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CONSENT IN RAPE

ERNST WILFRED PUTTKAMMER*

I

It is familiar law that certain crimes are not committed where the alleged victim was himself willing to have the act in question performed on him. As a result the courts have frequently been called upon to determine what constitutes such willingness, viz., consent, and, secondly, what effect is to be given to it when it is present. No attempt will be made to discuss the latter question, nor will this paper touch on force or duress as affecting consent, except as may be necessary for a proper examination of the points more directly covered. Putting it affirmatively, the article will take up the question how far a defendant may be able to excuse himself by showing that his victim made no opposition, where, however, it also appears that the latter was laboring under mistake, or was deceived as to some circumstance involved, or was intoxicated, etc.

Although this ground has been gone over frequently, confusion has developed which is out of proportion to the comparative simplicity of the situations involved. For instance, statements are recklessly made that “fraud will vitiate consent,” and equally recklessly that “fraud is immaterial,” with little or no regard to what particular crime is involved and very often with no effort to define or understand what is meant by the term “fraud.” Thus in Reg. v. Barrow, Bovill, C. J., uses the term fraud to describe conduct where no deception whatsoever was employed and advantage was simply taken of the prosecutrix’s self-created error. Only slightly better is the often-heard statement (to be found even in the largest and best texts) that “in assault fraud vitiates consent.” Always, as to any facts? Or only as to certain facts, and if so as to what facts? The reader is usually left to answer these questions for himself. Accordingly it has appeared worth the effort to examine as a whole the rape and assault cases where the victim’s frame of mind was considered and to attempt to co-ordinate the various conclusions to which the cases point.1a

The effort will be made to demonstrate that the real center of interest in this inquiry is whether at the time of the act the victim

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1a. The assault cases will be considered separately in a later article.

[410]
CONSENT IN RAPE

had or had not a certain, definite minimum of intelligent understand-
ing of the true facts surrounding him. If this minimum of intelligent understanding was not attained, it is generally said that there was no consent on her part—if it was attained (and no objections were made) the defendant has shown all that was necessary in order to establish this part of his defense. In other words we are asking whether the victim's mind was sufficiently enlightened by the facts to make her consent the act of a reasoning being. It follows that a mere failure to have any comprehension may be as significant as an active misunderstanding of the situation. Such a failure to understand may be the result of ignorance or of lack of mental capacity or of intoxication, etc.; the result should be the same in each case.

A clearer realization of this point would in itself suffice to terminate such erroneous uses of the word fraud as have already been referred to. The basis on which mere ignorance has in the course of time come to receive such importance is that prima facie the defendant appears to have done an antisocial act. He attempts to meet this inference by showing that the act was not disapproved of by the other person primarily concerned. Such approval or rather such absence of disapproval is not, however, effectively demonstrated, if it also turns out that the failure to object was due either to an active misunderstanding of highly important circumstances or to a complete failure to think about or understand them at all. What circumstances are of such high importance will be considered later. While situations involving the complete absence of any thought or desire one way or the other will be found most frequently in the rape cases where the prosecutrix was drugged or intoxicated, or was feeble minded, the point is well illustrated in an assault case, Reg. v. Lock, in which the defendant was charged with the doing of immoral acts to two small boys. The latter had raised no objection not knowing the meaning of the prisoner's conduct. In answer to the argument that they were thereby shown to be willing Grove, J., said, "I think that negative dissent is enough, and that mere submission in ignorance of the nature of the act done does not differ from negative dissent." It is plain that by "nega-

3. To the same effect is the Indian Penal Code, section 90, which provides that it is not consent within the meaning of the law if it is given under a misconception of fact or by one who is unable to understand the nature and consequences of that to which he appears to give consent.
5. (1872, Crim. App.) 12 Cox C. C. 244, 247.
tive dissent" he means an absence of approval. If, however, the prosecutrix has the minimum requirement of correct knowledge and thereupon adopts an indifferent attitude, the defendant has nevertheless shown that he acted on one who did not object, and the defense remains good. Strictly speaking, then, it is not necessary for the defendant to show consent; the absence of opposition suffices.

Since the law demands that the prosecutrix have some minimum of information before attaching any weight to her active approval or passive submission, all means of demonstrating the absence of this information must be equally valid, as all alike would destroy an essential element of the defense. It follows that the cause of the failure to understand need not be the defendant's fraudulent misrepresentations, nor, indeed, need it be anything for which he is responsible. Once he has knowingly taken advantage of it, it becomes a part of the situation and its earlier history is no longer significant. This point is most frequently met in those rape cases in which the prosecutrix submitted believing that the person present was her husband. Although this type of case is generally held not to be rape, the decision is never placed on the ground that the defendant himself must be active in deceit and may with impunity take advantage of errors not produced by him. It is also shown in the cases where the defendant took advantage of the prosecutrix's drunken stupor, but had no share in causing it. That this would be rape was first pointed out in a dictum by Patteson, J., that if it were not so "Then may the person of a drunken woman by the roadside be violated with impunity by every passer-by." A more direct authority is Reg. v. Ryan, where Platt, B., charged the jury that "If she was in a state of unconsciousness at the time the connection took place, whether it was produced by the act of the prisoner or by any act of her own, any one having connection with her would be guilty of rape." To the same effect is Lord President

6. Discussed on p. 422, following.
7. This statement does not fully hold good for such states as Texas, where by statute the erroneous belief must have been induced in the use of "some stratagem." Huffman v. State (1904) 46 Tex. Cr. 428. See also note 60, infra.
10. It is of course true that the fact that the defendant himself caused the intoxication, instead of its being voluntary on her part, would frequently be highly significant in determining her frame of mind at her last conscious moment. (For a discussion of the importance of determining her frame of mind at that moment see the text, p. 417.) If the defendant contends that she was then willing, but it appears that he plied her with intoxicants, such a conclusion will as a matter of fact be far less probably than would be the case had she herself chosen to become intoxicated.
Macneill's opinion in Reg. v. Sweenie,\textsuperscript{11} where he says, "I think the law would be the same, although the state of insensibility was not at all caused by any act of the accused, but had been knowingly and wickedly taken advantage of by him."\textsuperscript{12} As to the authorities in the United States, the leading case of Commonwealth v. Burke\textsuperscript{13} assumes the matter almost without discussion. While many other American cases are indirectly in harmony with the point just made, they do not directly discuss it, and their force will be sufficiently brought out in the pages of this article.

If it is granted that the defendant need not have been instrumental in causing the victim's ignorance, stupor or intoxication, but need only have taken advantage of it, it is obvious that he is in no more favorable a position where he actually caused it but at the time of doing so had a different purpose in mind, even though such a purpose was in no way criminal. The principal authority is Reg. v. Camplin.\textsuperscript{14} There the prisoner made the prosecutrix drunk, intending to excite her and so to secure her consent. The jury found that at that time he had no intention to make her insensible and then to violate her. After she had lost consciousness he committed the alleged rape. It was decided, in a judgment by Patteson, J., and concurred in by Lord Denman, C. J., Tindal, C. J., and Anderson, B., that what the original intention of the defendant was, was immaterial, where advantage was taken of the insensibility by the defendant to carry out his subsequent wrongful purpose.\textsuperscript{15}

\textsuperscript{11} (1858, Scot. Justic.) 8 Cox C. C. 223, 230. Though this was a dissenting opinion the ground of difference between the learned Lord President and the majority related to points not at present involved.

\textsuperscript{12} It is true that a dictum, contra, may be found in the opinion of Palles, C. B., in the civil action of Hegarty v. Shine (1878, Ir. C. A.) 14 Cox C. C. 145, 159, that mere concealment of the truth is of no importance unless it further appears that there was a duty to enlighten, and that the rule applies alike to civil and criminal cases. Any force which this dictum might have had, however, was terminated when six years later (in Reg. v. Dee supra note 2) the same judge was called on to make a square decision on this precise point, and, in a passage already referred to (p. 411, supra), came to a conclusion in complete harmony with the foregoing quotations.

\textsuperscript{13} Supra note 4. In a note in 1 Green, Criminal Law Rep. 322, it is said that such a conclusion could only have been a "slip of the pen," but no reason is given for this belief. In a number of western states, however, the statute minutely describes rape with the aid of drugs or narcotics "administered by or with privity of the accused," thereby implyingly excluding the situation here involved. For a typical statute see Calif. Penal Code, 1923, sec. 261. On the other hand, the New York statute applies specifically to defendants who have taken advantage of a stupor not caused by them, Cahill's Laws of N. Y. 1923, ch. 41, sec. 2010 (4).

\textsuperscript{14} Supra note 8.

\textsuperscript{15} This point does not seem to have arisen since in England, but it is considered in the opinion of Lord President Macneill in Reg. v. Sweenie supra note 11, already quoted. He says (at p. 230): "Is it necessary to the crime of rape that the inability shall have been brought
same question was involved in an American case, where the defendant, a dentist, administered chloroform to a female patient for a medical purpose. It was charged that he assaulted her during the time that she was unconscious. He was not allowed, however, to derive any benefit from this originally lawful motive.  

II

Having disposed of some general matters, we proceed to a detailed examination of the foregoing propositions as they have been applied in rape. Caution, however, is necessary in drawing inferences about by an act of the accused, with the design of availing himself of it? It is not so if the sufferer be under puberty, or in the opinion of some of your lordships, if she be an insane person. I think it is not so in the case where a man takes advantage of the state of insensibility to which a woman has been reduced by his act, or contrivance, although in producing the insensibility he may not have harboured that design, or may even have intended something different, as would be the case of a medical man who should take advantage of the inability to resist produced by opium or chloroform which he had administered for a different purpose to his patient."

16. Harlan v. People (1904) 32 Colo. 397, 76 Pac. 792. Regarding his frame of mind at the time of administering the drug, the court said (at p. 402, 76 Pac. at p. 794):

"the jury may have accepted his statement that the chloroform was administered for a lawful purpose, but that he formed the intention of having sexual intercourse after he had placed her in a condition where she could offer little or no resistance, and that he intended to overcome such resistance as she offered. And there can be no doubt that if the defendant had at the time he administered chloroform no unlawful purpose, yet if he afterwards formed the design and purpose to have sexual intercourse with her while she was under the influence of chloroform, and while she was in such a condition from the effects of chloroform that she was unable to remonstrate or resist, and that while harboring such intention he undertook to have sexual intercourse with her, he was guilty of an assault with intent to commit rape."

This rule was subsequently adopted by statute. See (1921) Colo. Comp. Laws sec 6689 (6).

17. With the rape cases may also be considered certain cases where the charge was assault with intent to commit rape, in which the sole ground of defense was that even had the act been consummated, it would not have been rape because consented to. In such a situation the question of what constitutes consent in rape is as directly before the court as it is in a rape charge, because the specific intent to commit rape is alleged, and the only way to test whether the facts prove the charge is to examine the act intended by him in order to determine whether this act, if completed, would have been rape. See State v. Long (1885) 93 N. C. 542, 544 ("There is no difference with respect to the 'want of consent' as constituting a necessary ingredient of the offense, between the higher crime of rape, and an assault with intent to ravish"); Edwards v. State (1897) 37 Tex. Cr. 242, 244, 39 S. W. 368 ("All of the constituent elements that go to make up rape, except penetration, must be alleged and proved in an assault with intent to rape"); People v. Quin (1867, N. Y. Sup. Ct.) 50 Barb. 128, 134 ("If the violation of the person of the female under the circumstances, would not have constituted the crime of rape, but another and different crime, the assault and battery with the intent to do the act could not include the intent to commit a rape, but the other crime"). See also Charles v. State (1850) 11 Ark. 389; McNair v. State
CONSENT IN RAPE

ences from some of the cases, due to the fact that formerly at least the use of actual force by the defendant was a necessary element in the crime. If the act was accomplished without resorting to force, the crime was not committed, regardless of the manner in which the defendant had succeeded in accomplishing his purpose. Thus no manner of fraudulent conduct was of any significance in the issue. If force was essential, no substitute would do, and logically submission gained by duress should be valid. The connection between duress and force however is so close that it is no wonder that courts easily admitted duress as a substitute for force, while not yet prepared to do so for fraud. Whether force should or should not any longer be so demanded is not within the limits of this inquiry. It is merely necessary to recognize that many decisions which at first glance are apparently deciding a question of consent by holding the consent valid, are actually freeing the defendant solely on the entirely separate ground that, regardless of consent or non-consent, the crime is incomplete because no force was used.18

The defendant, then, may escape through showing, by various means, that regardless of consent or non-consent by the prosecutrix he is not guilty. What must he show if on the other hand his contention is that the frame of mind of the woman was such as to make the crime impossible, viz., if his defense is consent? How much understanding of the circumstances must she have had to make her acquiescence effective? The simplest case would obviously be

18. Perhaps the leading cases to this effect are Don Moran v. People (1872) 25 Mich. 356, and Reg. v. Sweenie supra note 11. The interest of the latter case is increased by several vigorous dissenting opinions. A few cases apparently lean toward a middle view that force is necessary, but that fraud may take its place, if, and only if, a use of force is intended should the fraud fail. So in Walter v. People (1867, N. Y. Sup. Ct.) 50 Barb. 144, it was held that force was an ingredient of the offense, but that it was error to refuse a charge that “Even if the defendant had accomplished his alleged purpose by fraud, without intending to use force, then such fraud does not constitute rape, unless the evidence shows that the defendant intended to use force, if the fraud failed.” See also Reg. v. Stanton (1844, N. P.) 1 C. & K. 415; Reg. v. Wright (1866, N. P.) 4 Fos. & Fin. 967; McQuirk v. State (1868) 94 Ala. 435, 4 So. 775. Such a view seems wholly indefensible; either force is still a substantive part of the offense, and must always be shown, or it has become simply one of the facts rebutting any inference of consent. In effect these cases attempt to reapply the exploded maxim that “The intent may be taken for the deed.” This was clearly presented by Christiancy, C. J., in the Don Moran case, supra, when he said, “I am wholly unable to discover how the intent to use force in such cases, when it is not in fact either resorted to, or in any manner threatened, can be at all material on the question, whether a rape has been committed, or how such intent, never brought to the notice of the woman by word or act, can satisfy the requirement of force in the legal definition of the offense.”
where her mind is a blank, a complete zero, as to the situation before her. If some modicum of understanding is needed, this state of affairs would seem not to give the defendant any aid. Such a mental blank may be due to feeble-mindedness, intoxication (or to drugs in general), or to sleep, to mention only the causes most frequently met. Of these situations the one involving feeble-mindedness needs almost no discussion. No doubt seems to be felt anywhere that a woman so imbecile as not to know what is occurring about her is not capable of consenting to the sexual act. Mentally such a person is simply not present. The same thing should be true of the woman in a stupor from intoxication. She too, being unconscious of the act, is not intelligently submitting in any sense of the term. Nor would the result differ where other drugs caused the stupor, as the mental state of the prosecutrix is for the present purpose the same regardless of the nature of the chemicals which have acted on her, although decisions are comparatively rare, as could be expected. The foregoing remarks however are subject to one qualification or restriction. If prior to her

19. Due to the practical unanimity of the authorities, their detailed discussion is needless. For representative cases see Reg. v. Fletcher (1859) Crim. App.) 8 Cox C. C. 131; Reg. v. Barratt (1873, Crim. App.) 12 Cox C. C. 498; State v. Tarr (1869) 28 Iowa 397; State v. Atherton (1878) 50 Iowa 189; State v. Warren (1911) 232 Mo. 185, 134 S. W. 522; Gore v. State (1904) 119 Ga. 418, 46 S. E. 671. For the present discussion there is no distinction between an insane woman and a feebleminded one. Reg. v. Connelly (1867) 26 Up. Can. Q. B. 317.

20. So held in Commonwealth v. Burke supra note 4, and assumed without discussion in People v. O'Connor (1920) 295 Ill. 198, 129 N. E. 157. Indeed there has apparently been no case contra in recent times. Other decisions to the same effect are Quinn v. State (1913) 153 Wis. 573, 142 N. W. 510; McQuirk v. State supra note 18; State v. Curtis (1921) 108 Kan. 357, 196 Pac. 445, and two California cases, People v. O'Brien (1900) 130 Cal. 1, 62 Pac. 297, and People v. Snyder (1888) 75 Cal. 323, 17 Pac. 208. The last two were decided under a statute, which however was said to be only declaratory of the common law. The leading English case is Reg. v. Camplin supra note 8. People v. Quin supra note 17, is apparently contra, in holding it not rape. This was due however to the fact that in New York a separate offense was created by statute for this precise situation, thus by implication taking it out of rape.

21. An authority squarely in point is Harlan v. People supra note 16; where stupor was due to chloroform. The same drug was charged to have been used in State v. Green (reported in 2 Western Law Monthly, 183) a case in a subordinate Ohio court and never carried to an appellate court. The same result was reached on the authority of Wharton and Still treatise on medical jurisprudence. The only other decisions to be found, though they are in harmony with the foregoing depend directly on statutes. See People v. Espanol (1910) 16 Porto Rico 203, 214; Milton v. State (1887) 23 Tex App. 204, 4 S. W. 574; Ford v. State (1899) 41 Tex. Cr. 270, 53 S. W. 846. Some slight further authority might be found in State v. Riggs (1862, Del.) 1 Houst. Cr. Cas. 120, where the argument was raised by the prosecution in opposing a new trial. A new trial was refused without rendering any opinion. See also elaborate charges to the jury in Commonwealth v. Childs (1863, Pa. Co. Ct.) 2 Pittsb. 391.
intoxication, the prosecutrix had signified her willingness to submit, then such willingness should be regarded as continuing in force, even though at the moment the act was perpetrated she was actually unconscious. This will readily be evident on analyzing the situation. The defendant maintains that there was acquiescence. The mere blank fact of unconsciousness, however, will not establish this contention for him, and if previous to the unconsciousness she refused, a reference to such a prior mental state will only fill the blank with evidence adverse to his contention. A showing that at such time she had no warning of the danger and therefore had no thought about it leaves her mind a blank as before. In both instances nothing has occurred since her stupor began, so far as her brain is concerned, and there being no further mental action her frame of mind remains as before. But the same reasoning leads to the opposite result where at the last moment of consciousness she acquiesced. Again saying that her mind became blank or motionless from then on, it leaves her in such a state as does bear out the defendant's contention, and he succeeds in his defense.22

The final situation in which the prosecutrix would be unaware of any surrounding events is where she is asleep. Though it would seem obvious that her situation in regard to consent is the same as that of the intoxicated woman or that of the imbecile, yet courts have seemingly had more difficulty in arriving at certainty. Some have balked on the wholly legitimate ground that no force was used, but have destroyed their own logic by insisting that where the prosecutrix is an imbecile no more force is needed than is necessary to perform the physical act itself.23 Obviously such "constructive force" is in reality only a disguised means of removing the force requirement, and is as legitimately applicable in the case of the sleeping woman as elsewhere. Once the force difficulty is settled, however, the conclusion is regularly and easily reached that the act is rape. Thus in what seems to be the first case hereon in

22. See supra note 10.
23. See Reg. v. Sweenie supra note 11, a Scottish case. Other cases resting on the absence of force are Commonwealth v. Fields (1832, Va.) 4 Leigh 648, and (relying on it as their authority) McNair v. State supra note 17, and Charles v. State supra note 17. The latter at least has been expressly overruled, Harvey v. State (1890) 53 Ark. 425. The force argument was also raised by counsel for the defense, arguendo, in Reg. v. Complins supra note 8, and was apparently not opposed by the court. Square decisions on the same question, subsequent to this case, however, destroy any value which might otherwise be attached to it. The same is true of the dictum of Kelly, C. B., in Reg. v. Lock supra note 5, in which he expresses doubt on the question.
America, *State v. Shepard*, the point was not even discussed, but was taken quite for granted. It was, however, noticed and definitely passed on in *State v. Shroyer*, in which the court said: "It was the evident intention of the defendant to have connection with the girl without her consent, and whether it was to be by actual physical force or during the unconsciousness of sleep, is wholly immaterial. There could have been no consent while the intended victim slept." The language is even stronger in *State v. Welch*, where it is stated that the "General, if not universal, rule is that if a man have connection with a woman while she is asleep, he is guilty of rape, because the act is without her consent." Apparently the question has not been passed on elsewhere in the United States. In England certainty was speedily reached, as the charge to the jury in the first case directly involving the point was squarely to the effect that this was rape. Later the Court of Criminal Appeal passed on the situation, and on its being made clear in the case stated, that the prosecutrix was asleep at the time it was said that this "put an end to any doubt as to the case under the circumstances, being clearly one of rape."

Next to the entire unconsciousness which we have been considering comes the situation where the woman was awake, but was so completely unaware of the true circumstances that she did not realize that a sexual act was being performed. The result should be the same. The only added circumstance distinguishing this situation from the previous one is that according to the medical man's standpoint she is conscious, viz., that she is aware of certain events going on around her. But, if her awareness does not extend to the act in question it will not affect matters legally to show that immaterial and extraneous circumstances are registering in her brain. As to the sole point in which we are interested, she is mentally as

24. (1828) 7 Conn. 54. The case is well criticized from the force ground in *Don Moran v. People* supra note 18, at p. 360.
25. (1891) 104 Mo. 441, 16 S. W. 286. The passage quoted appears at p. 446, 16 S. W., at p. 287.
27. This must be qualified. It has been considered in several Texas cases, which, however, have little informational value, due in part to their dependence on a specific statute (Penal Code, arts. 1063, 1066), and more especially to the irreconcilability of the various conclusions reached. See *Stout v. State* (1886) 22 Tex. App. 339, 3 S. W. 231; *King v. State* (1887) 22 Tex. App. 650, 3 S. W. 342; *Mooney v. State* (1890) 29 Tex. App. 257, 15 S. W. 724; *Edwards v. State* supra note 17; *Payne v. State* (1897) 38 Tex. Cr. 494, 43 S. W. 515; *Payne v. State* (1899) 40 Tex. Cr. 202, 49 S. W. 604; *Ford v. State* supra note 21.
CONSENT IN RAPE

much a blank as before, with the same disastrous consequences for the defendant. The leading case to this effect is Reg. v. Flattery,\textsuperscript{30} where the defendant, a quack doctor, persuaded the prosecutrix that she would have to undergo an operation by him. Under cover of a belief by her that what was occurring was medical treatment, and not a sexual act, he committed the alleged rape. The court unanimously upheld the conviction, saying (through Mellor, J.) that "Here the prosecutrix consented to be treated medically and to have a surgical operation performed, and to nothing else, and in no sense did she consent to the prisoner having connection with her."\textsuperscript{31}

A state of facts almost identical with that in Reg. v. Flattery was involved in an American case, Pomeroy v. State,\textsuperscript{32} and largely on the authority of the English decision the same conclusion was arrived at. The only other American case in which the facts squarely show an ignorance that the act was sexual, is State v. Ely,\textsuperscript{33} in which the decision, though in accord, rests so directly on the Washington statute as not to be of any help elsewhere.\textsuperscript{34}

Next in order of inquiry is the case where there is the bare knowledge that an act of copulation is taking place, but where ignorance still exists as to all other circumstances. Does such knowledge satisfy that minimum with which acquiescence becomes

\textsuperscript{30} (1877, Crim. App.) 13 Cox C. C. 388. The case stated by the court below was slightly ambiguous, and this was seized on by the defendant. The outline of the facts given here, however, follows the view taken of them by the Court of Criminal Appeal. In Reg. v. O'Shay (1898 N. P.) 19 Cox C. C. 76, it was doubted whether the principal case was still the law, in view of the Criminal Law Amendment Act of 1885, in which, by sec. 3, subsec. 2, it was made "an offense" if any person by false pretences . . . procures any woman . . . to have unlawful connection.\textsuperscript{35} But in Rex v. Williams (1922 Crim. App.) 39 T. L. R. 131, in which the facts were on all fours with the Flattery case, it was held that the statute had merely made certain acts criminal which previously had not been so, and had left the law unchanged as to what was already a crime.

\textsuperscript{31} At p. 392. Previous to Reg. v. Flattery the same problem had been twice considered. In Reg. v. Stanton supra note 18, a nisi prius case, where the charge was assault with intent to commit a rape, a medical man attempted to have intercourse while pretending to be making an injection. Coleridge, J., charged the jury that as no force was intended, there was no intent to commit a rape. He did not discuss the consent element directly. The case was overruled, sub silentio, a year later, Reg v. Camplin supra note 8. The other occasion at which the question was considered was in Reg. v. Case (1850, Crim. App.) 4 Cox C. C. 220, in which the charge was simply for an assault, under circumstances closely resembling those in the Flattery case. Several of the judges, in dicta, stated that a charge of rape might have been supported.

\textsuperscript{32} (1883) 94 Ind. 96.

\textsuperscript{33} (1921) 114 Wash. 185, 194 Pac. 988.

\textsuperscript{34} Walter v. People supra note 18 is not contra to the foregoing as it would seem at first glance, as the conviction was reversed. This was due in part to the court's view that under the facts "no one would seriously contend" that she had been ignorant of the doing of the act, and in part to an erroneous charge relating to the situation where she knew the nature of the act.
significant, or may the object of the act still be so unenlightened that objections cannot be expected from her and hence that her failure to object will not involve any legal consequences? By far the commonest situation of this type is that where the prosecutrix believed the person with her to be her husband; other forms of error are comparatively rare. It will, however, be more convenient to consider the latter first. The leading case is Don Moran v. People,\textsuperscript{35} where a situation superficially much alike that in Reg. v. Flattery,\textsuperscript{36} was involved, with this distinction, that here the defendant informed the prosecutrix prior to the act, that an act of copulation was necessary for medical reasons, and the prosecutrix permitted it because of her belief in these false representations. It was held not to be rape, but the theory rested on what was the absence of force. It would have been far simpler to go on the consent ground, and so to avoid conflict with the cases holding that rape can be committed on an unconscious or terrified woman, where likewise force is not used. A more satisfactory method of putting it was employed in a Pennsylvania nisi prius case, Commonwealth v. Childs,\textsuperscript{37} where the court, after referring to the force necessary, went on to tell the jury that "No amount of persuasion or solicitation however improper, no amount of deception or 'even fraud however villainous or outrageous, will make illicit intercourse constitute rape, where the woman, induced or persuaded, consents to the act."

To the same effect see Wills' opinion in Reg. v. Clarence,\textsuperscript{38} though in this connection his remarks were not required by that case, which was merely one of assault. Contra to the view that consent secured by fraud remains consent notwithstanding the fraud is Eberhart v. State.\textsuperscript{39} The defendant, an itinerant medical quack, had persuaded the prosecutrix that the only cure for her illness lay in permitting him to have intercourse with her. Believing him she consented. The court, after pointing out that the failure to resist is merely evidence tending to show consent, concludes that this was rape on the supposed authority of Pomeroy v. State.\textsuperscript{40} The latter case however dealt with a prosecutrix who had no knowledge that a sexual act was involved at all, and hence has no bearing on one involving

\textsuperscript{35} Supra note 18.

\textsuperscript{36} Supra note 30.

\textsuperscript{37} 2 Pittsb. 391. The quotation is from p. 395.

\textsuperscript{38} (1888, Cr. Cas. Res.) L. R. 22 Q. B. Div. 23, 27. See also Clark v. State (1867) 30 Tex. 448, in which, however, it is equally consistent with the facts that the defendant truthfully meant his assertions while making them and only later conceived the idea of not performing.

\textsuperscript{39} (1893) 134 Ind. 651, 34 N. E. 637.

\textsuperscript{40} Supra note 32.
a consent which had its origin in fraud. Thus the precedents are confined to one case which went off on another point, another which erroneously regarded the question as closed, one nisi prius decision and one dictum—hardly a sufficient array of authority to close the question one way or the other. The writer submits that expediency is against so defining rape as to include this group of facts. At first glance such a conclusion seems unsound. An evil act, calling for punishment, has been committed. In its nature it resembles what is always regarded as rape, the reaction of society against it is much the same, and as a consequence the punishment which is regarded as suitable, will be much the same. These considerations however are far from conclusive. Two acts may be identical in their antisocial consequences, yet constitute different crimes simply because different means are used. Larceny and obtaining property under false pretenses are examples. The mere fact of similarity is therefore of no importance, if a substantial distinction in fact exists. In its very nature rape is a crime which is peculiarly open to false accusations and is difficult of defense.\textsuperscript{41} If fraudulent charges are always to be feared, they are specially dangerous here where the central fact of prime importance is, not the woman's objective conduct, but her unmanifested thoughts and beliefs. To ascertain them with any degree of assurance is bound to be an excessively difficult task. But it is not alone true that fraudulent charges are especially easy in rape, it is also true that there are special inducements to make such charges, which do not apply in other crimes. Thus a man's automobile may be stolen. He is ordinarily under no inducement to hide the fact of a theft or to accuse an innocent person. If, on reasonable suspicion he has made an accusation he will generally have no ground to desire a conviction, should it appear that the defendant is innocent. His reputation will not suffer if the jury is not convinced of the defendant's guilt or concludes that the defendant honestly believed he had the prosecutor's consent. In a rape charge all these considerations are reversed. If the commission of a sexual act becomes known, the prosecutrix is impelled by many motives of self-interest to assert that it was done criminally. If thereafter a man is put on trial she has every selfish inducement to bring about his conviction, as every ground of acquittal except possibly mistaken identity would involve a reflection on her. In

\textsuperscript{41} This needs no demonstration. For generations judges have been repeating Lord Hale's statement that "it is an accusation easily to be made and hard to be proved, and harder to be defended by the party to be accused though never so innocent." (Hale "Pleas of the Crown" *635.) For a very recent quotation with approval see \textit{People v. Blanch} (1923) 309 Ill. 426, 431.
short, point for point the conclusion is the direct opposite of that just referred to in the case of the stolen automobile. Thus there are unusual inducements for false charges, which can be plausibly constructed with exceptional ease, and, finally, such charges are extremely likely to succeed because of the intense feeling that the charge is very likely to awaken. Suppose, for instance, that the defense were a mistake in good faith as to the genuine consent of the prosecutrix. It is obvious that a fair determination would be attended with the gravest difficulties. Verdicts probably colored by prejudice are an evil always; they are such in the highest possible degree in an offense which, in three states, is punishable by death alone, and, in thirteen others, by death if the jury so determines. Where the conviction may be based on the testimony of the victim alone, the danger is even clearer. Quite aside from the foregoing, if the opposite view were taken, it would be far from easy to see where the line should thereafter be drawn. For example, will the giving of a counterfeit coin to a prostitute constitute rape? Faced with results of such doubtful expediency it would hardly seem the part of wisdom for a court to hold the situation under discussion rape, unless it could point to the command and guidance of a specific legislative enactment. Indeed in a few states the legislature have definitely declared that the borders of rape shall stop short of a case where the woman knows the sexual nature of the act.

If then it is agreed that as a general rule a showing of fraud should not deprive the defendant of the acquiescence on which he relies, or, to put it as it is more frequently phrased, if fraud should not vitiate consent, where a sexual act is known to be taking place is there any fundamental difference if the false belief induced or taken advantage of is to the effect that the doer of the act is the husband of the prosecutrix? Certainly the burden would seem to

42. Arkansas, Louisiana, and North Carolina.
43. Alabama, Delaware, Florida, Georgia, Maryland, Mississippi, Missouri, South Carolina, Tennessee, Texas, Virginia, and West Virginia. As a separate jurisdiction the District of Columbia has been included as the thirteenth "state."
44. Trimble v. Territory (1903) 8 Ariz. 273, 71 Pac. 932.
45. It is conceivable that an exception might practically (though not logically) be made for the cases of husband impersonation which will be discussed next. As these form the bulk of the fraud cases, such an exception would cover most of the field, and yet be confined within clear and knowable limits.
be on those asserting that here is one belief which, unlike all others leaves the woman with a knowledge that a sexual act is being performed, and yet does not draw with it her consent. Supporters of this view generally argue that the act consented to is fundamentally different from the one done. Thus it is said that "The act she permitted cannot be properly regarded as the real act which took place," or that this is a "case which it is hardly necessary to point out is not that of consent in fact sought to be avoided for fraud, but one in which that which took place never amounted to consent. The person by whom the act was to be performed was part of its essence. The consent of the intellect, the only consent known to the law, was to the act of husband only." All this, however, amounts to no more than an attempt to beg the question by so narrowly defining "the act" to which she is said to have consented as to exclude the case under consideration. If this can be done, of course, the desired conclusion follows with ease. If the identity of the person doing the act is part of the essence, then a mistake regarding his identity is an essential mistake. Such an obvious and harmless assertion needs no proof and proves nothing. In the same way there is the suggestion that there must be a "consent of the intellect," an understanding consent. Understanding what? Understanding how much? If the understanding need merely be that a sexual act is being done, then there actually is a consent of the intellect fully present. Assertions that the two facts are "fundamentally" different rest on no firmer ground. If there is any use in speaking of the fundamental distinctions the line would seem most naturally to be drawn between knowledge that it is a sexual act and absence of such knowledge, rather than between various situations in all of which that knowledge is present but other circumstances are or are not known. But in fact there is little profit in any event in speaking of "fundamental differences" as contrasted with "merely collateral circumstances"; the dividing line may too easily be drawn where the speaker wishes and the arbitrary nature of his choice be covered by such terms of mere camouflage.

47. May, C. J., in Reg. v. Dee supra note 2, at p. 587.
48. Palles, C. B., ibid. To the same effect Stephen, J., in Reg. v. Clarence supra note 38, at p. 44: "Consent in such cases does not exist at all, because the act consented to is not the act done. . . . Consent to connection with a husband is not consent to adultery."
49. The language of May, C. J., and Palles, C. B., quoted in the text from their opinions in Reg. v. Dee would apply with equal facility and apparent aptness if the prosecutrix had been induced to submit by means of going through a pretended marriage ceremony. Is her consent a "consent of the intellect" or not? Is intercourse under such circumstances fundamentally different or is the difference only as to collateral matters? It will
sole significant considerations that remain are that inherently there is no compelling need in logic and on a priori grounds to decide the case either one way or the other, but that in all other cases knowledge that a sexual act was involved validated the consent without more, and hence that the same result might well be expected here. That a conclusion to the contrary must be reached in this one instance alone is not satisfactorily demonstrated by an argument which assumes its own conclusion.

Apparently the first English case in point was *Rex. v. Jackson*, where the charge was burglary with intent to commit rape. It was found as a fact, that the defendant meant to pass for the woman's husband and not to use force, but to desist if the mistake was discovered. The question was reserved, and it was later decided by eight judges that this would be no rape, with four judges dissenting. After a sixteen year interval Gurney, in *Reg. v. Saunders*, charged the jury that "in point of law this was not a rape," and at substantially the same time and under like circumstances Alderson, B., was likewise so holding on the authority of *Rex. v. Jackson*. Both these two later cases were at nisi prius, however, and it was not until 1854, after another sixteen years, that the question was again before a higher court. This was in *Reg. v. Clarke*, where the prosecution attempted to reopen the point, but the Court of Appeal refused to do so, saying that *Reg. v. Jackson* was conclusive and in the opinion of most of them was right. Lastly, in 1868, in *Reg. v. Barrow* the Court of Criminal Appeal said that "It does

be no answer to say that here her error is as to previous events and their effect, viz., the prior supposed marriage. Here, too, her error concerns the then situation, viz., the status and relationship toward her of the man then in her presence, and a full knowledge of the facts then and there occurring would at once involve a complete refusal to permit the act. Yet where such a question arose, *Bloodworth v. State* (1872) 65 Tenn. 614, it was held no rape (though the decision was rested principally on the absence of force). It was also considered in a dictum in *State v. Murphy* (1844) 6 Ala. 765, and the law was said to be that

"If a woman be beguiled into her consent by marrying a man who had another wife living, or by causing the nuptials to be illegally celebrated and persuading her that the directions of the law had been observed; in neither case will the pretended husband be guilty of a rape. There are cases which lay down the rule in general terms, that wherever the consent is obtained by fraud, the crime has not been committed."

For a further discussion of the same point but under statutes altering the common law, see *Lee v. State* (1902) 44 Tex. Cr. 354, 72 S. W. 1005; *Wilkerson v. State* (1910) 60 Tex. Cr. 388, 131 S. W. 1108; and *Draughn v. State* (1916) 12 Okla. Cr. 479, 158 Pac. 890.

54. Supra note 1. The opinion is by Bovill, C. J. It appears on p. 192.
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 consent, 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 offense does not amount to rape." No subsequent case has raised the point, although, Huddleston, B., in a dictum expressed the wish that it might be reconsidered. This, in a measure, occurred in Reg. v. Dee, although, as that was an Irish case, the result contra reached in it did not overrule the English decisions. The view urged in Reg. v. Dee has already been commented on through an examination of the opinions of May, C. J., and Palles, C. B. Its efforts to explain away the line of English cases by demonstrating their mutual inconsistency breaks down in part because of the indiscriminate confusion with which it discusses rape and assault cases, and in part because of its failure to appreciate the distinction between ignorance of the sexual act, and knowledge of it with ignorance of some other highly important circumstance. In America, just as in England, there has apparently never been any serious doubt that rape was not committed by impersonating a husband or by taking advantage of the prosecutrix's self-induced error. In general the decisions are rested on the absence of force, a ground weakened by the simultaneous admission in most of the opinions that there may be instances of mere "constructive force," which however are said not to apply here, thereby tacitly indicating that the consideration actually decisive of the case lies elsewhere, viz., in the difference between the mental situation of the woman here involved and the idiot or intoxicated woman. Typical cases where the husband impersonator was held not guilty are Lewis v. State and State v. Brooks. Accordingly it may be said that the trend of decisions

56. Supra note 2.
57. Ante p. 423.
58. (1857) 30 Ala. 54.
59. Supra note 17. This case is not to be regarded as overruled by State v. Williams (1901) 128 N. C. 573, 37 S. E. 952. In the latter the defendant was held guilty under similar circumstances but it should be noted that the crime charged was not rape but was "carnal knowledge of a married woman by fraud in personating her husband," a new offense created by statute subsequent to the date of State v. Brooks and punished far less severely than rape (See Con. Sts. 1919 sec. 4207). Other cases in point are Wyatt v. State (1858) 32 Tenn. 394; People v. Bartow (1823 N. Y. N. P.) 1 Wheel. C. C. 378; Reg. v. Francis supra note 17; and (a dictum only) Pleasant v. State (1853) 13 Ark. 360, 373. A line of cases in Texas has considered the question in the light of a statute broadening rape so as to include situations
is decidedly against holding this to be rape. Logic seems to be on the same side. As to expediency the arguments pro and con have already been sufficiently canvassed.  

If it is true that knowledge that a sexual act is taking place, is sufficient to constitute a valid acquiescence, however base or extreme a fraud may have been resorted to in order to cover other important facts or to induce a mistaken willingness, it seems to follow that it is no rape if the defendant administered a drug which operated, not to make his victim unconscious, but to destroy her will power and to arouse her passions. Here again there is a failure to object to the sexual act, indeed even a willingness that it should occur, and again the attempted answer by the state is that such a willingness was artificially and fraudulently created by the defendant, where, if she had been in full command of facts or faculties (as the case might be) she would have refused absolutely. As the attempted answer fails in the one case, it must fail in the other also. Judicial discussion fails, however, extremely rare.

where the woman is induced by some stratagem to believe the offender is her husband. The discussion is so closely directed to the meaning of the statute that it seems inadvisable to do more than cite the cases here. They are Mooney v. State supra note 27; Ledbetter v. State (1894) 33 Tex. Cr. 400, 26 S. W. 725; and Huffman v. State supra note 7.

60. See p. 12 supra. In ten states (Alabama, Arizona, California, Colorado, Idaho, Montana, North Dakota, Oklahoma, South Dakota, and Utah) and Porto Rico it has been made rape by statute, where the defendant by fraud induces the erroneous belief. In Alabama one of the objections discussed in the text is met by providing that "no conviction must be had on the unsupported evidence of the woman." In North Carolina and Tennessee husband impersonation is not rape, but is made an independent offense (N. C. Con. Sts., 1919, sec. 4207; Tenn. Code, 1896, sec. 6453).

61. Thus, too, in the case of an imbecile prosecutrix, if she has enough mind to know that a sexual act is being performed and she thereupon approves because of mere animal passion, the defendant has met the charge, despite the imbecility. For the present purposes she is then actually consenting intelligently. Crosswell v. People (1865) 13 Mich. 427; Reg. v. Fletcher (1866, Crim. App.) 10 Cox C. C. 248 (as explained in Reg. v. Barratt, supra note 19).

62. The clearest comment will be found in State v. Lung supra note 17, where the defendant had attempted to administer a quantity of cantharides by mixing it in coffee. This drug, it was testified, left the taker in full possession of his faculties, and did not produce unconsciousness. As it was not shown that it created an irresistible desire on the woman's part the court was not forced to decide squarely what the law would be in such an event, but in holding that no attempt to commit rape was shown here it used language strongly indicating a view in harmony with the one expressed here. Thus it said (at p. 213, 28 Pac. at p. 236):

"The sum of the cases seems to be that to constitute rape, where there is no force used, the woman must have been unconscious, or unable to fairly comprehend the nature and consequences of the sexual act. . . . Anything which merely excites the woman's passions, leaving her at the same time in the full possession of her mental and physical powers, capable of comprehending the nature of the act, and of exercising her own volition in the mat-
In view of the analysis here made, what is the proper definition of rape; is it intercourse against the will of the prosecutrix or, intercourse without her consent? It is not within the scope of this article to trace the use of one term or another since the enactment of the first statute creating the crime.\(^\text{63}\) Whichever has the better historical claim, it is undeniably true that both expressions have the support of a long line of judicial decisions. Either one therefore may well be regarded as possibly authentic. It has been argued that the two are in contemplation of law the same and may be used interchangeably with no alteration of meaning.\(^\text{64}\) If this is true, the difficulty is overcome by urging its non-existence. But to the layman at least and to many courts it will doubtless seem certain that a substantive difference lies between the terms, and that to be against her will would involve nothing less than a conscious opposing volition on her part, while to be without her consent would mean simply that active approval was withheld by her. If such an interpretation is put on will and consent, either definition proves to be inadequate. To require that the state must show that the act was against her will, would put too great a task on it. It has frequently been pointed out that this would involve an acquittal wherever the prosecutrix was an idiot or was in a stupor, etc., viz., it would completely reverse the cases where the woman's mind was a blank. The other definition, applied rigidly, is only slightly more satisfactory. To consent either means actively to approve, or at the very least it signifies an affirmative thought process by which a situation and its consequences are considered and the conclusion is reached that the situation should be allowed to take its course.

In arriving at this conclusion reliance was placed in part on People v. Royal (1878) 53 Cal. 62, an unusual case in which the defendant, it was asserted had gained the prosecutrix's consent partly by hypnotism and partly by physical manipulation of her body. While drugs were not involved the analogy seems close enough to justify a reference to the case here. The court held that proof that a device or trick was used to render her unable to resist temptation was relevant in a seduction charge, but had no significance where the charge was rape. The same conclusion may easily be inferred from Reg. v. Camplin supra note 8, where it was taken for granted that had the intercourse occurred while the girl was conscious and had it been permitted by her as a result of the excitement created by the alcohol, the charge would have been fully met. For a view apparently at variance with those expressed here see State v. Green, an Ohio nisi prius case, reported in 2 Western Law Monthly 183. Doubtless the arguments of expediency, discussed on p. 421, do not here apply with their full force.

For such an historical survey see Commonwealth v. Burke supra note 4.

This is well discussed in Whittaker v. State (1880) 50 Wis. 518, 7 N. W. 431.
without hindrance on the part of the consenting party. If the former, it follows that it should be rape where the woman adopted a frame of mind of complete indifference and unconcern, since in such event there would be no active approval and hence no consent. But plainly the rule is otherwise; before extending its protection the law demands that the woman must actually dissent. Half assent and half refusal will not do. It follows that neither statement of the crime, if applied literally, is completely satisfactory, one favoring the defendant too much, the other, the state. Both must be interpreted and restricted. That being so it will make little difference which form of expression is used, provided the meaning of the one chosen is carefully blocked out so as to have some assurance that those using it are all referring to the same thing.\footnote{65. The analogous treatment of assault cases will appear in a subsequent article.}