suffering from a venereal disease, has sexual intercourse with the prosecutrix by her permission (but without her knowing of the disease), and so infects her. She has assented to the exercise of certain physical forces, viz., those forming a part of the sexual act. If she is ignorant of the diseased condition of the defendant, she has not assented to the

18. (1873) 114 Mass. 303. In accord on same facts, *State v. Monroe* (1897) 121 N. C. 677, 28 S. E. 547.

19. This is the view which at the start also prevailed in England. The first authority available is *Rex v. Treeve* (1796 Cr. Cas. Res.) 2 East P. C. 821. The defendant was indicted for that he "maliciously did provide . . . bread to be eaten as food by French prisoners of war," such bread "being made of and containing dirt, filth, and other ingredients not fit to be eaten." He was held guilty. It will be noticed that the offense was not denominated an assault in so many words and indeed seems rather to have been looked at, from the special circumstances, as an offense against the king. Almost identical charges were made in *Rex v. Dixon* (1814 K. B.) 3 Maule & Sel. 11, though this time the victims were the inmates of an orphan asylum. Using the foregoing case as a precedent, the same result was reached. In *Reg. v. Button* (1838 Cent. Crim. Ct.) 8 Carr. & P. 660, however, a common-law assault was specifically charged. The facts were to all intents and purposes as in *Commonwealth v. Stratton*, the defendant having placed a drug in the prosecutrix's coffee. His counsel evidently considered the consent argument hopeless, and contented himself with a vain attempt to show that an infliction of poison did not constitute the kind of overt act necessary to ground an assault charge on, a contention not in point in this paper. The jury were charged to the opposite effect, however, and the prisoner was held guilty. This apparently common sense result was first attacked in *Reg. v. Dilworth* (1843 N. P.) 2 Moody & Rob. 531, where Coltman, J., in a dictum not called for by the case before him, expressed his disagreement with *Reg. v. Button*, but gave no reason therefor. A decision on the exact lines of Coltman's dictum came two years later, in *Reg. v. Walkden* (1845 N. P.) 1 Cox C. C. 282, but again no reason for rejecting Button's case was given, Parke, B., merely saying that it "could not be supported." Apparently, however, this simply overrules it on the question whether the giving of poison was the requisite overt act, not on the issue of the presence or absence of consent. Finally such an act was held, without opinion, to be no assault at common law in *Reg. v. Hanson* (1849 N. P.) 4 Cox C. C. 138. The overruling of *Reg. v. Button* is criticized in *Commonwealth v. Stratton* (p. 306).

other and wholly distinct forces thereby exerted on her. With regard to them her mind is a blank, a state of affairs completely constructive of the defendant's excuse of consent.²⁰ Most of the cases dealing with the point have been civil suits in which the injured woman sought to recover damages,²¹ criminal prosecutions being comparatively rare. Apparently it has not yet been passed on by the highest court of any American state,²² although three cases have dealt with it in England. The first was *Reg. v. Bennett*,²³ where Willes, J., instructed the jury that if the facts as charged were made out an assault would be shown. This instruction was approved and followed in *Reg. v. Sinclair*.²⁴ But in *Reg. v. Clarence*,²⁵ these cases were overruled and the contrary result reached. The majority of the court was obviously led astray by the erroneous notion that they were bound by a line of rape cases. As was more justly appreciated by Hawkins, J.,²⁶ the charge has nothing to do

20. The majority of the court in *Reg. v. Clarence* (infra note 25) are groundlessly troubled with the fear that a holding as urged in this article would necessarily render a man criminally responsible even when the woman infected by him was a mere professional prostitute. Without discussing whether or not such a result would be clearly undesirable, it suffices to say that it is by no means an unavoidable consequence. The professional prostitute plies her trade under circumstances where the element of disease is extremely likely to be present, as she is well aware. As a result her acquiescence in the performance of the act almost inevitably leads to the inference that she was in fact aware of the risk of contracting disease. In other words, in measuring the extent of her understanding of what was going on or probably going on, we find that it includes far more than would be inferrible in the case of the chaste woman. Cases will be referred to later where the victims were children and where in consequence the scope of their intelligent assent was narrowed. If for them it should be narrowed because of their limited understanding, it is equally proper to broaden it, when dealing with a case of unusually wide understanding. In short, the very fact of the victim's being a prostitute would go far to answer the state's contention that she was not aware of the risk of contracting a disease.

21. The leading case is *Hegarty v. Shine* (1878 Ir. C. A.) 14 Cox C. C. 145.

22. A well-considered nisi prius case from Delaware directly supports the views expressed in the text: *State v. Lanford* (1917) 29 Del. 594, 102 Atl. 63. See also *State v. Marcks* (1897) 140 Mo. 656, 43 S. W. 1095, a case not directly in point, the charge being rape, and the diseased condition of the woman being merely shown to establish the fact of connection. Referring to the possibility of an assault charge, Sherwood, J., says, in a dictum (p. 677, 43 S. W. at p. 1097): "If he [the defendant] was aware at the time of the illicit connection . . . that he was infected with the venereal disease, her consent to the sexual act would be abrogated by the fraud practiced on her, and would consequently constitute the sexual act an assault." This statement is misleading in one respect, however. The sexual act itself, being understood by her, is not and cannot become an assault. The assault lies in inflicting the disease, regarding which there never was any thought by her.

23. *Supra* note 13.

24. (1867 N. P.) 13 Cox C. C. 28.

25. L. R. 22 Q. B. Div. 23. This case has already been commented on at length.

26. L. R. 22 Q. B. Div. at p. 52.

with the sexual act as such. It is a mere coincidence of no importance whatsoever that the poison inflicted was transmitted in the doing of such an act. For the present purpose the identical problem would be raised had the poison been transmitted, let us say, by infecting one's glove with lockjaw and then shaking hands with a person who had an open wound in his hand. Yet it is almost an irresistible inference that in the assumed case some, at least, of the majority judges would have gone over to the dissent. While *Reg. v. Clarence* doubtless represents the present state of the law in England, it is submitted that the view of the earlier English cases and of what American authority there is, is the better reasoned.²⁷

A slightly more difficult situation arises where the prosecutor is not put in contact with any additional or greater force than the one contemplated by him, but where there is (unknown to him) a substitution of force A, which he has knowledge of, by force B, which he does not know about, the two being alike in their effect on his body. An instance of this appears in *Reg. v. Case*,²⁸ where the defendant, according to the interpretation put on the facts by the court, took indecent liberties with the person of the prosecutrix after persuading her that he was treating her surgically with medical instruments. Apparently she expected his instruments to manipulate her in just the manner in which his hands did.²⁹ It would seem that the line might well have been drawn here, on the ground that she did know the full amount of force that was to be applied on her, and that the means by which it was applied, the purpose of the doer, and the consequences to her were all merely collateral. In other words, just as in rape the central fact which must be known is the sexual act, so here it is the amount of the force being brought to bear. It was, however, ruled otherwise, it being said that "what she consented to was something wholly different from what was done, and, therefore, what was done, was done without her consent." In support of the case it can of course be urged, and perhaps rightly, that it was only a coincidence that the two forces were equal, and that there was no consent to any other act than medical treatment, even though the thing done happened to be the same in its effect on her. Next in order is the question, will her knowledge still be insufficient even if she correctly understands the nature of the force and the manner of its application, but is in error regarding the per-

27. This is also Bishop's opinion. See *Bishop "Criminal Law"* (9th ed. 1923) II sec. 72 b (2).

28. (1850 Crim. App.) 4 Cox C. C. 220.

29. A parallel case is *Nichols v. State*, supra note 10, if we accept the woman's evidence as true.

sonal identity of the doer? Even here it has been twice held that the act thereby remains an assault.³⁰ In both instances, however, the facts showed her assent to sexual connection because of her belief that the doer was her husband, hence the matter of his identity was obviously of unusual importance. Certainly it would not be safe to infer from them that in general error as to the actor is enough to "vitiare consent."

So far discussion has been limited to cases of ignorance as to the then existing circumstances and happenings. But the victim may be uninformed or incorrectly informed regarding the consequences which will at a future time occur to him as a result of the act in question, or regarding the purpose with which the defendant does the act.³¹ In both of these situations there is authority that the defense is ineffective.

The only direct adjudications dealing with error as to consequences are respectively an English and a Wisconsin case, *Reg. v. Rosinski*³² and *Bartell v. State*,³³ the facts being practically the same in both. The defendant, a quack healer, persuaded the prosecutrix that certain indecent conduct was necessary as a means toward curing her ailment. Knowing what he was doing but deceived by him as to its effects, she raised no objection to his conduct. In both it was held to be an assault, though with almost no discussion on this point by the court. Ignorance or error, not as to consequences, but as to the purpose actuating the defendant, has come before the courts slightly more frequently. Thus in *Reg. v. Lock*³⁴ the defendant had committed indecent acts on two very young boys, who had no conception of the meaning of his conduct or his reason for doing so. The judges in a series of brief but forceful opinions point out the difference between a bare submission induced by ignorance on the one hand and, on the other, consent, by which it is plain from the context that they mean an understanding acquiescence. While they refer to the boys' ignorance of the *nature* of the act, they actually have in mind their ignorance of the prisoner's evil *purpose*, as there is no evidence that more, different, acts occurred here than they knew of. Error regarding the purpose of the de-

30. *Reg. v. Saunders* (1838 N. P.) 8 Carr. & P. 265, and *Reg. v. Williams* (1838 N. P.) 8 Carr. & P. 286.

31. Purpose is used as synonymous with motive, as the latter is defined by Professor *Walter Wheeler Cook* in "Act, Intention and Motive" (1917) *Yale Law Journal* XXVI 645, 661.

32. (1824, Cr. Cas. Res.) 1 Moody 19.

33. (1900) 106 Wis. 342, 82 N. W. 142.

34. (1872 Crim. App.) 12 Cox C. C. 244.

fendant was involved in *State v. Nash*,³⁵ where according to the state's version the prosecutrix believed that the prisoner's actions were done with a purpose of medical diagnosis. It is apparent that had this version of the facts been accepted it would have been held an assault.³⁶ In thus making the criminality hinge on the proper or improper purpose or motive of the defendant these courts are not without supporting authority.³⁷ None the less, it would seem a dangerous doctrine, and certainly a difficult one to limit. Indeed, when once it has been held that fraud or ignorance will still operate to destroy consent even when the force to be applied to the prosecutor is known and is not exceeded, and the fraud or ignorance extends only to collateral circumstances, it inevitably becomes difficult or impossible to fix on any subsequent logical stopping place. Perhaps it is significant, however, that in all these cases involving misconception of collateral circumstances, the prosecutor was innocent, in the sense either of not knowing of the defendant's evil purpose or of believing in facts which had they been true would have made the conduct of both parties morally and legally proper. Thus they do not necessarily stand for the proposition that fraud as to consequences or result will always vitiate consent. It is apparently only when the fraud operates against an innocent and guiltless person that the law regards it as serious enough to overthrow the de facto consent. If the fraud is practiced on one who is thereby necessarily shown to be morally at fault himself, probably the resulting defect in consent will not injure the defendant.³⁸ No cases can be found so limiting it, but it is submitted that this is the farthest extent to which we can push the cases.

To sum up, it would appear to be a fair statement that the law here is not directly interested in actual consent. It concerns itself rather with an inquiry into the state of knowledge of the victim, and judges the defendant accordingly. If the knowledge is insuffi-

35. (1891) 109 N. C. 824, 13 S. E. 874.

36. The same may be said as to *Nichols v. State*, supra note 10, according to the facts as put in paragraph one of the headnote opinion.

37. Space will not permit any discussion hereof. For a direct holding that a wrongful motive may render an act otherwise innocent a guilty one, see *Young v. Commonwealth* (1907) 126 Ky. 474, 104 S. W. 266. There is also a brief but forceful discussion by Professor Cook in his article cited, supra note 31, at p. 661, together with a reference to a number of cases. To these should be added *State v. Beck* (1833 S. C. Law) 1 Hill 363 (dictum only).

38. This limitation will meet the difficulty often raised by counsel, arguendo, that we must now hold it an assault if a man secures a woman's consent to intercourse on the promise that he will give her a large sum of money, but not meaning to keep the promise. Not at all. The facts, even if true, would show a prosecutrix not morally blameless, but quite the contrary, and so not within the cases just discussed.

cient or is distorted by misinformation, the defense fails, however enthusiastically and willingly the victim may have approved under the facts as he saw them.³⁹ Thus there are in effect simply two distinct ways for the state to overcome the issue of consent, either by showing a mind which did not act at all on the matter as to which it is alleged to have chosen, or a mind which acted in circumstances indicating that no choice was made on the situation really involved. In both the end is the same, the explaining and thereby the overcoming of the alleged consent by which the defendant is trying to excuse himself.⁴⁰

39. This statement probably epitomizes the difference between the views urged in the present paper and those advanced in Professor Beale's widely known article on "Consent in the Criminal Law" (1895) Harv. L. Rev. VIII 317. Space is not available for a detailed comparison of the two, nor is there any need of it, as the divergent viewpoints are sufficiently apparent in the texts themselves. Such a detailed criticism may, however, be found in 29 Ir. L. T. 427.

40. In conclusion the writer wishes to forestall one objection which might be raised, viz., that by this analysis of consent it would be possible to punish a person who in the best of faith believed that he was dealing with a consenting party, and who was completely taken by surprise by a later discovery that the consent was not valid. Thus, for example, Wills, J., in *Reg. v. Clarence*, supra note 7, at p. 32, says, "If the conviction be upheld on the ground of the difference between the thing consented to and the thing done, . . . knowledge of his or her condition on the part of the person affected is immaterial." The answer, as is indicated by Field, J., in the same case (see also *State v. Lankford*, supra note 22) is that where the defendant is acting under a mistake of fact (of such a kind as is deemed sufficient by the law) he is always to be treated, so far as the criminal law is concerned, as if the facts really were as he believed them to be. What constitutes a sufficient mistake, whether it must be entertained both honestly and reasonably, or whether it need merely be the former, does not concern us here. (Typical decisions holding that it must be both honest and reasonable are: *Chambless v. State* (1904) 46 Tex. Cr. 1, 79 S. W. 577; *McQuirk v. State* (1888) 84 Ala. 435, 4 So. 775; *Beaven v. Commonwealth* (1895 Ky.) 30 S. W. 968; that it need merely be honest: *Bartell v. State*, supra note 33; *Rex v. Rosinski*, supra note 32; *State v. Warren* (1911) 232 Mo. 185, 134 S. W. 522. If, therefore, he believes on grounds regarded as adequate that he is dealing with a consenting person, he will be treated as if this were so by the operation of a rule in no way specially devised for this situation, but extending all through the field of criminal law and applicable generally in cases of mistake of fact. Where the victim's error is due to the fraud of the defendant himself, good faith on the latter's part would seem to be necessarily excluded. Where, on the other hand, it is a case of ignorance by the victim, it may very well be that the defendant escapes. In this respect, and in this only, it is submitted, there is a possible difference of result between the case of absence of thought by the victim and that of his mistaken thought.