UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

PRINCIPLES

OF THE

LAW OF CONSENT

WITH SPECIAL REFERENCE TO CRIMINAL LAW,

INCLUDING

THE DOCTRINES

OF

Mistake, Duress, and Waiver,

BY

HUKM CHAND, M.A.,

AUTHOR OF "RES JUDICATA."

Bombay:

PRINTED AND PUBLISHED BY THE

BOMBAY EDUCATION SOCIETY'S PRESS.

1897.

To

His Highness Rustam-i-Dauran; Aristu-i-Zaman;

Muzaffar-ud-Dowlah; Muzaffar-ul-Mumalig, Nizam

-ud-Dowlah; Nizam-ul-Mulk; Asaf Jah; Nawab Mir

Sir Mahbub Ali Khan Bahadur,

Futteh Jung, G.C.S.I.,

Nizam of Hyderabad,

This first result of a

Gracious Patronage,

Bestowed by His Highness' Government for the

prosecution of legal studies,

is,

By permission,

Gracefully dedicated

by the

Author.

PREFACE.

THE favour with which my work on "Res Judicata" has been received, not only in India, but in England and the United States, may be taken as a conclusive proof of the general approval of the plan adopted in its preparation—the plan of the utilization of the labours of foreign judges and jurists for the development of the Indian law, and of a recourse to judicial decisions and legal writings of other countries for the elucidation of legal questions coming before the Indian courts. The references in that work to the decisions of American courts and to the works of American authors, are attracting the attention of Indian judges and Indian lawyers to the vast sources of hidden judicial wealth, which can be so well and so easily utilized to help them in the administration of justice in this country, and to guide them in the proper solution of the legal difficulties they every day encounter in their work. In England, the inclusion of Mr. Browne's notes in Campbell's series of Ruling Cases, and the increasing references to American decisions in all legal publications, is a tangible evidence of an increasing demand for such knowledge, and must result in a still further increase in that demand. The foundation there of the Society of Comparative Legislation with a view to disseminate a more extended knowledge of foreign law is also a step, and an important step, in the same direction. The work of the Society cannot fail to direct general attention to the study of the American and Continental systems of Jurisprudence, and to provide facilities for that study by giving a special stimulus to the creation of a foreign legal literature in the English language. The importance of this result can hardly be overestimated, as it will not only prevent the adoption by the legislature of measures already tried and found to be a failure in other countries; but it is certain also to increase the vision and

broaden the horizon of the English legal public, and by familiarizing it with judicial conceptions and legal methods other than its own, to prepare the way for legislation on a wider and more catholic basis. This is also likely in the end to contribute materially to the general assimilation of the commercial and general laws of different jurisdictions under the British Empire, and even of other countries, and to a relaxation of that antiquated rule which treats the law of even an adjoining country as a question of fact, to be proved like other facts, by the evidence of experts. In these circumstances, an explanation can hardly be required of me for the cosmopolitan character of this work, in which the writings of Kessler, Breithaupt, and Binding; of Carrara, Crivellari, and Giorgi; and of Garraud, Blanche, and Adolphe and Hélie are cited as freely as those of FitzJames Stephen, Russell, and Pollock; of Hume, Alison, and Macdonald; and of Wharton, Bishop, and Clark: and the Codes, legislative projects and decisions of Germany, Italy, and France are referred to as frequently as those of India, the British Islands, and North America.

2. The principle of *res judicata* and other cognate doctrines having been treated in my last work with special reference to their application in civil proceedings, I decided to treat next of some subject with special reference to its application in criminal law. The Irish decision in *Reg.* v. *Hehir* called my attention last year to the apparently hopeless conflict of opinion in regard to the subject of consent, as disclosed in the leading articles on that subject in the Harward Law Review and Madras Law Journal, as well as in the leading decisions of *Reg.* v. *Middleton*, *Reg.* v. *Ashwell*, *Reg.* v. *Flowers*, and *Reg.* v. *Clarence* in England; of *Reg.* v. *Dee* in Ireland; and of *Wolfstein* v. *People*, and *Dutcher* v. *State* in the United States. I was aware that the conflict was not restricted to the questions touched by those decisions, or even to the countries whose jurisprudence was derived from or based on the English law. I soon came to know that in regard to

criminal matters, it extended as well to the leading countries of Europe, where jurists are still discussing the general effect of consent on crimes, and the inalienability of individual rights, of rights to one's life and limb, and even to one's person or property. Among the most successful accomplishments of the Indian Penal Code, is the treatment of the essential qualifications and the positive operation of consent—of consent as a legal phenomenon in the law of crimes, and as a ground for justification of criminal acts. Unlike it, the Penal Code of almost every country in Europe, to a great extent, ignores consent altogether; and even the Codes which recognize it, do so only in a very few cases and only as a ground of the mitigation of punishment. The question even of the necessity of the absence of consent for any offence, is usually left to be determined by general considerations relating to the nature of that offence, and of the general principles bearing on consent. It occurred to me that some of this conflict was due to a misapprehension of the nature of consent and its usual incidents, and might be avoided or lessened by a proper consideration of the subject in all its bearings; light being thus thrown on points not sufficiently developed or clear in one branch or system of law by what has been written or said about them in other branches or systems. The results of this consideration are embodied in this treatise, for which I now claim the indulgence of the public.

3. The subject is at once important and comprehensive. Consent may be said to be the essence of the obligation of all contracts, the destruction of the liability involved in all torts, and a justification or mitigation of the criminality of most crimes. If acts and intention are the base of a legal transaction, consent is one of its chief modifying factors, giving it its particular coloring and tone. Consent can make a wrong right; and there is hardly a transaction which may not undergo some change in its legal character on account of its wide extending operation. The effects of this operation in the case of most transactions are of too uniform a character to require separate treat-

ment. This treatise, therefore, aims chiefly at discussing the general principles relating to consent, the illustrations in support of the leading propositions advanced being drawn from the most usual and common classes of transactions. As compared with the branches of law affecting merely private rights and duties, the effect of consent is, no doubt, rather limited in criminal law ; but even in that law, it affects the criminality of almost every act to a greater or less extent, and most of the private crimes can exist only in the absence of consent. The effect of consent is, in some cases, direct and in others indirect, and sometimes as preventive or destructive of criminality, and sometimes merely as a mitigation of the offence or of its punishment. On that very account, however, most of the difficulties connected with the subject arise in criminal law, a consideration which has chiefly influenced me in its selection for treatment with special reference to the law of crimes. For a proper elucidation of the questions arising in connection with that law, full advantage has, however, been taken of the analogies of the civil law relating to consent, and of the operation and effect of consent in the law of contracts and torts. There is an increasing tendency, at present, to look at different branches of law as separate from each other ; but law is an organic whole, and so clearly are its component parts dependent on and connected with each other, that individual notions and principles of any one branch are, isolated and by themselves, as little capable of being understood properly as any separate piece of a homogeneous and complete mechanism. This is particularly necessary in regard to the law of consent, both as that law in its bearing on crimes is, even in British India, where it is most advanced, in a very undeveloped condition ; and as the questions arising in cases of offences against property directly involve principles of the transfer of property and possession, and thus turn on the civil law of obligations and things.

4. The general plan of this work is much the same as that adopted in the treatise on *Res Judicata*. Unlike *Res Judicata*,

however, there is no statutory law on the subject of consent even in British India, except in regard to the causes of its disqualification, and to its effects as a justification; and it has naturally not been practicable to follow the order of any positive law. The treatment has, therefore, proceeded on natural lines, and in the orderly sequence in which the various questions connected with the subject arose for consideration. The entire subject has been divided into thirteen chapters. The first chapter, after referring briefly to the operation of consent in the law of contracts and torts, explains the general character of its operation in criminal law. The second chapter treats of the nature of consent as an operation of mind, and in relation to the fact of knowledge. The third chapter discusses at length the nature of coercion, mistake, and other objective and subjective disqualifications and vitiating causes of consent in the law of contracts, and the effect of those disqualifications and causes on the existence of consent, which in every branch of law is, however, independent of them. The fourth chapter treats of the expression of consent as express, and implied or constructive, and of the various cases in which it may or may not be implied from acts or circumstances which do not convey it directly. The fifth chapter explains the scope of consent and of the act consented to, discussing the difference between consent and will. The effect of consent forms the subject of the sixth chapter, in which the subjective and objective incidents of an effective consent are discussed. The seventh and eighth chapters, which read together, form, as it were, an extended commentary on S. 90 of the Indian Penal Code, treat respectively of the objective and subjective causes that vitiate consent in criminal law; the former, discussing the exact effect on consent of fear, misconception, and fraud; and the latter, the grounds of incapacity for consent, including infancy, unsoundness of mind, and drunkenness. The ninth chapter deals with the absence of consent, and with the offences of which that absence is an essential constituent, and which cannot coexist with consent.

The tenth chapter is a sort of extended commentary on S.S. 87-89, 91 and 92 of the Indian Penal Code, and deals with consent as a justification of acts which otherwise would fall within the criminal law. The next succeeding chapter deals with consent as a ground of mitigation of the criminality of acts or of their penalties. The twelfth chapter deals with the effect of consent on jurisdiction and rights of procedure, and the extent to which they may be waived. And the work concludes with the thirteenth chapter, in which mention is made of a few points relating to the *onus probandi* and evidence of consent.

5. Reference has already been made to the scantiness of the statutory law on the subject. Nor is the case-law bearing on the subject very heavy. Full advantage has, however, been taken of both these sources of information so far as they go, as well as of the unofficial literature on the subject. I am not aware of any English work dealing exclusively with the subject, which is dismissed even by writers like Dr. Wharton and Dr. Bishop in a few pages of their respective works on criminal law. On the continent of Europe, I have been able to get only two small treatises in Germany by Kessler and Breithaupt respectively, and though they are both essentially controversial, discussing only particular aspects of the subject, my best acknowledgments are due to them. The subject is referred to, however, at some length in almost every general work on criminal law, and assistance has been taken from almost all such works, as well as from the leading commentaries on most of the Penal Codes of India, Europe and America ; the learned commentaries of Olshausen, Rüdorff and Rubo on the German Penal Code having, for instance, remained on my table, during the preparation of the work, even more constantly than the works of Mayne, Starling and Collett on the Indian Penal Code. The assistance taken by me has generally been acknowledged expressly and by name in the body of the work ; but special reference may here be made also to the debates in the various Legislative assemblies which have enacted Criminal Codes, to

the reports of the English and the Indian Law Commissioners engaged at different times in the revision of the criminal law of England and India, and to the excellent report with which Livingston presented his Draft Criminal Code for Louisiana.

6. In treating of the subject, I have not contented myself with an enunciation of a bare statement of the law applicable, nor even with merely formulating hard and fast rules. The subject being, to a great extent, still in a controversial stage, it has been my constant endeavour to cite authorities for every leading proposition advanced, and to illustrate the same by quotations from decisions and text-books, using, so far as practicable, the *ipsissima verba* of the judges and the jurists. This has appeared to be specially desirable, as the foreign reports and publications from which assistance has been taken are almost entirely inaccessible in this country.

7. One of the main objects of the work being the explanation of the present law of India relating to the subject of consent, it has been an object of constant endeavour to introduce references only to such aspects of foreign laws and decisions as are of a general character and may be of use in this country. And when for the sake of argument or for the elucidation of any point, the mention of other facts has been found unavoidable, their real character has been invariably so clearly indicated as to avoid all chance of confusion to the Indian lawyer. Further, as the majority of the Indian readers cannot generally be acquainted with the modern continental languages, I have, in case of citations from the German and the Italian, and in most cases even from the French authors, given an English translation in the notes. In regard to the decisions cited, the authoritative report alone has generally been given in the body of the work; but reference has been made in the nominal index to other contemporaneous reports, and to the well-known series of the Revised Reports in England, and to the National Reporter Series, the Law

Reports Annotated Series, and the series which the public owe to Mr. Freeman and his associates in the United States. In most cases, the year in which the decisions were passed has also been given in that index. To further increase the usefulness of the work, a list of contents has been added, and the index of subjects made full by means of cross-references, and a proper classification of subheads.

HUKM CHAND.

Delhi, 20*th June* 1897.

TABLE OF CONTENTS

CHAPTER I.

Operation of Consent in Criminal Law.

		PAGE
1.	General operation of consent	1
2.	Operation of consent on contracts	1
3.	Operation of consent on torts	3
4.	Injury to person if consented to cannot be tort	6
5.	Consent of an individual does not affect acts prejudicial to public	7
6.	Operation of consent in Criminal law	9
7.	The exact character of this operation of consent	10
8.	Absence of consent, the essence of most private crimes ...	12
9.	Absence of consent expressly made essential for some offences in the Indian Penal Code	14
10.	Consent is an excuse for several criminal acts	14

CHAPTER II.

Nature of Consent.

11.	Consent is an operation of mind	16
12.	Nature of physical consent	17
13.	Consent not to be confused with estoppel	18
14.	No consent to an act without knowledge thereof	19
15.	Knowledge of attributes of an act how far necessary to consent	20
16.	Consent in law of contracts	21
17.	Consent in non-contract law	22
18.	A person while asleep cannot give consent	23
19.	No consent if want of knowledge due to unconsciousness on other account	25
20.	Consent to an act does not involve knowledge of its non-essential incidents	28
21.	Knowledge of character of an act not necessary for consent to it...	30
22.	No consent where mind incapable of operation required for consent or of knowledge	32

CHAPTER III.

CONSENT IS INDEPENDENT OF ITS QUALIFICATIONS.

		PAGE
23.	Existence of consent independent of subjective and objective considerations	33
24.	In contracts also, consent not free or fair, may be consent.	33
25.	Consent required to be free and fair for valid contracts ...	35
26.	Coercion as affecting freedom of consent	35
27.	General signification of duress in English law	36
28.	Extent of fear required to constitute coercion	39
29.	Withholding possession of goods how far a duress in English law	41
30.	Duress of goods in the United States	43
31.	Illegality of act done or threatened how far necessary to constitute duress	48
32.	In the United States, lawful imprisonment, if malicious, may constitute duress	50
33.	Illegality of act done or threatened how far necessary to constitute duress in Indian law	54
34.	Undue influence as affecting freedom of consent	55
35.	General notion of fraud as affecting freedom of consent ...	57
36.	Fraud in English law	59
37.	Fraud in Indian law	60
38.	Absence of free and fair consent makes contracts only voidable	61
39.	General effect of mistake on consent	65
40.	Mistake, error, and ignorance how far different	66
41.	Mistake even of one party may prevent formation of contract	68
42.	Nature of facts, mistake of which may affect consent ...	69
43.	Mistake as to the nature of the transaction	72
44.	Mistake as to the parties to a contract	75
45.	Mistake as to the identity of the object of contract ...	77
46.	Mistake as to the existence of the object of contract ...	78
47.	Mistake as to the substance of the object of contract ...	80
48.	Mistake as to substance in English law	82
49.	Mistake as to the quantity of object of contract	87
50.	Mistake as to the motives for the contract	87
51.	Effect on consent of mistake of law	90
52.	Mistake of law distinguished from mistake of fact ...	93
53.	Mistake as to the existence of a title or right	96
54.	Action of Courts of Equity in regard to mistake of law ...	98
55.	Mistake as to legal effect or construction of contracts ...	101
56.	Mistake of a well-settled principle of law not entitled to special relief...	103
57.	Effect of mistake of law in European countries	106
58.	Effect of mistake on transfer of ownership	108
59.	Transfer of ownership in case of non-specific chattels ...	109

PAGE

60. Transfer of ownership in case of specific articles 110
61. Recovery of a thing given under mistake 113
62. Effect of mistake on transfer of rightful possession ... 123
63. Rightful possession distinct from possession 124
64. Possession may be transferred by mere physical delivery... 126
65. Mistake has no effect on transfer of mere possession ... 128
66. Subjective incapacity to contract 132
67. Consent distinguished from free consent in law of torts ... 137
68. Consent distinguished from free consent in Criminal law... 138
69. Consent distinguished from free and intelligent consent in the Indian Penal Code 141

CHAPTER IV.

Expression of Consent.

70. Necessity of the expression 143
71. The expression though in agreement, is not identical with consent 143
72. Consent may be implied 145
73. Consent may be implied in contracts 148
74. Consent may be implied in non-contract law 149
75. Consent may be implied in Criminal law 149
76. Implied consent distinguished from constructive consent ... 150
77. Consent implied from non-resistance 152
78. Obligation to have an act done does not involve consent to the doing of that act 159
79. Consent to an act implies consent to its natural and contemplated consequences 161
80. Recognition of the implied consent to consequences in law of contracts 163
81. Recognition of the implied consent to consequences in law of torts 164
82. Doctrine of obvious risks in England 166
83. Doctrine of obvious risks in the United States 169
84. Exact character of the voluntariness of the assumption of risks 172
85. Consent to an act implies consent to everything necessary to do that act 176
86. Consent not implied from non-prevention 176
87. Consent to an act not implied by providing facilities for it to catch the doer 179
88. Creating opportunity for an act does not imply consent to it 183
89. Encouraging or co-operating in an act to discover the doer, does not imply consent to it 185
90. Inducing a person to an act implies consent to the act ... 185

PAGE

91. Soliciting a person to do an act implies consent to it ... 187
92. No question of consent where criminal act is done by injured person 188

CHAPTER V.

The Scope of Consent.

93. Consent is merely to an act 192
94. Consent can be only to another's act 192
95. Distinction between consent and will 192
96. General recognition of the distinction between consent and will 195
97. Consent to one act is not consent to another act ... 197
98. Identity of act how far affected by difference of subjective and objective incidents 200
99. Separate acts how far deemed one and the same ... 202
100. Consent to taking of one article is not consent to taking of another article 206
101. Consent may be conditioned or limited in any manner... 209
102. Consent to an act is to the act as usually done... ... 210
103. Consent to an act is not consent to the consequences of that act 211

CHAPTER VI.

Effect of Consent.

104. Consent can be only to a future act 213
105. Consent distinguished from subsequent approval ... 216
106. Consent must exist at the time of the act 219
107. Consent must be of person to whom harm is caused ... 222
108. Effect of consent not affected by motive of its giving ... 228
109. Consent must have come to the knowledge of the doer of the act 231
110. Mere belief as to absence of consent not equivalent to its absence 233
111. Belief of absence of consent how far deemed equivalent to consent in India 235

CHAPTER VII.

OBJECTIVE DISQUALIFICATIONS OF CONSENT.

		PAGE
112.	Consent caused by fear or misconception of fact is not consent in criminal law	237
113.	General recognition of the principle in the Indian Penal Code	237
114.	Knowledge by person acting on consent of its having been given by fear or misconception	239
115.	Recognition of the provision in English Criminal Law.	241
116.	Coercion and fraud will not necessarily avoid consent...	242
117.	Fear may be caused by duress	242
118.	Fear may be result of one's dependent position... ...	245
119.	Character of the injury causing fear	246
120.	Fear must be of some harm other than that contemplated from the act consented to	247
121.	Scope of misconception of fact in Indian Criminal Law.	248
122.	Effect of mistake on consent in English Criminal Law...	249
123.	Effect of mistake on consent in larceny cases	250
124.	Effect of delivery by an agent	253
125.	Mistake as to the identity of the person...	257
126.	Mistake as to the thing given	258
127.	Mistake as to motives confused with mistake as to identity	260
128.	How far receiving of a thing given by mistake as to motive is larceny	262
129.	Effect of mistake as to the thing in French law of theft...	264
130.	No larceny if person receiving shared giver's mistake at time of receipt	267
131.	No larceny if person receiving was not aware of giver's mistake at time of receipt	273
132.	Effect of fraud on consent in law of crimes	273
133.	Fraud negatives offences of which absence of consent is essential constituent	274
134.	Intercourse with a woman by fraud in personating her husband	276
135.	Cases against conviction for rape turn on the supposed necessity of force for that offence	280
136.	Signification of force extended constructively	281
137.	Force did not include mere fraud...	283
138.	Penality of intercourse obtained by fraud	286
139.	Consent obtained by fraud negatives rape chiefly under special legislation	288
140.	Consent obtained by fraud negatives assault	289
141.	Fraud vitiates consent merely as an error	293
142.	Consent obtained by fraud does not affect abduction ...	294
143.	How far consent obtained by fraud is consent in theft...	297
144.	How far consent to entrance obtained by fraud is consent in house-breaking	300

CHAPTER VIII.

SUBJECTIVE DISQUALIFICATIONS OF CONSENT.

		PAGE
145.	Consent of incompetent person is not sufficient consent in Criminal law	304
146.	Statutory protection of minors in regard to rape in English law	306
147.	Substitution of minority for force in rape	307
148.	Constructive extension of force in cases of minority ...	308
149.	Sexual intercourse with minor's consent statutorily punishable even outside England	309
150.	Minor's consent to sexual intercourse generally held not to be consent...	310
151.	Consent immaterial in case of attempt to have carnal knowledge of minors	311
152.	Minor's consent, according to common law, avoids the criminality of an indecent assault	312
153.	Special legislation to make indecent assault against minors an offence in spite of consent	316
154.	Limit of the age of consent	318
155.	Common law did not recognize unsoundness of mind as disqualification of consent	321
156.	Effect of idiocy on consent in the United States... ...	324
157.	Attempted extension by analogy of rules concerning minors to persons of unsound mind	325
158.	Statutory legislation for protection of the insane ...	327
159.	Intoxication as a vitiating cause of consent	329
160.	Causing intoxication in order to get consent is equivalent to force in English law	330
161.	Effect on consent of causing intoxication on the Continent...	331
162.	Sexual intercourse with a female by drugging her is not rape, though sometimes deemed punishable as such.	334
163.	Criminal act done to a person after intoxicating him is not excused by that person's consent	336
164.	Consent by an intoxicated person does not excuse criminality of act done with knowledge of his intoxicated condition	337
165.	Recognition of vitiating effect of intoxication in Indian Penal Code	338
166.	Effect of spiritual force on consent	339

CHAPTER IX.

OFFENCES INVOLVING ABSENCE OF CONSENT AS AN ESSENTIAL CONSTITUENT.

167.	Negative operation of consent in criminal law	340
168.	Determination of offences for which absence of consent is essential	341

PAGE

169. Moral character of an offence no criterion of the necessity of absence of consent 343
170. Necessity of absence, consent for an offence may be determined by the object of the law applicable ... 344
171. Consent in theft 344
172. Consent in other offences relating to property 347
173. Consent in rape 349
174. Consent in assault... 352
175. Consent in assault in disturbance of public peace ... 353
176. Consent in cases of aggravated assault 355
177. Consent in wrongful confinement 356
178. Consent in offences relating to compulsory labour ... 358
179. Consent in other offences affecting personal freedom ... 360
180. Consent in abduction 361
181. Consent in adultery 363
182. Mere consent does not avoid criminality of an act which must be done with particular evidence of it 368

CHAPTER X.

CONSENT AS JUSTIFICATION.

183. Consent as a ground of exemption from criminal liability 369
184. Principle of the exemption from liability 371
185. Restriction of the rule as to non-liability on the ground of consent... 372
186. Restriction of the exemption from liability in regard to the age 372
187. Restriction of the exemption from liability in regard to the nature of the harm caused 373
188. Harm to one's life among ancients 375
189. Influence of Church and State on harm to one's life ... 376
190. Immunity of suicide from punishment 377
191. Suicide not an offence as it does not contemplate injury to any rights 378
192. Suicide not punishable as indicative of unsoundness of mind at the time of its commission 379
193. Inadvisability of punishing suicide 380
194. Suicide in English law 383
195. Penality of attempt of suicide 383
196. Penality of abetment of suicide 385
197. Abetment of suicide in English law 387
198. Attempt and abetment of suicide punishable in India ... 388
199. Confusion of abetment of suicide with homicide of consenting person 389
200. Abetment of suicide is really distinct from homicide by consent 391

PAGE

201. Homicide by consent is real homicide 393
202. Objections to the treatment of homicide by consent as murder 395
203. General concensus as to penality of homicide by consent 400
204. How far homicide in a duel is murder 402
205. Homicide by consent punishable in India 405
206. Effect of consent on acts merely known to be likely to cause one's death... 406
207. Knowledge of likelihood of an effect distinguished from intention to cause that effect 407
208. Penality of causing hurt to oneself 408
209. Voluntary causing of hurt to another as affected by his consent 409
210. In Indian Criminal Law, consent justifies every hurt other than grievous 415
211. Even grievous hurt justified in certain cases by consent. 416
212. Taking risk of harm contrasted with consent to suffer harm 417
213. Manly exercises with arms how far allowed 421
214. Greater effect of consent on acts done for benefit of person consenting 422
215. Such acts to be justified must be done in good faith ... 423
216. Extent of justification by consent in case of acts for benefit of person consenting 424
217. Acts for a person's benefit not justified if not consented to by him... 425
218. Guardian's consent generally deemed equivalent to one's own consent 426
219. Guardian's power of consent is not co-extensive with one's own... 427
220. Restrictions on. guardian's power of consent 427
221. What acts causing harm justified when done without consent 428
222. Restrictions on the power of causing harm without consent 430
223. Consent does not justify acts constituting public offences 431
224. Consent does not justify acts constituting other offences, irrespective of harm caused by them to person consenting 432

CHAPTER XI.

Consent as a ground of mitigation.

225. Consent a ground for mitigation of liability 434
226. Consent is ground of mitigation in case of homicide ... 435
227. Consent is a mitigation of offence of homicide in India.. 438

		PAGE
228.	Limitation of the age of consent for homicide in India...	440
229.	Proposed English legislation in regard to homicide by consent	441
230.	Burning the *suttee* is only culpable homicide	443
231.	Homicide in a duel is culpable homicide in India...	444
232.	Unsatisfactory effects of treating homicide in a duel as murder	445
233.	Attempts in English law against the treatment of homicide in a duel as murder	446
234.	General *concensus* against treating homicide in a duel as murder...	448
235.	Homicide in a premeditated fight between armed factions is murder	450
236.	Consent is a ground for mitigation of punishment in case of bodily injuries	457
237.	Absence of consent is aggravation	458
238.	Even approval, not amounting to consent, causes a mitigation of punishment	459

CHAPTER XII.

239.	Consent cannot give jurisdiction...	460
240.	Consent cannot give jurisdiction over subject-matter ...	462
241.	Consent cannot give jurisdiction over appeals	463
242.	Objection to jurisdiction may be taken at any stage of proceedings	464
243.	Estoppel from plea of jurisdiction	466
244.	Waiver of defect of other jurisdiction	470
245.	Waiver of defect of local jurisdiction	473
246.	Waiver of defect of jurisdiction over person	476
247.	Waiver of personal exemption from jurisdiction ...	476
248.	Disqualification of a judge at common law may be waived	477
249.	Statutory disqualification of a judge may not be waived.	479
250.	Waiver of defect of personal jurisdiction by appearance.	483
251.	Pleading after objection to jurisdiction not a waiver of its absence	486
252.	Waiver of irregularities in initiating proceedings ...	489
253.	Waiver of the irregularity of the first institution of proceedings in a Court not having jurisdiction ...	491
254.	Waiver of irregularity of initiative process in criminal proceedings	494
255.	Waiver of conditions of exercise of civil jurisdiction ...	498
256.	Waiver of conditions of exercise of criminal jurisdiction.	504
257.	Waiver of rights in matters of procedure	508
258.	Right of waiver unlimited in civil proceedings	510
259.	Essentially different character of criminal proceedings in regard to rights of waiver	513

PAGE

260. Rights may be waived to a certain extent in criminal proceedings 514
261. Waiver of accused's right of not being asked to criminate himself 517
262. Waiver of ordinary forms of procedure 520
263. Accused may bind himself by agreement in criminal proceedings 524
264. Waiver not allowed where it is prejudicial to accused ... 527
265. Waiver of incompetency of evidence 528
266. Waiver of right of trial by jury 530
267. Waiver of the number of jurymen 531
268. Waiver of formal rules for empanelling jury 536

CHAPTER XIII.

EVIDENCE OF CONSENT.

269. Onus probandi as to consent 539
270. Onus probandi as to absence of consent when essential for an offence 539
271. Application of the rule of onus probandi as to the person alleging the affirmative... 541
272. Application of the rule of onus probandi as to the person alleging the negative 542
273. Evidence of absence of consent 543
274. Evidence in rape cases of female's prior connection with accused 544
275. Evidence of female's character for unchastity on charge of rape 545
276. Individual acts of unchastity with persons other than accused may be proved... 546
277. Complainant may be questioned as to individual acts of connection with other persons... 550
278. Complainant's denial as to individual acts may be contradicted 551

TABLE OF CASES.

A

PAGE

Abbot, People *v.*, (1838) 19 Wend., 192 ... 153, 548, 550, 551
Adams *v.* Adams, (1867) 1 P. & D., 333 ... 364
Adams *v.* Schiffer, (1887) 11 Colo., 15; 7 Am. St. Rep., 202; 17 Pac. Rep., 21 ... 47
Adams *v.* Waggoner, (1870) 33 Ind., 531; 5 Am Rep., 230 ... 5, 6a, 434
Adams, Rex *v.*, (1812) 2 Russ. Crimes, 266; Russ. & R., 225 ... 252
Adams *v.* State, (1850) 11 Ark., 466 ... 479
Ady, Rex *v.*, (1840) 7 C. & P., 140 ... 180
Ah Wah, Territory *v.*, (1881) 4 Mont., 149; 47 Am. Rep., 341; 1 Pac. Rep., 732 . 533, 534
Albee, State *v.*, (1881) 61 N. H., 423; 60 Am. Rep., 325 ... 516, 519
Alderson *v.* White, (1873) 32 Wis., 308 ... 486
Alibez, People *v.*, (1875) 49 Cal., 452; 1 Am. Cr. Rep., 345. ... 205
Allison, Reg. *v.*, (1838) 8 C. & P., 418 ... 391
Allen, Rex *v.*, (1826) 1 Mood. C. C., 154 ... 540, 543
Allen *v.* State, (1884) 16 Tex. Ct. App., 237 ... 522
Allen *v.* State, (1876) 54 Ind., 161 ... 535
Allen *v.* State, (1896) 37 S. W. Rep., 429 ... 313
Allen *v.* State, (1867) 40 Ala., 334; 91 Am. Dec., 477 ... 182
Allen *v.* Hammond, (1837) 11 Pet., 63 ... 79
Allison, *In re*, (1889) 13 Colo., 525; 16 Am. St. Rep., 224 ... 206
Amina, Queen-Empress *v.*, (1884) I. L. R., VII Mad., 277 ... 359
Anderson *v.* State, (1885) 104 Ind., 467 ... 153
Andrews *v.* Elliot, (1855) 5 E. & B., 502; (1856) 6 E. & B., 338; 25 L. J. Q. B., ... 336, 511
Andrews *v.* Linton, 2 Ld. Raym., 884 ... 478
Anonymous, Holt, 635, 3 Salk., 317 ... 524
Anschicks *v.* State, (1879) 6 Tex. Ct. App., 524 ... 228, 310
Archer, State *v.*, (1874) 54 N. H., 465 ... 519
Argent, Rex *v.*, (1826) 1 Mood. C. C., 154 ... 540
Ashwell, Reg. *v.*, (1880) 16 Q. B. D., 190 ... 110, 126, 127, 208, 259, 264, 268
Aspinwall, Rex *v.*, 2 Stark., 700 ... 544
Astley *v.* Reynolds, 2 Stra., 2901 ... 42, 138
Atherton, State *v.*, (1878) 50 Iowa, 189; 31 Am. Rep., 134 ... 216, 324
Atkinson, R. *v.*, (1799) 2 East P. C., 673 ... 252
Atlee *v.* Backhouse, (1838) 3 M. & W., 633 ... 42
Attorney-General of N. S. W. *v.* Bertrain, 36 L. J. P. C. C., 51 ... 528
Aukhil Chunder Sen *v.* Mohing Mohun Dass, (1879) I. L. R., V Cal., 489 ... 463
Aurora Fire Ins. Co. *v.* Johnson, (1874) 46 Ind., 315 ... 475, 484, 492
Austine *v.* People, (1884) 110 Ill., 218 ... 158
Avery *v.* Slack, (1837) 17 Wend., 85 ... 489
Axiom, State *v.*, (1871) 23 La. Ann., 621 ... 520
Azemar *v.* Casella, (1867) 2 C. & P., 431 ... 84

B

Babaji *v.* Lakshmibai, (1885) I. L. R., IX Bom., 266 ... 473
Babaji Hari *v* Rajaram, (1875) I. L. R., I Bom., 75 ... 499
Baboolun, Queen *v.*, (1866) V W. R. Cr., 7 ... 424
Bacon *v.* Bacon, (1835) 17 Pick., 134 ... 117
Bagan, State *v.*, (1889) 41 Minn., 285 ... 215
Bailey *v.* Com., (1886) 82 Va., 107; 3 Am. St. Rep., 87 ... 156, 245, 247, 349
Bailey *v.* Joy, (1882) 132 Mass., 356 ... 510
Bailey *v.* State, (1855) 4 Ohio, 57 ... 530

PAGE
Baird v. Mayor, (1884) 96 N. Y. 567 64
Baker v. Braman, (1843) 6 Hill, 47; 40 Am. Dec., 387 508
Baker v. Morton, (1870) 12 Wall., 150 ... ... 47, 51
Baldwin v. Bricker, (1882) 86 Ind., 221 74
Baldwin v. Calkins, (1833) 10 Wend., 167 483
Baltimore R. R. Co. v. Koontz, (1881) 14 Otto, 5 488
Baltimore & O. R. Co. v. Stricker, (1878) 51 Md., 47; 34 Am. Rep., 291 169
Banda Ali v. Banspat Singh, I. L. R., IV All., 352 54
Bane v. Detrick, (1869) 52 Ill., 119. 51
Bangor, State v., (1856) 41 Me., 553 509
Bank of Chillicothe v. Dodge, 8 Barb., 233 ... ... 91, 119
Bank of United States v. Daniel, (1838) 12 Pet., 32 92
Banks, Reg. v., (1838) 8 C. & P., 574 312
Bannen, Reg. v., (1844) 1 Car. & K., 295; 2 Moody C. C., 309 185
Bapuji Aubitram v. Umedbhai, (1870) VIII B. H. C. R. A. C., 245 465
Barholt v. Wright, (1887) 45 Ohio, 177; 4 Am. St. Rep., 535 ... ... 5, 457
Barker v. Dixie, Cases Temp. Hard., 264 529
Barker, Reg. v., (1828) 3 C. & P., 589. 551
Barnett v. State, (1888) 83 Ala., 40; 3 South. Rep., 612 520
Barratt, Reg. v., (1873) 12 Cox C. C., 498; L. R. 2 C. C. Res., 39 ... ... 322, 337
Barrett v. State, (1880) 9 Tex. Ct. App., 33 520
Barrington v. Vennables, Raym., 34 483
Barrow, Reg. v., (1868) 11 Cox C. C., 191 ... ... 24, 277
Barton v. Forsyth, (1857) 20 How., 532 ... ... 480, 520
Barton, People v., (1823) 1 Wheel. Cr. Cas., 378 253
Bassett v. Spofford, (1871) 45 N. Y., 387; 6 Am. Rep., 101 299
Bassick Mining Co. v. Schoolfield, (1858) 10 Cal., 46 489
Batchelder v. Currier, (1864) 45 N. H., 460 480
Batson v. Donovan, 4 B. & A., 21 270
Beale, Reg. v., (1865) 10 Cox C. C., 157 313
Bayley v. Williams, 4 Giff., 638 53
Beauchamp v. Winn, (1873) 6 Eng. & Ir. App., 223 ... ... 101, 103
Beck, State v., (1833) 1 Hill., 363; 26 Am. Dec., 190 229
Bedell v. Bailey, (1876) 58 N. H., 62 479
Beer Chunder Manikkya v. Nobodeep Chunder, (1883) I. L. R., IX Cal., 525 ... 477
Beer Chunder Roy v. Tumeezooddeen, (1869) XII W. R., 87 511
Beith v. Beith, (1889) 76 Iowa, 601; 41 N. W. Rep., 371 56
Bell v. Hansley, (1855) 3 Jones N. C., 131 ... ... 5, 20
Bell v. State, (1870) 44 Ala., 393 ... ... 524, 535
Ben v. State, (1853) 22 Ala., 9; 58 Am. Dec., 234 205
Benham, State v., (1829) 7 Conn., 414 205
Bennett, Reg. v., (1866) 4 F. & F., 1105 ... ... 198, 289, 290, 291
Benson v. Markoe, (1887) 37 Minn., 30; 33 N. W. Rep., 38 97
Benson, People v., (1856) 6 Cal., 221; 65 Am. Dec., 506 ... ... 549, 551
Benstine, State v., (1879) 2 Lea, 169; 31 Am. Rep., 593 552
Beyer v. People, (1881) 86 N. Y., 369 297
Bholanath, Queen v., (1876) I. L. R., II Cal., 30; XXV W. R., 57 527
Bhoopendro Nath v. Kalee Prosunno, (1875) XXIV W. R., 205 460
Biffin v. Bignel, (1862) 7 H. & N., 877 48
Bigley, Rex v., 1 Craw. & D., 202 191
Bilbie v. Lumley, (1802) 2 East, 469 117
Billingham, Rex v., (1825) 2 C. & P., 234 432
Bingham v. Bingham, 1 Ves. Sen., 126 80
Bird v. Jones, (1845) 7 Ad. & El. N. S., 742 357
Bishop v. Nelson, (1876) 83 Ill., 495 461
Blakeman v. Blakeman, (1872) 39 Conn., 320 97
Blacklock v. Small, (1888) 29 Davis, 96 472
Block v. Henderson, (1888) 82 Ga., 23; 14 Am. St. Rep., 138; 8 S. E. Rep., 877 ... 461
Bloodworth v. State, (1872) 6 Baxt., 614; 32 Am. Rep., 546 ... . 283, 286
Bluestone Coal Co. v. Bell, (1893) 18 S. E. Rep., 493 86
Boddie v. State, (1875) 52 Ala., 395 547
Boggs v. Hargrave, (1860) 16 Cal., 559; 76 Am. Dec., 561 100
Bonas v. Steffens, 62 Hun., 619 ... ... 4, 364
Bond v. State, (1856) 17 Ark., 290 530
Borowsky, State v., (1876) 11 Nev., 119 536
Boston Ice Co. v. Potter, (1877) 123 Mass., 28; 25 Am. Rep., 9 75

PAGE
Boulter *v.* Clarke, Bull. N. P., 16 4
Boulton *v.* Jones, (1857) 2 H. & N., 564 75
Bowen, Com. *v.*, (1816) 13 Mass., 356; 7 Am. Dec., 154 388
Bowers *v.* Thomas, (1885) 62 Wis., 488; 22 N. W. Rep., 710 74
Boyland, State *v.*, (1880) 24 Kan., 186. 225
Boylston National Bank *v.* Richardson, (1869) 101 Mass., 287 116
Bradley *v.* Andrews, (1879) 51 Vt., 530 164
Brady *v.* Richardson, (1862) 18 Ind., 1 470
Branner *v.* Chapman, (1873) 11 Kan., 118 486
Bretling, United States *v.*, (1857) 20 How., 252 520
Bridgewater Iron Co. *v.* Enterprise Ins. Co., (1883) 134 Mass., 433 85
Briggs *v.* Boyd. (1874) 56 N. Y., 293 45
Briggs *v.* Sizer, (1864) 30 N. Y., 647 148
Brij Basi *v.* The Queen-Empress, (1896) I. L. R., XIX All., 74 ... ... 539, 540
Brisbane *v.* Dacres, (1813) 5 Taunt., 143 ... ... 113, 121
Brooks, State *v.*, (1877) 76 N. C., 1 284
Broughton *v.* Hutt, (1858) 3 De. G. and J., 501 80
Brown *v.* College Corner, (1877) 56 Ind., 110 116
Brown *v.* Com., (1886) 82 Va., 653 152
Brown *v.* Farran, (1827) 3 Ohio, 153 173
Brown *v.* People, (1878) 36 Mich., 203; 2 Am. Cr. Rep., 203 216
Brown, People *v.*, (1874) 47 Cal., 450 158
Brown *v.* State, (1861) 16 Ind., 496 530
Bruce, Reg. *v.*, (1847) 2 Cox C. C., 262 353
Brummitt *v.* McGuire, (1890) 107 N. C., 351; 12 S. E. Rep., 191 116
Bucklin *v.* Chapin, 53 Barb., 493... 508
Budd *v.* Eyerman, 10 Mo. App., 437 115
Buffalo *v.* O'Malley, (1884) 61 Wis., 255; 50 Am. Rep., 137; 20 N. W. Rep., 913 116
Bunker *v.* Steward, (1886) 4 Atl. Rep., (Me.) 558 50
Bulliner *v.* People. (1880) 95 Ill., 394 509
Bureau *v.* Thompson, (1866) 39 Ill., 566 470
Burgdorf, State *v.*, (1873) 53 Mo., 65 153
Burgess, Reg. *v.*, (1862) 9 Cox C. C., 257 384
Burke, Com. *v.*, (1870) 105 Mass., 376; 7 Am. Rep., 531 ... ... 26, 27, 193
Burkhauser *v.* Schmitt (1878) 45 Wis., 316; 30 Am. Rep., 740 94
Burrow *v.* Scammell, (1881) 19 Ch. D., 182 99
Burtine *v.* State, (1855) 18 Ga., 534 509
Bush *v.* Brown, (1875) 49 Ind., 573; 19 Am. Rep., 695 62
Bush, Com. *v.*, 105 Mass., 376 24
Butler, State *v.*, (1884) 97 Ind., 378 522
Butterick, Com. *v.*, (1868) 100 Mass., 1; 97 Am. Dec., 65 151
Byers *v.* Chapin, (1876) 28 Ohio, 300 86

C

Cameron *v.* Hodges, (1888) 20 Davis. 322 472
Campbell, People *v.*, 4 Park. Cr., 386 526
Camphor *v.* State, (1846) 14 Ohio, 437 355
Camplin, Reg. *v.*, (1845) 1 Car. & K., 746; 1 Cox C. C., 220; 1 Den. C. C., 89...25, 278, 284, 336
Cancemi *v.* People, (1858) 18 N. Y., 128... ... ... 513, 515, 532, 535
Canedy *v.* Marcy, (1859) 13 Gray, 373 102
Carpenter *v.* Shepardson, (1877) 43 Wis., 406 484
Cartwright *v.* Green, (1803) 8 Ves., 405; 1 Den. C. C., 387; Leach, 952; 7 R. R., 99. 125, 127, 207, 264
Cartwright *v.* Rowley, (1799) 2 Esp., 722 43
Case, Reg. *v.*, (1850) 4 Cox C. C., 220; 1 Den. C. C., 580; 19 L. J. (M. C.) 174 ... 27
Cassy, Kel., 62 301
Castro, Queen *v.*, (1880) 5 Q. B. D., 490 205
Central Bank *v.* Copeland, (1832) 18 Md., 305; 81 Am. Dec., 597 ... ... 38, 47
Chamberlain, Rex *v.*, (1826) 1 Moody C. C., 154 ... ... 540, 543
Chambers *v.* Clearwater, 1 Abb. App. Dec., 341; 1 Keyes, 314 480
Chambers *v.* Hodges, (1859) 23 Tex., 583 480
Chambers, State *v.*, (1844) 6 Ala., 855 230

PAGE
Champlin *v.* Laytin, (1837) 18 Wend., 407; 31 Am. Dec., 382 ... ... 67, 100
Chandler *v.* Sanger, (1874) 114 Mass., 364; 19 Am. Rep., 367 45
Chandu Lal *v.* Awad Bin Umar, (1896) I. L. R., XXI Bom., 351 498
Chanter *v.* Hopkins, (1838) 4 M. & W., 404 112
Chapman *v.* Cole, (1858) 12 Gray, 141; 71 Am. Dec., 739 111
Charles *v.* State, (1850) 11 Ark., 390 24
Charles Fletcher, Reg. *v.*, (1866) 10 Cox C.C., 248; 14 L. T. (N. S.), 537; 28 L. T. M. C., 85 ... ... 195, 322, 326, 327
Charter, Rex *v.*, 13 Shaw's J. P., 746 26
Chase *v.* Dwinal, (1830) 7 Greenl., (Me.,) 134; 20 Am. Dec., 352 45
Cheltenham Commissioners, Queen *v.*, (1841) 1 Ad. & El., N. S., 467 478
Childs, Com. *v.*, 2 Pitts., 391 275
Choolie Lall *v.* Kokil Singh, (1873) XIX W. R., 248 521
Choonmaker *v.* Clearwater, 41 Barb., 200 480
Christy *v.* Sullivan, (1875) 50 Cal., 337; 19 Am. Rep., 655 94
Churchill *v.* Bauman, (1894) 104 Cal., 369 4
Clarence, Reg. *v.*, (1888) 22 Q. B. D., 23; 16 Cox C. C., 511 ...159, 162, 198, 241, 273, 289 291, 294
Clarke *v.* Dutcher, 9 Cow., 674 118
Clark *v.* Turnbull, (1885) 47 N. J. Law., 265; 54 Am. Rep., 157 50
Clarke, King *v.*, 2 Stark., 243 546
Clarke, Reg. *v.*, (1854) 6 Cox C. C., 412 276
Claunch *v.* Castlebury, (1853) 23 Ala., 85 479
Clay, Reg. *v.*, (1851) 5 Cox C. C., 146 546
Clayton *v.* Bussey, (1830) 30 Ga., 946; 76 Am. Dec., 680 101
Clayton *v.* Per Dun, (1816) 13 Johns., 218 480
Clayton *v.* State, (1884) 15 Tex. Ct. App., 348 544
Clem *v.* Newcastle and D. R. Co., (1857) 9 Ind., 488; 68 Am. Dec., 653 102
Clem *v.* State, (1873) 42 Ind., 420; 13 Am. Rep., 369... 205
Clemons, People *v.*, 37 Hun., 531 157
Cline *v.* Guthrie, (1873) 42 Ind., 227; 13 Am. Rep., 357 72
Cliver *v.* State, (1883) 45 N. J. L., 46 314
Clough *v.* London and North Western Ry. Co., (1871) 7 Ex., 26 63
Clough, People *v.*, (1881) 59 Cal., 438 229
Coal Creek Mining Co. *v.* Davis, (1891) 90 Tenn., 711 169
Coates *v.* State, (1887) 50 Ark., 330; 7 Am. Cr. Rep., 587 ... ... 308, 310
Cobb *v.* Charter, (1865) 32 Conn., 358; 87 Am. Dec., 178 41
Cobb *v.* People, (1877) 84 Ill., 511 ... ... 461, 479
Cockburn, Reg. *v.*, (1849) 3 Cox C. C., 543 312
Cockeroft, Reg. *v.*, (1870) 11 Cox C. C., 410 ... ... 544, 551
Cochrane *v.* Willis, (1865) 1 Ch. App., 58 94
Colbern's Case, 1 Wheel C. C., 479 529
Coleman *v.* Woodworth, (1865) 28 Cal., 568 501
Colberg, Com. *v.*, (1876) 119 Mass., 350; 20 Am. Rep., 328, 1 Am. Cr. Rep., 59 .. 433
Collins, People *v.*, (1878) 53 Cal., 185 183
Collins *v.* Westbury, (1799) 2 Bay, 211; 1 Am. Dec., 643 46
Coney, Queen *v.*, (1882) 8 Q. B. D., 553; 15 Cox C. C., 46 ... ...354, 432, 433
Conners *v.* State, 47 Wis., 523 228
Connolly, Reg. *v.*, (1867) 26 U. C. Q. B., 317; 3 Cr. Def., 330 .. ... 323, 327
Connor *v.* People, (1893) 18 Colo., 373; 36 Am. St. Rep., 295; 25 L. R. A., 346 184, 186
Connor *v.* People, 26 N. Y., 281 154
Connors *v.* People, (1872) 50 N.Y., 240 517
Connors *v.* State, (1879) 47 Wis., 523; 2 N. W. Rep., 1143 ... ... 152, 228
Conyers *v.* State, (1873) 50 Ga., 103; 15 Am. Rep., 686 ... . 540, 541, 543
Cook *v.* Wood, (1860) 30 Ga., 891; 76 Am. Dec., 677 ... ... 4, 364
Cooke *v.* Husband, (1857) 11 Md., 492 102
Cooper *v.* Phibbs, (1867) 2 Eng. & Ir. App., 149 ... ... 80, 96
Cooper, State *v.*, (1849) 22 N. J. (L) 52; 5 Cr. D., 344... 433
Corby *v.* Weddle, (1874) 57 Mo., 452 74
Cottingham, United States *v.*, (1854) 2 Blatchf., 470; 184
Countee *v.* State, (1895) 33 S. W. Rep., 127 215
Couturier *v.* Hastie, (1856) 5 H. L. Cas., 673 79
Covington *v.* Powell, 2 Mett., 229 117
Covington, State *v.*, (1832) 2 Bailey, 569 ... ... 177, 230
Crawley *v.* Luchmee Ram, (1866) 1 Agra, 129 461
Crepps *v.* Durden, (1777) 2 Cowp., 640; 1 Sm. L. C., 632 204

PAGE
Croft v. Lumley, (1857) 6 H. L. Cas., 672 147
Croghan v. State, (1868) 22 Wis., 444 246
Crook v. Cowang, 64 N. C., 743 148
Crosswell, People v., (1865) 13 Mich., 427; 87 Am. Dec., 774... ... ... 195, 324, 338
Crosswhite, State v., (1895) 130 Mo., 359; 51 Am. St. Rep., 571 521
Crow, State v., (1853) 10 West L. J., 501 325
Crowell v. State, (1887) 24 Tex. App., 404; 6 S. W. Rep., 318 346
Croy v. State, (1869) 32 Ind., 384 509
Cuddy, Reg. v., (1843) 1 C. & K., 210 403
Culbreath v. Culbreath, (1849) 7 Ga., 64; 50 Am. Dec., 375 ... ... 66, 122
Cundy v. Lindsay, (1878) 3 App. Cas., 459 76
Cunningham, State v., (1890) 100 Mo., 382 243
Curby v. Territory of Arizona, (1895) 42 Pac. Rep., 953 158
Cushman v. Flanagan, (1878) 50 Tex., 359 510
Cutts v. Guild, (1874) 57 N. Y., 229 78

D

Dailey, Com. v., (1853) 12 Cush. (Mass.), 80 ... ... 534, 535
Damp v. Town of Dane, (1872) 29 Wis., 419 ... ... 462, 476, 484
Daniel, The Bank of the U. S. v., (1838) 12 Pet., 32 103
Daniell v. Sinclair, (1881) 6 App. Cal., 181 101
Darling v. Pierie, 15 Hun., 542 479
Darling v. Williams, 35 Ohio, 60 6
Darrow v. Family Fund Soc., (1889) 116 N. Y., 537; 15 Am. St. Rep., 430 ... 385
Darst v. People, (1869) 51 Ill., 286; 2 Am. Rep., 301 531
Davies v. Burton, (1829) 4 C. & P., 166... 512
Davies v. Harness, 10 C. P., 166 63
Davies v. Marshall, (1861) 10 C. B. (N. S.) 697; 31 L. J. C. P., 61 137
Davies, Reg. v., (1856) 7 Cox C. C., 104. Dears. C. C., 640 257
Davis v. Cundasami, (1896) I. L. R., XIX Mad., 398 3
Davis v. Krum, 12 Mo. App., 279... 115
Davis v. State, (1872) 37 Tex., 277 544
Dawes v. Harness, (1875) 10 C. P., 166 63
Dawson v. State, (1874) 29 Ark., 116 ... ... 308, 310, 520
Day, Reg. v., (1841) 9 C. & P., 722 ... ... 153, 243
Dean, People v., 58 Hun., 610. 544
De Bonneval v. De Bonneval, 1 Curt., 856 145
De Camp v. Hamma, (1876) 29 Ohio, 467 74
Dee, Reg. v., (1884) 15 Cox C. C., 579; 14 L. R. Ir., 468... 17, 26, 30, 139, 277, 278, 294, 327, 350
Dela Guerra, People v., (1864) 24 Cal., 73 480
De Leon, People v., (1888) 109 N. Y., 226; 4 Am. St. Rep., 444; 7 Am. Cr. Rep., 314, 297
Delong, State v., (1895) 65 N. W. Rep., 402 216
Denning v. Norris, 2 Lev., 243 478
Dennis, Com. v., (1870) 105 Mass., 162... 385
Dent v. N. A. Steamship Co., (1872) 49 N. Y., 390 148
Denton v. Marshall, 33 L. J. Ex., 89 466
Despard, Rex v., 28 State Trials., 489 189
Detwiler v. Bish., (1873) 44 Ind., 70 74
Devine v. Edward, (1882) 101 Ill., 138 116
Deysher v. Triebel, (1870) 64 Pa. St., 383 117
Dickerman v. Lord, (1866) 21 Iowa, 338; 89 Am. Dec., 579 51
Dicks v. Hatch, (1860) 10 Iowa, 380 460
Dill v. Shahan, (1854) 25 Ala., 694; 60 Am. Dec., 540 104
Dillingham v. State, (1832) 5 Ohio, 280 530
Diman v. Prov. R. Co., (1858) 5 R. I., 130 99
Dixon v. Wells, (1890) 25 Q. B. D., 249 496
Doctor v. Hartman, (1865) 24 Ind., 221 462
Dockery v. State, (1893) 34 S. W. Rep., 281 355
Dodd v. Hamilton, Taylors N. C. Term Rep., 31 231
Dodge v. Brittain, (1838) Meigs., 84 ... ... 183, 230
Dodge v. Essex Ins. Co., (1858) 12 Gray, 65 102
Dohring, People v., (1874) 59 N. Y., 374; 17 Am. Rep., 2493 ... ... 153, 335
Dole v. Erskine, 35 N. H., 503 ... ... 5, 6

PAGE
Don Moran v. People, (1872) 25 Mich., 356; 12 Am. Rep., 283...243, 248, 283, 286, 288, 331
Donovan, State v., (1883) 61 Iowa, 278; 4 Am. Cr. Rep., 26 224
Doody, Reg. v., (1854) 6 Cox C. C., 463 384
Doss v. People, (1895) 41 N. E. Rep., 1093 299
Douglas, State v., (1891) 44 Kan., 618; 26 Pac. Rep., 476 188
Douglass v. State, (1854) 3 Wis., 820 527
Dowell v. Guthrie, (1889) 99 Mo., 653; 17 Am. St. Rep., 598; 12 S. W. Rep., 900 164
Drevon v. Drevon, 34 L. J. Ch., 129 147
Driskill v. State, (1871) 45 Ala., 21 530
Drobo Moyee v. Bipin Mundul, (1868) X W. R., 6 468
Ducher v State, (1849) 18 Ohio, 317 301
Duke de Cadaval v. Collins, (1836) 4 Ad. & El., 858... 41
Ducker, State v., (1880) 8 Oreg., 394; 34 Am. Rep., 590 267
Duncan, State v., (1845) 8 Rob. (La.), 562 181
Dyson, Rex v., (1823) Russ. & R., 523 391

E

Eadie v. Slimmon, (1862) 26 N. Y., 9; 82 Am. Dec., 395 53
Eaglesfield v. Marquis of Londonderry, (1876) 4 Ch. D., 702 96
Earl of Aylesford v. Morris, (1873) 8 Ch. App., 490 59
Easterly v. Eppelshemier, (1887) 73 Iowa, 260; 34 N. W. Rep., 846... 74
Eberhart v. State, (1893) 134 Ind., 651; 34 N. E. Rep., 637 157
Eddy v. Herrin, (1840) 17 Me., 338; 35 Am. Dec., 261 50
Edward Senior, 32 L. R. A., 183 519
Edwards v. Brown, 1 Cr. & J., 312 72
Egginton, Rex v., (1801) 2 Bos. & P., 508; 2 Leach C. C., 913; 5 R. R., 689 180, 185
Eggleston v. Ry. Co., 35 Barb., 162 149
Elkins v. State, (1853) 13 Ga., 435 541
Ellenberg v. State, (1896) 35 S. W. Rep., 989 355
Ellsworth v. Moore, (1857) 5 Iowa, 486 478
Ellyatt v. Ellyat, 3 Sw. & Tr., 504 364
English v. State, (1890) 15 S. W. Rep., 649 226
Enright, State v., (1894) 58 N. W. Rep., 901 325
Estate of White, (1869) 37 Cal., 190 479

F

Fagan v. Scott, 14 Hun., 162 149
Fairbanks v. Snow, (1887) 145 Mass., 153; 1 Am. St. Rep., 446 62
Farmer v. Arundel, 2 Wm. Bl., 824 117
Farre's Case, Kel., 43 300
Faulkner v Del. and Rar. Can. Co., 1 Den., 441. 485
Faust v. United States, 163 U. S., 452 225
Fazal Shau Khan v. Gafar Khan, (1891) I. L. R., XV Mad., 82 484
Fechener v. Washington, (1881) 77 Ind., 366 479
Fee v. Bigs and Iron Co., 13 Ohio, 563 484
Fernald, State v., (1893) 55 N. W. Rep., 534 246
Feton v. Gregory, (1881) 130 Mass., 176 51
Fields, Com. v., (1832) 4 Leigh, 648 ... ... 24, 281, 350
Fight v. State, 7 Ohio, 180 522
Fish v. Cleland, (1864) 33 Ill., 243 102
Fisher v. Com. (1867) 1 Bush., 211; 89 Am. Dec., 620 203
Fitzgerald v. Cavin, (1872) 110 Mass., 153 197
Fitzgerald v. Connecticut River P. Co., (1891) 155 Mass., 155; 31 Am. St. Rep., 537; 29 N. E. Rep., 464 170
Fitzsimon, State v., (1893) 18 R. I., 236; 49 Am. St. Rep., 770; 27 Atl. R., 446. 548
Flattery, Reg. v., (1877) 13 Cox C. C., 388; 2 Q. B. D., 410 ... ... 29, 30, 277
Fleischman v. Walker, (1878) 91 Ill., 318 462
Fletcher Charles, Reg. v., (1866) 10 Cox C. C., 248 195
Fletcher v. Holmes, (1864) 25 Ind., 458 471
Fletcher, Reg. v., (1859) 8 Cox C. C., 131 ... ... 195, 278, 322, 337
Fletcher v. Tollet, (1799) 5 Ves., 14 66
Florence, People v., (1874) 59 N. Y., 83 ... ... 509, 511

PAGE
Flowers, Reg. v., (1886) 16 Q. B. D., 643 258
Flynn, People v., (1893) 96 Mich., 276; 55 N. W. Rep., 834 246
Foakes v. Beer, (1884) 9 App. Cas., 605 3
Foley v. Greene, (1885) 14 R. I., 618; 51 Am. Rep., 419 53
Fooks, State v., (1884) 65 Iowa, 452; 21 N. W. Rep., 773 522
Forbes v. Smith, (1855) 10 Ex. Rep., 717; 24 L. J. (Ex.), 167 483
Forshner, State v., (1861) 43 N. H., 89; 80 Am. Dec., 132 546
Foshay v. Ferguson, (1843) 5 Hill, 154 37
Foster v. Dawber, (1851) 6 Exch., 839 3
Foster v. Mackinnon, (1869) 4 C. P., 704 73
Foye, United States v., (1854) 1 Curt. C. C., 364 184
Frances, R. v., 13 U. C. Q. B., 116 277
Frazer, Reg. v., (1861) 8 Cox C. C., 446 163
Freeman v. Curtis, (1862) 51 Me., 140; 81 Am. Dec., 564 117
Frevert v. Swift, (1886) 19 Nev., 363; 11 Pac. Rep., 273 479
Fritzler v. Robinson, (1886) 70 Iowa, 500; 31 N. W. Rep., 61 86
Frost, R. v., (1840) 9 C. & P., 162 520
Fry v. Derstler, 2 Yeates, 278 364
Fuller, Rex v., (1817) Russ. & R., 408 229
Fulmer v. Com., (1881) 97 Pa. St., 503 203

G

Ganpatrav v. Bai Suraj, (1870) VII B. H. C. R., A. C., 79 464
Garcia v. State, (1862) 26 Tex., 209; 82 Am. Dec., 605 ... ... 345, 540
Gardiner, People v., 35 N. Y. (Supp.), 1072 229
Gardner v. Lane, (1865) 9 Allen, 492; 85 Am. Dec., 779 109
Gardner, Reg. v., (1845) 1 C. & K., 628 184
Garney, State v., 37 Me., 156 509
Garrard v. Frankel, (1862) 30 Beav., 445 240
Garrison v. Graybill, (1873) 52 Mo. App., 580 211
Gascoigne, Rex v., (1783) 1 Leach, 284 300
George, State v., (1885) 93 N. C., 567 297
Georgia Rail and Bank Co. v. Harris, (1848) 5 Ga., 527 471
German Bank v. American Fire Ins. Co., (1891) 83 Iowa, 491; 32 Am. St. Rep., 316 485
Gibson v. Pelkie, (1877) 37 Mich., 380 86
Gibson, People v., (1885) 58 Mich., 368 204
Giddins, Reg. v., (1842) Car. & M., 634 203
Gill, People v., 5 Thomp. & Co., 508 520
Gizler v. Wilzel, 82 Ill., 322 6
Goldnamer v. O'Brien, (1896) 33 S. W. Rep., 831 ... ... 6 (6)
Goltra v. Sonasack, (1870) 53 Ill., 458 102
Good v. Herr, (1844) 7 Watts & S., 253; 42 Am. Dec., 336 ... ... 93, 98, 105
Goodall v. Mussoorie Bank, (1887) 1. L. R., X All., 97 ... ... 41, 66
Goodenow v. Ewer, (1860) 16 Cal., 461; 76 Am. Dec. 549 100
Goodridge v. Washington Mills Co., (1893) 160 Mass., 234; 35 N. E. Rep., 484 ... 171
Gooroo Persad Roy v. Juggobundoo Mozoomdar, (1862) W. R. F. B., 15 ... 465
Gopi Nath v. Bhugwat Pershad, (1884) I. L. R., X Cal., 697 468
Gordon, People v., (1886) 70 Cal., 467 315
Gore v. State, (1889) 52 Ark., 285; 12 S. W. Rep., 564 522
Gorril v. Whittier, (1825) 3 N. H., 268 478
Gosha v. State, (1876) 56 Ga., 35; 2 Am. Cr. Rep., 589 434
Government of Bombay v. Ranmalsingji, (1872) IX B. H. C. R., 242 2
Graham v. Scripture, 29 How. Pr. (N. Y. Sup. Ct.) 50 501
Granice, People v., (1875) 50 Cal., 447 480
Grant v. Reese, (1880) 82 N. Car., 72 510
Grant v. State, (1877) 3 Tex. Ct. App., 1 524
Gray v. Hawes, (1857) 8 Cal., 568 476
Green v. Nixon, (1857) 23 Beav., 535 59
Green, State v., Whart. and Stil. Med. Jur., 459 27
Green v. Green, (1889) 42 Kan., 654; 22 Pac. Rep., 730; 16 Am. St. Rep., 510 ... 486
Gregory v. Lincoln, (1882) 13 Neb., 352 510
Gregory v. Cleveland, (1829) 4 Ohio, 675 478
Griffith v. Sebastian Co., (1887) 49 Ark., 24; 3 S. W. Rep., 886 97

PAGE
Griffith *v.* Townley, (1878) 69 Mo., 13; 33 Am. Rep., 476 95
Griffiths *v.* Kellogg, (1876) 39 Wis., 290; 20 Am. Rep., 48 74
Griggs *v.* Howe, 31 Barb., 100 521
Grimes *v.* Briggs, (1872) 110 Mass., 446 51
Groton *v.* Hurlbert, (1853) 22 Conn., 178 478
Guidici, People *v.*, (1885) 100 N. Y., 503 522
Gwinn *v.* Hamilton, (1856) 29 Ala., 233... 67

H

Hackley *v.* Headley, 45 Mich., 569 51
Hackett *v.* King, (1863) 6 Allen., 58 51
Hale *v.* Cole, (1888) 31 W. Va., 576; 8 S. E. Rep., 516 56
Hallett, Reg *v.*, (1841) 9 C. & P., 748 ... ... 157, 215
Haley *v.* State, (1887) 49 Ark., 147; 4 S. W. Rep., 746. 7 Am. Cr. Rep., 333. 247, 349
Hamidunessa *v.* Gopal Chandra, 1 Cal., W. N., 556 469
Hamlyn *v.* Betteley, (1881) 6 Q. B. D., 63 486
Hammond, State *v.*, (1882) 77 Mo., 157 ... ... 219, 290
Hammon's Case, (1812) Leach, 1083 345
Hancock, 27 Hun., 82 480
Hancock *v.* State, (1883) 14 Tex. App., 392 ... ... 509, 522
Hands, Reg *v.*, (1857) 16 Cox C. C., 188; 8 Am. Cr. Rep., 272 209
Hanmant *v.* Jayarao, I. L. R., XIII Bom., 50 137
Hanmanta, Reg. *v.*, (1877) I. L. R., I Bom., 610 227
Hanselman, People *v.*, (1888) 76 Cal., 460 181
Hanson *v.* Jones, 20 Mo. App., 595 115
Harkness. *v.*, Hyde, (1879) 8 Otto, 476 486
Harman *v.* Fisher, Lofft., 472 59
Harmon *v.* Harmon, (1873) 61 Me., 222 149
Harmony *v.* Bingham, (1854) 12 N. Y., 99; 62 Am. Dec., 142 44
Harper, State *v.*, (1876) 28 La. Ann., 35 470
Harrington *v.* Heath, (1846) 15 Ohio, 483 492
Harris *v.* Pepperell, (1876) 5 Eq., 1 240
Harris *v.* Shaffer, (1885) 92 N. Car., 30 510
Hartigan, State *v.*, (1860) 32 Vt., 607; 78 Am. Dec., 609... ... ... 215, 217
Hartog *v.* Memory, (1885) 9 Davis, 588 472
Harvey *v.* Harris, (1873) 112 Mass., 32 86
Harvey *v.* State, (1890) 53 Ark., 425; 25 Am. St. Rep., 239; 14 S. W. Rep., 645 ... 24
Hatter *v.* Greenlee, (1834) Port., 222; 26 Am. Dec., 370 52
Haven *v.* Foster, (1829) 9 Pick., 112; 19 Am. Dec., 353 91
Haverly Invincible Mining Co. *v.* Howcutt, (1882) 6 Colo., 574 479
Hawkins, R. *v.*, (1704) East P. C., 485 300
Hawralty *v.* Warren, (1866) 3 C. E. Green, 134; 18 N. J. Eq., 124; 90 Am. Dec., 613 102
Haycraft *v.* Creasy, (1801) 2 East, 92; 6 R. R., 380 57
Haydock *v.* Haydock, (1881) 7 Stew. 570; 33 N. J. Eq., 494; 38 Am. Rep., 385 .. 55
Haynes *v.* Rudd, 30 Hun., 237 53
Hays *v.* People, (1841) 1 Hill, 351 ... ... 314, 374
Hays, State *v.*, (1891) 16 S. W. Rep., 514 190
Hazetrigg *v.* Donaldson, 2 Metc. (Ky.), 445 45
Heacock *v.* Hosmer, (1884) 109 Ill., 245... 510
Heaps *v.* Dunhaven, (1880) 95 Ill., 583 50
Heber, Rex. *v.*, 2, Barn., 101 494
Hecht *v.* Batcheller, (1888) 147 Mass., 335; 17 N. E. Rep., 651; 9 Am. St. Rep., 708 84
Heely *v.* Barness, (1847) 4 Den. (N. Y.), 73 531
Hegarty *v.* Shine, (1878) 14 Cox C. C., 124; 2 L. R. Ir., 273; 4 L. R. Ir., 288 198, 290
Hehir, Reg. *v.*, (1895) 2 I. R., 709; 19, 83, 111, 124, 126, 127, 129, 131, 132, 259... 263, 271, 280
Heilbron *v.* Campbell, (1889) 23 Pac. Rep., 122 480
Heller, People *v.*, (1878) 2 Utah, 133 527
Henderson *v.* State, (1876) 1 Tex. Ct. App., 432 347
Henkel *v.* Pape, (1870) L. R. 6 Exch., 7 87
Hennessey, State *v.*, (1872) 23 Ohio, 339; 13 Am. Rep., 253 203
Hentsch *v.* Porter, (1858) 10 Cal., 555 501

PAGE
Hesketh v. Braddock, 3 Burr., 1847 478
Hewett v. Jones, (1874) 72 Ill., 208 74
Heydenfeldt v. Towns, (1855) 27 Ala., 423 478
Heyward v. Mayor, Atc., of New York, 8 Barb., 489... 508
Hill v. People, (1867) 16 Mich., 357 ... ... 532, 533
Hills v. Snell, (1870) 104 Mass., 173; 6 Am. Rep., 216 109
Hitchcock v. Giddings, Dan. Rep., 1 79
Hoagland v. Creed, (1876) 81 Ill., 506 461
Hobart v. Frost, 5 Duer, 672 470
Hodgson, Rex v., (1812) Russ. & R., 211 546
Hoffeditz v. Southern Penn. R. & Min. Co., (1889) 129 Pa., 264; 18 Atl., Rep., 125 164
Hogele v. Wilson, (1892) 31 Pac. Rep., 469 169
Holborn v. Bucknam, 78 Me., 482 51
Holbrook v. Cooper, (1880) 44 Mich., 373 51
Hollis, Queen v., (1883) 12 Q. B. D., 25 262
Hollister, Com. v., (1893) 157 Pa., 13; 25 L. R. A., 349 185
Holmes v. Hill, (1853) 19 Mo., 159 51
Holmes, Reg. v. (1871) 1 C. C. Res., 334 551
Home Ins. Co. v. Security Ins. Co., (1868) 23 Wis., 171 509
Home Life Ins. Co. v. Dunn, (1874) 19 Wall, 214 487
Hopkins, Reg. v., (1842) C. & M., 254 196
Hoskins v. People, (1876) 84 Ill., 87; 25 Am. Rep., 433 527
Howland v. Manufac. Co., (1892) 156 Mass., 542 4
Huber v. State, (1890) 126 Ind., 186; 25 N. E. Rep., 904 157
Hackubee, United States v., (1873) 16 Wall., 414 46
Hudson v. State, (1880) 9 Tex. Ct. App., 151; 35 Am. Rep., 732 203
Huff, State v., (1886) 11 Nev., 17 519
Hughes, Queen v., (1879) 4 Q. B. D., 614 ... ... 494, 495
Hull v. State, (1868) 22 Wis., 580 ... ... 313, 355
Hullhorst v. Tscharner, (1883) 15 Neb., 57; 17 N. W. Rep., 259 51
Humble v. Hunter, (1848) 12 Ad. & El., N. S., 316 75
Humfrey v. Dale, (1857) 7 E. & B., 266 149
Hunt v. Rousmanier, (1823) 8 Wheat., 174 102
Hurd v. Hall, (1860) 12 Wis., 112 ... ... 69, 93
Hurley v. State, (1874) 29 Ark., 17 523
Huthmacher v. Harris Adm'rs, (1861) 38 Pa., 491; 80 Am. Dec., 502 209

I

Ilott v. Wilkes, (1820) 3 Barn. & Ald., 304; 22 R. R., 400 165
Imperial Loan Co. v. Stone, (1892) 1 Q. B., 601 136
Imperial and Ass. of Trieste v. Funder, 31 Eng. W. R., 116 91
Ins. Co. v. Dunn, (1873) 10 Otto, 457 487
Irick v. Fulton, (1846) 3 Gratt., 193 94
Irwin v. Wilson, (1887) 45 Ohio, 426; 15 N. E. Rep., 209 82
Ishwardas Tribhovandas v. Kalidas Bhaidas, (1896) I. L. R., XX Bom., 779 ... 502

J

Jacks, People v., (1889) 76 Mich., 218; 42 N. W. Rep., 1134 544
Jackson v. Ashton, (1834) 8 Pet., 148 462
Jackson v. Com, (1870) 19 Grat., 656 524
Jackson, Rex v., (1826) 1 Moody C. C., 119 253
Jackson, Rex v., (1822) Russ. & R., 487... 276
Jackson v. State, (1860) 14 Ind., 327 203
Jackson v. State, 1 Tex. Ct. App., 363 544
Jaffray v. Davis, (1891) 124 N. Y., 164; 11 L. R. A., 710 2
Jansen, State v., (1880) 22 Kan., 498 ... ... 181, 188
January v. State, 3 S. W. Rep., 179 480
Javecharam, Queen-Empress v., (1894) I. L. R., XIX Bom., 363 189
Jenks v. Fritz, (1844) 1 Watts & S., 201; 42 Am. Dec., 327 87
Jessop, Reg. v., (1877) 16 Cox C. C., 204 391

PAGE
Jijaji Pratapji *v.* Balkrishna, (1892) I. L. R., XVII Bom., 169 499
Jivan Vasudev, Reg. *v.*, Cited in VII B. H. C. R., Cr., 61 507
Johnson *v.* Girdwood, 28 N. Y. Supp., 651 137
Johnson, Reg. *v.*, (1841) Car. & M., 218... 190
Johnson, Reg. *v.*, (1865) 10 Cox C. C., 114 ; 12 L. J. (N. S.) 503 313
Johnson *v.* State, (1884) 43 Ark., 391 520
Johnson *v.* State, (1878) 3 Tex. Ct. App., 593 186
Johnson, State *v.*, (1856) 28 Vt., 512 550
Johnson, State *v.*, (1877) 76 N. C., 209 314
Johnston *v.* Com., (1877) 85 Pa. 54 ; 3 Am. Cr. Rep., 30 301
Jones *v.* Clifford, (1876) 3 Ch. D., 779 ; 45 L. J. C., 815 80
Jones *v.* James *In re*, 10 L. J., (Q. B.) 257 ... ... 475, 501
Jones *v.* Jones, (1888) 108 N. Y., 415 ; 2 Am. St. Rep., 447 .. .. 485, 489
Jones, Reg. *v.*, (1864) L. R. 9 C. C., 10 ; 4 L. T. (N. S.) 154 ; 245, 278
Jones, State *v.*, (1856) 18 Tex., 874 ... ... 524, 526
Jones *v.* State, (1889) 28 Tex. Ct. App., 42 ; 9 S. W. Rep., 53 ... ... 227, 273
Jordan *v.* Elliott, 15 Cent. L. J., 232 40
Jordan *v.* Stevens, (1863) 51 Me., 78 ; 8 Am. Dec., 556 ... ... 96, 100
Josling *v.* Kingsford, (1863) 13 C. B. N. S., 447 ; 32 L. J. C. P., 94 84

K

Kadambinee Dossee *v.* Doorga Churn Dutt, Marsh., 4 ; 1 Hay, 25 462
Kagel *v.* Totten, (1882) 59 Md., 447 74
Kandoth Mammi *v.* Neelancherayil, (1875) VIII M. H. C. R., 14 484
Kashinath *v.* Collector of Poona, (1884) I. L. R., VIII Bom., 553 479
Kaufman, State *v.*, (1879) 51 Iowa, 578 ; 33 Am. Rep., 145 ; 2 N. W. Rep., 275,... 514, 531, 535
Keater *v.* Ulster Road Co., (1843) 7 How. Pr., 42 508
Keene *v.* New England Mut. Acc. Ass., (1894) 161 Mass., 149 ; 36 N. E. Rep., 891 173
Kelly *v.* Alcona Circuit Judge, (1890) 79 Mich., 392 ; 44 N. W. Rep., 925 491
Kelly *v.* People, (1890) 132 Ill., 363 ; 24 N. E. Rep., 56 509
Kelly *v.* Solari, (1841) 9 M. & W., 54 .. .. 114, 115
Kemp *v.* Pennsylvania R. Co., (1893) 156 Pa. 430 ; 26 Atl. Rep., 1074 163
Kemp *v.* State, (1850) 11 Humph., 320 ... ... 190, 230
Kendall, Com. *v.*, (1873) 113 Mass., 210 ; 18 Am. Rep., 469 545
Kenney *v.* Greer, (1851) 13 Ill., 432 ; 54 Am. Dec., 439 476
Kennedy *v.* Panama Etc. Mail Co., (1867) L. R. 2 Q. B., 580 ... ... 83, 87
Kern *v.* Huidekoper, (1881) 13 Otto, 485 487
King Iron Bridge and Mfg. Co. *v.* County of Otoe., (1887) 13 Davis, 225 472
King *v.* State, (1887) 3 S. W. Rep., 342 288
King *v.* Com., (1892) 20 S. W. Rep., 224 246
King *v.* Doolittle, (1858) 1 Head., 77 95
Kingston Bank *v.* Eltinge, (1869) 40 N. Y., 391 116
Kirby *v.* Ingersoll, 1 Harr. (Mich.), 172 60
Knapp, State *v.*, (1864) 45 N. H., 148 546
Knight, People *v.*, (1895) 43 Pac. Rep., (Cal.) 6... 152
Knisley *v.* Pratt, (1896) 148 N. Y., 372 ; 32 L. R. A., 367 172
Kocourek *v.* Marak, (1881) 54 Tex., 201 ; 38 Am. Rep., 623... 38
Komby *v.* Central National Bank, (1873) 51 Mo., 275... 115
Koontz *v.* Central Nat. Bank, 51 Mo., 275 116
Koylash Chunder *v.* Ashruf Ali, (1874) XXII W. R., 101 465
Kristna Rau, (1872) VII M. H. C. R., 58 507
Krishnasami *v.* Kanakasabai, (1890) I. L. R., XIV Mad., 183 469
Kukier Mather, Queen *v.*, Unreported 450
Kumarasami, Queen *v.*, (1865) II M. H. C. R., 331 225
Kyle *v.* Kavanagh, (1869) 103 Mass., 356 ; 4 Am. Rep., 560 78

L

Ladkuvarbai *v.* Ghoel Sarsangji, (1870) VII B. H. C. R., 160 477
Ladli Begam *v.* Raje Rabia, (1888) I. L. R., XIII Bom., 650 463
Lalmoney Dassee *v.* Jaddoonauth Shaw, I W. R., 279 ; 1 In. Jur., N. S., 319 ... 464
Lancaster County Bank, State *v.*, (1879) 8 Neb., 218 501

PAGE
Lannan, Com. v., (1866) 13 Allen, 563 519
La Pierre v. Chicago G. T. R. Co., (1894) 99 Mich., 212; 58 N. W. Rep., 60 ... 169
Latter r., Braddell, 50 L. J. Q. B., 448... 228
Larger, State r., (1870) 45 Mo., 510 509
Laurintz, People v., (1896) 46 Pac., (Cal.) Rep., 613 316
Lawrence r. Beaubien, (1831) 2 Bailey, 623 : 23 Am. Dec., 155 66
Lawrence r. Am. Nat. Bank, (1873) 54 N. Y., 432 116
Lawrence, Reg. r., (1851) 4 Cox C C., 438 230
League v. State, 36 Ind., 259 530
Leary r. Bostan R. R. Co., (1885) 139 Mass., 580; 52 Am. Rep., 733 171
Leddington, Reg. r., (1839) 9 C. & P., 79 387
Ledgard v. Bull, (1886) L. R. XIII I. A., 144; I. L. R., IX All., 191 ... 433, 492
Lee v. Tillotson, (1840) 24 Wend., 337 ; 35 Am. Dec., 626 ... ... 259, 510
Le Mott's Case, Kel., 42 301
Levin v. Russell, (1870) 42 N. Y., 251 522
Lewellen v. Garrett, (1877) 58 Ind., 443 ; 26 Am. Rep., 74 116
Lewis r. State, (1857) 30 Ala., 54; 68 Am. Dec. 113 .. ..281, 283, 286
Linden Grand M. Co. v. Sheplar, (1881) 58 Cal., 245 486
Line v. Blizzard, (1880) 70 Ind., 23 38
Lock, Reg. v., (1872) 12 Cox C. C., 244; 2 C. C. Res., 10 ; 27 L. T. N. S., 661 13, 19, 23
Lockhart v. Mayor of St. Albans (1888) 21 Q. B. D., 188 504
Lockwood, State r., (1877) 43 Wis., 403 531
Loew r. State, (1884) 60 Wis., 559; 19 N. W. Rep., 437 ; 67 Iowa, 641 ... 509, 520
Logan r. Austin, 1 Stew., 476 5
Logan v. Logan, (1886) 22 Fla., 561 ; 1 Am. St. Rep., 212 60
Lonergan v. Buford, (1893) 41 Davis, 582 44
Long, Reg. v., (1831) 4 C. & P., 423 424
Long, State v , (1885) 93 N. C., 542 210
Longstreeth, Rex r., (1826) 1 Moody C. C., 137 ... ... 253, 255
Longton, State r., (1886) 35 Kan., 375, 11 Pac. Rep., 163 520
Looper v. Bell, (1858) 1 Head., 373 ... ...
Lorton r. State, (1841) 7 Mo., 55 ; 37 Am. Dec., 179 203
Love v. State, (1887) 78 Ga., 66 ; 3 S. E. Rep., 893 ; 6 Am. St. Rep., 234 37
Love r. State, 15 Tex. Ct. App., 563. 544
Lovell v. Wall, (1893) 12 South. Rep., 659 97
Low v. Rice, (1811) 8 Johns., 409... 480
Lowry v. Bourdien, Doug. 468 117
Lucas v. Lucas, (1860) 30 Ga., 191; 76 Am. Dec., 642... 101
Lucking r. Denning, 1 Salk , 200... 470
Lung, State v., (1891) 21 Nev., 209 ; 37 Am. St. Rep., 505 ; 28 Pac. Rep., 235 ... 281
Lyle v. Shinnebarger, 17 Mo. App., 66 ... ... 91, 115, 119
Lynch v. State, (1862) 15 Wis., 38 509
Lyons, Reg. v., (1841) Car. & M., 217 180

M

Macdonald v. Riddell, (1871) XVI W. R., Cr., 69 464
Madan Mohun r. Queen Empress, (1892) I. L. R., XIX Cal., 572 358
Mahammad Azmat Ali v. Lalli Begum, (1881) L. R., IX I. A., 20 ; I. L. R., VIII, Cal., 42 499
Maine, State r., (1858) 27 Conn., 281 530
Maness v. Henry, (1892) 96 Ala., 454 ; 11 South Rep , 410 3
Manohar v. Bhivrav, (1865) II B. H C. R. A. C., 374 476
Manohur v. Thakur Das, (1888) I. L. R., XV Cal., 319 ... ... 3, 472
Mansfield v Swan, (1884) 41 Davis, 379... 3
Mansfield, State r., (1867) 4, Mo., 475 ... ... 524, 530, 533, 536
Manufacturer's Accident Indemnity Co. r. Dorgan, (1893) 58 Fed. Rep., 945 ... 173
Marris r. Marris, 2 Sw. & Tr., 530 364
M'Arthur, Shaw, 211 317
Martin r. Hamlin, (1869) 18 Mich., 354 ; 100 Am. Dec., 181 102
Martin v McCormick, (1853) 8 N. Y., 331 94
Martin v. Houghton. 45 Barb., 258 119
Martin, Reg r., (1840) 2 Moody C. C., 123; 9 C. & P., 213 312
Martin, Rex r., (1811) R. & R., 196 ; 9 C. & P., 213 : 6 C. & P., 562 ..229, 312, 544, 546
Marvin r. Marvin, (1890) 52 Ark., 425; 12 S. W. Rep., 875; 20 Am. St. Rep., 191... 50

PAGE
Mascolo *v.* Montesanto, (1891) 61 Conn., 50; 23 Atl. Rep., 714; 29 Am. St. Rep., 170 50
Mather, People *v.*, (1830) 4 Wend., 229 525
Mathew *v.* Ollerton, Comb., 218 4
Mathews *v.* Baxter, (1873) L. R., 8 Exch., 132 136
Mathews *v.* State, (1886), 19 Neb., 330; 27 N. W. Rep., 234 153
Mathews, United State *v.*, (1888) 35 Fed. Rep., 890; 1 L. R. A., 104 184
Mattingly *v.* State, (1880) 8 Tex. Ct. App., 315 509
Maul *v.* State, (1860) 25 Tex; 166 509
Maxwell *v.* Griswold, (1850) 10 How., 242 44
May *v.* State, (1843) 4 Ala., ... 542
Mayers, Reg. *v.*, (1872) 12 Cox C. C., 311 ... ... 23, 24, 278
Mays *v.* Fricton, (1874) 20 Wall., 414 ... ... 469, 485
McCaffrey, State *v.*, (1884) 63 Iowa, 479 220
McCall *v.* United States, (1876) 1 Dak., 320; 46 N. W. Rep., 608 520
McCartey, State *v.*, (1871) 17 Minn., 76 226
McCauley *v.* Murdock, (1884) 97 Ind., 219 476
McClusky *Ex parte*, (1889) 40 Fed. Rep., 71 526
McCombs *v* State, (1838) 8 Ohio, 643 547
McCord, People *v.*, (1889) 76 Mich., 200; 42 N. W. Rep., 1106; 8 Am. Cr. Rep., 117 186
McCormick *v.* Penn. Central Railroad Co., (1872) 49 N. Y., 303 ... ... 477, 485
McCormick *v.* Miller, (1882) 102 Ill., 208; 40 Am. Rep., 577 100
McCoy *v.* State, (1885) 46 Ark., 141 520
McCue *v.* Klein, (1883) 60 Tex., 168; 48 Am. Rep., 261 ... ... 6, 336, 377, 407
McDaniel, Rex *v.*, (1755) 1 Fost., 121 ... ... 229, 235
McDermott *v.* State, (1862) 13 Ohio, 332; 82 Am. Dec., 444 546
McDonald, Com. *v.*, (1872) 110 Mass., 405 ... ... 156, 215
McDonald, People *v.*, (1861) 9 Mich., 150 311
McDonald *v* Riddell, (1871) XVI W. R. Cr., 69 464
McGann, People *v.*, 43 Hun., 55 509
McGarry, People *v.*, 2 Lans., 227 517
McGinn *v.* Tobey, (1886) 62 Mich., 252; 4 Am. St. Rep., 848; 28 N. W. Rep., 818... 72
McGavaran, Reg. *v.*, (1852) 6 Cox C. C., 64 245
McKay, People *v.*, (1820) 18 Johns. Rep., 212 513
McLean, People *v.*, (1888) 71 Mich., 309; 15 Am. St. Rep., 263; 38 N. W. Rep., 917 552
McMahon *v.* State, (1876) 1 Tex. Ct. App., 102... 544
McMahon, State *v.*, (1882) 17 Nev., 365 509
McMillan *v.* Nicholls, (1878) 62 Ga., 36 478
McMinn *v.* Pittsburg M. & Y. Ry Co., (1892); 147 Pa St., 5; 23 Atl. Rep., 325 ... 164
McNaughten *v.* Partridge, (1842) 11 Ohio, 223; 38 Am. Dec., 731 102
McQuirk *v.* State, (1888) 84 Ala., 435; 5 Am. St Rep., 381; 4 South. Rep., 775 ... ... 147, 216, 282, 324, 329, 547
Meacham *v.* New York State Mut. Benevolent Assoc., (1890) 120 N. Y., 237; 24 N. E. Rep., 283 385
Meek *v.* Atkinson, (1828) 1 Bailey's Law, 84; 19 Am. Dec., 653 52
Mehegan, Reg. *v.*, (1856) 7 Cox C. C., 145 313
Mehtab Rai *v* Nanak Chand, (1878) P. R., No. 59 500
Mellish *v.* Robertson, (1853) 25 Vt., 603 102
Membery *v.* Great Western Ry. Co., (1889) 14 Ap. Cas., 179 ... ... 168, 175
Merchant's National Bank *v.* National Eagle Bank, (1869) 101 Mass., 281 ... 116
Meredith, Reg. *v.*, (1838) 8 C. & P., 589 312
Mereleth *v.* People, (1870) 84 Ill., 479; 2 Am. Cr. Rep., 448 524
Merry *v.* Green, (1841) 7 M. & W., 623 ... ... 127, 208, 259 264, 268
Metcalf, People *v.*, (1824) 1 Wheel. C. C., 378 279
Metcalfe *v.* Watertown, (1888) 21 Davis, 586 472
Meyer *v.* Delaware R. C. Co., (1879) 10 Otto, 457; 487
Middlemore, Reg. *v.*, 6 Mod., 212 524
Middleton, Reg. *v.*, (1873) 2 C. C. Res., 38; 12 Cox. C. C., 426 1, 110, 111, 130, 139, 230 252, 254, 255, 256, 260, 272, 298
Midland Ry. Co. *v.* Johnson, 6 H. L., 811 102
Mighell *v.* Sultan of Johore, (1894) 1 Q. B., 149 477
Millard, Reg. *v.*, 22 L. J. M. C., 108 494
Miller *v.* Bayer, 68 N. W. Rep., 869 ... ... 6, 66
Miller *v.* Miller, 68 Pa., 486 51
Miller *v* State, (1871) 45 Ala., 24 520
Miller *v.* Minor L. Co., (1893) 98 Mich., 163; 39 Am. St. Rep., 524; 57 N. W. Rep., 101 62

PAGE
Miller, State v.. (1890) 42 La. Ann., 1183 ; 21 Am. St. Rep., 418 ; 8 South. Rep., 309 310
Milnes v. Duncan, 6 B. C., 671 ; 9 D. & R., 731 116
Minakshi v , Subramanya, (1887) L. R. XIV I. A., 160; I. L. R., XI Mad , 26 ... 463
Mininger v. Carver Commissioners, (1865) 10 Minn., 133 470
Mink. Com. v., (1877) 123 Mass., 422; 25 Am. Rep., 109 ... ... 378, 385
Mitchell v. Kintzer, (1847) 5 Pa. St., 216 ; 47 Am Dec., 408... 60
Mitchell v. Lapage, Holt, N. P., 253 75
Mitchell v. Work, (1881) 13 R. I., 645 548
Modun Mohun Ghose v. Boroda Sondori, (1880) VIII C. L. R., 261 491
Mohammad Hossein v Akhaya Narayan, (1859) II B. L. R. App., 42 465
Mona Puna, Queen-Empress v., (1892) I. L. R., XVI Bom., 661 187
Montgomery v. Town of Scott, (1873) 32 Wis., 252 476
Moody, State v., (1857) 24 Mo , 560 530
Moon, State v., (1877) 41 Wis., 684 544
Moore v. Eddowes, (1834) 2 Ad. & El., 133 117
Moore v. Gamgee, (1890) 25 Q. B. D., 244 ... ... 475, 501
Moore v. State, (1886) 22 Tex. App., 117 ; 2 S. W. Rep., 634 530
Moreland v. Aitchison. (1857) 19 Tex., 303 91
Morey, State v. (1853) 2 Wis.. 494 ; 60 Am. Dec., 439 540
Morgan v. Edwards, (1860) 5 H. & N., 415 504
Morgan v. Ravey, (1861) 6 H. & N., 276 159
Morphew, Rex v., (1814) 2 M. & S., 602 522
Morris v Gilmer, (1889) 22 Davis, 315 472
Morrison, People v.. (1854) 1 Parker Cr., R., 626 ... ... 153, 228
Morton, People v., (1883) 4 Utah, 407; 11 Pac. Rep., 512 177
Morton, Queen-Empress v., (1884) I. L. R., IX Bom., 288 507
Moses v. Dubois, 1 Dudley (Law), 209 4
Moses v. McFerlan, 2 Burr., 1005 121
Mostyn v. Fabrigas, Cowp., 72 483
Motilal Ramdas v. Jamnadas Javerdas, (1865) II B. H. C. R., 40 490
Moung Shoay Att v Ko Byaw, (1876) L. R. III I. A., 61 ; I. L. R., 1 Cal., 330 .. 55
Mowatt v. Wright, (1828) 1 Wend.. 355 ; 19 Am. Dec., 508... 93
Mucklow, Reg. v., (1827) 1 Moody C. C., 160 ... ... 257, 260
Mullins, Reg. v., (1848) 3 Cox C. C., 526 ... ... 187, 189
Mullen, Com. v., (1867) 97 Mass., 545 519
Murphy, Com. v., 1 Metc., 1365 ... ... 535, 536
Murphy, Com. v., (1895) 165 Mass., 66 ; 52 Am. St. Rep., 496 314
Murphy, State v., (1844) 6 Ala., 765 ; 41 Am. Dec., 79 276
Murphy v. State, (1884) 97 Ind., 579 530
Murray, People v , (1883) 52 Mich., 288 ; 17 N. W. Rep., 843... 522
Murray v. Queen-Empress (1893) I. L. R., XXI Cal., 103 218
Murray, State v., (1869) 63 N. C , 31 ... ... 549, 550
Murray v. State, (1870) 34 Tex., 331 480
Muttrie, State v., 156 Mass., 19 2
Myers, People v., (1871) 1 Colo., 508 464

N

Naimudda v. Scott, (1869) III B. L. R., 283 465
Narain Das v. Kotu Mal, 1883 P. R., No. 132 473
Naro Hari v. Anpoornabai, (1874) I. L. R., XI Bom., 160 (n) 467
National Steamship Co. v. Tugman, (1882) 16 Otto, 118 488
Naunhoo Singh v. Tofan Singh, (1870) XIV W. R., 229 464
Nayamuddin, Queen-Empress v., (1891) I. L. R., XVIII Cal., 494 ... 419, 420, 452
Naylor v. Winch, 1 Sim. & St., 555 103
Nealey v. Greenough, (1852) 25 N. H., 325 51
Ned v. State, (1857) 33 Miss., 364 509
Nehora Roy v. Radha Pershad Singh, (1879) IV C. L. R., 353 468
Nelson v. Campbell, (1890) 1 Wash., 261 ; 24 Pac. Rep., 539 486
Nelson v. Davis, (1872) 40 Ind., 366 102
New Albany R. R. Co v. Combs, (1859) 13 Ind., 490. 486
New Comb v. State, (1859) 37 Miss., 383 526
New Orleans, M. & T. R. R. Co. v. Mississippi, (1880) 12 Otto, 135. 487
Nicho , Rex v.. (1807) Russ. & R., 130 245
Nidhi Lal v. Mazhar Hussain, (1884) I. L. R., VII All., 230 464

PAGE
Nobeen Kishen Mookerjee v. Shib Pershad, (1867) VII W. R., 490. 464
Norden's Case, Fost. C. C., 129 183
North and West Branch Ry. Co. v. Swank, (1884) 105 Pa., 555. 164
Northrop v. Graves, (1849) 19 Conn.. 548 ; 50 Am. Dec., 264 ... ... 113, 119, 121
Norton v. Marden, (1838) 15 Me., 45; 32 Am. Dec., 132. 91
Nott, Com. v. (1883) 135 Mass., 269 185
Nyamtula v. Nana, (1883) I. L. R., XIII Bom., 424.... 500

O

Oakley v. Aspinwall, (1850) 3 N. Y., 547. 481
Ober, State v., (1872) 52 N. H., 459; 13 Am. Rep., 88 518
O'Brien v. Cunard Steamship Co., 154 Mass., 27 144
O'Brien v. State, (1879) 6 Tex. Ct. App., 665 185
O'Connor, State v., (1877) 65 Mo., 374 ; 27 Am. Rep., 291 521
Oil City v. McAboy, (1873) 74 Pa. St., 249 480
Oiler v. Gard (1865) 23 Ind., 212 102
Oliphant v. Markham, (1891) 79 Tex., 543; 23 Am. St. Rep., 363; 15 S. W. Rep., 569... 45
Oliver v. State, 45 N. J. Law., 46 ... ... 298, 308
O'Maley v. South Boston Gaslight Co., (1893) 158 Mass., 135 ; 32 N. E. Rep., 1110 171
One case of hair pencils, U. S. v., I Paine, 400 521
Ooma Soondurce v. Bepin Beharee, (1870) XIII W. R., 292 468
Oregon Pac. R. Co. v. Forrest, (1891) 128 N. Y., 83 ; 28 N. E. Rep., 137 62
Orton, Reg. v., 39 L. T., 293 355
Osburn v. Throckmorton, (1893) 18 S. E. (Va.), Rep. 285 102
Oswald v. Sproehule, (1855) 16 Ill. Ap., 368 102
Oulton v. Radcliffe, (1874) L. R., 9 C .& P., 189 .. .. 473, 483
Owens v. Lewis, (1877) 46 Ind., 498 4

P

Pachaoni Awasthi v. Ilahi Bakhsh, (1882) I. L. R., IV All., 473. 491
Paddock v. Wells, (1846) 2 Barb. Ch., 333 478
Page, Reg. v., (1846) 2 Cox C. C., 133 ... ... 26, 216
Paget v. Marshall, (1884) 28 Ch. D., 255 68
Palmer v. Broder, (1891) 78 Wis., 483 ; 47 N. W. Rep., 744 197
Parankusam v. Stuart, (1865) II M. H. C. R., 396 357
Parbutty v. Higgin, (1872) VIII B. L. R. App., 98 ; XVIII W. R., 475 512
Paris v. State, (1860) 36 Ala., 332 477
Parker, Com v., (1845) 9 Met., 263 ; 43 Am. Dec., 396 432
Parmentier v. Pater, (1886) 13 Or., 121 ; 9 Pac. Rep ; 59 39
Parry v. Appasami Pillai, I. L. R., II. Mad. 407 486
Parshram, Reg. v. (1870) VII B. H. C. R., Cr. 61 507
Parvatibai v. Vinayek Pandurang. (1887) I. L. R., XII Bom., 68 512
Paup, State v., (1852) 13 Ark., 129 ; 56 Am. Dec., 303 101
Payne v. Constable, (1868) I B. L. R., o. c., 49 500
Peckham v. Hendren, 76 Ind., 47 51
Pedley v. Wellesley, (1829) 3 C. & P., 558 529
Peebles v. Rand, (1861) 43 N. H., 342. 47
Peninsular R. Co. v. Howard, (1870) 20 Mich., 25 480
Penny v. Martin, (1820) 4 John. Ch., 567 66
Pepper v. W. Union Tel. Co., (1889) 87 Tenn., 554 ; 10 Am. St. Rep., 669; 11 S. W. Rep., 783 87
Perkins v. Perkins, (1829) 7 Conn., 558; 18 Am. Dec., 120 464
Perkins, Rex v., (1831) 4 C. & P., 537 432
Perkins v. State, (1886) 65 Ind., 317 248
Peter v. Lancaster, (1843) 14 N. H., 382 117
Peterson v. State, (1878) 45 Wis., 535 520
Phelps v. Mayer, (1853) 15 How., 160 ... ... 520, 521
Phelps v. Znschlog, (1870) 34 Tex., 371 51
Phyfe v. Eimer, (1871) 45 N. Y., 102 510
Pickering v. Pickering, (1839) 2 Beav., 31 100
Pickett, State v., (1876) 11 Nev., 255 ; 21 Am. Rep., 754 311
Pickslay v. Starr, (1896) 149 N. Y., 432 ; 32 L. R. A., 703 123

PAGE
Pierson *v.* People, (1879) 79 N. Y., 424; 35 Am. Rep., 524 ... ... 508, 515, 537
Pigg *v.* State, (1875) 43 Tex., 108 182
Piggott 43
Pillow *v.* Bushnell, 5 Barb., 156 4
Plano Manufacturing Co *v.* Rasey, (1887) 69 Wis., 246; 34 N. W. Rep., 85 ... 464
Platt *v.* N. Y. and Boston R R. Co., 26 Conn., 544 478
Pleasant *v.* State, (1852) 13 Ark., 360 ... ... 157, 243, 245, 284, 546
Pollard *v.* State, (1856) 2 Iowa, 567; 3 Cr. Def., 309 ... ... 156, 540
Polson, State *v.*, (1870) 29 Iowa., 133 ... ... 509, 525
Pomeroy *v.* State, (1883) 94 Ind., 96; 48 Am. Rep., 146 ... ...29, 216
Ponder *v.* Moseley, (1848) 2 Flo., 207; 48 Am. Dec., 194 470
Ponnu Sami Ayangar, (1886) Weir, 1136 507
Poole *v.* Fleeger, (1837) 11 Pet., 185 521
Porter *v.* Jefferies, (1893) 18 S. E. Rep. 229 102
Posey *v.* Eaton, (1882) 9 Lea, 500 478
Pratt, *ex-parte* (1884) 12 Q. B. D., 341 490
Pressy, Reg. *v.*, (1867) 10 Cox C. C., 635 322
Preston *v.* Boston, 12 Pick., 12... 51
Price *v.* State, 36 Miss., 531 522
Pr chard *v.* Sharp, (1883) 51 Mich., 432; 16 N. W. Rep., 798... 51
Primelt, Reg. *v.*, (1858) 1 F. & F., 50 163
Prince, Reg. *v.*, (1868) I C. C. Res., 155, 11 Cox C. C., 193 ... ... 253, 297
Punai Fattama, Queen *v.*, (1869) III B. L. R., A. Cr., 25 248
Purmessur Singh *v.* Soroop Audhikarec, (1870) XIII W. R., Cr., 40 523

Q

Quail, Reg. *v.*, (1864) 4 F. & F., 1076 183
Quigg, People *v.*, (1874) 59 N. Y., 83 509
Quin, People *v.*, (1861) 50 Barb., 128; 3 Cr. D., 325 ... ... 27, 335, 350

R

Radha Gobind *v.* Ooma Sundaree Dossia, (1875) XXIV W. R., 363 468
Raffles *v.* Wichelhaus, (1864) 2 H. & C., 906; 33 L. J. Ex., 160 78
Raghunandan Lall, (1889) All. W. N., 84 490
Rains *v.* State, (1880) 7 Tex. Ct. App., 588 544
Raj Narain *v.* Rowshun Mull, (1874) XXII W. R., 134 465
Ramayyangar *v.* Krishnayangar, I. L. R., X Bom., 185 499
Ram Das *v.* The Official Liquidator, (1887) I. L. R., IX All., 366 512
Ramkuar, Empress of India *v.*, (1880) I. L. R. II All., 723 359
Ram Rao Tatyaji *v.* Babaji Dhondji, (1896) I. L. R., XX Bom., 630 462
Randolph County *v.* Rolls, (1856) 18 Ill., 29 492
Ranganaya Kamma *v.* Alwar Setti, (1889) I. L. R., XIII Mad., 214 54
Rankin *v.* Mortimere, (1828) 7 Watts, 372 104
Raumalsingji, The Government of Bombay *v.*, (1870) IX B. H. C. R., 242 ... 462
Ransbottom *v.* State, (1896) 43 N. E. Rep., 218; 18 C. L. M., 305 157
Ransom, People *v.*, (1831) 7 Wend., 417 536
Rathbun, People *v.*, (1839) 21 Wend., 509 ... ... 515, 525
Ray *v.* Bank of Kentucky, 3 B. Mon., 510 122
Ray *v.* Smith, (1873) 17 Wall., 411 522
Read, Reg. *v.* (1849) 3 Cox C. C., 377; 4 C. & K., 957; 1 Den. C. C., 266 ... 139, 312
Real Estate Sav. Institution *v.* Linder, (1873) 74 Pa., 371 117
Record *v.* State, (1872) 36 Tex., 521 520
Reed, State *v.*, (1867) 39 Vt., 417; 94 Am. Dec., 337 ... ... 549, 550
Reedland, Reg. *v.*, 4 Post. & F., 967 158
Reg. *v.* Long (1831) 4 C. & P., 423 424
Regan, Com. *v.*, (1870) 105 Mass., 593 546
Regan, State *v.*, (1877) 67 Me., 380 470
Reid State *v.*, (1888) 39 Minn., 277 243
Reynolds *v.* People, 41 How. Prac., 179... 152
Reynolds *v.* State, (1889) 27 Neb., 90; 20 Am. St. Rep., 659; 42 N. W. Rep., 903. 228

PAGE
Rice v. State, (1895) 35 Fla., 236 ; 48 Am. St. Rep., 245 ; 17 South. Rep., ... 547
Richards, Queen v., (1877) 2 Q. B. D., 311 206
Richardson v. Duncan, (1826) 3 N. H., 508 52
Ritchie v. State, (1877) 58 Ind., 355 ... ... 210, 546
Ridout v. State, (1879) 6 Tex. Ct. App., 249 16
Riley, Reg. v , (1887) 18 Q B. D., 481 .. .. 545, 552
Roadley, Reg. v., (1880) 14 Cox C. C., 463 312
Robins, Reg. v., 2 Moo. & Rob., 512 551
Robinson, People v., (1873) 46 Cal , 94 520
Robinson, State v., (1891) 43 La. Ann., 383 ; 8 South. Rep., 937 530
Rodgers, Rex. v., (1811) 2 Camp., 654 543
Rogers v. Ingham, (1876) 3 Ch. D., 356 118
Rohimuddin, Empress v., (1879) I. L. R , V Cal., 31 450
Roosnell, Com. v., (1886) 143 Mass., 32 ; 8 N. E. Rep., 747 ... . 32, 314
Rosenbaum v. State, (1859) 33 Ala., 354 524
Rosinski, Reg. v., (1824) 1 Moody C. C., 19 ... ... 245, 293
Ros v. Armstrong, (1860) 25 Tex. Supp., 354 ; 78 Am. Dec., 574 80
Roy v. Union Merc. Leo., (1891) 26 Pac. Rep., 926 484
Royal, People v , (1878) 53 Cal., 62 ... ... 27, 276
Ruhland v. Supervisor's of Hazel Green, (1882) 55 Wis., 668 ; 13 N. W. Rep., 877. 502
Russell, Reg. v., (1832) 9 C. & P., 80 (n) ; 1 Moody, 386 387
Russell, State v., (1881) 33 La. Ann., 135 520
Ruth v. State (1879) 21 Kan., 583 ... ... 156, 244, 246
Rutter v. State, (1855) 1 Iowa, 99 464
Ryan, Reg. v., (1845) 2 Cox C. C., 115 ... ...26, 322

S

Sackett, State v., (1888) 38 N. W. Rep., 773 535
Sachs, State v , (1892) 29 Pac. Rep., 416 479
Sacramento, United States v., (1875) 2 Mon., 239 ; 25 Am. Rep., 742 ... 523, 742
Saeger v. Runk, (1892) 148 Pa., 77 ; 33 Atl., 1006 .. .. 3, 106
Samshere Khan v. The Empress, (1880) I. L. R., VI Cal., 154 ... 419, 451, 453, 454
Sanborn v Neilson, (1828) 4 N. H., 501 ... ... 4, 364
Sanders v. State, 30 Am. Rep., 130 (n) 190
Sanders, State v., (1870) 30 Iowa, 582 224
Sankumani v. Ikoran, (1889) I. L. R., XIII Mad., 211 ... ... 471, 490
Sashi Bhusan v. Jadu Nath, (1885) I. L. R., XI Cal., 552 137
Saspartas v Jenings, 1 Bay. 470 46
Saunders v. People, (1878) 38 Mich., 218 189
Saunders, Reg. v., (1838) 8 C. & P., 265 ... ... 275, 277
Scanlon v. Wedger, (1893) 56 Mass., 462 ; 31 N. E. Rep., 642 ; 16 L. R. A., 395 .. 164
Schaper v. Schaper, (1877) 84 Ill., 603 74
Scharmer v , Farwell, 56 Ill., 542 51
Schmidt v. Oregon Gold Mining Co., (1895) 28 Oreg., 9 , 52 Am. St. Rep., 759 ; 40 Pac. Rep., 406, 1014 471
Schoener v. Lissauer, (1887) 107 N. Y., 111 ; 13 N. E. Rep., 741 51
Schofield v. Walker, (1885) 58 Mich., 96; 24 N. W. Rep., 624 56
Schorn v. Berry, 63 Hun., 110 ; 17 N. Y. Supp., 572 .... 4, 364
Schultz v. State, (1886) 20 Tex. Ct. App., 303 544
Schuylkill County v. Copley, (1871) 67 Pa., 386 ; 5 Am. Rep., 441 74
Scott v. Kelly, (1875) 22 Wall., 57 485
Scott v. Simons, (1881) 70 Ala., 357 173
Scotton, Reg. v., (1844) 5 Ad. & El. N. S., 493 497
Searing v. Saratoga, 36 Hun., 907 4
Sharina, Empress v. (1884) P. R., Cr. No. 42 508
Sharp v. State, (1883) 15 Tex. App., 171 ... ... 157, 245, 246, 308
Sharp v. State, (1855) 17 Ga., 290 543
Shaw, Reg. v., (1865) 10 Cox C. C., 66 ; 34 L. J. (M. C.), 169 495
Shaw v. Spooner, (1838) 9 N. H., 197 ; 32 Am. Dec., 348 53
Shaw v. Woodcock, (1827) 7 Barn. & Cr., 73 43
Shay v. Thompson, 59 Wis., 540 ; 48 Am. Rep., 548 ; 18 N. W. Rep., 473 ... 5, 6
Sheetul Pershad v. Junmejoy Mullick, (1869) XII W. R., 244 521
Shephard, State v., (1828) 7 Conn., 54 ... ... 279.
Shephard, Reg. v., Dears C. C., 606, 2 Jur. N. S., 96; 25 L. J. M. C., 52 184

PAGE

Sherwood *v.* Walker, (1887) 66 Mich., 568 ; 33 N. W. Rep., 919; 11 Am. St. Rep., 531. 85
Shields, State *v.*, (1877) 45 Conn , 256 155
Shivram Vithal *v.* Bhagirathi Bai, (1869) VI B. H. C. R., A C., 20 491
Shotwell *v.* Murray, (1815) Johns. Ch., 512 102
Shropshire *v.* State, (1851) 12 Ark., 190 479
Shumbhu Nath Sarkar *v.* Ram Kamal, (1883), XIII C. L. R., 212 524
Shushee Bhoosun *v.* Muddon Mohun Chattopadhya, (1878) II C. L. R., 297 ... 511
Shutle *v.* Thompson, (1872), 15 Wall., 151 521
Sibert *v.* McAvoy, (1853), 15 Ill., 106 102
Sigourney *v.* Sibley, (1838) 21 Pick., 101 ; 32 Am. Dec., 248 482
Sikundur, Queen *v.*, III N-W. P. H. C. Rep., 146 359
Silliman *v.* Wing (1845). 7 Hill (N. Y.), 159 117
Sinclair, Reg. *v.* (1867) 13 Cox C. C., 28 291
Sivaraman Chetti *v.* Iburam Saheb, (1895) I. L. R., XVIII Mad., 327 484
Skeate *v.* Beale, (1840). 11 A. & E., 983 42
Slanter *v.* Hallowell, (1883) 90 Ind., 286 484
Slattery, Com. *v.* (1888), 147 Mass., 423 ; 18 N. E., 399 ... ... 215, 399
Smillie *v.* Titas, 32 N. J. Eq., 51 50
Smith *v.* Atwood, (1853) 14 Ga., 402 51
Smith *v.* Bromley, 3 Dougl., 695 43
Smith *v.* Curtis, (1857) 7 Cal., 584 484
Smith *v.* Com. (1826), 14 S. & R., 69 393
Smith *v.* Compton, (1856) 6 Cal., 24 501
Smith *v.* Elder (1808) 3 Johns. Rep. (N. Y.), 105 484
Smith *v.* Hughes (1871) 6 Q. B., 607 ... ...18, 239
Smith *v.* Monteith (1844) 13 M. & W., 427 48
Smith, People *v.*, (1861) 9 Mich., 193 530
Smith, People *v.*, (1873) 53 N. Y., 111 299
Smith *v.* State, (1861) 12 Ohio, 466 ; 80 Am. Dec., 355 ... ... 13, 314
Smith *v.* State, (1889) 88 Ala., 73 ; 7 South Rep., 52 509
Sneed *v.* State, (1878) 4 Tex. Ct. App., 514 226
Sneff, State *v.*, (1887) 22 Neb., 481; 35 N. W. Rep., 219 177
Soorendro Pershad *v.* Nundun, (1874) XXI W. R., 196 524
Sornborger *v.* Sanford, (1892) 34 Neb., 498; 52 N. W. R., 368 62
Soule *v.* Bonney, (1853) 37 Me., 128 51
South, State *v.*, (1859) 4 Dutch., 28; 75 Am. Dec., 250 14
Southern Pac. R. R. Co. *v.* Superior Court Kern. Co., (1879) 53 Cal., 471 486
Spaids *v* Barrett, (1870) 57 Ill., 289; 11 Am. Rep., 10 ... ... 2, 41, 46
Speaks, State *v.*, (1886) 95 N. C. 689 509
Speiden *v.* State (1877), 3 Tex. Ct. App., 156; 30 Am. Rep., 126 188
Spoor *v.* Spooner, (1846) 12 Metc., 281 4
Springs *v.* Harven, (1857) 3 Jones Eq., 96 1021
Spruill *v* State, (1881) 10 Tex. Ct. App., 695 227
Spurr *v.* Benedict, (1868) 99 Mass., 463 95
Srimotee Pod, Queen *v.*, (1864) I W. R. Cr., 45 225
Staff, *In re*, (1885) 63 Wis., 285 ; 53 Am. Rep., 285 ... ... 516, 530, 531, 536
Stanton, Reg *v.*, (1844) 1 C. & K., 415 198
Steamship Co. *v.* Tugman, (1882) 16 Ott., 118... 489
Stearns *v.* Wright, (1872) 51 N. H., 600 478
Steed *v.* Preece, 18 Eq., 196 467
Steen *v.* Norton, (1878) 45 Wis., 412 502
Steer, *In re*, 3 Hur. & N., 594 147
Stenton *v.* Jerome, (1873) 54 N. Y., 480... 45
Stephen *v.* State, (1852) 11 Ga., 225 210
Stewart *v.* State, (1880) 9 Tex. Ct. App., 321 544
Stickney, State *v.*, (1894) 53 Kan., 308 ; 42 Am. St. Rep., 287 181
St. Louis & S. Co. *v.* Sandoval C. Co., (1884) 111 Ill., 32 462
Stockton Bank *v.* Howland, (1871) 42 Cal., 129 501
Stone, Rex *v.*, (1801) 1 East P. C. 639 ... ... 102, 494
Storrs *v.* Barker, (1852) 6 Johns. Ch., 170; 10 Am. Dec., 316 102
Stoudenmire *v.* Harper. (1887) 81 Ala., 242 ; 1 South. Rep. 857 148
Stout *v.* Wren, 1 Hawks, 420 5
Strang *v.* People, (1871) 24 Mich., 1 ... ...242, 247, 552
Strickland *v.* Turner, L. R. 7 Exch., 208 79
Sturtevant *v.* Sturtevant, (1886) 116 Ill., 340 ; 6 N. E. Rep., 428 50

PAGE
Subhan, Queen-Empress v., (1893) I. L. R., XVIII All., 395 225
Suoh, State v., (189) 53 N. J. Law, 351 ; 21 Atl. Rep., 852 51
Sukaroo v. Empress, (1887) I. L. R., XIV Cal., 536 424
Sullivan v. India Mfg. Co., (1873) 113 Mass., 396 170
Supervisors, People v., 27 Cal., 655 102
Swamirao v. Collector of Dharwar, (1892) I. L. R., XVII Bom., 299 479
Swecnie, R. v. (1858) 8 Cox C. C., 223 ... ... 32, 280, 307, 308, 326, 330, 336, 349, 350
Sweepster v. Gaines (1857) 19 Ark., 96 478
Sweetzer v. Boslin and M. R. Co., (1876) 66 Me., 583 4
Syud Mahomed v. Oomdah Khanum, (1870) XIII W. R., 184 524

T

Taintor, U. S. v., 11 Blatchf., 374 226
Talbot v. National Bank, (1880) 129 Mass., 67; 37 Am. Rep., 302 115
Tapley v. Tapley, (1865) 10 Minn., 448 ; 88 Am. Dec., 76 38
Taylor v Atlantic and Pac. R. Co, (1878) 68 Mo., 397 485
Taylor v. Atlantic, &c., R. R. Co., 57 Barb., 45 508
Taylor v. Best, 14 C. B., 489 477
Taylor v. Calhell, (1854) 16 Ill., 93 50
Taylor v. Jacques, (1871) 106 Mass., 291 51
Teekum Lall Dass v. Peter Mc. Arthur, (1864) I W. R., 279 468
Templeton v. Giddings, (1889) 12 S. W. Rep., 851 479
Thomas v. Quartermaine, (1887) 18 Q. B. D., 685 166
Thompson, Rex v., (1787) 2 T. R., 18 494
Thompson v State, (1862) 18 Ind., 386 ; 81 Am. Dec., 364 177
Thornton v. Kempster, (1814) 5 Taunt., 786 ; 1 Marsh., 355; 15 R. R., 658 ... 84
Thoroughgoods, (1577) 2 Co. Rep., 9 72
Thorpe v. Priesthall, (1897) 1 Q. B , 159 505
Thowing v. Lumber Co., 40 Minn., 184 86
Thrussel v Handyside, (1888) 20 Q. B. D., 359 174
Thurborn, R. v., (1848) 1 Den. C. C., 387 241
Tilman, State v., (1878) 30 La. Ann. 1249 ; 31 Am. Rep., 236 ... ... 310, 319
Toland v. Corey, (189.) 6 Utah, 394 ; 24 Pac. Rep., 190 97
Tolliver, Com. v., (1976) 119 Mass., 312 520
Town of Ohio v. Marcy, 18 Wall., 552 510
Town of Sharon v. Gager, (1878) 46 Conn., 189... 51
Townsend v. Cowles, (1858) 31 Ala., 428 102
Townsend v. Crowdy, 8 C. B. N. S., 495 114
Township v. County Marion, (1887) 110 Ind., 579, 10 N. E. Rep., 291 491
Trainor v. Philadelphia, R. Co., (1890) 137 Pa. St., 148 169
Trelawny v. Williams, 2 Vern., 484 483
Trigg v. Read, (1845) 5 Humph., 529 ; 42 Am. Dec., 447 ... ... 93, 105
Trimbakji v. Tomu, (186.) II B. H. C. R., 192... 465
Trueman, Reg. v , (1839) 8 C. & P., 727 205
Trombly v. Richard, (1881) 130 Mass., 259 74
Troylukho Nath, Empress v., (1878) I. L. R., IV Cal., 366 ... ... 178, 231
Turner v. People, (1876) 33 Mich., 363 244
Turner v Postmaster-General, (1864) 10 Cox C. C., 15 ; 5 B. & S., 756 494
Turner v. Yates, (1853) 16 How., 14 520
Tyler v. Smith, (1858) 18 B. Mon., 798 117
Tyra v. Com., 2 Metc., 1... 535

U

Updegrove v. Penn. S. V. R. Co., (1890) 132 Pa., 540 ; 19 Atl. R., 283 ; 7 L. R. A., 213 164
United States v. Withier, 5 Dil ., 35 368
Upton v. Tribilcock, (1875) 1 Otto, 45 92
Urry, Reg v., ... 241

V

PAGE

Vadnais, State v., (1875) 21 Minn., 382... 546
Van Brunt v. Singley, (1877) 85 Ill., 281 74
Varner v. State, (1884) 72 Ga., 745 183
Vaughan v. Scade, (1831) 30 Mo., 600 530
Velayudam v. Arunachala, (1889) I. L. R., XIII Mad., 273 492
Verdegreen, People v., (1895) 106 Cal., 211 ; 46 Am. St. Rep., 235 315
Vester, State v., (1877) 29 La. Ann., 620 520
Viraragav v. Krishnasami, (1882) I. L. R., VI Mad., 341 474
Vishnu Sakharam v. Krishna Rao, (1886) I. L. R., XI Bom., 153 493
Vitrifield Co. v. Edwards, (1883) 135 Mass., 591. 510
Vogel, State v., (1868) 22 Wis., 471 517
Voinet v. Barrett, 55 L. J. Q. B., 39 172

W

Wahid Ali, v. Inayet Ali, (1870) VI B. L. R., 52 ; 14 W. R., 288 464
Waixel v. Harrison, (1865) 37 Ill. App., 323. 164
Wakefield Local Board of Health v. West Riding and Grinsly R. Co, (1865) L. R. 1 Q. B., 84. 482
Walker v. Egbert, (1871) 29 Wis., 194; 9 Am. Rep., 548 73
Walling v. Beers, (1876) 120 Mass., 540.... 486
Walter v. People, (1867) 50 Barb., 144 ... ... 30, 275, 284
Wansley v. Robinson, (1876) 38 La. Ann., 793 462
Ward v. People, (1874) 30 Mich., 116 530
Ward, State v., (1887) 73 Iowa, 532. 216
Warden, State v., (1878) 46 Conn., 349 530
Warren, State v., (1893) 77 Md., 121; 39 Am. St. Rep., 41 203
Warwick, State v., (1886) 47 Ark., 568; 2 S. W. Rep., 335.... 536
Wasson v. Cone, (1877) 86 Ill., 46 484
Waters, State v., (1876) 62 Mo., 190. 509
Watkins v. Baird, (1810) 6 Mass., 506; 4 Am. Dec., 170 ... ... 50, 52
Webb v. Alexandria, (1880) 33 Gratt., 168 103
Webb, Reg. v., (1848) 2 Car. & K., 933; 13 Jur., 42; 1 Den. C. C., 338 139
Webster v. Cecil, 30 Beav., 62 240
Weiskittle, S. v., (1883) 61 Md., 48 479
Wentworth, State v., (1876) 65 Me., 234 ; 20 Am. Rep., 688 519
Westmore v. Paine, (1891) 1 Q. B., 482 504
West, State v., (1888) 39 Minn., 321 ; 40 N. W. Rep., 249; 8 Am. Cr. Rep., 381 ... 317
Wheaton v. Wheaton, (1816) 2 Conn., 96 102
Wheeler v. Hatheway, (1885) 58 Mich., 77 ; 24 N. W. Rep., 780 116
Wheeler v. Smith, (1850) 9 How., 55... 100
Whitoher v. State, (1891) 2 Wash., 286 353
White v. Heylman, (1859) 34 Pa. St., 142 46
White, State v., (1881) 33 La. Ann., 1218; 35 Mo., 500 546
Whitney v. Snyder, 2 Lans. (N. Y.), 477 74
Whittaker v. State, (1880) 50 Wis., 518; 36 Am. Rep., 856 ... 16, 140, 145, 193
Whittier, United States v., (1878) 5 Dill., 35; 7 Cent. L. J., 51 ; 111 Cr. D., 704 235
Whittingham, Rex. v., (1801) Leach C. C., 913 185
Wightman v. People, 67 Barb., 44 ... ... 522 524
Wiley v. Prince, 21 Tex., 641 38
Willey v. Carpenter, (1892) 15 L. R. A., 853... ... ... 6, 377, 409
Williams v. Bayley, 1 Eng. & Ir. App., 200 53
Williams v. Champion, (1833) 6 Ohio, 169 94
Williams v. Moor, (1843) 11 M. & W., 256 136
Williams, R. v., (1838) 8 C. & P., 286 277
Williams, Reg. v., (1843) 1 C. & K., 195 ... ... 180, 231
Williams v. State, (1876) 12 Ohio, 622... ... ... 524, 531
Williams v. State (1875) 55 Ga., 391 ; 1 Am. Cr. Rep., 413... 181, 187, 188, 230, 234
Williams, State v., (1876) 75 N. C., 134 20
Williams v. State, (1884) 61 Wis., 28 ., 21 N. W. Rep., 56 522
Wilson v. Barker, (1862) 50 Maine, 447 116

PAG

Wilson *v.* Life Ins. Co., (1854) 6 Md., 157 97
Wilson *v.* State, (1869) 42 Miss., 639 524
Wilson *v.* State, (1855) 16 Ark., 601 530
Wilson *v.* State, (1882) 12 Tex App., 481 544
Wilson *v.* State, (1876) 45 Tex., 76; 23 Am. Rep., 602 203
Winter *v.* Henn, (1831) 4 C. & P., 494 364
Withier, United States, 5 Dill., 35 368
Wolff *v.* Marshall, (1873) 52 Mo., 171 45
Wolfstein *v.* People, (1875) 6 Hun., 121 ... ...112, 262, 267
Wolaston, Reg. *v.*, (1872) 12 Cox C. C., 180; 26 L. J., N. S., 403 ... ... 13, 16
Womack *v.*, State, 7 Cold., 409 205
Wood *v.* Price, (1868) 46 Ill., 439 102
Woodford *v.* People, (1875) 62 N. Y., 117; 20 Am. Rep., 464 205
Woodhouse, Reg. *v.*, 12 Cox C. C., 443 13
Woodhurst, Reg. *v.*, (1870) 12 Cox C. C., 443; 1 Green C. R., 313 ... 138, 245
Woodley *v.* Metropolitan Dist. Ry. Co., (1877) 2 Ex. D., 384 ... ... 166, 173
Woods *v.* People, (1874) 55 N. Y., 515; 14 Am. Rep., 309 549
Woods *v.* State, (1888) 26 Tex. App., 490; 10 S. W. Rep. 108 227
Woodward *v.* Hanchett, (1881) 52 Wis., 982; 9 N. W. Rep., 468 475
Works, Appeal, (1868) 59 Pa., 444 51
Wright *v.* Andrews, (1881) 130 Mass., 149 486
Wright *v.* Remington, (1879) 12 Vroom (N. J.), 48; 32 Am. Rep., 180 ... 38
Wright *v.* State, (1843) 4 Humph., 194 ... ... 215, 243, 245
Wroe *v.* Greer, (1852) 2 Swan., 172 478
Wyatt *v.* State, (1852) 2 Swan, 394 ... ... 279, 281, 283, 286

Y

Yarmouth *v.* France, (1887) 19 Q. B. D., 647 ... ... 168, 174
Young, Reg. *v.*, (1878) 14 Cox C. C., 114 23
Young, Reg. *v.*, (1838) 8 C & P., 644 403
Young *v.* Ross, (1855) 31 N. H., 205 484

ADDENDA AND CORRIGENDA.

Page	*Line*	*For*	*Substitute*
7	29	Ill	Il.
21	34	*ruoluta di acques*	*risoluta di acquis*
	41	obliging another towards	obligating another to
24	14	couse	course.
25	24	uhiform	uniform.
		rap	rape.
36	8	*raisonable et quelle*	*raisonnable, et qu'elle*
38	23	kokoureck.	*kocourek.*
45	35	mnst.	must.
	Foot-ref. 55	Mt.	Metc.
50	23	E-en.	Even.
	Foot-ref. 75	Dunhaver.	Dunhaven.
	Do. 76	150	50
51	Do. 85	Hulhorst *v.* Scharner.	Hullhorst *v.* Tscharner.
66	29	ign-	igno-
68	32	partes.	parties.
	Foot-ref. 15	15	16
	Do. 16	16	17
	Do. 17	17 Paget	Paget
69	Do. 20	Loins	Louis
70	Do. 23	110	1110
71	17	*serklärung*	*erklärung*
74	Foot-ref. 37	Co.	County
75	Do. 44	Frand	Fraud
76	32	a generally	generally
82	11	circusmtances	circumstances
88	4	sasy	says
	31	beng	being
90	39	psychlogically	psychologically
91	2	goverment	government
	38	effect as a same	same effect as a
93	36	rescision	rescission
95	17	nvolves	involves
98	6	thre	the
102	Foot-ref. 37	Jeffries	Jefferies
		Osborn	Osburn
		Clen	Clem
		4 8.	488.
104	8	admixtnre	admixture

Page	*Line*	*For*	*Substitute*
116	Foot-ref. 34	Kingston *v.* Bank	Kingston Bank *v.* Eltinge
126	6	transferrred.	transferred.
	31	Gibson.	Gibson, J.
143	35	manfestation.	manifestation.
152	37	Conners.	Connors.
156	30	a great.	as great.
164	Foot-ref. 34	V. & C.	M. & Y.
169	Do. 46	Past.,	Pa.
176	24	*willight*	*willigt*
182	19	*cos*	*cose*
	23	*stremi*	*estremi*
191	14	not	nor
194	17	a an act	an act
197	15	consenteed	consented
198	16	infects	infect
	17	wa	was
200	20	in	is
203	7	a contrary	the contrary
205	Foot-ref. 41	*v.* State	Clem *v.* State
214	24	*Einwilligunq*	Einwilligung
215	4	acquiescence	acquiescence in
220	14	*Wider.*	*Wider—*
222	36	inasmu h	inasmuch
228	16	*Wevrzeuge*	*Werkzeuge*
	Foot-ref. 2	Auschicks	Anschicks
231	36	Böhlou	Böhlau
	38	*der*	*des*
232	33	*gekommelm*	*gekommen*
	34	(*b*)	(*l*)
233	20	( )	(*r*)
236	29	*Rechts, widrigkeit.*	*Rechtswidrigkeit.*
277	Foot-ref. 50	C. B.	Q. B.
278	13	derson	person
288	Foot-ref. 3	146 P.	1 Whart. Cr. L.,
295	15	*fraud*	*fraude*
	34	*e nale*	*Penale*
319	13	*zichen*	*ziehen*
340	15	*deg*	*des*
347	42	possession as a legal interest.	possessor as protected by law.
356	20	of	or
	Foot-ref. 20	Porat	Prat
357	18	*Vorausetzung*	*Voraussetzung*
359	30	(war)	*war*
361	30	on sent	consent

Page	*Line*	*For*	*Substitute*
362	33	he	the person abducting
363	8	*sopendo*	sapendo
	16	executed	committed
	29	their	her
378	26	*av c*	*avec*
387	36	mechanica	mechanical
391	16	Alison	Allison
393	26	head	accord
395	33	*monıs*	*moins*
397	26	*consent,*	*consenti*
401	11	*Tötung*	*Tödtung*
409	Foot-ref. 49	L. A.,	L. R. A.,
	27	same	same [1s]
	29	sonly	only
413	17	*Törtung*	*Tödtung*
	51	P art	Part
417	mar. heading	con trasted	contrasted
418	26	*ie din*	*in die*
		Einwilligedner	*Einwilligender*
435	2	*Handeln den*	*Handelnden*
436	10	*piurrait*	*pourrait*
	36	complai-	complais-
439	Foot-ref. 12,	13 Commissioner's	Commissioners'
440	14	codsidered	considered
450	22	ground that if it,	ground, that if it
457	27	*Ferlangen*	*Verlangen*
464	Foot-ref. 25*a*	Manu'fing	Manuf'ing
475	27	Ganjee	Gamgee
478	Foot-ref. 39	Ld.	2 Ld.
486	After Foot-ref. 28		28*a* Parry *v.* Appasami Pillai, I. L. R., II. Mad., 407.
495	9	a magistrate	the magistrate
500	17	Collector	conciliator
504	Foot-ref. 86	86	36
512	15	a	the
527	Foot-ref. 21	Cor.	Cr.
529	Do. 27	4 9	479
530	Do.	Wiss.	Wis.
533	32	th s	this
	41	cana	can a

CHAPTER I.

Operation of Consent in Criminal Law.

Volenti non fit injuria.

General operation of consent.

This principle of Roman jurisprudence is of a very general application, and recognized in every system of law. The Roman Jurists knew it in several aspects, and acted upon it in several ways. The Roman Law had several maxims virtually to that same effect (*A*). Ulpian laid down broadly—*Nulla injuria est, qua in volentem fiat.* Indeed, what more natural than to presume that there is in fact no evil, or that if there is any, it is perfectly compensated, when there is a consent. Bentham, approving of the rule embodied in the maxim, observes that it is founded upon two very simple propositions; one, that every person is the best judge of his own interest; the other, that no man will consent to what he thinks hurtful to himself.

As reverse of fraud, consent appears to make right everything that would otherwise be a wrong. It is even said *consensus facit legem*, and *consensus tollit errorem*. Bramwell, B., in his opinion in *Reg.* v. *Middelton*[1], observed: "It is a good rule not to make that a crime which is the act or partly the act of the party complaining: *Volenti non fit injuria:*—As far as he is willing let it be no crime." Dr. Bishop, in his work on Criminal Procedure[2], after observing that "in natural reason, one should not complain of a thing done with his consent," says that "the law, in all its departments, follows this principle."

Operation of consent on contracts.

2. Consent is the very basis of contract as a legal conception. It is only an agreement of two or more persons to do or not to do something, that can form a contract; and from the nature of an agreement its most essential constituent is the consent of the parties. There can be no agreement, unless

(*A*) *Sciente et consentiente non fit iniuria. Nemo videtur fraudare eos, qui sciunt et consentunt. Si quis volentem retineat, non videtur dolo malo retinere Lege Fabia caveatur, ut liber, qui hominem ingenuum, vel libertinum invitum celaverit; . . . eius poena teneatur.*

[1] 2 C. C. Res., 54. | [2] I, 79

there is a meeting of at least two minds in one and the same intention, and different minds can be held to meet only when there is consent on the part of them all. An agreement may in fact be said to be merely another name for a proposal assented to by the person to whom it is made. Without consent there may be the shadow, but not the substance of the contract [3].

Consent can also generally, without anything else, undo a contract, dissolving the obligation created, and discharging the liability imposed, by it. As it is the agreement of the parties which binds them, so may their agreement loosen the contractual tie. In British India, it is expressly enacted that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed [4]. Under the English Common Law, a bill of exchange or promissory note could always be discharged by the holder's consent [5]. Even now a delivery of it to the acceptor, or a waiver in writing, will be deemed a discharge [6]. In the United States, the instrument has to be destroyed and surrendered for the purpose of discharging the debt [7]. In case of other contracts, they may be discharged by consent only when it amounts to a contract, and is therefore expressed under seal or accompanied by consideration. Mutual forbearance or discharge of obligations is, however, a sufficient consideration.

It is sometimes said that a simple contract may, before breach, be waived or discharged without a deed and without consideration. It is thus observed in *Bullen and Leake's Pleadings* [8], that "It is competent to the parties to a contract, at any time before breach of it, by a new contract to add to, subtract from, or vary the terms of it, or altogether to waive and rescind it [9]. The substituted contract forms a good defence to an action on those terms of the previous contract which have been altered by it, and may be so pleaded without any performance or satisfaction, which is required to constitute a good defence after breach [10]". This is correct, however, only when the original contract is executory, as, in such a case, the discharge of each party by the other from his liabilities under the contract is a sufficient consideration for the promise of the other to forego his rights. If a contract has been performed on one side, an agreement that it shall no longer be binding, without more, is void for want

[3] Spaids *v.* Barrett, 57 Ill. 289.
[4] S. 62, Act IX of 1872.
[5] Foster *v.* Dawber, 6 Exch., 839.
[6] 45 & 46 Vic., C. 61, s. 62.
[7] Jaffray *v.* Davis, 124 N. Y., 164; State *v.* Muttrie, 156 Mass., 19.
[8] II., 298.
[9] Goss *v.* Lord Nugent, 5 B. & Ad., 58.
[10] Taylor *v.* Hilary, 1 C.M. & R., 741.

of consideration.[11] Both the rule and this exception were laid down in *Foster* v. *Dawber*, in which Parke, B., said: "It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment, where the obligation is to be performed by payment." These restrictions are all based on the ground that the consent to revoke previous consent should, like the previous consent, be of a formal character.

The rule of the Indian law quoted above has, as only a "legislative expression of the common law," been construed as restricted to the cases contemplated by Bullen and Leake[12]; and to "agreements which more or less affect the rights of both parties discharged by such agreements," as they necessarily imply "consideration which is either the mutual renunciation of right or coupled with it the mutual undertaking of fresh obligations, or the renunciation of some right on the one side and the undertaking of some obligation on the other."[13] In regard to all other cases, s. 63 of the Indian Contract Act provides in direct antagonism to the law of England,[13a] that "every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may accept instead of it any satisfaction which he thinks fit."

Operation of consent on torts.

3. Nor is the operation of consent restricted to contracts, leave and license being quite as ordinary a defence in actions on torts. Consent to a wrongful act takes away from the act all the tortious character it may have on account of any harm it may cause to the person giving the consent. Consent to suffer any harm takes away the tortious character of any act that may cause that harm to the person giving the consent. And this effect of consent in regard to the turning into right of every tort is not restricted to any particular class of torts, and appears to be quite general. Thus, Mr. Jaggard, in his work on Torts,[14] says: "Harm suffered by consent is not, in general, the basis of a civil action. If the defendant is guilty of no wrong against the plaintiff, except a wrong invited and procured by the plaintiff for the purpose of making it the

[11] Saeger v. Runk, 148 Pa. St., 77; Manoss v. Henry, 96 Ala., 454.
[12] Manohur v. Thakur Das, I. L. R., XV Cal., 319.
[13] Davies v. Cundasami, I. L. R., XIX Mad., 398.
[13a] Foakes v. Beer, 9 App. Cas., 605.
[14] P. 199.

foundation of an action, it would be most unjust that the procurer of the wrongful act should be permitted to profit by it." "Consent," as observed by Mr. Cooley in his work on Torts,[15] "is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. . . . . A man may not even complain of the adultery of his wife, which he connived at or assented to." Consent to an assault on a wife is a bar to a suit for damages by her and her husband.[16] Consent to commit what would otherwise be a trespass carries with it an exemption from the necessary results of what was consented to. Where one expressly or impliedly invites or permits another to come upon his premises or to use his premises in a way otherwise wrongful, he cannot complain of that coming or using as a trespass.[17] Nor can there be wrongful imprisonment of a person without his detention against his will For, if he voluntarily place himself in a situation, where another may lawfully do that which has the effect of restraining liberty, especially if he refuses to depart when he may, he cannot complain that he is unlawfully imprisoned.[18] Consent of the husband, whether to the specific act, or to the general immorality of the wife, is a bar to his recovery of damages for the same.[19] So also, if one person procure another to publish defamatory matter concerning him, with a view to sue that other for the matter published, he cannot afterwards sue him in respect of the same.[20]

The contrary has sometimes been held chiefly on the ground that a consent which the law forbids cannot be accepted as a legal protection. Thus, in a very early case,[21] it was held that if a person licensed another to beat him, the license would be void, as it would be against the law. In *Boulter* v. *Clarke*,[22] the action was for an assault, and the circumstance that the assault was in the boxing, in which the parties had joined with their mutual consent, was held not to be a good plea; as the

[15] P. 187.
[16] Pillow *v.* Bushnell, 5 Barb., 156.
[17] Sweetzer *v.* Boslin and M. R. Co., 66 Me., 383; Owens *v.* Lewis, 46 Ind., 498; Churchill *v.* Banman, 104 Cal., 369; Searing *v.* Saratoga, 35 Hun., 907.
[18] Moses *v.* Dubois, 1 Dudley (Law), 209; Spoor *v.* Spooner 12 Metc., 281.
[19] Bonas *v.* Steffens, 62 Hun., 619; Schorn *v.* Berry, 63 Hun., 110; Cook *v.* Wood, 30 Ga., 891; Sanborn *v.* Nelson, 4 N. H., 501.
[20] Howland *v.* Manufacturing Co., 153 Mass, 543.
[21] Mathew *v.* Ollerton, Comb., 218.
[22] Bull. N. P., 16.

boxing was unlwful, and the consent of a party to it could not excuse the injury caused by the boxing. In *Stout* v. *Wren*[22a] it was held, "that a man shall not recover recompense for an injury received by his own consent, provided the act from which he received the injury be lawful; but when two fight by consent, and one is beaten, he may recover damages for the injury, because the fighting is illegal." In *Bell* v. *Hansley*,[22b] the Court held, "that one may recover in an action for an assault and battery, although he agreed to fight, for such agreement to break the peace being void the maxim, *Volonti non fit injuria* does not apply." The same was held in *Logan* v. *Austin*,[22c] and in *Dole* v. *Erskine*.[22d] In *Shay* v. *Thompson*,[23] the jury were instructed that, if the parties "by common consent, in anger, fought together, and that the plaintiff was actually injured in said fight by the defendant, the plaintiff is entitled to recover from the defendant the actual damages resulting from said injury"; and the Supreme Court held that the instruction was fully sustained by authorities. In *Adams* v. *Waggoner*,[24] it was held, on a review of authorities, that it was no bar to an action for assault that the parties fought each other by mutual consent.

In *Barholt* v. *Wright*,[24a] Minshall, J., in delivering the opinion of the Supreme Court of Ohio, said: "As often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. . . . It is upon the same principle of public policy, that one who is the first assailant in a fight may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defence, and unnecessarily injures the plaintiff; or that, with apparent want of consistency, permits each to bring an action in such case, the assaulted party for the assault first

[22a] 1 Hawks, 420.
[22b] 3 Jones, N. C., 131.
[22c] 1 Stew., 476.
[22d] 35 N. H., 503.
[23] 59 Wis., 540.
[24] 33 Ind., 531.
[24a] 45 Ohio, 177.

committed upon him, and the assailant for the excess of force used beyond what was necessary for self-defence.[24b]" In *Willey* v. *Carpenter*,[24c] the Supreme Court of Vermont held that a license to a person to commit assault is no defence to an action for damages for the assault, and said that "the rule that consent will not justify an assault and battery is good law, and conclusive to a sound public policy." In *McCue* v. *Klein*,[25] Willie, C. J., in delivering the opinion of the court, said that the rule of law was clear that consent to an assault was no justification. Cooley, in his work on Torts,[26] says that "the rule of law is clear and unquestionable, that consent to an assault is no justification." It is said in Jaggard on Torts,[27] that consent does not justify assault. It has even been held that a person may maintain his civil suit for a battery, to which he consented and in which he participated.

Dr. Bishop, referring to "decisions like these, proceeding on a misapprehension, and overlooking established law," says that they should not be followed in future cases. They are clearly wrong, as the ground on which they proceed is untenable. That ground pre-supposes that, in such cases, the law has forbidden the consent,[28] while consent is never forbidden in them; but at the best, only the act constituting the tort is forbidden, and the ground, to have any sense, should be stated to be that consent to an act forbidden by law is inoperative, and can have no effect in excusing the act.[29] Thus in *Miller* v. *Bayer*,[29a] Marshall, J., in delivering the opinion of the Supreme Court of Wisconsin observed, that "consent by one person to allow another to perform an unlawful act upon such person does not constitute a defence to an action to recover the actual damages which such person thereby received." In *Willey* v. *Carpenter*,[29b] the Supreme Court of Vermont observed that all such decisions proceeded "on the principle, that the act assented to being unlawful at common law, the consent of the plaintiff is no bar to his action." If this were true, however, consent would never have any effect, as, of course, there would be no use of it in regard to an act

---

[24b] Dole v. Erskine, 35 N. H., 503. Darling v. Williams, 35 Ohio, 60. Gizler v. Witzel, 82 Ill., 322.
[24c] 15 L. R. A., 853.
[25] 60 Tex., 168.
[26] P. 188.
[27] P. 203
[28] Cooley on Torts, 187.
[29] Shay v. Thomson, 59 Wis., 540.
[29a] 68 N. W. Rep., 869.
[29b] 15 L. R. A., 853.

which was, already and without it, lawful. It might as well be contended that the consent of a person could not transfer his rights or property to another, as such transfer would be in itself, and apart from consent, a wrongful act. This would, however, destroy the very basis of the law of contracts, and therefore shows the absurdity of the ground even as it might be urged.

To minimize the absurdity, a further distinction is made. It is said, that "the law does not recognize consent to conduct unlawful, or forbidden by positive law, or for doing that to which a penalty is attached; but where the wrong complained of is not forbidden by law, though it may be by morals, such as the seduction or debauch of a man's wife or daughter, slander, libel or trespass on his real estate or to his personal property, agreement, consent or license, is a good defence."[30]

Thus in *Adams* v. *Waggoner*,[30a] Pettit, C. J., in delivering the opinion of the Court, said: "We think the deduction and conclusion to which we have come are fully warranted by the law and by the reason thereof, which is, that an agreement, leave, or license to do an act which in itself is unlawful, forbidden by positive law, and for the doing of which a penalty is attached and denounced, whether a felony or a misdemeanor, is no defence to an action for damages by a party who has been injured by the doing of such act, though he made the agreement, gave the license, leave and consent; but when the wrong complained of is not forbidden by law, though it may be by morals, such as the seduction or debauching a man's wife or daughter, slander, libel, or trespass on his real estate or to his personal property, agreement, consent or license, is a good defence."

Mr. Jaggard himself, however, does not consider this distinction tenable, observing that "seduction is as much forbidden by positive law as is assault." He suggests, what is no doubt true, that "the true distinction is that a man cannot consent to do anything which is a breach of public duty." And the contrary principle that a person consenting to an injury cannot profit by that injury and recover in an action

---

[30] Jagg. Torts, 203.

[30a] 33 Ind., 531.

for it has recently been recognized, in a most general form, by the Court of Appeals of Kentucky in *Goldnamer* v. *O'Brien*,[31] in which it has been held that a woman consenting to abortion cannot sue for it; the court not being "able to understand how, in a civil suit, in which the party consenting alone is interested, compensation can be allowed by the law."

The principle is not settled, however, and the Supreme Court of Wisconsin has, however, still more recently held that the consent of a woman to the performance of an abortion upon her is not a defence to an action for actual damages thereby sustained by her.[31a]

Injury to person, if consented to, cannot be tort.

4. It has been said that "consent alone is not enough to justify what is on the face of it bodily harm," that "wilful hurt is not excused by consent or assent if it has no reasonable object."[32] This is sometimes attempted to be justified on the ground of the inalienability of a person's right to the safety and preservation of his body, but consent does not involve the question of the alienation of any rights. The doctrine of inalienability has been maintained by some eminent jurists. But there do not appear to be any sufficient grounds for belief in the existence of any such inalienability, for believing that a person can allege and recover for an injury to any right of his, notwithstanding that the act causing the injury was done at his desire and request, or with his approval and permission. Besides, under every system of law, a person is competent to inflict any injury on himself and his body he may like. And it is a general principle that a person can consent to any act which he can do himself without offending the law. Pollock himself, in his draft of the Indian Civil Wrongs Act,[33] proposed to enact, in general language, that a person is not wronged who suffers accidental harm or loss, through a risk naturally incident to the doing by any other person, of a thing to the doing of which the first-mentioned person has con-

---

[31] 33 S W. Rep.., 831.
[31a] Miller v. Bayer, 68 N. W. Rep., 869.
[32] Poll. Torts, 144 (2nd Ed.)
[33] S. 25.

sented, or any harm or loss in consequence of any act done in good faith and with his free consent.

To what extent consent may completely justify or excuse bodily harm or wilful hurt will be explained later on; but there appears to be no sufficient authority against the proposition that the person, to whom such harm or hurt is caused, is not able to recover in an action for that harm or hurt if he had consented to suffer the same.

Consent of an individual does not affect acts prejudicial to public.

5. Consent is thus a complete defence to a tort. But an act causing harm to a person is a tort only in regard to that harm. A consent to one act, or to suffer one harm or sort of harm from one person will not affect the tortious character of any other act, or of any other harm, or sort of harm from any other person, nor as against any person except him who gave the consent. Consent will thus not take away the wrongful character of any act so far as it may be wrongful independently of the harm to the person who gave his consent to that act. M. Garraud, in his work on the Theory and Practice of French Penal Law, says:[34] *La faculté de consentir une renonciation valable à un droit personnel trouve, en effet, une double limite et dans le droit d'autrui et dans l'intérêt public. Ill n'est pas possible de renoncer à un droit lorsque, par cette renonciation, le droit d'autrui se trouve lésé; ainsi, le père ne peut renoncer à l'un des attributs de sa puissance paternelle, par exemple au droit de faire élever son fils de telle maniére et dans telle religion, parce que, au droit personnel, correspond alors un devoir vis-à-vis d'autrui, et la renonciation à ce droit serait, en même temps, la violation du devoir. Ill n'est pas non plus permis de renoncer à des droits au maintien desquels l'ordre public est intéressé: "jus publicum privatorum volontate mutari nequit." De ces considérations, il faut donc conclure qu'un individu ne peut pas accorder à un autre individu le droit de violer, en sa personne, les lois qui intéressent, soit d'autres individus soit l'ordre public et les bonnes mœurs.* In one sense, indeed, there is no act which causes harm only to one person. So intermingled are the affairs of men, that a person can seldom suffer harm without involving some harm to a number of other persons. Almost every injury to one's person or property may affect his means of providing for the maintenance of his relations, of payment to his credi-

[34] I. 395.

tors, of affording relief to the poor and distressed, and even of discharging his liability as a tax-payer to the State. These means, however, are interests of too remote a character to be recoginzed by law, and the harm resulting from a diminution of them is considered too remote to affect the legal character of the act itself. These interests of the relations and the creditors of an individual, of the poor and distressed, and of the State are, at best, what are known in German Law as *neben interessen.*[a] If law cared for these interests, it would protect them even against the individual himself. In case of property, *wenigstens die muthwillige vergeudende Sachbeschädigung zu ihren Gunsten verboten haben.*[b] Yet, in most systems of law, mischief consists in the causing of harm to *another* person's property. In British India, the causing of harm to one's own property may also constitute that offence, but only when it is intended or known to be likely to cause "wrongful loss or damage to the public or to any person," that is, to any other person. And causing harm to one's own person is not an offence anywhere, not even when the harm amounts to a loss of limb or the severest bodily injury, except when it is caused for some ulterior purpose directly prejudicial to the State. Nor is further cognizance of these subsidiary interests of others essential, as, in most cases, the notion of self-interest and self-advantage will be strong enough to prevent acts that are likely to cause harm to them.

A tort may, however, sometimes cause even such harm to the society as the law takes cognizance of, and, viewed as a cause of that harm, it will be treated not as a tort, but as a crime, though as distinguished from a crime essentially against society, it may be designated a private crime.

Harm to the society being the essence of all crimes, it is the consent of the society alone that can excuse them or affect their criminal character. The legislature, as representing the will of the society in the interests of the society, often declares criminal acts free from their criminality. It is on this ground that the general and in fact even special exceptions in regard to the criminal liability of acts are based. These exceptions, in most countries, declare that the consent of the person directly injured will excuse the commission of certain crimes, which mainly affect only that person. To the general exceptions, thus contained in the Indian Penal Code, reference will be made later

(*a*) Subsidiary interests.

(*b*) At least the wanton wasting injury to property would be forbidden for their advantage.

on, but, apart from them, it is clear that no individual can, by consenting to any criminal act causing harm to the society, alter the criminal character of that act.

Any injury committed in such a way as to be an offence against the body politic can be prosecuted in defiance of the consent of the party immediately injured[35]. Dr. Wharton speaks of it as the better opinion, that "so far as concerns the State, no private individual can, by consenting that a crime shall be committed on him, estop the State from prosecuting."

This principle is recognized in every system of jurisprudence. Among the Romans it found expression in several maxims. *Jus publicum privatorum pactis mutari non potest. Privatorum conventio iuri publico non derogat. Pacta, quæ contra leges constitutionesque, vel contra bonas mores fiunt, nullam vim habere, indubitati iuris est. Liber homo suo nomine utilem Aquelliae habet actionem : directam enim no habet, quoniam dominus membrorum suorum nemo videtur.*

The Mahomedan Law not having had at its first conception a distinct notion of the body politic, and being essentially an exclusive religious system, grouped all rights of the society with those which men owe to the deity, under the head of rights of God (*Huquq Allah*) as contrasted with the rights of individuals (*Huquq-ul-Ibad*). And offences against the rights of God are punishable altogether apart from the consent of the person directly affected by them, which takes away the tortious character only of offences against the rights of individuals.

Operation of consent in Criminal law.

6. Consent would thus appear to have no field for its righting operation in the criminal law, except under direct legislation. This is indeed the case even in regard to private crimes, where the harm is such or so considerable as to actually affect the appreciable interests of the society, as, for instance, if the harm consists in the loss of a person's life or limb. The consent of the person to whom such harm is caused cannot naturally affect the criminal character of the act causing that harm. Generally, however, the harm to the society is only an indirect result of the harm to the individual, and can have no existence without it ; and a harm consented to by an individual is no harm, as explained above, to that individual. In some cases the harm

[35] Whart. Cr. L., 160.

to the society consists merely of the general alarm to the public resulting from the harm caused to the individual, and there can be no alarm from an act done to a person with his own consent.

On these grounds, consent has, as a fact, considerable operation in criminal law, and often negatives the existence of a crime. Among Germans, it is an ordinary maxim that *die Einwilligung des Verletzten schliesst die Strafbarkeit der Handlung aus*[c]. In the English Law, as observed by Dr. Wharton[36], consent by an owner to the taking of goods is a defence to a prosecution for larceny; consent to the entrance into a house is a defence to a prosecution for burglary; consent to an assault, not connected with a breach of public order, is a defence to a prosecution for assault; consent to an intended rape bars a prosecution for rape; consent to an intended robbery bars a prosecution for robbery. The same principle was recognized even among the Romans. *Sed et si credat aliquis invito domino se rem commodatam contrectare, domino autem volente id fiat dicitur furtum non fieri. Vi factum videri Quintus Mucius scripsit, siquis contra, quam prohiberetur, fecerit.*

The exact character of this operation of consent.

7. The effect of consent in criminal law is thus quite distinct from that in the law of contracts. There its effect is positive, and it leads directly to the creation, transfer, or extinction of rights. In the criminal law, its effect is a purely negative one, and it does not affect any rights.

Die Einwilligung besteht nicht in der Constituirung eines Rechts für den Anderen zur Vornahme der fraglichen Handlung[37(d)]. *Das Wesen der Einwilligung besteht nicht in der Uebertragung des in Frage kommenden Rechts des Einwilligenden auf den Anderen*[38(e)]. *Die Einwilligung ist keine Dereliction des fraglichen Rechts*[39(f)]. *Die Einwilligung ist kein Verzicht auf ein Recht*[40(g)].

Consent is at the most a relinquishment of one's interest in the doing of an act. Thus Kessler says: "*Wenn ich mit bewusstem*

(c) The consent of the injured person excludes the penality of the act.
(d) The consent does not consist in the constitution for another of a right to the undertaking of the act in question.
(e) The existence of consent does not consist in the transfer of the right in question of the consenting person to another.
(f) The consent is no dereliction of the right in question.
(g) The consent is no renunciation of a right.

36 I Whar. Cr. L., 159.
37 Kess. Einw., 20.
38 Kess. Einw., 19.
39 Kess. Einw., 21.
40 Kess. Einw., 22.

Willen eine dem Gute gefährliche Handlung gestatte, so beweist dies dass es insoweit kein Gut mehr für mich ist oder, was dasselbe sagt, dass ich kein Interesse mehr daran habe, dass diese Handlung unterbleibe.[41 (h)]

It does not lead to any direct "*rechtliche Folgen, namentlich keine Veränderung in den bestehenden Rechtsverhältnissen, aber sie schlesst, wenn die Handlung, auf welche sie gerichtet war, geschehen ist, das Einschreiten der staatlichen Strafgewalt aus, welches ohne sie den Handelnden getroffen haben würde.*[42 (i)] *Durch die Einwilligung ist die Handlung nicht zu einer berechtigten, sondern nur zu einer rechtlich indifferenten geworden.*[43(j)]

Consent does not even authorize or empower the doing of an act. In this it differs from the *Vollmacht* of the German Law, which is the basis of the entire law of agency, and to which it is so far similar that *wie die Vollmacht dem Bevollmächtigten die Möglichkeit giebt, etwas mit civilrechtlichen Folgen zu thun, was ohnedem nur der Vollmachtgeber selbst mit diesen Folgen thun könnte; so giebt die Einwilligung,—soweit sie überhaupt etwas wirkt,—dem Empfänger die Möglichkeit, etwas ohne strafrechtliche Folgen zu thun, was sonst nur der Einwilligende ohne diese Folgen thun könnte.*[44(k)]

In distinguishing the two, Kessler says[45]: *Während die Vollmacht dazu bestimmt ist, der rechtsgeschäftlichen Handlung eines Anderen die volle rechtliche Erheblichkeit zu verleihen; ist es der Zweck der Einwilligung, der rechtswidrigen Handlung ihre Beziehung zum Rechte zu nehmen, sie also zur rechtlich unerheblichen zu machen. Die Vollmacht bewegt sich mitten*

(*h*) When I with a conscious will permit an act dangerous to a good (*i. e.*, to an object of any interest of mine), so does it show that it is, so far, no more good for me, or which is the same, that I have no more an interest in that act remaining undone.

(*i*) Legal consequences, namely, no change in the existing legal relations, but it excludes, when the act to which it had reference, has happened, the interference of the penal power of the State, which without it would have befallen the person doing the act.

(*j*) On account of consent an act does not become a right one, but only one legally indifferent.

(*k*) As the full authority gives to the person empowered the possibility (power) of doing perchance with civil rights, what without it only the person giving the authority could himself do with those consequences, so the consent gives—as far as it is at all operative—the receiver (of the consent) the possibility (power) of doing perchance without penal consequences, what otherwise only the person consenting could do without those consequences.

[41] Kess. Einw., 51.
[42] Kess. Einw., 101.
[43] Kess. Einw., 26.
[44] Kess. Einw., 26.
[45] Kess. Einw., 110.

im Rechtsgebiete : die Einwilligung nur auf dessen Grenze, welche im Einzelfalle zu bestimmen, die vom Rechte ihr zugewiesene Aufgabe ist. Die Vollmacht trägt daher das characteristische Gepräge aller rechtsgeschäftlichen Institute, die Ergänzung des wirklich vorhandenen Privatwillens durch den vom Rechte präsumirten; bei der Einwilligung kommt nur der effectiv nachweisliche Einzelwille in Betracht. Die Vollmacht gilt demgemäss nach dem präsumtiven Willen des Vollmachtgebers als fortbestehend, bis eine von vornherein ihr mitgegebene Beschränkung oder ein ausdrücklicher Widerruf ihr ein Ende macht. Das Gegentheil würde mit ihrem Zwecke und mit dem allgemeinen Verkehrsinteresse unvereinbar sein. Die Einwilligung dient nicht einem solchen Interesse der Erleichterung des Rechtsverkehrs[l].

Absence of consent, the essence of most private crimes.

8. The absence of consent is, however, the very gist of most private crimes. *On comprend, en effet, que certaines infractions supposent, pour être punissables, que le fait a eu lieu contre la volonté de la personne qui en est victime ; qu'il n'y ait pas vol, par exemple, si le propriétaire de l'objet soustrait a consenti à son enlèvement ; qu'il n'y ait pas viol ou attentat violent à la pudeur, si la victime ne s'est pas opposée à l'accomplissement de l'acte incriminé : or, l'inculpé, en démontrant, dans ces divers cas, qu'il a agi du gré de la victime, invoque moins un fait justificatif que l'absence d'un des éléments constitutifs du vol, du viol ou de l'attentat violent à la pudeur.*[46] Wrongful restraint and confinement, using criminal force, criminal intimidation, criminal breach of trust, and assault involve the notion of the absence of consent, and cannot exist where they are consented to. Wrongful restraint and confinement of a person involve, as their essential constituents, a desire on the part of that person to go from the place where he is, and cannot possibly exist if he consents to stay there. Simi-

(*l*) While the giving of full power is intended to give full legal importance to an act of another of the character of a legal transaction, it is the object of consent to remove from an illegal act its character of illegality before law. The full power operates in the midst of legal territory ; the consent only on its boundary, to decide which is, in individual cases, a task assigned to it by law. The full power bears, therefore, the same characteristic image (impression) as all the institutions of law, which make transactions legal, *i. e.*, it completes (or gives legal importance) to the actually present private will by making it a legally presumed one. In the case of consent, only the effectively demonstrable individual will is taken into consideration. In keeping with the presumptive will of the person giving the full power, this full power therefore holds good, till it terminates in keeping with a limit given to it from the very beginning, or by an express revocation. The contrary would be irreconcilable with its very purpose as well as with the interest of general dealings.

[46] I Gar. Dr. Pen., 394.

larly, nothing said or done to a person with his consent can constitute a threat; nor the use or disposal by any one of property entrusted to him, with the consent of the person who so entrusted it, can be a breach of trust. So also, the force used to a person will not be criminal, when it is used against him with his consent. Similarly, an assault implies force or an indication of the intention to use force on one side, and a repulsion or repugnance, or at least a want of consent on the other; and there can be no fear, annoyance, or injury, or apprehension of the use of force, where there is consent.

In English Law, the word assault is used in a more general sense, but even there it is quite settled that "an assault excludes consent,"[47] and "there can be in law no assault unless it be against consent."[48] An assault on a consenting party appears to be a legal absurdity, and on a consenting female, old or young, it has been said to be "a contradiction in terms—a legal impossibility."[49] In Meredith's case[50], Lord Abinger said, that to constitute the offence of assault, "you must show an assault which could not be justified, if an action were brought for it, and leave and license is pleaded." So also Kelly, C. B., in delivering the judgment of the court in *Reg.* v. *Wollaston*[51], said: "If any thing is done by one being upon the person of another, to make the act an assault, it must be done, without the consent and against the will of the person upon whom it is done." And in *Reg.* v. *Lock*[52], Brett, J., said: "I agree that to constitute an assault an act must be against the consent of the person to whom it is done."

Similarly, for theft, it is absolutely necessary that the taking of the property is without the consent of the owner of the property, *invito domino*. An act of spoliation of property cannot be considered a crime, where the owner of the property is a participant in the transaction and consents to it.

This is recognized in almost every system of jurisprudence. In the Roman Law, *Furtum* was the *Contractatio rei alienæ fraudulenta, cum animo furandi invito illo domino cujus res illa fuerit*. In the English law, larceny as defined in East's Pleas of the Crown[53], is "the wrongful or fraudulent taking and carrying away by any person of the mere personal

[47] Reg. v. Woodhouse, 12 Cox. C. C., 443; per Lush. J.
[48] Martin's Case, 2 Moody, C. C., 123; per Patteson, J.
[49] Smith v. State, 12 Ohio, 460.
[50] Russ. and R., 46.
[51] 12 Cox C. C., 182.
[52] 2 C. C. Res., 13.
[53] Ch. 16, s. 2, p. 553.

goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." And this is the definition that has been approved most by judges [54] and text-writers [55]. On general principles also, in every act of larceny there must be a taking or severance of the goods from the possession of the owner. This implies the consent of the owner to be wanting, and necessarily involves a trespass. If there be no trespass in taking, there can be no felony in carrying them away. The Italian Penal Code [56] defines theft as "the possessing oneself of the movable thing of another person for to draw profit from it, removing it from the place where it may be, without the consent (*senza il consenso*) of him to whom it pertains." The French, the Belgic, and the German Penal Codes together with some others do not expressly refer to the absence of consent, but that absence is there also recognized on general principles as involved in the definition of, and essential to, the offence.

Absence of consent expressly made essential for some offences in the Indian Penal Code.

9. Most of the definitions of private offences in the Indian Penal Code expressly provide for the absence of consent. Thus conveying a person from British India cannot be kidnapping, unless the person is conveyed without his consent [57]. Taking or enticing young people from a person's guardianship cannot be kidnapping, unless the taking or enticement is without that person's consent [58]. Sexual intercourse with a woman is rape only when it is had without her consent [59]. Moving a property out of a person's possession cannot be theft, unless the property is moved without that person's consent [60]. Having sexual intercourse with a person's wife can be adultery only when the intercourse is had without that person's consent or connivance [61].

Consent is an excuse for several criminal acts.

10. Even in cases in which the absence of consent is not an essential constituent of an offence, consent of the person, to whom the harm is caused to suffer that harm, is often a ground for entire non-liability in respect of the act causing that harm—a justification for the causing of that

54 State *v.* South, 4 Dutch., 28.
55 Arch., 377.
56 S. 402.
57 I. P. C., s. 360.
58 I. P. C., s. 361.
59 I. P. C., s. 375.
60 I. P. C., s. 378.
61 I. P. C., s. 497.

harm. In such cases the act causing that harm is not treated as criminal; and consent forms a *fait justificatif*, or at least, a *cause de non-culpabilite*, and in the language of the Indian Penal Code, a general exception, providing a complete immunity for the act from the sanction provided for acts of that class by the law of crimes. The most usual cases of general exemption from criminal liability on the ground of consent are provided for in ss. 87-89 and 92 of the Indian Penal Code.

Even when it does not operate as a general exemption, it may be a ground for partial non-liability, corresponding to the French *excuse*. In such a case, it only diminishes the criminality of the act, and renders it liable to a punishment less than that fixed by law for acts of that class. This may be taken to be the case in regard to every offence, which, when committed with the consent of the person affected, does not require to be punished with the same severity as if it were committed against his will. Several instances of this statutory partial diminution of criminality are expressly enacted in the Indian Penal Code. Thus the fifth exception of s. 300 provides that "culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

Similarly, sometimes an act is an offence irrespective of the consent of the person affected by that act, and in such cases the act is deemed to be a higher offence liable to greater punishment, when it is committed without the consent of that person. Thus an act causing the death of a woman, and intended only to cause her miscarriage is rendered by s. 314 of the Code a much graver offence when done without her consent. In most cases, however, the offence as mitigated by the consent of the injured person, has not got a special designation, and is thus not expressly recognized by positive law. Consent, in such a case, operates only as a *circonstance attenuante*, but its mitigating effect is not less real on that account, and cannot be ignored in the administration of criminal justice.

CHAPTER II.

Nature of Consent.

Consent is an operation of mind.

11. In a general sense, consent is the *quo animo* of the act; to consent is an operation of the mind implying positive mental action; and "consenting is to be willing, as a condition of the mind" [1]. This has been laid down repeatedly by jurists and judges. In *Reg.* v. *Middleton* [2], Brett, J., observed that "consent or non-consent is an action of the mind; it consists exclusively of the intention of the mind." Consent has been defined as the concurrence of wills [3], as the *voluntas multorum or plurium ad quos res pertinet.* To consent, *c'est vouloir ce qu'un autre veut et nous propose de vouloir egalement*; and consentment, it has been said, consists in the conformity *d'une volonté avec une autre volonté.*

In the German law, the corresponding expression *Einwilligung* has in its general sense, been defined by Kessler in his work on that subject [4] as *die Erklärung der Ueberein stimmung meines Willens mit dem Willens-acte eines Anderen*(a), and for the special purpose of the Criminal Law as *die erklärte Ueberein-stimmung des Willens einer Person mit der, abgesehen von dieser Erklärung, zum Schutze eines Interesses des Erklärenden bei Strafe verbotenen Handlung eines Anderen* [5](b).

It must be kept distinct as much from mere absence of dissent as from a wish or instigation. The absence of dissent or even mere submission is not consent. Submission, far from being consent, is totally different from it, for there may be submission without consent, and even while the feelings are repugnant to the act done and submitted to [6]. As observed in *Reg.* v. *Day* [7], "every consent involves a submission, but it by no means follows that a submission involves consent."

(a) The declaration of the agreement of my will with the voluntary act of another.

(b) The declared agreement of the will of one person with the act of another which, apart from that declaration, is prohibited under pain of punishment, for the protection of an interest of the person making the declaration.

[1] Whittaker v. State, 50 Wis., 518.
[2] 2 C. C. Res., 62.
[3] Black's Dict.
[4] P. 26.
[5] P. 99.
[6] Reg. v. Wollaston, 12 Cox. C. C., 180; Ridout v. State, 6 Tex. Ct. Ap., 249.
[7] 9 C. & P., 722.

So at the importunity of another person one may often consent to an act which he really dislikes, and even does his best to thwart or prevent. To take the case of a surgical operation for extracting stone which is for a man's benefit, a nervous patient will often, on the first smart of the surgeon's knife, like to escape it altogether, even at the risk of death, and would escape but for the chloroform administered to him, and still he is said to consent to the operation. As to the instigation, Kessler says[8]: *Die Einwilligung ist keine Anstiftung des Anderen zu der schädigenden Handlung* (c).

Nature of physical consent.

12. Reference is made in some cases to physical consent, as distinguished from consent. Really, of course, the consent of the intellect is the only consent known to the law.[9] As Lawson, J., observed in his judgment in *Reg.* v. *Dee*[9], "there can be no such thing as material consent in the case of a rational being, it must be mental consent or nothing." No practical harm can, however, result from this use of the term, so long as its exact signification is understood. What is really contemplated in such cases is the physical expression of consent, because like every other state of mind, it can be expressed only physically.

The term physical consent is, however, not used always to indicate this physical mode of the expression of consent, but often the absence of those legal qualifications of consent, without which it is generally deemed to have no legal operation or effect, and without which it is sometimes said not to exist at all, at least for the purpose of the law with reference to which its existence may at the time be in question. It is often even maintained that a consent, which is not operative in any branch of the law, is, so far as that branch is concerned, no consent at all; and acting on this principle, consent is in some branches of law defined so as to include all those incidents of it, without which it will not have operation in that branch, as if they were its very essentials. Thus, in Story's Equity Jurisprudence, consent is defined as "an act of reason, accompanied with deliberation, the mind weighing as in a balance the good or evil on each side".[10]

The proposition can, however, be correct only as an elliptical expression, and may cause no harm so long as its

(c) The consent is no instigation of another to the act causing the injury.

[8] Kess. Einw., 23.
[9] Reg. v. Dee, 15 Cox C. C., 594, per Pallcs, C.B.
[10] S. 222.

elliptical character is borne in mind. It has practically, however, led to considerable difficulties by encouraging a confusion between the absolute essentials of consent, and such qualifications thereof as are of importance only for particular branches of law.

Besides, merely to say, in any case, that a consent is no consent at all, tends to avoid or throw into back-ground, in all cases of that sort, the real question of the adequacy of every alleged vitiating cause of consent, to divert attention and controversy from the question of any circumstance being or not being sufficient to render consent inoperative in any case. Negative the existence in any case of consent, and, so far as consent is concerned, there will be no distinction in that case, between circumstances which are the essential constituents of consent, and those the absence of which only prevents consent from re ceiving a certain effect which law assigns only to a consent in acertain branch of law or with certain qualifications.

Consent not to be confused with estoppel.

13. Consent is sometimes spoken of as apparent. This is generally the case, when its declaration does not constitute real concurrence of wills. The practical effect in such a case, however, is the same, as if there were real consent. In contracts, for example, the law often deems that there is an agreement when really there is none. A party consenting to an act proposed to be done by another is entitled to understand what is ordinarily conveyed by the mention of that act among that class of people and in similar circumstances, even if that other person should have meant something else by that act, so long as he did not indicate that he meant something else. It is thus a general rule, that a party can claim to have a contract interpreted in the sense in which he believed it, at the time of making the contract, to be understood by the other party. This is, however, not so much on account of anything in the nature of consent, as on the principle of estoppel. Consent has thus been said to be analogous to estoppel or a species of it [11], and the same principle will, to some extent, apply to other branches of law also.

As observed by Blackburn, J., in *Smith* v. *Hughes* [12], "if, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to

[11] I Bish. Cr. Pr., 70. | [12] 6 Q. B., 607.

the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." Similarly, in *Reg.* v. *Hehir* [13], Palles, C.B., said: "I apprehend that according to our law, as one's mental act, such as consent or intention, can be known to another only by his external act, it follows that where the actually existing intention, by mistake, differs from the intention expressed by the external act which signifies it, the expressed intention must, in relation to the act of another, honestly induced by such expressed intention, be deemed to be the real intention. This matter may be tested by cases of written contracts, in which the only intention which the law recognises is that expressed in the writing. In such a case, if there be a material mistake as to the subject-matter of the contract, the law does not say that, by reason of that mistake, the signing of that contract is reduced from an intelligent act to something from which intelligence and consciousness are absent, or that that act of signing did not carry legal consequences because the party signing, did not, in a sense, know the exact thing he was doing, and did not intend to do that very thing. In such a case the remedy, if any, would be in equity on the ground of mistake."

No consent to an act without knowledge thereof.

14. Consent, however, is never any thing other than an intellectual operation or condition of the mind. Besides concurrence of wills, its chief essential constituent is a consciousness or knowledge of the act consented to. It is clear that there can be no consent to an act without knowledge thereof. In the nature of things what is not known cannot be consented to.

In *Reg.* v. *Lock* [14], the charge was of an indecent assault on a boy of eight years of age, and the jury was instructed that "knowledge of what is to be done, or of the nature of the act that is being done, is essential to a consent to the act." The case was reserved, however, and Kelly, C.B., said: "Where a child submits to an act of this kind in ignorance, the offence is similar to that perpetrated by a man who has connection with a woman while asleep. If that were not an assault, our law would be very defective." Quain, J., said that "the find-

[13] [1895] 2 Q. B., Ir., 757.

[14] 12 Cox. C. C., 244.

ing of the jury that the boys did not know the nature of the acts done, clearly shows that they did not consent to the acts done."

Similarly, in *Sukaroo* v. *The Empress* [15], the evidence showed that a person consented, with great reluctance, to a surgical operation being performed upon him, and that the only information communicated to him was that if he submitted to it he would be cured : and a Division Bench of the Calcutta High Court held that a person could hardly be said to accept a risk of which he was not aware, and that section 88 of the Indian Penal Code could not apply, unless it were shown that the patient did accept the risk, and that he was aware of it.

So far is the principle carried, that it is held to be no defence that the force applied was a part of the form of initiation of a voluntary society, which the party assaulted had agreed to join, if he did not know beforehand that that was part of the ceremony [16].

But the knowledge of an act, though essential to the consent to it, is not identical with consent, and must always be kept distinct from it. The maxim is, *Volenti non fit injuria*, not *scienti*. Knowledge is not consent. If one know of a danger or of a wrong, and then willingly consent to it, he can not be heard to claim damages consequent upon this conduct; but if he had merely knowledge without either appreciation of risk, or opportunity to exercise an option, the maxim cannot be applied to him [17].

Knowledge of attributes of an act how far necessary to consent.

15. For consent to an act, it is not necessary that there should be an agreement in regard to every circumstance connected with that act. The parties may be contemplating many of such circumstances quite differently, and still they may be said to consent to that act. It is generally said, that for consent there ought also to be a knowledge of the important attributes of the act consented to. Thus Kessler says [18] : *Die Einwilligung muss gegeben werden mit dem Bewusstsein aller für das Interesse des Einwilligenden wesentlichen Eigenschaften der in Aussicht genommenen Handlung.* [(d)] This can be correct only when those attributes of an act are considered important which form a part

(*d*) The consent must be given with the consciousness of all the attributes of the act contemplated, which are of importance for the interest of the consenting person.

[15] I. L.R., XIV Cal., 566.
[16] Bell v. Hansley, 3 Jones, 131 ; State v. Williams, 75 N. C., 134.
[17] 1 Jagg. Torts, 200.
[18] Kess. Einw., 105.

of that act. They will of course be different not only in different branches of law, but also in relation to different matters. The instances of the application of this rule given by him show that the words *wesentlichen Eigenschaften* are not construed strictly enough to allow an acceptance of the rule in all its generality. He thus says that if A, anyhow mistaking the shooting rifle of B for a fowling-piece, consents to B's shooting with it, the consent will not exclude the criminality of B shooting with the rifle, and A will not have consented to the shooting at the object. So also, he adds, that the consent to the use of a sword by an adversary has no effect, when the point of the sword has been poisoned. These examples involve, however, a question of the effect on consent of mistake, which question will be treated of in sequel.

The term "consent" is defined differently in different branches of law, and with reference to different matters. This difference is, in most cases, merely of words, and therefore apparent only. So far as real, it is due not to a difference in the nature of the mental condition or operation which constitutes consent, but to a difference in those aspects of an act which have predominant importance in the several branches of law, and in relation to several matters, respectively.

Consent in law of contracts.

16. The law of contracts, for instance, deals as much with the object to which the act relates, as with the act itself. The mode in which, and the intention and motive with which, the act is done, and the consequences which it involves, except as regards the aforesaid object, have, if any, only a secondary importance.

Consent, in the law of contracts, is therefore defined as *pactio duorum pluriumve in idem placitum consensus*. The Italian jurists define it from the promisor's point of view as *la volontà seria e definitiva di costituirsi debitori verso altri*[e]; from the point of the promisee as *la volontà seria e ruoluta di acquestare un credito, obbligando altri verso noi*[19] [f]; and generally as *la conformita e la partecipazione delle due volontà* [20] [g].

The Indian Contract Act lays down that two or more persons are said to consent, when they agree upon the same thing in the same sense. The word "thing," taken with the

(e) The will, serious and definite, of making oneself the debtor of another.
(f) The will, serious and resolute, of acquiring a credit, and obliging another towards oneself.
(g) The conformity and the participation of two wills.

19 III Giorg Teo. Obbl., 134, 132.

20 IV Giorg. Teo. Obbl., 34.

context, must be deemed to refer primarily to the act in regard to which there is an agreement. It appears to be generally agreed upon that there must be an agreement not only as to the nature of the act; but, if the act refer to an object, also to the identity or substance of that object. In some contracts, the identity of the parties is also an essential attribute of the act agreed upon, and there will be no consent to an act independent of them.

Consent in non-contract law.

17. In other branches of law, however, the same subjective and objective aspects of the act consented to have not the importance which they have in the law of contracts. In the law of torts, for example, it is the consequences of the act, the harm actually resulting from the act, that have the greatest importance; and therefore an agreement as to the act and its natural and direct consequences may be a consent apart from the identity of the object that may be affected by that act. In the law of crimes also, the object of the act is of secondary importance; the will, intention, and the motive with which the act is done, sharing with the consequences contemplated the importance that the latter have in the law of torts. The personality of the doer must also bear a greater importance in these laws, than in the law of contracts; but will not, in all cases, be an essential constituent of the act. A consent given to one person shall not, therefore, generally avail any other person or excuse the act if done by any other. Consent to be killed by a person will not place a man beyond the pale of the law of murder so as to be killed by any one without fear of the penalty of death, though the idea of any particular person may not be implied in case of a patient suffering from an acute pain asking for the performance of an operation that turns out fatal, or, in case of a soldier lying on a conquered field praying to have an end put to his last agonies. In Germany, Ortmann and Rödenbeck take an opposite view, and allow *X, wenn er einwilligt, vom Y getödtet zu werden, dadurch zu einem "untauglichen objecté" für den Mord werden; so dass wenn hierauf Z, ohne Kentniss jener Einwilligung, den X tödte, dies nur ein Mordversuch am untauglichen objecte sei*[h]. Kessler shows, however, the mistake of that view, and says: *selbst das Todesurtheil macht anerkanntermassen*

(*h*) When he has consented to be killed by Y to become thereby an unsuccessful object for murder, so that if Z should thereupon, without knowledge of that consent, kill X, this would only be an attempt at murder on an unsuccessful object.

den verurtheilten nur dem Scharfrichter gegenüber zur bestimmten Stunde zu einem untauglichen Objecte für den Mord; und die blosse Einwilligung in die Tödtung durch eine bestimmte Person sollte eine derartige Wirkung jedem Beliebigen gegenüber haben [21(i)].

Definitions of consent in the law of torts and the law of crime may thus well be different from those in the law of contracts, having reference rather to the physical consequences and the mental aspect of the act, respectively, than to the act and the object to which the act relates.

A person while asleep cannot give consent.

18. It is on account of the necessity of the knowledge of the act for the consent, that sexual intercourse with a woman while asleep has been held to be without her consent. Thus Dr. Wharton, in his work on Criminal Law, says "that an unconscious submission during sleep is rape is now settled." [22]

In *Reg.* v. *Mayers* [23], Lush, J., observed, in the course of the argument, that "if she was asleep, she was incapable of consent, and therefore it would be a rape"; and, in summing up, he laid down "that if a man gets into bed with a woman while she is asleep, and he knows she is asleep, and he has connection with her, or attempted to do so while in that state, he is guilty of rape in the one case and of the attempt in the other." The same was held in *Reg.* v. *Young* [24], in which she, on awaking, flung him off; and, though the prisoner must have known that she was asleep, there is no reference made to that circumstance in the Report. (A)

In *Reg.* v. *Lock* [25], Kelly, C. B., speaking, by way of argument, of the case of a connection with a woman while asleep, said: "In such a case consent is out of the question, for a woman whilst asleep is in such a state that she cannot consent, and the act of connection with her under the circumstances is quite sufficient to constitute an assault."

(i) Even a sentence of death makes the condemned, as is well known, an unsuccessful object for killing only for the executioner at a certain hour, and should the mere consent to be killed by a certain person have such an effect for any other person.

(A) In some of the cases in which there has been a connection, the woman was said to be *bonâ fide* asleep, and the man committing the intercourse to have known her to be asleep, but it does not appear that, in any case, the decision turned on the fact of his knowledge, and, though *non omnes dormiunt quelousos et connivents*, of course one cannot be said to be asleep, unless she is asleep *bonâ fide*.

[21] Kess. Einw., 22.
[22] I., 522.
[23] 12 Cox C. C., 311.
[24] 14 Cox C. C., 114.
[25] 12 Cox C. C., 246.

The same was held in the United States in *Harvey* v. *State*[25a], in which Hughes, J., in delivering the opinion of the Supreme Court of Arkansas approved of the decision in *Reg.* v. *Mayers*, and said "we have considered the cases of *Sullivant* v. *State*[26], and *Charles* v. *State*[27], and cannot assent to the doctrine of the latter cases, that if the prisoner designed to accomplish his purpose while the woman was asleep, he was not guilty of an attempt to commit rape." (B)

In *Reg* v. *Barrow*[28], there was an acquittal, but it proceeded on the ground that it did not appear that the prosecutrix was asleep or unconscious at the time when the connection took place. In *Com.* v. *Fields*[29], it was held that a person, who intended to have sexual intercouse with a woman, while she was asleep, would not be guilty of rape; but the decision, in that case, as well as in other similar cases,[30] turned on the early theory as to the requirement of force to constitute rape, to which reference will be made later on.

In *R.* v. *Sweenie*[31], it was held by the majority of the Court, in Scotland that sexual intercourse with a woman, while asleep, was not rape. This decision turned, however, on the ground that force and violence were necessary for rape, that the physical force incidental to the sexual intercourse was not sufficient to constitute rape, and that, though constructive force had been considered sufficient in some cases, yet that there was not sufficient authority for holding that there was constructive force in a case where the connection was had with a woman while asleep.(C)

(B) In *Lewis* v. *State*[32], a girl testified that she was awakened by the pleasure of sexual enjoyment, when she found the accused having intercourse with her, that she asked him to go away, but was told, in reply, to keep still, and that she did not consent, but that she made no outcry and no resistance. Woodward, J., in delivering the opinion of the court, said: "The fact of the girl being asleep is a circumstance, but one of very little or no moment, unless there were some manifestations of dissent when she awoke. It is just as consistent with willingness as with unwillingness, and takes its character from the subsequent acts." The fact that there could possibly be no state of mind prior to the act on account of sleep, that could be called consent, and that even a subsequent consent after awakening when the penetration had taken place, could have no effect, was not considered.

(C) Lord Ardmillan, who agreed with the majority of the court, observed: "If I am right in holding that the definition of rape is not satisfied, as regards the element of force, by

---

25a 53 Ark., 425.
26 8 Ark., 400.
27 11 Ark., 390.
28 11 Cox. C. C., 191.
29 4 Leigh, 648.
30 Com. v. Bush, 105 Mass., 376.
31 8 Cox C. C., 223.
32 30 Ala., 54.

Lord Ivory and Lord President Macneill dissented from the majority, holding that intercourse with a woman without her consent was sufficient to constitute rape, and that, as no consent could be given by a person asleep, the offence of rape had been committed.

No consent if want of knowledge due to unconsciousness on other account.

19. And, apparently, the same rule will apply when there is no sleep, but unconsciousness from liquor or other cause. Thus in *Queen* v. *Camplin*[33], sexual connection with a young woman, while insensible from intoxication, was held to be rape. The intoxication was caused by intoxicating liquors given to her by him; and the jury found that they were given not to make her insensible, but simply to excite her, though he took advantage of the insensibility brought on her. For the accused, it was contended that he had only offered the liquor, and her drinking it was her own voluntary act. Tindal, C. J., pointed out, in the course of argument, that that would not be

---

the mere bodily contact, implied in every act of connection, then, in the case before us there is no amount of force, actual or constructive, and none can enter into the act charged, unless we are prepared to introduce it by force of a legal presumption. No such presumption in the case of a sleeping woman has yet been recognized by law. It does not, like the presumption in the case of a child, rest on the basis of undivided institutional authority, and of uniform judicial recognition. It is a new presumption never hitherto recognized, and, though it may perhaps not be unreasonable, and there may be some affinities and analogies to support it, yet I am not prepared, for the first time, to establish it by our decision. Without such a presumption to introduce the element of force, it appears to me that the act here charged cannot be tried as rape." Lord Deas, after referring to the case of children and of idiots as exceptional, said: "It does not follow that because an exception is made of cases in which by law, or both by law and nature, the parties are totally disqualified from consenting, an exception shall equally be made of the case of a woman who might have consented if awake, although she neither did nor could consent being asleep. Beyond the case of parties whom the law holds incapable of consent, we have no recorded instance of the element of force being altogether omitted in the indictment." After referring to the cases of a woman being drugged into unconsciousness, he went on to say that they involved "one element, at least, which is not here, *viz* : the woman being in a state of disease, which it would have been a criminal and violent proceeding for the man to have used means to produce, and it may be a grave question when it arises, whether taking advantage of that state of disease is not equivalent to using means to induce it. Here the woman was not in a state of disease at all, but in the natural state of sleep. There is no room for alleging either criminality or violence, actual or constructive, in the production of that state, or any duty of assistance towards recovery connected with it, and although the distinction may be thin between taking advantage of a state of disease and taking advantage of the state of natural sleep, it is necessary to observe by what slight and almost imperceptible steps in the argument it is proposed to lead us on to hold that to be rape, which has never been held to be rap before; first drugging by the man, about which I do not say I should much hesitate; next, accidental drugging by another, or by the woman herself; then the case of a woman found in a faint; and, lastly, the case of a woman under no disease, either induced or accidental, but in the natural state of sleep. Stop we must at some thin distinction, or I do not know where we are to stop at all, in dispensing with the element of force, either actual or constructive, which, as a general rule, although not without exceptions, has been immemorially deemed necessary, in our practice to the charge of rape."

---

[33] 1 Cox C. C., 220.

consistent with the finding as to his having given her liquor with intent to excite her. Alderson, B., observed that it might be considered against the general presumable will of a woman that a man should have unlawful connection with her. Patteson, J., in delivering the judgment of the court, said: "The prosecutrix showed by her words and conduct up to the very latest moment, at which she had sense or power to express her will, that it was against her will that such intercourse should take place; and it was by your illegal act alone, that of administering liquor to her to excite her to consent to your unlawful desires, that she was deprived of the power of continuing to express such want of consent. Whatever your original intention was in giving her the liquor, you knew that it was calculated, in its natural consequences, to make her insensible, and you knew also that it had produced that effect upon her at the time you took advantage of her insensibility."(D)

In *Rex.* v. *Charter* [35], the carnal knowledge of a woman laboring under delirium, who was insensible to the act, was held to be rape. In *Queen* v. *Ryan* [36], the prosecutrix was an idiot and therefore incapable of giving consent, and as her habits were said to be of decency and propriety, the presumption was against her consenting to the act of intercourse. Platt, B., however, in summing up, said: "If she was in a state of unconsciousness, at the time the connection took place, whether it was produced by any act of the prisoner, or by any act of her own, any one having connection with her would be guilty of rape. If she was in a state of unconsciousness, the law assumes that the connection took place without her consent, and the prisoner is guilty." Similarly, May, C. J., in *Reg.* v. *Dee* [37], observed that there was no doubt that unlawful connection with a woman in a state of unconsciousness produced by profound sleep, stupor or otherwise, if the man knew that the woman was in such a state, amounted to rape.

(D) It appears from the judgment of Patteson, J., as well as by the contemporaneous notes of Parke, P., printed in a note to 1 Den., 92, and of Alderson, B., as read by him in *Queen* v. *Page* [34] that the decision was influenced by the fact that, before the girl became insensible, the man had attempted to procure her consent, and had failed. But it further appears from those notes that Lord Denman, C. J., Parke, B., and Patteson, J., thought that the violation of any woman without her consent, while she should be in a state of insensibility and have no power over her will, by a man knowing, at the time, that she was in that state, was a rape, whether such state was caused by him or not; for example, as Alderson, B., added, "in the case of a woman insensibly drunk in the streets not made so by the prisoner."

[34] 2 Cox. C. C., 133.
[35] 13 Shaw's J. P., 746.
[36] 2 Cox. C. C., 115.
[37] 15 Cox. C. C., 579.

The same has been held in the United States also. Thus in *Com.* v. *Burke*[38], Gray, J., in delivering the opinion of the court, said: "We are unanimously of opinion that the crime of a man's having carnal intercourse with a woman, without her consent, while she was, as he knew, wholly insensible, so as to be incapable of consenting, and with such force as was necessary to accomplish the purpose, was rape. If it were otherwise, any woman in a state of utter stupefaction, whether caused by drunkenness, sudden disease, the blow of a third person, or drugs which she had been persuaded to take, even by the defendant himself, would be unprotected from personal dishonor." (*E*)

Dr. Bishop says:[39] "It is doubtless sound legal doctrine, and is not denied, that, as laid down by Lawrence, J., in the Ohio Case,[40] where a woman has chloroform, for example, given her by a man to bring about with her a carnal intercourse, to which she would not otherwise consent, then, if she had the capacity to hear, feel, and remember, and a capacity to speak and forcibly resist, but the inclination to do so was lost, the will overcome by the action of chloroform, either operating upon the will faculty, or the judgment and reflective faculties (or sexual emotions), so that the mind was thereby incapable of fairly comprehending the nature and consequences of sexual intercourse, and the defendant, knowing these facts, had unlawful carnal knowledge of her, forcibly, that would be rape. And it would, in such a case, be wholly immaterial whether the entire mind was disordered and overthrown, or only such faculties thereof as are rendered incapable of having just conceptions, and drawing therefrom correct conclusions in relation to the alleged rape."

It is provided by the New York[41] and California[42] Penal Codes, that sexual intercourse with a woman is rape, where she is, at the time of the intercourse, "unconscious of the nature of the act, and this is known to the accused."

(*E*) In *People* v. *Quin*,[43] the intercourse with a woman while intoxicated was held not to be rape, but there was no evidence that the original intent was to use force, and the decision proceeded on the wording of a particular statute. In *People* v. *Royal*,[44] a person had practised manipulations upon a girl of sixteen years until she was so dull and stupid as to be unconscious of the nature of the act of sexual intercourse, and he was held not guilty of rape.

---

[38] 105 Mass., 376.
[39] 11 Bish. Cr.L., 651.
[40] S. *v.* Green, Whart. and Stil. Med. Jur., § 459.
[41] N. Y., P. C., s. 278.
[42] Cal. P. C., s. 261.
[43] 50 Barb., 128.
[44] 53 Cal., 62.

Consent to an act does not involve knowledge of its non-essential incidents.

20. Consent to an act involves knowledge, however, only of the act which is consented to, and not necessarily of all its subjective and objective aspects. Thus, when consent is given to an act merely as such, it will not import the knowledge of the circumstances in which the act is to be done, nor of any consequences which it shall produce. Even entire unconsciousness of these will not affect the existence or reality of the consent given to the act. And, *a fortiori*, consent to an act will not be affected by the unconsciousness or ignorance of, or a mistake in regard to, any other incidents of the act, as, *e. g.*, of the legal character or competency, or the physical condition of the person doing the act, or of the physical, legal, or moral aspect of the consequences of the act.

Sexual intercourse by a medical practitioner with a diseased woman submitting to it under the impression that she was being treated medically, or that the act was a medical operation that would cure her, has often been held to be rape on the ground of want of consent. Thus in *Reg.* v. *Case*[45], the girl passively consented to her being treated medically, and the consent was held not to extend to the sexual connection with her, which she did not resist, because she believed it to be a medical treatment. Before commencing the act, the accused had represented to her that he must try further means for her cure, and she therefore believed that the act was one done for the cure. Wilde, C. J., said: "She made no resistance to an act which she supposed to be quite different from what it was, and therefore that which was done was done without her consent." Platt, B., said: "The girl consents to one thing, and the defendant does another, that other involving an assault." It is submitted, however, that the act was the same whatever its moral character or object, whether it was one of pure sensual gratification or of medical treatment. The identity and the nature of the act could not be affected by her ignorance of its moral aspect or physical incidents; and the real ground for the conviction was expressed by Patteson, J., who said that there was no resistance to the act, but, at the same time, there was no evidence that she consented, and, as the conviction was only for assault, the question of the act being of force or against her will did not arise.

[45] 4 Cox C. C., 220.

In *Queen* v. *Flattery*[46], a female, nineteen years old, consented to what the medical adviser called breaking the nature's string, only understanding that it was some surgical operation that would do good to her health. He had connection with her, she making but feeble resistance, as she believed that he was merely treating her medically and performing a surgical operation. It was attempted to distinguish the case from that of *Reg.* v. *Case*, on the ground that there was no finding in this case as to her not having known the nature of the act done to her, and, having regard to her age, she must have known the nature of sexual connection. Kelly, C.B., said, however, that he was not prepared to say that "if she did know the nature of sexual intercourse, it would have been any evidence of consent . . . It appears that she submitted to what was done under the belief that the prisoner was performing a surgical operation to cure her of her illness." Similarly, Mellor, J., said: "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."

This decision was followed in *Pomeroy* v. *State*[47], the facts of which were quite similar, and in which the accused professing to be a medical man, with a view to effect a medical cure of one Rebecca, a woman of twenty-two years of age, put his hand under her private clothes to examine her, and, on her making an objection to the examination, said that she must let him examine her; and, next morning, he took her into a private room, and, while pretending to make a further examination of her person, succeeded in having sexual intercourse with her, and, though she made no outcry at the time, she was crying after he had gone, and complained to her mother of the "outrage" he had committed upon her. Hawk, C. J., in delivering the opinion of the Supreme Court of Indiana, said: "If the jury believed that the appellant, as a physician, obtained possession and control of Rebecca's person for the purpose of making a further examination of her alleged disease of the womb, and not for the purpose of sexual intercourse, and that she never, in fact, gave her consent, through fraud or otherwise, to the sexual connection, then it seems to us that the case falls fairly within the doctrine declared in *Queen* v. *Flattery*."

---

[46] 13 Cox. C. C., 388.

[47] 94 Ind., 96.

In *Walter v. People*[48] also, it was alleged that the offender went on with sexual intercourse with a woman of thirty years of age, while professing to be making a physical examination of her person, and she believed his professions. He was acquitted, but only as it was not credited in the circumstances, that she did not understand the nature of the act of sexual intercourse.

The view taken in these cases of the act consented to appears to be based on a wrong notion of the identity of an act. She did not resist sufficiently, and thus acquiesced in a certain act, which was an act of sexual intercourse; and the identity of the act to which she consented, cannot be considered altered because of the fraud and mistake on account of which the consent was given. The conviction, in such cases, may, however, be justified on the ground referred to by Kelly, C.B., in his decision in *Queen* v. *Flattery*, "that, even if she had such knowledge (of the act), she might have supposed that penetration was being effected with the hand or with an instrument, as in such a case, the act consented to would, of course, be different from that done."

Knowledge of character of an act not necessary for consent to it.

21. On the same principle, however, sexual intercourse, by a person with a woman consenting to it under the belief that he is her husband, has been held to be without her consent, on the ground, sometimes, that her consent, in such a case, is to a lawful and marital act of duty and not to an act of adultery. Thus in *Reg.* v. *Dee*[49], it was held that a connection with a person believing him to be one's husband would not be with her consent, and May, C. J., said: "She intends to consent to a lawful and marital act, to which it is her duty to submit. But did she consent to an act of adultery? Are not the acts themselves wholly different in their moral nature. The act she permitted cannot properly be regarded as the real act which took place." Palles, C.B., after observing, that "excluding cases in which the doctrine of estoppel applies, an act done under the *bonâ-fide* belief that it is another act different in its essence is not in law the act of the party," said: "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

[48] 50 Barb., 144.

[49] 15 Cox, C. C., 579.

act of the husband only, and of this the prisoner was aware. What the woman consented to was not adultery but marital intercourse. The act consented to was not a crime in law; it would not subject her to a divorce. . . . I cannot entertain any doubt that the violation by a stranger of the person of a married woman is, in the view of that law, as it is in morality, an act different in nature from the lawful act of the husband." Similarly, Lawson, J., said: "If she consents to her husband having connection with her, and the act is done, not by her husband, but by another man personating the husband, there is no consent to the prisoner having connection with her." This might be correct, if, after giving the consent, she fell asleep or became insensible, and thus could not give consent to the act of the person personating the husband; but if she was conscious at the time of the act, and consented to the act under the impression that the person doing the act was her husband, she must be deemed, notwithstanding her wrong belief, to have consented to the act. Taken, however, with the facts with reference to which the statement was made, it was not correct.

And apart from the correctness of the final decision in the case, it appears that the particular statements made by the other Judges also as to the non-identity of the act consented to with the act done are not tenable. The statement by May, C. J., was even independent of the physical identity of the person who had the intercourse, and will be equally applicable if the intercourse was had by a person who had gone through a mock ceremony of marriage with her, and was, merely by a mistake of law, believed to be her husband. Even in such a case the act will be one which she believed to be an act of duty, yet the correctness of the proposition as to the non-identity of the act, will hardly be maintained by any one and the act will really be an act of adultery. The consent, in such case, is to an act by a certain person, and the mere circumstance that it was given under a wrong belief, that that person stood in a certain legal relation to her in which he did not stand, or that the act was legal when it was not legal, cannot affect the identity of the acts or the existence of the consent given to it. As to the statement by Palles, C. B., it may also be observed that the consent was not to an act of the husband, but to the act of the person who had the intercourse, though it was given under the mistaken belief that that person was her husband, and the mistake was caused by that person himself.

No consent where mind incapable of operation required for consent or of knowledge.

22. There can be no real consent, however, when the mind is incapable of the operation that constitutes consent, or of the knowledge which is essential to consent. This is the case in regard to persons who are very young or of unsound mind. It is on this same principle that, in the case of a female child, and also in some cases of insanity or imbecility of all females, the English law usually holds them to have no will in the matter of sexual connection with them, and the act of intercourse, though not actually forcible, is treated as such in the estimation of law [50].

Consent to different acts imports a knowledge of different matters of different degrees of complexity, and a person may be quite competent to know or understand one act, while he is utterly unable to grasp another. It is thus impossible to lay down any fixed standard of intelligence, as applicable to all acts and to all cases; and the only rule that can practically be laid down is that for a man to give real consent, it is necessary that he should be able to know and understand the act consented to. For free and intelligent consent, and specially for such consent as may be operative in criminal law, a superior standard of intelligence is generally required; and an ability to understand the nature and consequences of the act consented to also considered necessary. It appears, however, that for real consent as such, anything further than an ability to understand the act is not necessary. In *Comm.* v. *Roosnell* [51], the Supreme Court of Massachusetts attempted to justify the immateriality of the consent of a young girl below ten years of age. Allen, J., in delivering the opinion of the court, observed that, "although she gives a formal and apparent consent, yet, in law, as in reality, she gives none, because she does not and cannot take in the meaning of what is done."

---

[50] R. v. Sweenie, 8 Cox. C. C., 224, per Lord Ardmillon.

[51] 143 Mass., 32.

CHAPTER III.

CONSENT IS INDEPENDENT OF ITS QUALIFICATIONS.

23. That consent as such is independent of all considerations relating to the capacity of the person giving the consents, and to the circumstances in, and on account of, which it has been given appears to be admitted by most jurists. These considerations may affect the validity of the consent, but not its existence; and the distinction between these two conditions is recognized in almost every system of jurisprudence. Bentham, in his work on Morals and Legislation,[1] says that the alarm created, and the unpleasantness caused are quite different when there is no consent, and when there is consent; but the consent is not a fair or a free one, having been obtained by fraud or force respectively.

Existence of consent independent of subjective and objective considerations.

The difference between the existence and the non-existence of consent is pithily put by him when he says: "The pleasure of the sexual appetite, if reaped at all, must have been reaped either against the consent of the party, or with consent. If with consent, the consent must have been obtained either freely and fairly both, or freely but not fairly, or else not even freely, in which case the fairness is out of the question. If the consent be altogether wanting, the offence is called rape; if not fairly obtained, seduction simply; if not freely, it may be called forcible seduction."

24. In the law of contracts it is quite wrong, as Savigny[2] has shown, to say that a consent determined by mistake, coercion or fraud, is no consent. Consent that is not fair or free, is not the less a consent on that ground. Its effect on a contract in those two cases is essentially different. Thus while the absence of consent prevents the formation of a contract, the absence of a free and fair consent makes it, as will appear later on, only voidable. Thus it is said, "where the consent of one party to a contract is obtained by the other under such circumstances

In contracts consent not free or fair, may be consent.

[1] P. 253.

[2] Sys. ss. 114, 115.

that the consent is not free, the contract is voidable at the option of the party coerced. If, however, there was no consent whatever, as if the party's hand was forcibly guided to sign his name, or, perhaps, if he was so prostrated by fear as not to know what he was doing, the contract is absolutely null and void." [3]

Etsi coactus voluit, attamen voluit, is a general maxim of the Roman law. Giorgio Giorgi, in his work on the Theory of Obligations, says [4]: *Il consenso estorto dalla violenza é pur tuttavia consenso . . . per cui anche nel contratto concluso nell' imminenza del pericolo, e sotto il costringimento di un grave male, vi é sempre concorso di volontá. Vi é concorso di volontá, perché anche il coatto vuolle, e con esercizio libero del suo arbitrio si determina a preferire al male minacciato la conclusione del contratto . . . . gli rimaneva la possibilità di scelta fra il male minacciato e la conclusione del contratto.*(a) *Una violenza, che costringa il paziente a concludere suo malgrado un contratto, può derivare tanto da una forza fisica, la quale rendendo la vittima strumento mecanico dell'altrui volontá gli faccia sottoscrivere materialmente il contratto, quanto da una forza morale, che col mezzo di qualche grave minaccia induca il paziente a consentire. Nel primo caso il contraente agisce invito, e come corpo puramente fisico, che obbedisce necessariamente all'impulso di un corpo piú forte. Nel secondo caso agisce coatto, vale a dire con un certo concorso della intelligenza e della volontà; ma, torniamo a ripeterlo, con volontà menomata nella libertà di elezione. Infatti nella violenza fisica nullo é il concorso della volontá, e manca ogni principio di consenso.*(b)

So also Emile Acollas, in his work on Contracts, says [5]: *Le consentement, qui est un acte de la volonté, est exposé comme*

(a) Consent extorted by violence is still consent, on account of which there is an agreement of wills even when the contract has been concluded in imminent peril, and under the constraint of a serious evil. There is an agreement of wills, because even the coerced person wishes, and with the free exercise of his judgment, determines to prefer the concluding of the contract to the evil threatened. There remained to him the choice between the evil threatened and the concluding of the contract.

(b) A violence which constrains the person coerced to conclude a contract in spite of himself, can arise just as much from a physical force, which, rendering the victim a mechanical instrument of another's will, should make him physically subscribe the contract, as from a moral force, which by means of some grave threat induces him to consent. In the first case, the contracting party acts against his will, and as a purely physical body which must necessarily obey the impulse of a stronger body. In the second case, the coerced person acts, that is to say, with a certain concourse of intelligence and will, but let us repeat with a will diminished in its liberty of choice. In fact in physical violence, there is no agreement of wills, and all principle of consent is wanting.

[3] 28 Encyc. L., 479. | [4] IV. 89. | [5] P. 29.

la volonté á subir des atteintes plus ou moins graves, et l'on conçoit fort bien, de prime abord, qu'il y ait telles atteintes propres à faire considérer le consentement comme n'ayant pas existé, telles autres propres à le faire considèrer comme simplement diminué.

Consent required to be free and fair for valid contracts.

25. It is recognized, however, as a general rule, that mutual consent of the parties to a contract, which is essential to every agreement, must be free and fair. The element of obligation underlying a contract springs primarily from this mutual consent, and where that consent is constrained and involuntary, or misled and unintelligent, the parties will not be held obligated or bound by it. There will thus be no valid and binding contract, where the consent of the parties to it is caused by coercion or error, or any particular form of them.

The French Civil Code says: *Il n'y a point de consentement valable, si le consentement n'a été donné que par erreur, ou s'il a été extorqué par violence ou surpris par dol.*[6] The Italian Civil Code similarly says: *Il consenso non è valido, se fu dato per errore, estorto con violenza o carpito con dolo.*[7] (c)

The Indian Contract Act expressly provides that an agreement is a contract, only if made by the free consent of parties competent to contract[8]; and consent is said to be not free when it is given on account of the existence of coercion, undue influence, fraud, misrepresentation, or mistake, as defined in that Act.[9]

Coercion as affecting freedom of consent.

26. The term coercion is used in a comprehensive sense. It is thus, in the Indian Contract Act[10], defined as "the committing, or threatening to commit any act forbidden by the Indian Penal Code, or the unlawful detaining or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement." It thus includes both the *vis* and the *metus* of the Roman Law; the former being *majoris rei*

(c) Consent is not valid, if it was given on account of error, extorted by violence or grasped by fraud.

[6] S. 1109.
[7] S. 1108.
[8] S. 10, Act IX of 1872.
[9] S. 14, Act IX of 1872.
[10] S. 15, Act IX of 1872.

impetus, qui repelli non potest; and *metus* the *opinio unpendentis mali quod intolerabile esse videatur;* and as observed by Ulpian nothing is so contrary to consent as *vis* or *metum.*

The term is used in a similar broad sense in the continental systems of law. Thus, in the French law, coercion is designated *violence*, and the French Civil Code lays down, that there is *violence* when it is such as to make impression over a *personne raisonable et qúelle peut lui inspirer la crainte d'exposer sa personne ou sa fortune à un mal considérable et présent* [11]. Nor is the term restricted to violence against the person who has contracted the obligation, but extends also to cases in which it has been exercised *surson epoux ou sur son epouse, sur ses descendants ou ses ascendants.* The Belgic Civil Code has enacted the same. The rule of the Italian Civil Code is the same, except that it requires the fear to be reasonable, and does not require the evil threatened to be a present one [12]. In the Spanish Civil Code [13], the expression violence is restricted to the use of irresistible force; but intimidation is said to be a cause of the vitiation of consent, and to exist when it inspires in one of the contracting parties a reasonable and well grounded fear of suffering an imminent and grave evil to his person or goods or to the person or goods of his (or her) spouse, descendants or ascendants.

General signification of duress in English Law.

27. In the English law, coercion is generally designated as duress, and has still a rather limited signification. It had a very restricted signification in the English law, restricted originally, as in the Roman Law (*A*), to injuries to life and limb. Coke said that a man could not avoid his act on the ground that it was procured by the fear of battery, burning his house, taking away or destroying his goods, or the like; for there he may have satisfaction by the recovery of damages [14]. Actual violence does not appear to have long been held to be exclusively necessary, menace having been a distinctly recognized species of duress even in Coke's time. Moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, was regarded as sufficient, in law, to destroy free agency, without which there can be

(*A*) Thus Diocletian had ordered: *Nec tamen quilibit metus ad rescindenda ea quæ consensu terminata sunt, sufficit, sed talem metum, probari oportet, qui salatis periculum vel corporis cruciatum continant.*

[11] S. 1112.
[12] S. 1112.
[13] S. 1267.
[14] 2 Inst. 483.

no free consent. Such threats formed, in fact, a special sort of duress, usually designated as *per minas*. As to the fear of imprisonment, Coke said that it was enough to constitute duress, and this has been understood ever since to have been the rule[15]. Nor need the threats, to constitute duress be to the party himself. Duress *per minas* included threats to one's near relations also. *Persona conjuncta aequi paratur interesse proprio*. Commenting on the maxim, Bacon says: "so if a man menace me, that he will imprison or hurt in body my father or my child, except I make unto him an obligation, I shall avoid this duress, as well as if the duress had been to mine own person."

In the United States, a more liberal rule is recognized in regard to the nature of the injury caused or threatened. It is generally held that contracts procured by threats of battery to the person, or of the destruction of property may be avoided on the ground of duress. Thus in *Love* v. *State*,[16] a threat of causing hurt was held to constitute duress sufficient to prevent consent being free. The leading decision appears to be that of *Foshay* v. *Ferguson*[17], in which Bronson, J., in delivering the opinion of the Supreme Court of New York, entertained "no doubt that a contract procured by threats and the fear of battery, or the destruction of property, may be avoided on the ground of duress," and said "there is nothing but the form of a contract in such a case, without the substance. It wants the voluntary assent of the party to be bound by it."

It was further contended in that case, that there must be a threat of life or limb, or of mayhem, and that a man could not avoid his contract on the ground that it was procured through the fear of illegal imprisonment; but the contention was overruled on the authority mainly of Coke, and Bronson, J., said: "If the defendant arrested the plaintiff under pretense that he had a warrant, when in fact he had none, or if he arrested the plaintiff under a warrant issued by a justice of the peace in the county of H., which had not been indorsed in S., the imprisonment was, in either case, unlawful; and a contract procured by such means cannot be supported. It wants the essential ingredient of the free assent of the contracting party. No rights can be acquired by such an act of violence. All the books agree that a man may avoid his deed for duress of

[15] 2 Inst., 483; Co Litt., 253*b*.
[16] 78 Ga., 66.
[17] 5 Hill., 158.

imprisonment. Some of the cases hold that the deed may be avoided, although the imprisonment was under legal process."

Even threats by a husband of abandonment or separation of his wife have been held to constitute duress to her, and to invalidate a contract executed by her on account of them. Thus in *Tapley* v. *Tapley*[18], the Court said: "Looking at the reason of things, if, as is well settled, a threat of injury to goods and other property, a threat of a battery or of illegal imprisonment, are held sufficient to constitute duress and to avoid a contract, on the ground that they take away freedom of action, and are calculated to overcome the mind of a person of ordinary firmness, when believed in, it would seem too clear for argument that equal effect ought to be given to a threat by a husband to abandon his wife and turn her out upon the world to shift for herself in the anomalous condition of a wife without a husband. If the degree of injury apprehended, and its almost remediless nature, are to be taken into account (and not to do so would be irrational), then certainly in these respects the abandonment of a wife by her husband is far in excess of a battery to the person or a trespass upon the goods, and stands upon stronger ground." This decision was cited with approval in *Kokoureck* v. *Marak*[19], and the same was held in *Line* v. *Blizzard*[20]. Threats by the husband to burn down the house and carry away the children have also been held to constitute duress and to avoid a conveyance made by the wife under their effect.[21] A threat of suicide by a husband has been held, however, by the Supreme Court of Vroom not to constitute duress[22]. The only ground mentioned in support of this view was that such a rule would lead to an instability in a class of contracts which would be vicious, and that there was no trace of the doctrine that the threat of a husband against himself would avoid the contract of his wife or conversely; Reed, J., observing, "I am unable to perceive that any duress, in the sense in which the law has heretofore regarded it, exists in this case either to the husband or through him to the wife." This decision was affirmed by the majority of the Court of Errors and Appeals[23], the Chancellor observing in the opinion that "obviously in view of the facility of making a defence on that ground, the difficulty of meeting it, and the temptation to fraudulent disposition it would hold out to allow it, it

[18] 10 Minn., 448. | [19] 54 Tex., 201. | [20] 70 Ind., 23.
[21] Wiley *v.* Prince, 21 Tex., 641; Central Bank *v.* Copeland, 18 Md. 319.
[22] Wright *v.* Remington, 12 Vroom, 48. | [23] 14 Vroom, 451.

would be against public policy to extend the defence to that kind of pressure." Apart from policy, and in regard to the actual interference with the freedom of will, the threat of the husband to kill himself, and the threat to abandon the wife seem about equivalent. The effect of the former will practically be even greater in a country like India, where widow marriages are, though allowed, not customary.

Extent of fear required to constitute coercion.

28. In England, it is also generally said that duress means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or apprehension, to overcome the mind and will of a person of ordinary firmness[24]. Blackstone said that the threats, to produce such an effect, must be of such a character as to induce a well-grounded fear in the mind of a firm and courageous man of the loss of life or limb.

In regard to the requirement of ordinary firmness and prudence, the Roman Law was still stricter, as it required it to be such as to be able to make an impression upon a man of courage. Gaius, for instance, laid down that *metum autem non vani hominis, sed qui merito et in homine constantissimo cadat.* This rule has, however, not been generally approved. Pothier condemned it as "too rigid and not to be literally followed," adding that "upon this subject, regard should be had to the age, sex, and condition of the parties; and a fear which would not be deemed sufficient to have influenced the mind of a man in the prime of life and of military character, might be judged sufficient in respect of a woman or a man in the decline of life."[25]

In the United States, the question of the extent of fear has to be determined, in the main, with reference to the peculiar condition of the person affected by it. Thus Clark says that the reference to a person of ordinary firmness in this connection is incorrect, and there is probably no actual decision to sustain it[26]. "The law of contracts," says Bishop in his work on contracts[27], "considers the quality of the contracting mind, and therefore holds the apparent, yet unreal consent of a subject or timid person, or person of inferior intellect, as invalid, as that of the strongest and most independent understanding, though the latter would not have been enthralled where the former was."

In *Parmentier* v. *Pater*[28], the Supreme Court of Oregon said:

[24] Chitty Cont., 217; 2 Greenl. Ev., 283; Mark. Juris., 369.
[25] 1 Evans Poth. Obl., 18.
[26] Clark Cont., 357.
[27] S. 719.
[28] 13 Or., 121.

"Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves. Capricious and timid persons are generally the ones that are influenced by threats, and it would be great injustice to permit them to be robbed by the unscrupulous, because they are so unfortunately constituted." It is quite a general rule, that where a party seeks to be relieved from the obligation of a contract on the ground of duress *per masin*, regard will be had to age, sex, and condition of life; and if the threats employed were such as were calculated to deprive one individually of his freedom of will, he would be relieved from liability, even though they were not of such a character as would produce a like effect on a firm and courageous man."[29] In the case cited, Gordon, J., giving the opinion of the Supreme Court of Pennsylvania, said: "We are free to admit, that by a man of ordinary courage this fuss and fume of Jordan might have been regarded as a mere farce, and would probably have been productive of a consequence no more serious than a summary and unceremonious ejectment of the intruder from the premises. But to this old lady, helpless as she was, and unprepared either to encounter or deal with such sham heroics, the matter was altogether different, and the jury were justified in believing that she was much frightened, and that her will was so controlled thereby that the obligation which she signed was not her free and voluntary act. We are aware that neither under the rule of the civil nor common law, as formerly expressed, would there be sufficient to release Mrs. Elliott from her contract. But fortunately for the weak and timid, courts are no longer governed by this harsh and inequitable doctrine, which seems to have considered only a very vigorous and athletic manhood, overlooking entirely women and men of weak nerves. Pothier regards this rule as too rigid, and approves the better doctrine, that regard must be had to the age, sex, and condition of the parties, since that fear which would be insufficient to influence a man in the prime of life and of military character, might be deemed sufficient to avoid the contract of a woman or man in the decline of life[30]. And we think the opinion of Mr. Evans expresses the doctrine which is now approved by the judicial mind, both of this country and of England, that is, that any contract produced by actual intimidation ought to be held void, whether as

[29] Jordan v. Elliott, 15 Cent. L.-J., 232.

[30] I Evans Poth. Obl., 18.

arising from a result of merely personal infirmity or from circumstances which might produce a like effect upon persons of ordinary firmness."

The Louisiana Civil Code enacts that violence and threats to invalidate a contract must be such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation or fortune, but the age, sex, state of health, temper and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, must be taken into consideration [31]. The French [32], the Belgic [33], the Italian [34], and the Spanish Civil Codes [35], after speaking of the impression over a *raisonable* or *sensata* person, add that regard should be had in the matter to the age, the sex and the condition of the person. The Egyptian Code lays down that duress, to make consent void, must be sufficiently serious to influence a reasonable person, having regard to the age, sex, and position of the contracting party [36].

The Indian Contract Act is silent as to the extent of fear caused, and evidently on that ground, any act or threat to commit an act falling within the definition of the term coercion given in the Act, of whatsoever character, and to whomsoever done or addressed, shall constitute coercion; though if extremely trivial, or done or addressed to a stranger, it may of course be held in any case, not to have caused the consent of a party [37].

Withholding possession of goods how far a duress in English law.

29. Duress in regard to goods is, in the English law, still considered insufficient to vitiate consent. It is distinguished from duress as to person, on the ground that the latter is a constraining force, which not only takes away free agency, but may leave no room for appeal to the law for a remedy. A man, therefore, is not bound by the agreement which he enters into in such circumstances; while the fear that goods may be taken or injured, does not deprive of his free agency any one who possesses that ordinary degree of firmness which the law requires all to exert [38]. The reality of this distinction has been denied. For instance, in *Spaids* v. *Barrett*,[39] Thornton, J., in delivering the opinion of the Supreme Court of Illinois, said: "We cannot appreciate the differ-

[31] Art. 1851.
[32] S. 1111.
[33] S. 1112.
[34] S. 1112.
[35] S. 1267.
[36] S. 195.
[37] Shep. Com. Cont. Act, 62.
[38] The Duke de Cadaval *v.* Collins, 4 Ad. and E., 858.
[39] 57 Ill., 289.

ence. Liberty and life are justly dear to all men, and so is the exclusive right to possess, dispose of, and protect from destruction, our property. We cannot forget the fact that the desire for property is a strong and predominant characteristic of man, in organized society. An act done, prompted by this desire to preserve, and impelled by fear of the destruction of goods, is not voluntary. It is an act of compulsion." The rule, however, has maintained its sway in England. In *Skeate* v. *Beale*[40], Lord Denman, C. J., in delivering the judgment of the Court, considered "the law to be clear, and, founded on good reason, that an agreement is not void because made under duress of goods." So also in *Atlee* v. *Backhouse*[41], Parke, B., observed that "the law is clear, although there is some case in Viner's Abridgment to the contrary, that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and it is so laid down in Sheppard's Touchstone."

Even in England, it is agreed, however, that a threat to withhold certain property until a certain amount is paid, is a sufficient duress to make the payment a compulsory one, for which a recovery may be had by suit. Thus, in the very case of *Atlee* v. *Backhouse*[41], Parke, B., went on to say, that "there is no doubt of the proposition that if goods are wrongfully taken, and a sum of money is paid simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back." Referring to the doctrine that a contract induced by duress of goods is not valid, he added,—"If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress." The leading case on the point, however, is, *Astley* v. *Reynolds*[42], in which the defendant refused to return the plate pawned to him unless £10 were paid for interest, and the plaintiff paid the amount: and it was held that the amount paid to obtain the plate could be recovered; the Court observing that it was a payment by compulsion, as the plaintiff might have such an immediate want of his goods, that the action of trover would not do his

[40] 11 Ad. & E., 983.
[41] 3 M. & W., 650.
[42] 2 Stra., 915.

business, and that the maxim *volenti non fit injuria* would apply only, "where the party had his freedom of exercising his will, which this man had not." This decision was referred to with approbation by Lord Mansfield in the case of *Smith* v. *Bromley*[43], in which money had been advanced by a sister of a bankrupt to induce a creditor to sign a certificate, which he refused to do without such advance; and an action to recover back the money was sustained.

In *Cartwright* v. *Rowley*[44], Lord Kenyon observed that money might be recovered back in an action of *assumpsit* when it had been paid in consequence of coercion; and by way of illustration referred to a case of——v. *Piggott*, where money had been paid to the steward of a manor for producing at a trial some deeds and court rolls, for which he had charged extravagantly; and it was allowed to be recovered back, as it appeared that the party could not do without the deeds, and so the money was paid through necessity and the urgency of the case, and not voluntarily. In *Shaw* v. *Woodcock*[45], it is laid down as a general rule, that a payment made in order to obtain possession of goods or property to which a party is entitled, and of which he cannot otherwise obtain possession at the time, is a compulsory, and not a voluntary payment, and may be recovered back.

This admission by the English courts of the adequacy of the duress of goods to make a payment compulsory is essentially inconsistent with their refusal of its adequacy to make a promise compulsory, but the conservatism of the English law has not advanced yet to its removal, and the two rules are acted upon side by side by the English Courts on the authority of ancient precedents.

Duress of goods in the United States.

30. The rule relating to the compulsory character of a payment made under duress is recognized in the United States also. The ordinary rule, indeed, is that every person is bound to resist an unjust demand in the first instance. To pay when he can successfully defend against it, and then sue for the money paid, is a species of frivolity, involving also a circuity of action, which the law does not countenance or encourage.

This is, of course, on the presumption, that the defence against a suit for the demand will afford adequate redress.

[43] 3 Dougl., 695. | [44] 2 Esp., 722. | [45] 7 B. & Cr., 73.

Payment is held compulsory, and sufficient to justify recovery, when the defence cannot have that effect. In *Cobb* v. *Charter*[46], McCurdy, J., in delivering the opinion of the court, observed: "It is safe to say that wherever money is paid on account of a necessity to obtain possession of goods illegally withheld, and where the detention is fraught with great immediate hardship or irreparable injury, the payment is held to be compulsory."

This has been held invariably by the Supreme Court of the United States. Thus in *Maxwell* v. *Griswold*[47], it was laid down that, in order to constitute an involuntary payment, so that the money may be recovered back, it need not be made under actual violence or physical duress; it is enough that the party pays reluctantly in consequence of an illegal demand, and without being able to regain possession of his property except by submitting to the payment. So also *Brewer*, J., in delivering the opinion of the Supreme Court in *Lonergan* v. *Buford*[48], said: "It appears that the defendants refused to deliver any of the property without full payment. This was at the commencement of the winter. The plaintiffs had already paid $ 175,500, and without payment of the balance they could not get possession of the property, and it might be exposed to great loss unless properly cared for during the winter season. Under those circumstances, we think the payment was one under duress. It was apparently the only way in which possession could be obtained, except at the end of a law suit, and in the meantime the property was in danger of loss or destruction." The same view has been taken repeatedly by the New York Supreme Court and in other States (B).

(B) Thus in *Harmony* v. *Bingham*[49], the defendants refused to deliver the property without the payment of a greater sum for freight than they could legally claim. The plaintiff protested against the payment of what he considered an illegal and extortionate charge, and finally, from the necessity of the case, and for the purpose of obtaining possession of his property, he paid the illegal demand; and it was held that a payment under such circumstances should not be considered voluntary. Ruggles, J., said: "When a party is compelled, by duress of his person or goods, to pay money for which he is not liable, it is not voluntary, but compulsory. Where the owner's goods are unjustly detained on pretence of a lien which does not exist, he may have such an immediate want of his goods that an action at law will not answer his purpose. The delay may be more disadvantageous than the loss of the sum demanded. The owner, in such case, ought not to be subjected to the one or the other; and to avoid the inconvenience or loss, he may pay the money, relying on his legal remedy to get it back again. What shall constitute such duress is often made a question. Where the owner is in possession of his goods, the threat of a distress for rent, or of any other legal process, is not such duress, for the party may defend himself against such suit or proceeding. But if a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion. In the case under consideration the property

[46] 32 Conn., 253.
[47] 10 How, 242.
[48] 148 U. S. 589.
[49] 12 N. Y., 99.

The inconsistency of this rule with that of not recognizing duress of goods as sufficient to invalidate a contract, was noticed early by the courts in the United States, and led to the adoption of a different rule in regard to the withholding of goods on a contract induced by it; and, except in Kentucky[55] and a few other states, where the English rule still prevails, most Courts regard duress of goods, under oppressive circumstances, as sufficient to avoid a contract[56].

Thus Gaines, A. J., in delivering the opinion of the Texas Supreme Court in *Oliphant* v. *Markham*[57], speaking of the two rules of the English law, said: "It seems to us, they lead to an obvious absurdity. Upon principle, the position of a defendant who resists the payment of a note is as favorable as that of

---

detained was of great value. It was at a great distance from the plaintiff's residence; the necessity of obtaining immediate possession was evidently urgent, and the payment of the freight demanded was clearly compulsory within the decisions here and in England."

In *Stenton* v. *Jerome*[50], certain stockbrokers held two United States bonds belonging the plaintiff, and threatened to sell them, unless she paid a balance claimed by them on account. The payment was said to be so far voluntary that she was not compelled by physical duress to pay it; but it was held to be compulsory, as "she had great need for the bonds and could not well wait for the slow process of the law to restore them to her, and she paid this balance, not assenting that it was justly due, but for the sole purpose of releasing her bonds." In *Briggs* v. *Boyd*[51], a person unjustly claimed a lien on another's goods for commission or the like, and refused to deliver them, and the owner, to obtain their release, paid the sum demanded under protest, and the payment was held to be compulsory.

In *Chase* v. *Dwinal*[52], a raft was stopped by a boom, erected by the authority of the Government for the purpose of stopping drift timber, for which the owner of the boom might be entitled to demand and recover boomage. The owner demanded boomage for a raft, to which he was not entitled, and detained the raft until it was paid. An action for the recovery of the money back was held to lie, on the ground "that replevin would have restored the property unlawfully seized; but to procure a writ, and an officer to serve it, would have occasioned delay, which might have subjected the plaintiff to greater loss than the payment of the money demanded. Besides, he must have given a bond to the officer to prosecute his suit, and he might meet with difficulty in obtaining sufficient sureties, and that the delay in bringing a trespass suit to a *finale* might have been attended with serious inconvenience. To this it might have been added, that the plaintiff was not bound to take the risk of the defendant's ability to pay the value of the raft if the plaintiff recovered in trespass.

In *Chandler* v. *Sanger*[53], it was held that where a person who fraudulently and with knowledge that he had no just claim should sue process and seize the body or goods of another, and the latter to obtain a release of his person or property, should pay the demand, the payment would be compulsory and recoverable. In *Wolff* v. *Marshall*[54], the court said "that the conclusion deducible from the cases on the point was that a payment of money upon an illegal and unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent the seizure."

---

[50] 54 N. Y., 480.
[51] 56 N. Y., 293.
[52] 7 Greenl. Me., 134.
[53] 114 Mass., 365.
[54] 52 Mo., 171.
[55] Hazetrigg v. Donaldson, 2 Mart., 445.
[56] Clark Cont., 360.
[57] 79 Tex., 543.

a plaintiff who, instead of promising to pay, has actually paid the money and seeks to enforce its recovery. It would seem that, where money has been paid to obtain a release of property unlawfully withheld by the defendant, the want of consideration would be a sufficient reason why the action ought to be maintained; and upon the same principle, the maker of a note given for a similar purpose ought to be able to defeat an action upon it." If there be a sufficient duress of goods "where money has been paid," said the Supreme Court of Pennsylvania, "in *White* v. *Heylman*[58], "*a fortiori* is such a defence available in an action upon a promissory note extorted in the manner alleged by the defendant." In *Spaids* v. *Barrett*[59], "property which required especial care, had been wrongfully taken, was of a perishable nature, and rapidly going to destruction. The party having possession refused to surrender on payment of the actual indebtedness, but demanded more than double the sum due, and, in addition thereto, a release for all damages for the wrongful acts." The release was held invalid, and Thornton, J., in delivering the opinion of the court, observed: "If money could be recovered back, under the circumstances, why is not the release void? It was not obtained with the consent intended by the law. It would be a scandal to a court of justice if a release given under such circumstances could not be avoided."

The Supreme Court of South Carolina, as early as 1797, held that a contract made in order to obtain possession of goods unlawfully detained could not be enforced[60]. In *Collins* v. *Westbury*[61], some negroes were seized by a person under an attachment taken out by him, and a bond was given by their owner to obtain their release at once, as he could not wait the slow process of law to obtain them; and it was held to be invalid, the court observing that "duress of goods will avoid a contract, where an unjust and unreasonable advantage is taken of a man's necessities by getting his goods into his possession, and there is no other speedy means left of getting them back again but by giving a note or bond, or where a man's necessities may be so great as not to admit of the ordinary process of law to afford him relief." The United States Supreme Court has held the same, and in *The United States* v. *Huckabee*[62], Clifford, J., in deliv-

[58] 34 Pa., St., 142.
[59] 57 Ill., 289.
[60] Sasportas v. Jennings, 1 Bay, 470.
[61] 2 Bay, 220
[62] 16 Wall., 414.

ering the opinion of the Supreme Court, said: "Positive menace of destruction of goods, may undoubtedly be, in many cases, sufficient to overcome the mind and will of a person entirely competent, in all other respects, to contract, and it is clear that a contract made under such circumstances is as utterly without the voluntary consent of the party menaced as if he were induced to sign it by actual violence; nor is the reason assigned for the more stringent rule, that he should rely upon the law for redress, satisfactory, as the law may not afford him anything like a sufficient and adequate compensation for the injury."[63]

Nor is the rule restricted to the case of duress by the withholding of goods. In *Central Bank* v. *Copeland*[64], a mortgage of a mill and mill-seat was executed by a wife on account of "personal menaces and threats of her husband to destroy the property by fire, if she did not execute it"; and Cochran, J., in delivering the opinion of the Supreme Court of Maryland, said: "The execution and acknowledgment of the mortgage appears to have been induced by harshness and threats, and the exercise of an unwarrantable authority, so excessive as to subjugate and control the freedom of her will, the aid of this court to support and enforce its provisions against her must be refused."

The rule extends also to transfers of property, other than contracts in the strict sense of that term. In *Adams* v. *Schiffer*[65], a settlement was held to be void on the ground of duress., and Elbert, J., in delivering the opinion of the court, said: "Contracts made and money paid under duress of goods have been held, the former void and the latter recoverable, in many well-considered cases both in England and America. The decisions are not uniform in their expression of the law, but they all rest upon the proposition that the duress of property was such as to render the contract or payment involuntary. It seems to be well settled that where a party has possession or control of the property of another, and refuses to surrender it to the control and use of the owner, except upon compliance with an unlawful demand, a contract made or money paid by the owner under such circumstances, to emancipate the property, is to be regarded as made under compulsion."

---

[63] Baker v. Morton, 12 Wall., 158.

[64] 18 Md., 305.

[65] 11 Colo., 15.

Illegality of act done or threatened how far necessary to constitute duress.

31. As a general rule, an act or threat to do an act can constitute duress, only if that act is illegal. If a person does or threatens nothing which he has not a legal right to do, there should be no duress. "A threat of imprisonment," says Sir Frederick Pollock, "is not duress, unless the imprisonment would be unlawful"[66]. Thus in *Biffin* v. *Bignel*[67], the threat was of sending one's wife to a lunatic asylum, and it was held not to constitute duress, "as it was not of anything contrary to law; at least not so to be understood."

In Bacon's Digest[68], the doctrine is laid down that, "where a person is illegally restrained of his liberty, by being confined in a common jail or elsewhere, and, during such restraint, enters into a bond or other security to the person who causes the restraint, he may avoid the same for duress of imprisonment. But if a man be imprisoned by order of law, the plaintiff may take a feoffment of him, or a bond for his satisfaction, and the deliverance of the defendant, notwithstanding the imprisonment, for this is not by duress of imprisonment, because he was in prison by course of law; for it is not accounted in law duress of imprisonment, but where either the imprisonment or the duress that is offered in person, or at large, is tortious and unlawful, for *executio juris non habet injuriam*."

The question has arisen generally in case of an arrest or imprisonment in execution of a decree or on a criminal charge. Thus in *Smith* v. *Monteith*[69], the action was on a promise to pay a sum of money in consideration of the promisor's discharge out of custody in a former action, in which he had been arrested on plaintiff's application; and it was held not to be a case of duress, as Pollock, C.B., said: "for aught that appears, that arrest was legal, and the party was in lawful custody."

The rule of the German law appears to be the same Thus Eccius, in his Preussisches Privatrecht says[70]: "*Muss die Drohung ohne ein dem Drohenden gegenüber dem Bedrohten zustehendes Recht hierzu, und in diesem Sinne widerrechtlich ein übel androhen.*(C)

(C) The threat must be without there being a sufficient right to it in the threatening person over the person threatened, and in this sense, an illegal evil threatened.

[66] Poll. Cont., 577.
[67] 7 H. & N., 877.
[68] 2 Bac., 402.
[69] 13 M. & W., 427.
[70] P. 156.

So Pothier said: "the violence which leads to the rescission of a contract, should be an unjust violence, *adversus bonos mores*; and the exercise of a legal right can never be allowed as a violence of this description; therefore a debtor can have no redress against a contract which he enters into with his creditor, upon the mere pretext that he was intimidated by the threats of being arrested, or even of his being actually under arrest, when he made the contract, provided the creditor had a right to arrest him." [71]

The French law appears to be a little more free at present in this matter. Thus M. Rogron, in commenting on s. 1111 of the French Civil Code relating to *violence*, says that it *ne s'applique évidemment pas à l'emploi régulier des voies de droit légales. A plus forte raison en est-il ainsi de la menace d'employer les voies légales, à moins toutefois que l'emploi ou la menace d'une voie de droit légale n'aient eu pour but d'arriver à un résultat injuste.*

As to the Italian law, Giorgio Giorgi says [72]: "*La violenza deve essere ingiusta. Se fosse giusta, l'autore delle minacce avrebbe esercitato un diritto: e poichè, 'qui iure suo utitur, neminem laedit,' sarebbe inconcepibile un rimedio, che ne paralizzasse gli effetti. Però la minaccia di esercitare un diritto, o, come altrimenti dicesi, di 'agire per le vie legali,' non è stata mai dai giuristi considerata come violenza. Fingasi un creditore, che per ottenere la riscossione del suo avere intimidisca il debitore con lo spauracchio delle esecuzioni reali o penali concesse dalla legge. Costui certamente non commette violenza nel senso di cui parliamo. Ma nasce dubbio, se questo medesimo principio valga, quando la minaccia delle 'vie legali' sia stata usata non al fine diretto per cui sono riconosciute dalla legge, ma al secondo fine di estorcere convenzioni vantaggiose, o migliorare i patti già conclusi. Se per esempio, il creditore ha minacciato l'arresto e l'espropriazione non già peressere pagato, ma per ottenere un aumento d'interessi, una vantaggiosa novazione del contratto, il creditore avrà in questo caso commessa una violenza, o avrà fatto uso legittimo delle vie legali? Avrà commessa una violenza, rispondono generalmente gli scrittori: e con ragione, giacchè non è questo certamente un diritto che fa valere il creditore, ma un abuso colpevole delle sue facoltà.*" (c)

(c) The violence ought to be unjust. If it were just, the author of the menace would have exercised a right; and since he who uses his own right injures nobody, a

[71] I Evans Poth. Obl., 18.

[72] IV Giorg. Teo. Obl., 95.

32. In the United States also it has been repeatedly held that a threat of a lawful arrest is not duress.[73] Nor is it duress for an officer to threaten an execution-debtor to take him to jail unless he secures the debt by a mortgage, when the officer has in his hands legal process requiring him to do that.[74] It has been generally held that imprisonment, when lawful, is by no legal intendment an abridgement of the free and voluntary volition of the mind in the management of business transactions[75]; and therefore to constitute duress by imprisonment the imprisonment or the duress must be tortious and unlawful.[76]

In the United States, lawful imprisonment if malicious may constitute duress.

It is necessary to show an unlawful imprisonment, or abuse of or oppression under lawful process or legal detention.[77] Thus, if a man, supposing that he has a cause of action against another by lawful process cause him to be arrested and imprisoned, and that other voluntarily execute a deed for his deliverance, he cannot avoid such deed for duress of imprisonment, although, in fact, the plaintiff had no cause of action.[78] So also where a man, lawfully arrested on process for seduction, marries the woman to procure his discharge, the marriage is not deemed to have been performed on account of duress; even if it subsequently appear that he could not have been convicted, provided that the prosecution was on probable cause, and not merely from malice.[79]

A fortiori, if a judgment-creditor threatens to levy his execution on the debtor's goods, and under fear of the levy,

remedy, which would paralyze the effects of that, would be inconceivable. Therefore the menace to exercise a right, or, as is otherwise said, to act in a legal manner, has never been considered by jurists as violence. Let us imagine a creditor, who in order to obtain what is due to him, intimidates his debtor with the threat of the executions, real or penal, allowed by law. He certainly does not commit violence in the sense in which we speak of it. But there arises a doubt, whether this same principle holds good, when the threat of legal measures has been made use of not for the direct object for which they are recognized by law, but for the secondary aim of extorting advantageous conventions, or to improve contracts already concluded. If, for instance, the creditor has menaced the arrest or the attachment not merely in order to be paid, but in order to obtain an increase of interest or an advantageous novation of contract, would the creditor in this case have committed violence, or have made a legitimate use of legal measures? The writers generally reply that he shall have committed a violence: and rightly, since it is certainly not a right which the creditor intends to make good, but a culpable abuse of his powers.

[73] Eddy *v.* Herrin, 17 Me., 338.
[74] Bunker *v.* Steward, 4 Atl. Rep. (Me.), 558.
[75] Heaps *v.* Dunhaver, 95 Ill, 583; Smillie *v.* Titas, 32 N. J. Eq., 51.
[76] Heaps *v.* Dunhaven, 95 Ill., 583; Mascolo *v.* Montesanto, 61 Conn., 150.
[77] Taylor *v.* Calhell, 16 Ill., 93.
[78] Hobb., 266; Clark *v.* Turnbull, 47 N. J. L., 265; Watkins *v.* Baird, 6 Mass., 511.
[79] Marvin *v.* Marvin, 52 Ark., 425.

the debtor executes and delivers a note for the amount of the decree, the note cannot be avoided for duress.[80] On the same principle, it is not duress for one who believes that he has been wronged to threaten the wrongdoer with a civil suit.[81] And if the wrong includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution. In most cases, the law regards it as the duty of every one who knows of the commission of a crime, to take measures to have the offender brought to justice, and it does not involve itself in the absurdity of making it unlawful for one to express to the offender an intention of doing what the law makes it his duty to do.[82]

A threat of a legal process has been held not to be even such duress as will authorize a person to recover back money voluntarily paid on an illegal claim; for he might make proof and show that he was not liable.[83] Even a threat to withhold the payment of a debt, or to refuse the performance of a contract, is not duress.[84]

The rule appears to be somewhat modified recently, and even a legal imprisonment held to constitute duress if the process is sued out maliciously and without probable cause, or with probable cause, but for an unlawful purpose; as, for instance, where a legal arrest for crime is procured for the purpose of coercing payment of a private demand, or if the imprisonment, though legal, is made unjustly oppressive.[85] (C) To use criminal process to enforce the payment of a civil claim is evidence of an improper purpose.[86]

Thus in *Baker* v. *Morton*,[87] Clifford, J., in delivering the opinion of the Supreme Court of the United States, observed of duress by imprisonment, that it exists "where there is an arrest

---

(C) This is on the same principle on which it has been held that to justify recovering back money paid when all the facts were known to the person paying at the time of the payment, such payment must not have been simply an unwilling payment, but a compulsory one, and the compulsion must have been illegal, unjust, or oppressive.[88]

---

[80] Hackley v. Headley, 45 Mich., 569.
[81] Peckham v. Hendren, 76 Ind., 47.
[82] Holborn v. Bucknam, 78 Me., 482.
[83] Preston v. Boston, 12 Pick., 12.
[84] Miller v. Miller, 68 Pa. St., 486.
[85] Schoener v. Lissauer, 107 N. Y., 111; Holbrook v. Cooper, 44 Mich., 373; Bane v. Detrick, 52 Ill., 19; Scharmer v. Farwell, 56 Ill., 542., Work's Appeal, 59 Pa. St., 444; Phelps v. Zuschlog, 34 Tex., 371; Holmes v. Hill, 19 Mo., 159; Town of Sharon v. Gager, 46 Conn., 189; Hulhorst v. Sharner, 15 Neb., 57; Soule v. Bonney, 37 Me., 128; Prichard v. Sharp, 51 Mich., 432; Grimes v. Briggs, 110 Mass., 446; Feton v. Gregory, 130 Mass., 176; Nealy v. Greenough, 25 N. H., 325; Smith v. Atwood, 14 Ga., 402; State v. Such, 53 N. J. Law., 351.
[86] Taylor v. Jacques, 106 Mass., 291. Hackett v. King, 6 Allen, 58.
[87] 12 Wall., 150.
[88] Dickerman v. Lord, 21 Iowa, 338

for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose."

So also in *Hatter* v. *Greenlee*,[89] Lipscomb, C. J., in delivering the opinion of the Supreme Court of Alabama, said that "every restraint of a man's liberty, without warrant of law, is a duress of imprisonment; and further, that when there is a legal and regular warrant, that if on going behind such warrant, it should be found to be bottomed on a false charge, without probable cause, and only used as a feint or pretext to cover an illegal design, it will be considered in law as a duress of imprisonment; and further, that when the charge is well founded, if the prisoner is maltreated, whilst so confined, that it would make his confinement duress of imprisonment, so far as to invalidate any act of his produced by such maltreatment." In *Watkins* v. *Baird*,[90] Parsons, C. J., in delivering the opinion of the Supreme Court of Massachusetts, said: "It is a sound and correct principle of law, when a man shall falsely, maliciously, and without probable cause, sue out a process, in form regular and legal, to arrest and imprison another, and shall obtain a deed from a party thus arrested to procure his deliverance, such deed may be avoided by duress of imprisonment. For such imprisonment is tortious and unlawful as to the party procuring it." In *Richardson* v. *Duncan*,[91] it was held that an arrest for just cause and under lawful authority, if made for unlawful purposes, might constitute duress, so as to avoid a contract which the party made for his deliverance.

In *Meek* v. *Atkinson*,[92] Johnson, J., in delivering the opinion of the court, observed: "that a contract is not necessarily void, because even the person of the party to be bound is under restraint. One who is lawfully imprisoned may enter into a contract to obtain his discharge, or he will, in general, be bound by any contract he may make; and so with respect to duress of his goods. Contracts made with respect to them are not necessarily void; for they may be based on a good and valuable consideration. And I take that it is only in those cases where the arrest is without sufficient cause, or lawful authority, or where an improper use has been made of it, and an advantage gained, that the party can avoid his contract."

---

[89] 1 Porter, 222.
[90] 6 Mass., 506.
[91] 3 N. H., 508.
[92] I. Bailey's Law, 84.

In *Eaddie* v. *Shininon*[93] an assignment of an insurance policy of a person by his wife, procured from her by threatening, in case of her refusal to execute the same, to arrest her husband and prosecute him for embezzlement committed by him while in the assignee's service, was held to be void, on the ground that such threats amounted to duress. So also in *Haynes* v. *Rudd*,[94] a note for an amount for which the promisor's son was about to be arrested for embezzlement, was held void for duress, as it was executed under the influence produced by the promisee by operating upon his family pride, his fear of disgrace, and his desire to save his son from the ruinous effects of a prosecution. In *Foley* v. *Greene*[95] also, a security executed by a mother to protect her son from exposure and prosecution for embezzlement was held invalid, even though there was no direct threat; because the mother was a poor and ignorant woman, and she was told that if she executed the security, the whole matter of the defalcation would be kept quiet, and no criminal charge made against the son; and there was thus a pressure exerted which had the effect, and was doubtless intended to have the effect, of a threat (*D*).

In *Shaw* v. *Spooner*[96] a promissory note was executed and given by a person, while under arrest, in compliance with a requisition from another State for trial for the offence of cheating, at the instance of one Shaw, who, on getting the note, set him at liberty and promised that no creditor would harrass him if he came for business to that State. In delivering the opinion of the court, Parker, C. J., said that the arrest was made merely with a view to his removal to the other State, and "if, instead of this, he (Shaw) caused the defendant to be arrested, and made use of the process in any manner to compel the defendant to

(D) The facts and the decision in this case were similar to those of the English case of *Bayley* v. *Williams*,[96] in which agreements and securities were given by a father to protect his son from criminal prosecution for the forgery of his (father's) name to certain promissory notes, and the court said: "If the agreements were executed under influence felt by the plaintiff and exercised by the defendants, if the fear of the criminal prosecution against the plaintiff's son, or if the result of the discovery of a criminal act, for which the plaintiff was not liable, was used by the defendants against the plaintiff to operate upon his fears, so as to induce him to give a security which would relieve his son from a criminal prosecution, according to the law of this court, a security obtained under such circumstances cannot stand." The decision was maintained on appeal by the House of Lords,[97] but on the ground that the plaintiff, on account of the pressure implied from the defendant's idea of prosecuting the plaintiff's son for forgery unless he gave the securities, was not a free and voluntary agent. There was no question of duress or its illegality in that case, and Sir Frederick Pollock treats that case as one of undue influence.

[93] 26 N. Y., 9.
[94] 30 Hun., 237.
[95] 14 R. I. 618.
[96] 4 Giff., 638.
[97] Williams *v.* Bayley, I. Eng. and Ir. App., 200.
[98] 9 N. H. 191.

settle, or give the note now in suit, that was a use of the process wholly unauthorized by law, and the note thus procured is void."

In the Louisiana Civil Code, it is enacted that "if the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, they shall not invalidate the contract" [99]; but it is added that "the mere forms of law to cover coercive proceedings for an unjust and illegal cause, if used or threatened in order to procure the assent to a contract, will invalidate it." [100] An illustration of this rule is given, by providing that an arrest without cause of action, or a demand of bail in an unreasonable sum, or threats of such proceeding, invalidate a contract made under their pressure.

Illegality of act done or threatened how far necessary to constitute duress in Indian Law.

33. Apparently the same comprehensive view will be taken of duress in the Indian Law. Where the Indian Penal Code is in force, every act forbidden by it will of course be unlawful, and practically the Code is in force in all British India. The explanation attached to the definition of the term duress, expressly enacts that the same acts will constitute duress even where the Indian Penal Code is not in force, and the acts therefore are not necessarily illegal. The definition also provides that "the unlawful detaining, or threatening to detain, any property" is duress. The word "unlawful" may no doubt be so construed as to qualify "threatening," but on a strict construction of the language, the detention threatened need not necessarily be unlawful. The question has, however, never been judicially determined. In *Banda Ali* v. *Banspat Singh*, [101] the particular question did not arise as the arrest, in execution of a decree was held to constitute duress sufficient to avoid a bond given for the amount of the decree, on the ground that the decree, was not only *ex parte*, but void for want of jurisdiction. The decision in *Ranganayakamma* v. *Alwar Setti* [102] supports the broader construction, as the judges said that they could not "say that obstructing the removal of a corpse by the deceased's widow or her guardian unless she made an adoption and signed a document, is not an unlawful act or not an act such as is defined by section 15 or 16 of the Indian Contract Act." In British Burma, lawful imprisonment in Siam was distinctly held to constitute duress, on the ground that "im-

[99] S. 1856.
[100] S. 1857.
[101] I. L. R., IV All., 352.
[102] I. L. R., XIII Mad., 224.

prisonment in a country where there is no settled system of law or procedure, and where the judge is invested with arbitrary powers, is duress of a wholly different kind, the prisoner neither knows what will be the length of his imprisonment, nor what amount of pain and misery he may be put to; all is indefinite, and therefore the apprehension acting on the mind of a man in such a situation would be infinitely greater than if he were imprisoned in a country like England, where the law is settled and cannot be exceeded by the judge." [102a]

Undue influence as affecting freedom of consent.

34. Coercion contemplates, however, only physical acts. Corresponding moral considerations also prevent a consent being free. They are too varied in their character to admit of an exact description, and may generally be said to "include any improper or wrongful constraint, machination, or urgency of persuasion, whereby the will of a person is over empowered, and he is induced to do or forbear from an act, which he would not do, or would do if left to act freely." [103] On account of this very comprehensiveness, they are usually grouped under a particular head, and designated "undue influence"; which has been pithily described as that "which destroys free agency, and constrains the person whose act is brought in judgment to do what is against his will, and what he would not have done if left by himself." [104] Sir Frederick Pollock, in his work on Contracts, says: "In equity there is no rule defining inflexibly what kind or amount of compulsion shall be sufficient ground for avoiding a transaction, whether by way of agreement or by way of gift. The question to be decided in each case is whether the party was a free and voluntary agent. Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment." [105] Dr. Holland says that undue influence "consists in acts which, though not fraudulent, amount to an abuse of the power, which circumstances have given to the will of one individual over that of another." [106]

[102a] Moung Shoay Att *v.* Ko Byaw, L. R., III I. A., 61.
[103] 2 Abb. L. Dict., 615.
[104] Haydock *v.* Haydock, 33 N. J. Eq., 494.
[105] P. 579.
[106] Holl. Jur., 237.

So also Dr. Bishop says,[107] that "any complications in which a party may find himself involved, whereby his act of contracting is not that of a free agent, may, at least in equity, be availed of by him to avoid it, as against those by whose procurement it was made." Mr. Clark says,[108] that "Influence obtained by modest persuasion, and arguments addressed to the understanding, or by mere appeals to the affections, cannot properly be termed 'undue influence' in a legal sense[109]; but influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will of a person to such an extent as to destroy the free agency, or constrain him to do against his will what he is unable to refuse, is such an influence as the law condemns as undue[110]". Pomeroy considers undue influence as a moral, social, or domestic force exerted upon a party, controlling the free action of his will.[111]

The statutory definitions of undue influence are more definite and compact. Thus the California Civil Code enacts[112] that undue influence consists (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority, for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress. Recent text-writers have also adopted similar descriptions of the expression. Thus even Clark[113] describes undue influence as consisting: (*a*) in the use by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (*b*) in taking an unfair advantage of another's weakness of mind; and (*c*) in taking a grossly oppressive and unfair advantage of another's necessities and distress.

In British India also, undue influence is defined so as to include every such treatment of a person whose mind is enfeebled by old age, illness, or mental or bodily distress, which does not amount to coercion, and yet makes that person consent to that to which he would not otherwise have consented; and every use of confidence or authority by a person in whom

---

107 Bish. Cont., 290.
108 Clark Cont., 365.
109 Hale *v.* Cole, 31 W. Va., 576; Beith *v.* Beith, 76 Iowa, 601; Sturtevant *v.* Sturtevant, 116 Ill., 340.
110 Schofield *v.* Walker, 58 Mich., 96.
111 II. Pom. Eq. Juris., 1309.
112 S. 1575.
113 Clark Cont., 364.

confidence is reposed by another, or who holds a real or apparent authority over that other, for the purpose of obtaining an advantage over that other which, but for such confidence or authority, he could not have obtained [114]. This enumeration of circumstances constituting undue influence is far from complete; specially as English courts of equity have, since their early days, been busy with a recognition as undue influence of various circumstances of moral hardship; and undue influence is one of the chief branches of the exclusive jurisdiction of such courts.

General notion of fraud as affecting freedom of consent.

35. The term "fraud" is used in a very comprehensive sense in the English and the Indian Law. Its popular notion consists of deception, and ordinary lexicographers define it as "deception deliberately practised with a view to gaining an unlawful or unfair advantage." [115] Even Wharton, in his Law Lexicon, defines it as deceit in defrauding or endeavouring to defraud another of his right, by artful device, contrary to the rule of honesty. This was the early notion of fraud in the English law, the notion in the Common law, as not affected and widened by the practice of the courts of equity. Thus in *Haycraft* v. *Creasy*, [116] Le Blanc said that "by fraud he understood an intention to deceive, whether from an expectation of advantage to the party himself, or from ill-will towards another."

This is exactly what Roman lawyers meant by *dolus*. Thus Gallus Aquilius defined *dolus* as *Quam aliud simulatur et aliud agitur*. Servius more fully described it as *machinationem quandam, alterius decipiendi causa, cum aliud simulatur et aliud agitur*. This definition was considered too general, and Labeo pointed out ; *Posse sine dissimulatione id agi, ut quis circumveniatur; posse et sine dolo malo aliud agi, aliud simulari, sicuti faciunt qui per ejus modi dissimulationem deserviant et tuentur vel sua, vel aliena.* He defined it as *omnis calliditato, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita.* Ulpian and other Roman jurists approved of that definition. Speaking of that definition, M. Bédarride, in his work on *Dol* and *Fraud*, says [117]: *Elle répondait parfaitement à l'idée qu'on peut se faire du dol et des caractères le constituant. En effet, le concours de manœuvres déloyales et d'un préjudice pour la partie contractante, détermine nettement la nature du dol et son objet, indique le double fondement de l'action ouverte à celui qui en a été victime.*

[114] S. 16, Act IX of 1872.
[115] *Vide* Webster's Dictionary.
[116] 2 East, 108.
[117] I, 12.

The term fraud derived from a word denoting simple prejudice was at first used in a still more restricted sense, to denote a similar, but less artful, conduct directed rather against courts or third persons than against the other party to a transaction. To use the words of M. Chardon, it *descendait jusqu'à des cas dans lesquels l'intention n'a rien de coupable, mais qui présentent un dommage par l'événement, ce que les docteurs appellaient fraus non in consilio sed eventu.*[118] French jurists often refer to that distinction between fraud and *dol.*

Thus M. Bedarride says[119]: *Sans doute, le dol et la fraude ont des caractères communs, subissent dans leur recherche l'empire de principes analogues, produisent des effets identiques. Mais il y a entre eux des différences notables dans leur nature, dans leur origine, souvent même dans leurs résultats. Ainsi, le dol ne peut exister sans l'emploi de manœuvres, imputables à l'une des parties, ou exécutées dans son intérêt par un tiers. La fraude, au contraire, ne réside le plus souvent que dans l'exécution d'une convention licite et juste, elle n'exige aucune manœuvre; elle est, dans certain cas, concertée entre toutes les parties contractantes. Le dol vicie essentiellement le contrat. La fraude, même convenue, n'a souvent aucune influence sur la validité et, conséquemment, sur l'exécution à donner à la convention. Aussi, verrons—nous que la plainte en fraude n'est pas toujours permise, tandis que celle en dol ne saurait, dans aucun cas, être refusée à la partie lésée.* So also Chardon, in his *Traite du Dol*,[120] says: *Chacun de ces deux mots a cependant un sens propre auquel il est convenable de se fixer, pour concevoir des idées plus saines sur les questions qui s'y rattachent. Le dol est l'art de tromper la personne qu'on dépouille. La fraude est celui de violer les lois en trompant les magistrats ou les tiers par la forme des actes. Dans quelques circonstances il y a dol sans fraude; dans d'autres, il y a fraude sans dol, et très-souvent il y a dol et fraude. Par exemple, il n'y a que dol quand, par des artifices, un individu est déterminé à donner sa chose ou à la vendre à vil prix. Il n'y a que fraude quand l'usurier, de concert avec l'infortuné qu'il ruine, couvre ses rapines par une convention légale en apparence. Il y a dol et fraude lorsqu' un incapable obtient par des perfidies, non-seulement une libéralité imméritée, mais encore son déguisement sous la forme d'un contrat onéreux.*

---

118 Ch. Dol. et Fr. 3.

119 1 Bed. Dol. et Fr., 9.

120 I. 4.

Fraud in English Law.

36. In the English law, however, there is no term corresponding to *dol*, and a great deal of the difficulty attaching to the expression "fraud," is due to the circumstance of its doing duty for both *dol* and *fraude* of the French Law.

The greatest extension in the sense of that expression has been made, however, by the action of the Courts of Equity, which have released the expression entirely from the trammels of deliberate deception and moral turpitude. Thus in *Harman* v. *Fisher*[121], fraud was said to be an act unwarranted in law, to the prejudice of a third person, and not that crafty villainy or grossness of deceit to which it was applied in common language. In the case of *Green* v. *Nixon*,[122] Sir John Romilly observed that "fraud implies a wilful act on the part of any one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to." Similarly, in *Earl of Aylesford* v. *Morris*,[123] Lord Selborne, L. C., said: "Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions."

In England, fraud is, therefore, defined at present, as a statement creating in a person a false belief as to any circumstances, a false representation of fact, made with a knowledge of its falsehood, or recklessly without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it[124]. Similarly, Dr. Holland defines[125] it as "the intentional determination of the will of another to a decision harmful to his interests by means of a representation which is neither true nor believed to be true by the person making it;" with the further observation that "the essentials of a fraudulent representation are that it is (1) untrue in fact, (2) made with knowledge of its untruth, or without belief in its truth, or with recklessness as to its truth or falsehood, (3) made for the purpose of inducing another to act upon it."

The same view is taken in the United States also. Dr. Pomeroy says[126] that "every fraud, in its most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith in the broad meaning given to the

---

121 Lofft, 472.
122 23 Beav., 535.
123 8 Ch. Ap., 490.
124 Anson Cont., 165.
125 Holl. Juris., 207.
126 II Pom. Eq. Jur., 1224.

term by equity. Furthermore, it is a necessary part of this conception that the act or omission itself, by which the undue advantage is obtained, should be willful; in other words, should be knowingly and intentionally done by the party; but it is not essential in the equitable notion, although it is in the legal, that there should be a knowledge of and an intention to obtain the undue advantage which results." Clark, in his work on Contracts,[127] describes fraud as "a false representation of a material fact, or nondisclosure of a material fact under such circumstances that it amounts to a false representation, made with knowledge of its falsity, or in reckless disregard of whether it is true or false, or as of personal knowledge, with the intention that it shall be acted upon by the other party, and which is acted upon by him to his injury."

Thus, in *Kirby* v. *Ingersoll*,[128] the Michigan Supreme Court said that "by the term 'fraud,' the legal intent and effect of the acts complained of is meant. The law has a standard for measuring the intent of parties, and declares an illegal act prejudicial to the rights of others a fraud on such rights, although the parties deny all intention of committing a fraud." This was quoted with approval by McWhorter, C. J., in delivering the opinion of the Supreme Court of Florida in *Logan* v. *Logan*[129], in which, in speaking of a mortgage, he said, that, if the mortgage "in effect is a fraud upon the right of the creditor, the motives of the parties are of no consequence." In delivering the opinion of the Supreme Court of Pennsylvania in *Mitchell* v. *Kintzer*,[130] Coulter, J., said, that "it may safely be averred, that all deceitful practices in depriving or endeavouring to deprive another of his known right by means of some artful device or plan, contrary to the plain rules of common honesty, is fraud."

Fraud in Indian Law.

37. In the Indian Law, the term is used in the same comprehensive sense. It is not restricted to a "suggestion, as a fact, of that which is not true, by one who does not believe it to be true," but extends also to "any of the following acts committed by a party to a contract, or with his connivance, or by his agent—

(1) the active concealment of a fact by one having knowledge or belief of the fact;

---

127 P. 324.
128 1 Harr. (Mich), 172.
129 22 Flo., 561.
130 5 Pa. St., 216.

(2) a promise made without any intention of performing it;

(3) any other act fitted to deceive;

(4) any such act or omission as the law specially declares to be fraudulent.[131]

Even silence as to facts likely to affect the willingness of a person to enter into a contract is declared to be fraud, if the circumstances "are such that regard being had to them, it is the duty of the person keeping silence to speak, or the silence itself is equivalent to speech." Nor do these acts constitute fraud, only when they are committed with an intent to deceive another party to the contract, but also when the intent is to induce him to enter into the contract.

The Indian Law has, however, grouped some of the cases falling within what in the English Law is usually called legal or constructive fraud, as separate from fraud, under the head of 'misrepresentation,' which is defined in the Indian Contract Act,[132] to mean and include—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Absence of free and fair consent makes contracts only voidable.

38. Neither coercion or undue influence, nor fraud can prevent the creation of, or destroy, or even invalidate, a contract induced by a consent affected by them. Fraud is often said to vitiate consent, but it does not negative it; and a contract is not necessarily void, on the ground of its having been induced by a consent vitiated by fraud. Nor has coercion or undue influence any higher effect. The Indian Contract Act actually enacts that, when consent to an agreement is caused by coercion, undue influence, fraud or mis-

[131] S. 17 Act. IX of 1872.

[132] S. 18 Act. IX of 1872.

representation, the agreement is a contract voidable at the option of the party whose consent was so caused; and that, if the consent is caused by fraud or misrepresentation, that party may even insist on the performance of the contract, so that he may be placed in the position in which he would have been if the representation made had been true. Further, the contract will not even be voidable, when the consent is caused by misrepresentation or fraudulent silence, if the party, whose consent was so caused, had the means of discovering the truth with ordinary diligence.[133]

The English law is the same. Under that also a contract, induced by the abovementioned causes of consent, is not void; but only voidable at the option of the party injured by the contract. Sir Frederick Pollock broadly says: "that where the consent of one party to a contract is obtained by the other, under such circumstances that the consent is not free, the contract is voidable at the option of the party whose consent is so obtained. It is quite clear that it is not merely void" [134]. In the United States, the Louisiana Civil Code enacts[135], that " engagements made through error, violence, fraud or menace, are not absolutely null, but are voidable by the parties who have contracted under the influence of such error, fraud, violence or menace, or by the representatives of such parties."

A deed taken under duress has often been held to be voidable.[136] In *Bush* v. *Brown*,[137] Downey, J., in delivering the opinion of the Supreme Court of Indiana, said that duress " while it does not render the contract absolutely void, will yet enable the party so under duress to avoid it at his option." (C) Almost every text-writer has laid down the same rule.[139] Clark says " that a contract is not void, because it was entered into under duress, but, as in the case of fraud, is merely voidable at the option of the injured party, and stands unless he sees fit to avoid or rescind it.[140]

(C) In *Fairbanks* v. *Snow*[138], Holmes, J., in delivering the opinion of the court, said that it was well-settled, " that where, as usual, the so-called duress consists only of threats, the contract is only voidable." It is not to be inferred from this that the court considered that a different rule would apply when the duress did not consist of threats but of acts. The case under consideration being one of threats, it was not necessary to consider or pronounce upon any other point.

133 S. 19, Act IX of 1872.
134 Poll. Cont., 576.
135 S. 1881.
136 Miller *v.* Minor R. Co., 98 Mich., 163; Oregon Pac. R. Co. *v.* Forrest, 128 N.Y., 83; Sornborger *v.* Sanford, 34 Neb., 489.
137 49 Ind., 695.
138 145 Mass., 153.
139 Ans. Cont., 177.
140 Clark Cont., 363.

With regard to undue influence also, it has been repeatedly laid down that it renders a contract voidable at the option of the injured party.[141] The contract stands, however, unless avoided.[142] Anson observes that "contracts and gifts made under influence are voidable and not void".[143]

In regard to fraud, the character of its effect is still clearer. It has been repeatedly laid down that fraud renders a contract voidable and not void.[144] Kerr in his work on Fraud[145] says, that "a contract or other transaction, induced or tainted by fraud, is not void, but only voidable at the election of the party defrauded. Until it is avoided, the transaction is valid, so that third parties, without notice of the fraud, may, in the meantime, acquire rights and interests in the matter which they may enforce against the party defrauded." A contract which is void has no effect whatever, and, if it has any effect, it cannot be void. It is settled that a person, who has been induced by fraud to enter into a contract may waive the fraud, and hold the other party to his bargain, even recovering damages for the fraud, though he may not be able to rescind the contract, if he delays for an unreasonable time, or acts upon it with knowledge of the fraud; and that, as a rule, he will not be permitted to rescind, unless the other party is placed in *statu quo*. Even *bonâ-fide* purchases from a fraudulent vendee acquire a title which may not be defeated by the original vendor's exercise of his right to rescind. Thus where a bargain has been made by the owner of the chattel with another, by which any property is transferred to that other, the property actually passes, though the bargain has been induced by fraud. This was clearly laid down by the Exchequer Chamber in *Clough* v. *London and North-Western Ry. Co.*,[146] in which Mellor, J., in delivering the opinion of the court, said: "We agree completely with what is stated by all the Judges below, that the property in the goods passed from the London Co. to Adams by the contract of sale; the fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing; but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property . . . . We think that, so long as he has made no election, he retains the right to determine it either way,

141 Holl. Juris., 237; Clark Cont., 364.
142 27 Encyc. Law, 494.
143 Anson Cont., 182.
144 Davies v. Harness, 10 C. P., 166.
145 P. 5.
146 7 Ex., 34.

subject to this, that, if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property; or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind." It is clear from this, that a contract, induced by force or fraud, is not void, but only voidable, and that, even its rescission does not make it void as against *bonâ-fide* purchasers from the defrauding party.

The same rule is recognized in the United States. Thus Clark in his work on Contracts says "that fraud does not render the contract absolutely void, but renders it voidable at the option of the party injured.[147]" In *Baird* v. *Mayor*,[148] Ruger, C. J., in delivering the opinion of the court, observed, that "It is the duty of a party who has been induced to enter into the making of an executory contract for the purchase of personal property through fraud, if he desires to avail himself of that objection, to act upon the first opportunity and rescind it by repudiating its obligations," and said: "such a contract is not void, but is simply voidable at the option of the party defrauded, and requires affirmative action on his part to relieve himself from its obligations." It is no doubt sometimes said that coercion, undue influence and fraud render a contract void *ab initio*; but this is merely a careless use of words. The word "void" is often used for voidable,[149] though there is a material difference between the two. Thus in the Elizabethan Statute (27 Eliz., ch.4.), for the protection of purchasers, certain conveyances of lands, tenements or other hereditaments are declared to be "utterly void, frustrate, and of no effect," and still it is quite settled that they are only voidable as against persons who should have purchased them before or might purchase them afterwards, or their legal representatives. The same construction has also been put on 13 Eliz., ch. 5, which was enacted for the protection of creditors, and declared certain conveyances, &c., "to be clearly and utterly void, frustrate, and of none effect" generally and not only as against any person or persons, and still it has long been quite settled that such transactions are not void, but only voidable as against the creditors affected prejudicially by them.

Similarly, it is laid down in the Civil Code of France that *violence* and *dol* are a cause of the nullity of the contract induced by them[150]; but s. 1117 lays down that such a contract

147 Clark Cont., 347.
148 96 N. Y., 598.
149 Poll. Cont., 53.
150 S. S. 1113 & 1116.

n'est point nulle de plein droit, but only gives *lieu à une action en nullitè ou en rescision*. The Italian Civil Code has not got any such explanatory provision, but the clauses [1] relating to the nullity of a contract on the ground of *violenza* and *dolo* are construed in the same manner. Speaking of the rights of third persons, Giorgio Giorgi says that that is the chief reason for which *le moderne legislazioni hanno considerato la violenza come semplice vizio di consenso che produce invalidità con azione da esperimentarsi dentro un breve periodo di tempo.* (*g*) [2]

In the German Law also, in case of transactions *inter vivos*, *erzwungen abgegebene Erklärung wird durch nachträgliches Anerkenntniss im Zustand der Willensfreiheit rückwärts giltig.*[3] (*h*) Eccius, in his Preussisches Privatrecht further says: *Da die Erklärung des Betrogenen beim Rechtsgeschäft unter Lebenden nur nach seinem Willen anfechtbar ist, so folgt; dass der Betrogene auch bei ihr beharren, sie als giltig betrachten kann* (*i*) [4].

General effect of mistake on consent.

39. *Non videntur consentire qui erant. Nule a enim voluntas errantis est.* This must be generally correct also, as a consent is only in regard to an act, and the error referred to also must be in regard to that act, or in regard to such constituents of it as may be material in the particular branch of law to which the matter under consideration may relate. The term error, however, is a very comprehensive one. It has been described as *una difformità fra le idee della nostra mente e l'ordine delle cose* (*j*) [5].

Jurists look at error from different points of view, contemplating different incidents of the act erred about as its essentials, and therefore taking different views of its legal effect. Thus it has been said by Eccius, in his work on Preussisches Privatrecht, that an error is *die unwahre Vorstellung von den Wirkungen des Inhalts der Erklärung* (*k*)[6]. As a natural result

(*g*) The modern legislations have considered violence as simply a vice of consent, which produces invalidity by an action to be tried within a short period of time.
(*h*) A declaration extorted by force will, through subsequent ratification while the will is free, become valid again.
(*i*) A declaration of the deceived person in legal transactions *inter vivos* is voidable only according to his will ; so does it follow that the deceived person can also insist that the transaction may be deemed valid.
(*j*) An unconformity between the ideas of our mind and the order of the things.
(*k*) The untrue conception of the effectiveness of the contents of the declaration (of consent).

[1] Ss. 1111 & 1115.
[2] IV., 91.
[3] II. Preus. Priv., 1 7.
[4] II., 162.
[5] IV Giorg. Teo. Obbl., 47.
[6] II. 158.

of that, he says, that *Der Wille ist ferner nicht frei wenn der Wollende sich irrt* (*l*).

On the other hand, Sir Frederick Pollock says: "Mistake as such has no legal effects at all. When an act is done under a mistake, the mistake does not either add anything to or take away anything from the legal consequences of that act, either as regards any right of other persons or any liability of the person doing it, nor does it produce any special consequences of its own; unless knowledge of something which the mistake prevents from being known, or an intention necessarily depending on such knowledge, be from the nature of the particular act a condition precedent to the arising of some right or duty under it[7]." He even says that "mistake does not of itself affect the validity of contracts at all;" though it "may be such as to prevent any real agreement being formed"[8].

Parties to a contract sometimes do not mean the same thing, or, while meaning the same thing, one or both form untrue conclusions as to that thing or as to the object of the contract. In such a case, there is no actual concurrence of wills, and therefore no real consent to form a contract, and no contract. It is not necessary that a mistake should have this effect in every case. There are cases, however, in which it has that effect, and reference to those cases will be made later on.

Mistake, error, and ignorance how far different.

40. The word "error" is often identified with "mistake," and thus distinguished from "ignorance." It is sometimes held to be a general word including both mistake and ignorance. Mistake is, however, essentially different from ignrance.[9] Ignorance, it has been repeatedly said, is not mistake. The distinction has been chiefly adverted to in regard to the ignorance and the mistake of law. Johnson, J., in distinguishing the two in the opinion of the court in *Lawrence* v. *Beaubien*[10], observed that "the former is passive, and does not presume to reason, and unless we were permitted to dive into the secret recesses of the heart, its presence is incapable of proof; but the latter presumes to know when it does not, and supplies palpable evidence of its existence." The case of *Culbreath* v. *Culbreath*,[11] affords a good illustration of the difference between

(*l*) The will is further not free, when the person willing is mistaken.

7 Poll. Cont., 424.
8 Poll. Cent., 422.
9 Fletcher v. Tollet, 5 Ves., 14; Penny v. Martin, 4 John. Ch., 568.
10 2 Bailey, 623.
11 7 Ga., 64.

the two. Nisbet, J., in delivering the opinion of the court in that case, said: "Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches which is criminal; mistake argues diligence, which is commendable. Mere ignorance is no mistake, but a mistake always involves ignorance, yet not that alone. If the plaintiff—the administrator—had refused to pay the distributive share in the estate which he represented to the children of his intestate's deceased sister, upon the ground that they were not entitled in law, that would have been a case of ignorance, and he would not be heard for a moment upon a plea that, being ignorant of the law, he is not liable to pay interest on their money in his hands. But the case is, that he was not only ignorant of their right in law, but believed that the defendants were entitled to their exclusion, and acted upon that belief, by paying the money to them. The ignorance, in this case, of their right, and the belief in the right of the defendants, and action on that belief, constitute the mistake. The distinction is a practical one, in this, that mere ignorance of the law is not susceptible of proof. Proof cannot reach the convictions of the mind, undeveloped in action; whereas, a mistake of the law, developed in overt acts, is capable of proof like other facts."

On the other hand, Walker, J., in delivering the opinion of the court in *Gwinn* v. *Hamilton*,[12] observed that "a distinction has been taken in South Carolina, Georgia, Kentucky and Maryland between mistakes of law and ignorance of law, and there are some English decisions which have been regarded by some as supporting the distinction. But this distinction has been generally repudiated, as resting upon a mere imaginary difference, or as too subtle and refined for practical application. The great weight of authority, both in England and America, maintains the rule we have laid down above." In *Champlin* v. *Laytin*,[13] Branson, J., observed that there was no distinction between an ignorance and a mistake of the law, while Senator Paige observed that the distinction made was proper.

Strictly speaking, ignorance is the absence of some idea, the not knowing of something that exists, while a mistake is the existence of a wrong idea, the knowing of something which does not exist. Looked deeply, however, they are the different aspects of the same thing, each implying the not knowing of the real state of things. The Indian Contract Act thus uses the word mistake only, and the Indian Penal Code the word ignorance

[12] 29 Ala., 233.

[13] 18 Wend., 407.

only. Their legal effect, is, however, the same. So also Bigelow in an article in the *Law Quarterly Review*,[14] after observing that mistake,as contrasted with ignorance, implies some notice and consideration of the law, says "the terms are commonly used as synonymous; or rather the term mistake has nearly usurped the other's place."

In German law also, *Das Falschwissen und das Nichtwissen stehen sich in ihrer Bedeutung für das Recht gleich*[15] (*k*).

Mistake even of one party may prevent formation of contract.

41. To prevent the formation of a contract, it is not necessary that both the parties should be mistaken. There can be no concurrence of wills, even if one party is under a mistake. The Roman Law did not require for the invalidity of a contract that the error should be bilateral. Giorgio Giorgi in his work on the Theory of Obligations, after observing that, says: *Tanto merita scusa chi ha sbagliato solo, purche non sia stato vittima di un errore imperdonabile, quanto la merita chi ha sbagliato in compagnia dell'altro contraente. E d'altronde la legge scusa certe volte l'errore sulla persona: ora questa specie di errore come potrebbe essere bilaterale.*[16] (*l*)

Under the English Law, a contract may in some cases be held invalid on account of the mistake of one of the parties.[17] The Indian Law of Contracts lays it down, however, generally, as a necessary condition of the invalidity of a contract, that both the parties must be under a mistake. This view is not quite without authority, and though not generally approved, is of course, so far as it goes, not likely to lead to any practical difficulties, particularly as this provision of the Act will apply chiefly to cases in which there is a contract, and the mistake is only *in substantia* and such as may invalidate the contract. And in such cases, the contract even under the English Law will be invalid only, if the error is common to both partes.[18] "In fact," Dr. Bishop says,[19] "that as a general rule, the mistake which will render a contract void or voidable must be mutual." In any case, it is seldom that one party may be under a mistake,

(*k*) Mistake and ignorance are the same in their signification for purposes of law.

(*l*) He who has alone made a mistake, if he be not the victim of an unpardonable error, merits excuse as much as he who has made a mistake in company with the other contracting party. And as on the other hand, the law excuses sometimes the error concerning the person: how can this species of error be bilateral.

[14] I. 298.
[15] IV. 82.
[16] Poll. Cont., 42, 43, 476-477.
[17] Paget v. Marshall, 28 Ch. D., 263.
[18] Poll. Cont., 465. Kerr on Fraud, 523.
[19] Bish. Cont., 273.

without the other party being cognizant of it. And when this other party is innocent, it will generally be too hard on him to allow the mistaken party to allege a mistake, and have the contract set aside on account of it. A due regard to the interests of the innocent party who thought that there was a valid contract, and made all his dispositions in reliance on that contract, might well require that the contract should not be set aside except in cases in which there was a mistake on both the sides. In such cases, if one of the parties must suffer, it is only right that the suffering must be on the side on which there is a mistake. Nor is there any hardship in this. Law looks more to the expression of consent than to the consent itself. Even when there is no actual concurrence of wills, the parties or either of them are often not at liberty to allege their mistake, on the ground of estoppel or of public policy, and must suffer for its consequences.

Nature of facts, mistake of which may affect consent.

42. As observed above, mistake in certain cases has the effect of negativing or vitiating consent, and thus of affecting the existence or validity of a contract. Mistakes, both of fact and law, may have this effect, but there are differences in the operation of the two; and reference will be made first to the former, which proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none.[20]

The nature and effect of a mistake on contracts was well explained in the case of *Hurd* v. *Hall*[21], in which Dixon, J., in delivering the opinion of the court said: "A mistake of fact is ordinarily said to take place, either when some fact, which really exists, is unknown, or some fact is supposed to exist which really does not exist. In legal parlance it has a much more enlarged signification than a mistake of law, and extends to and includes the case of a party who, through mere ignorance of the existence or non-existence of a material fact is induced to do an act or enter into a contract injurious to himself, where, if he had been informed of the existence or non-existence of such fact, he would not have performed such act, or made such contract. Ignorance of the existence or non-existence of a material fact, precludes the idea that the party, at the time of the transaction, should have been influenced by it, for it is impossible that the mind should be

[20] Loins. Civ. Code, Art., 1821. | [21] 12 Wis., 112.

moved by that of which it knows nothing. This ignorance of facts must be excusable, that is, it must not arise from the intentional neglect of the party to investigate them. The rule which formerly prevailed, that if a party might, by the exercise of reasonable diligence, have ascertained the facts, he would not, on the ground of ignorance or mistake, be relieved from his contract, has of late been very much relaxed. The later cases establish the doctrine that whenever there is a clear *bonâ fide* mistake, ignorance or forgetfulness of facts, the contract may, on that account, be avoided."

Broadly speaking, there is no contract at all, where the mistake is in regard to the nature or the terms of the agreement itself, in regard to the person with whom the agreement is made, or in regard to the identity or existence of the object of the agreement. When the mistake is in regard to any other matter, there may be a contract, but the mistake will in certain cases render the contract void. What these cases are, has not been absolutely settled in any system of law, nor do they appear to admit of a general settlement. The Indian Contract Act lays down that the mistake of fact to invalidate the agreement must be as "to a matter of fact essential to the agreement." This does not solve the difficulty, but only throws it a step further as to what is so essential to an agreement; and this must be determined with reference to the peculiar circumstances of each case.

The provisions of the Continental Codes are also couched in general language, and do not throw much light on the matter. The French Civil Code thus lays down that the error is a cause of the nullity of the contract, only when it *tombe sur la substance même de la chose qui en est l'objet*[22]. The Italian Civil Code lays down that an error *di fatto non produce la nullità del contratto, se non quando cade sopra la sostanza della cosa che ne forma l'oggetto.* [23] (*m*)

The Spanish Civil Code provides that the error to vitiate consent ought to bear on the substance of the thing which forms the object of the contract, or on the conditions which have given room to its formation [24]. The Louisiana Civil Code [25] is a little more definite, and provides that an error to invalidate a

(*m*) Of fact produces the nullity of the contract, only when it relates to the substance of the thing which forms the object of it.

[22] S. 1110.
[23] S. 110.
[24] S. 1266.
[25] Art., 1123.

contract must be in some point, which was a principal cause for making the contract. The Egyptian Civil Code goes still further and enacts that a mistake renders the consent void, when it affects the main description under which the subject-matter of the contract has been regarded in the contract[26]. The German Civil Code has chalked out an altogether new line and is still more vague. Thus S. 119 of the Code enacts: *Wer bei der Abgabe einer Willenserklärung über deren Inhalt im Irrthume war oder eine Erklärung dieses Inhalts überhaupt nicht abgeben wollte, kann die Erklärung anfechten, wenn anzunehmen ist, dass er sie bei Kenntniss der Sachlage und bei verständiger Würdigung des Falles nicht abgegeben haben würde. Als Irrthum über den Inhalt der Erklärung gilt auch der Irrthum über solche Eigenschaften der Person oder der Sache, die im Verkehr als wesentlich angesehen werden* (*a*). And S. 120 adds: *Eine Willenserklärung welche durch die zur Uebermittelung verwendete Person oder Anstalt unrichtig übermittelt worden ist, kann unter der gleichen Voraussetzung angefochten werden wie nach* § 119 *eine irrthümlich abgegebene Willenserklärung* (*b*).

As a general principle in the abstract, an error to be able to form a ground for the invalidation of a contract *deve avere avuto tanto peso sull'animo del contraente medesimo, da rendere certo che esso non avrebbe concluso il contratto se avesse conosciuta la verità.*[27](*n*) This principle does not appear, however, to have been adopted in any positive system of law. The extent of its actual application is determined somewhat differently by judges in different countries. The illustrations given in the Indian Contract Act[28] of matters of fact essential to the agreement do not throw any valuable light on the character of the relation indicated by the word "essential. They all refer to the existence of the subject-matter of the agreement, and therefore do not help to indicate what

(*a*) He who in making a declaration of will was mistaken regarding the contents of it, or did not wish to make a declaration with such contents, may claim to avoid it, if it is to be supposed that he would not have made it, if aware of the state of things, and if rightly able to appreciate the case. An error regarding such qualities of the person or thing as are considered important in transactions is also to be considered a mistake regarding the contents.

(*b*) A declaration of will which has been wrongly transmitted by a person or institution employed in transmitting it, may be claimed to be avoided in the same manner as a wrongly made declaration according to S. 119.

(*n*) Must have had such weight over the contracting party himself, as to render it certain that he would not have entered into the contract if he had known the truth.

[26] S. 195.

[27] IV, Giorg. Teo. Obbl., 69.

[28] S. 20 Act IX. of 1872.

matters would be considered essential. The determination of what matters of fact are essential to the agreement, must, therefore, *ex necessitate rei* as in the case of the French and the Italian Codes, proceed, in the main, on general considerations.

It is beyond the scope of this treatise to discuss all the cases in which a mistake, as to these matters will, or will not, invalidate the contract; nor is it necessary to refer to the various conditions in which, and the various restrictions under which, a mistake will have that effect. Reference will be made briefly under these three heads respectively to the general principles governing the effect of mistake on consent in regard to contract, so far as they have a bearing on questions relating to the consent in the criminal law.

Mistake as to the nature of the transaction.

43. A mistake as to the nature of the transaction prevents the concurrence of wills, and is of rare occurrence. There can, however, be no contract where there is such a mistake.

Thus in *Thoroughgood's* case,[29] it was held that "if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed." In a note to that case in Fraser's Edition of Coke's Reports, it is suggested that the doctrine is not confined to the condition of an illiterate grantor, and a case in Keilway's Reports, p. 70, is cited in support of this observation. In that case, the grantee himself was the defrauding party; but the position that, if a grantor or covenantor be deceived or misled as to the actual contents of a deed, the deed does not bind him, is supported by many authorities, and recognized by the Court of Exchequer in the case of *Edwards.* v. *Brown.*[30] The same is held in the United States, and a deed was in *McGinn* v. *Tobey*[31] held void, as in fact, not the deed of the person by whom it purported to be executed, on the ground that he had signed it believing it to be the counterpart of a lease which he had executed, and "never meant to execute a deed, and never knew that he had executed one." In *Cline* v. *Guthrie*,[32] Buskirk, *J.*, said "It is well settled by authority and on principle, that the party whose signature to a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence

[29] 2 Co. Rep., 9*b*.
[30] 1 Cr. & J., 312.
[31] 62 Mich., 252.
[32] 42 Ind., 227.

in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery."

The Louisiana Civil Code[33] enacts that "error as to the nature of the contract will render it void," the nature of the contract being "that which characterises the obligation. Thus if the party receives property, and from error or ambiguity in the words accompanying the delivery, believes that he has purchased, while he who delivers intends only to pledge, there is no contract."

The principle is held to apply in the case of negotiable instruments even as against *bonâ fide* holders. The inquiry in such cases goes back of all questions of negotiability or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin and existence of the paper itself; and the proposition is to show, that it is not in law or in fact what it purports to be. "Negotiability pre-supposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or *bonâ fide* holder of it. That which in contemplation of law, never existed as a negotiable instrument, cannot be held to be such; and to say that it is, and has the qualities of negotiability, because it assumes the form of that kind of paper, and thus to shut out all inquiry into its existence, or whether it is really and truly what it purports to be, is *petitio principii* begging the question altogether."[34]

Thus, in *Foster* v. *MacKinnon*,[35] the acceptor of a bill of exchange had induced a person to endorse it by telling him that it was a guarantee. It was held that the bill did not bind him even in the hands of a *bonâ fide* purchaser for value. Byles, J., in delivering the judgment of the Court upon a rule *nisi* for a new trial, said: "It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man

[33] Art. 1841.

[34] Walker v. Egbert, 29 Wis., 194.

[35] 4 C. P., 704.

afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."

This decision was quoted with approval and followed in *Whitney* v. *Snyder*,[36] in which Talcott, J., in delivering the opinion of the New York Supreme Court, said: "A *bonâ fide* holder of commercial paper, for value and before maturity, is protected in many cases against defences which are perfectly available as between the original parties, such as that the signature was obtained by false and fraudulent representations, that a blank bill or acceptance has been filled up for a greater amount than the party to whom it was delivered was authorized to insert. But in all these cases the party intended to sign and put in circulation the instrument as a negotiable security. Where this is the case, he is bound to know that he is furnishing the means whereby third parties may be deceived, and innocently led to part with their property on the faith of his signature, and in ignorance of the true state of facts. But, while this is a rule of great convenience and propriety, there are, and must be, some limits to its application, some defences as to which even a *bonâ fide* purchaser purchases at his peril. The familiar case of a note declared void by statute, as in the case of usury, furnishes an illustration." The same has been held in several other cases in the United States.[37]

And the same rule has been held to apply even when the mistake is not as to the nature of the instrument, but only as to the amount or other details of it. Thus, in *Griffiths* v. *Kellogg*,[38] a lightning rod agent induced a woman to sign a promissory note for a greater sum than she owed by reading the instrument to her as of the less and real sum of her agreed obligation, and the Court said: "The note in suit was as little hers as if the transaction between her and the lightning-rod man had not taken place, and he had forged the note."

---

[36] 2 Lans., 477.

[37] Kagel *v.* Totten, 59. Md., 447.
Schuylkill Co. *v.* Copley, 67 Pa. St., 386.
De Camp *v.* Hamma, 29 Ohio, 467.
Trombly *v.* Ricard, 130 Mass., 259.
Corby *v.* Weddle, 57 Mo., 452.
Detwiler *v.* Bish, 44 Ind., 70.
Baldwin *v.* Bricker, 86 Ind., 221.
Hewett *v.* Jones, 72 Ill., 208.
Schaper *v.* Schaper, 84 Ill., 603.
Van Brunt *v.* Singley, 85 Ill., 281.
Easterly *v.* Eppelsheimer, 73 Iowa, 260.
Bowers *v.* Thomas, 62 Wis., 480.

[38] 39 Wis., 290.

Mistake as to the parties to a contract.

44. Similarly a mistake as to the identity of a contracting party may avoid the contract, but only where the identity of the person with whom a contract is made is a matter of substantial concern, where there is in contemplation a definite person with whom the contract is intended to be made. It is only in such a case that the personality of a party may be held to be essential to the contract. In most cases, no such person is in contemplation, "and then a mere absence of knowledge caused by complete indifference as to the personality of the other party cannot be considered as mistake." As enacted in the Louisiana Code, "in onerous contracts, such as sale, exchange, loan for interest, letting and hiring, the consideration of the person is by law generally presumed to be an incidental cause, not a motive for a contract," [39] though there are some exceptions to the rule. Sometimes, however, the intention of a contracting party is to create an obligation between himself and another certain person, as for example in case of gifts, and contracts of beneficence, marriage, compromise, agency, partnership, and bailments. In such cases, if that intention fails to take its proper effect, it cannot be allowed to take the different effect of involving him without his consent in a contract with some one else.[40] The reason for the avoidance of the contract in such a case is that a man, in entering into a contract, looks to the credit and character or to the reputation and skill of the person with whom he supposes he is contracting.[41]

The principle has often been recognized in England as well as in the United States.[42] Thus in *Humble* v. *Hunter*,[43] a contract with a person was held not to be with his father, Denman, C. J., observing that "you have a right to the benefit you contemplate from the character, credit and substance of the party with whom you contract." Kerr lays down the rule as follows:[44] "Where the consideration of the person with whom a man thinks he is contracting does not at all enter into the contract, and he would have been equally willing to make the contract with any person whatever as with him with whom he thought he was dealing, a mistake of identity will not prevent the formation of the contract. But when the consideration of the person with whom a man is willing to contract enters as an important element in the contract, as if it be a sale on credit where the solvency

[39] Art. 1836.
[40] Poll. Cont., 449.
[41] Boston Ice Co. v. Potter, 123 Mass., 28.
[42] Mitchell v. Lapage, Holt. N. P., 253; Boulton v. Jones, 2 H. & N., 564.
[43] 12 Ad. & El. N. S., 3101.
[44] Kerr. Frand & M., 485.

of the buyer is the chief motive which influences the assent of the vendor, or where a purchaser buys from one whom he supposes to be his debtor and against whom he would have the right of set off, a mistake as to the person dealt with prevents the contract from coming into existence for want of assent." Besides the person who thus substitutes himself is never present in the mind of the other party, and the latter, therefore, does not consent to a contract with him. Where a man imitated another's signature, and thereby induced persons to supply him with goods under the belief that they were supplying the person whose signature was imitated, it was held that there was no contract with the person so procuring the goods. "Of him," said Lord Cairns in *Cundy* v. *Lindsay*,[45] "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement or contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required."

In the United States, the Civil Code of Louisiana has broadly enacted that "error as to the person, with whom the contract is made, will invalidate it, if the consideration of the person is the principal or only cause of the contract."[46] The French Civil Code similarly provides that it is not a cause of nullity when it *tombe que sur la personne avec laquelle on a intention de contracter, à moins que la considération de cette personne ne soit la cause principale de la convention.*[47] The Italian Civil Code is to the same effect.[48] The Spanish Civil Code likewise provides that the error concerning the person will invalidate the contract only when it has that person for a principal object.[49]

An error concerning a party to a contract is a generally understood to refer to the individuality of that party. In certain systems of law, it is construed more liberally, and held also to include an error concerning the personal quality of a party. Thus in the Louisiana Civil Code,[50] it is enacted that "error as to the quality or character in which the party acts invalidates a contract, when such a quality or character is the principal cause of the agreement: thus, a compromise with one, who is supposed to be the heir of a deceased creditor of the party contracting, is void, if he be not really the heir." So

[45] 3 App. Cas., 465.
[46] Art. 1834.
[47] Art. 1110.
[48] Art. 1110.
[49] Art. 1266.
[50] Art. 1838.

also contracts, which could only be made by persons possessing certain powers, either delegated by contract, given by virtue of any private or public office, or vested by the operation of law, are also void, when there is error as to the character, quality or office under color of which such contract was made. Contracts entered into under forged or void powers or assignments, or with persons without authority assuming to act as public or private officers, are thus governed by that rule.[1]

Similarly Giorgio Giorgi in his work on the Theory of Obligations,[2] after putting forward that view, says, by way of example, that a Tizio who makes a contract with Caio, believing him to be a merchant, or a son of Sempronio, or believing him to be a citizen of Italy while he is a subject of France, commits an error concerning the person. He adds, however, that a mistake concerning the quality of a person usually has a much less importance than a mistake concerning his individuality, as it is difficult that a contract may be concluded with a person in consideration of his personal quality.

Mistake as to the identity of the object of contract.

45. A mistake as to the object of a contract will avoid it in most cases. When the mistake is in regard to the identity of that object, there will be no concurrence of wills, and therefore no consent. Such a mistake was designated by the Romans as *in corpore*, and by the Italians as *ostativa*, and is inconsistent with the existence of the consent which is of the essence of contract. The principle is, however, of quite a general application. To make a valid contract, the minds of the parties must meet, and both must intend to enter into the engagement expressed by the terms of the contract; and the covenants in which the contractors mistake one another's meaning, the one meaning to treat of one thing and the other of another, are null through the want of knowledge, and of their consent to one and the same thing.[3] Such mistake arises generally where the contract is in reference to a thing of a certain designation, and one of the parties thinks he is contracting for one thing that answers the designation, while the other party thinks it is something else which also answers that designation. In the Digest, lib. 18, tit. 4, *De contrahendâ Emptione, leges*, 9, 10, 11, it is laid down as a general rule, that where the parties are not at one as to the subject of the contract there is no agreement, and that this applies where the parties have misapprehended each other as to the *corpus*,

[1] Louis. Civ. Code, Art. 1840. [2] IV., 70.
[3] Domat's Civil Law, S. 234.

as where an absent slave was sold and the buyer thought he was buying Pamphilus and the vendor thought he was selling Stichus, in which case there is no bargain, as there is an error *in corpore*.

It is in accordance with the elementary principles of the English law of contracts also, that "if the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject-matter of the sale, there would be no contract by which the defendant would be bound."[4] Thus in *Raffles* v. *Wichelhaus*,[5] a person agreed to buy a cargo of cotton "to arrive *ex* Peerless from Bombay," and there were two ships of that name, and the buyer meant one and the seller the other; and it was held that there was no contract, and that the buyer was not bound to accept a cargo which, though it came "*ex* Peerless from Bombay," did not come on the vessel of that name which was present to his mind when he made the agreement.

In *Cutts* v. *Gueld*,[6] a sale of a judgment of a certain person was held void on account of a mistake as to the subject-matter of the sale, as what was really intended to be purchased was a tanning company judgment belonging to W in which that person had no interest, and which like all tanning company judgments was well known as of doubtful value and to be sold for only a nominal price. Dwight, C., in delivering the opinion of the court, said: "It is as though A was a bailor of a horse in the constructive possession of B, a bailee, and C made a proposition to B to purchase it as belonging to A, by indicating certain marks upon it which neither the bailor nor bailee remembered. Let it be further assumed that the bailee signed a bill of sale as having a special property in the animal, and that it turned out contrary to the understanding of all parties that the animal, possessing the specified marks, really belonged to B, and that while meaning to aid in the sale of A's horse, and being so supposed by C to act, B had really sold his own. Would that be a sale? Do the minds of the parties meet in such a case?"

Mistake as to the existence of the object of contract.

46. A mistake as to the existence of the object of a contract also avoids the contract, as is evident from the illustrations attached to S. 20 of the Indian Contract Act. There is, however, a full concurrence of wills

[4] Kyle v. Kavanagh, 103 Mass., 356. | [5] 2 H. & C., 906.
[6] 57 N. Y., 229.

in such a case, and therefore no absence of consent. There is no contract, not because of the absence of consent, but because of the non-existence of the object of the contract. In such a case, the parties intend the purchase and sale of a subsisting thing, and imply its existence as the basis of their contract, which, therefore, constitutes the very essence and as if it were, an implied condition of the obligation of their contract. The consequential impossibility of the performance of the contract is deemed to prevent its very creation. Thus in *Strickland* v. *Turner*,[7] the sale of a life annuity was held void, as before the sale, the life had dropped and the annuity come to an end unknown to both the vendor and the purchaser. In *Hitchcock* v. *Giddings*,[8] a remainder in fee expectant on an estate *tail* had been sold, but the sale was held invalid, as before the sale a recovery had been suffered unknown to the parties, chiefly on the ground that a vendor was bound to know that he actually had that which he professed to sell. In *Allen* v. *Hammond*,[9] the parties had entered into a contract in which H who had been prosecuting a certain claim, agreed to pay A, who had been acting as his agent, ten per centum on all sums which he should recover up to eight thousand dollars, and thirty-three per cent. on any sum above that as commission. It was found afterwards that before the contract was entered into, the claim of A had been allowed, and so there remained no occasion for the further services of A and the contract was held to be void as having been "entered into through the mistake of both parties," and if H were held liable to pay A's demand unde rthe contract, "it would be without consideration."

The same principle is held to apply where the subject-matter has not ceased to exist in nature, but to belong to the vendor; because in such a case, so far as the contract is concerned, it may be deemed as non-existent. Thus in *Couturier* v. *Hastie*,[10] a contract for the sale of a cargo of corn was held void, on the ground that such a contract "plainly imported that there was something which was to be sold at the time of the contract and something to be purchased;" whereas the object of the sale had ceased to exist by reason of having been before the contract sold to another person. The result will be the same even if the property sold was not the vendor's for

[7] 7 Exch., 208.
[8] Dan. Rep., 1.
[9] 11 Peters, 63.
[10] 5 H. L. C., 673.

any other reason;[11] as, for instance, if it belonged to the purchaser himself before the sale, though the parties were not aware of the purchaser's right.[12] Thus if A buys an estate of B, to which the latter is supposed to have an unquestionable title, and it turns out upon the investigation of the facts unknown at the time to both parties, that B has no title (as if there be a nearer heir than B, who was supposed to be dead, but is, in fact, living); in such a case equity would relieve the purchaser, and rescind the contract.[13] So also where a party entered into an agreement with another to take a lease of what in fact was his own property, both parties being under a mistake as to their respective rights, the agreement was set aside.[14] In *Ross* v. *Armstrong*,[15] the plaintiff, by her deed, released to the defendant the title to half the lease under the mistaken belief that she had an indefeasible title to the residue, the parties being alike ignorant of the existence of the superior title in a third party; and the deed was set aside, as it was clear that it would not have been executed but for the mistake.

Mistake as to the substance of the object of contract.

47. The invalidating effect of mistake on a contract is not restricted to an error *in corpore*. Even an *error in substantia* or *materia*, which may generally be said to be a mistake concerning some essential quality of the object of the agreement[16], in some cases vitiates the consent and avoids the contract. In case of such a mistake the subject-matter of the agreement is specifically indicated. Both parties mean precisely the same individual thing. There is, in other words, a complete *concensus in corpore*. The juristic act of the agreement is complete, and as such valid and binding. In the great majority of juristic acts, as for example, *traditio*, pledge, *depositum*, *commodatum*, an error *in substantia* is, like any other motive, immaterial, as far as the legal validity of the act is concerned. In certain cases, however, and where there is a bilateral contract, a person who becomes a party to such a contract, under the influence of an excusable error *in substantia*, may impeach the transaction on the ground of that error, in virtue of the *bonâ fides* which governs all such transactions.

---

[11] Broughton *v.* Hutt, 3 De G. & J. 501.
[12] Bingham *v.* Bingham, 1 Ves. Sen., 126.
[13] Story Eq. Jur., 141.
[14] Cooper *v.* Phibbs, 2 E. & Ir. App., 149. Jones *v.* Clifford, 3 Ch. D., 779.,
[15] 25 Tex. Supp., 354.
[16] Sohm's Inst., 136, (Ledlie).

There is a considerable difference of opinion as to what errors may be considered as *in substantia*; the ordinary instances of such mistake referred to by Roman lawyers being those of a gilt or copper vessel for one of solid gold, of vinegar for wine, or of a female slave for a male one. Generalizing the cases in the Roman law of sales, Savigny lays down that "when the difference in quality between the thing bought and that which the purchaser intended to buy is such as to put the one in a different category of merchandise from the other, then the error is fatal to the contract." Labeo, Trebatius, Marcian and some other jurists were inclined to go further in extending the effect of mistake, as, for example, in the case of the sale of old clothes for new; but the high authority of Ulpian was against them, and appears to have finally prevailed, and, according to the conception of consent, here advanced, justly so.

The Civil Codes[17] of France and Italy having declared that a mistake concerning the substance of the object of a contract will make it null, there has been a considerable discussion in those countries as to the exact signification of the word *substance*. In its most restricted sense, it was taken to refer only to the qualities essential *ex natura rei*, as in the cases quoted from the Roman lawyers. Some enlarged the conception of the term, to the essential qualities *ex pacto*, comprehending *l'origine, la forma, la derivazione, purchè apparisca, che fu questa la qualità in vista della quale le parti s'indussero a contrattare.*[18] (o) Larombière Troplong, Accollas considered that the pact should be explicit, and expressly designated the qualities that would be considered as substance. Marcadé, Labroüe and others held that the pact might be tacit. The criterion of a pact is now generally considered as far from adequate. Demolombe considered that the quality would be substantial when it should be described rather with a substantive than with an adjective, alleging, for example, that "being of gold or silver" would be a substantial quality, but "being of good or bad gold" would not be so. Pothier says:[19] "Error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject which the parties have principally in contemplation, and which makes the substance of it. Therefore if, with the intention of buying from you a pair of silver candlesticks, I buy a pair which are only plated, though you

(o) The origin, the form, the derivation, provided it appears that that was the quality in view which induced the party to contract.

[17] S. 1110.

[18] IV. Giorg. Teo. Obl., 60.

[19] I. Evans. Poth. Obl., 12.

have no intention of deceiving me, being in equal error yourself, the agreement will be void, because my error destroys my consent." It will, of course, be otherwise, if the error only affect some accidental quality of the thing which was not in the contemplation of the parties.

The theory in favor at present is that there is no general and absolute criterion, but *tutto dipendere dalle circostanze del fatto, la cui valutazione è rimessa all' arbitrio prudente del giudice;*[20](p) and the alleged price of the thing, the destination given to it by the contract, the condition of the contracting party, and a thousand other circusmtances of fact can often manifest, not less clearly than words, what was the intention of the parties, and open the mind of the judge by convincing him of the co-operation of the substantial error. In this view, *la natura fisica della cosa contrattata; la sua forma, l'origine o la derivazione sua; anche taluna di quelle qualità ordinariamente secondarie, ma eccezionalmente decisive secondo l'intenzione dei contraenti, possono acquistare il carattere giuridico di sostanza della cosa all' effetto di aprire l'adito alla nullitá per vizio di consenso.*[21](q)

Mistake as to substance in English law.

48. In the English law also, a mutual mistake as to the nature or fundamental qualities of the subject-matter, may avoid the contract, if it is such as goes to the whole substance of the agreement, and renders the subject-matter contracted for essentially different in kind from the thing as it actually exists.[22] Thus Sir Frederick Pollock says: "A material error as to the kind, quantity, or quality of a subject-matter which is contracted for by a generic description, may make the agreement void, either because there was never any real consent of the parties to the same thing, or because the thing or state of things to which they consented does not exist or cannot be realized . . . . Sometimes, even when the thing which is the subject-matter of an agreement is specifically ascertained, the agreement may be avoided by material error as to some attribute of the thing. For some attribute which the thing in truth has not may be a material part of the descrip-

(p) All depends on the circumstances of fact, the estimation of which is left to the wise discretion of the judge.

(q) The physical nature of the thing contracted for, its form, origin or derivation, and also any other such qualities as are ordinarily secondary, but exceptionally decisive according to the intention of the contracting parties, can acquire the judicial character of the substance of the thing with the effect of opening the door to nullity on account of a vice of consent.

[20] IV. Giorg. Teo. Obbl., 61.

[21] IV. Giorg. Teo. Obbl., 61.

[22] Clark Cont., 298.

tion by which the thing was contracted for. If this is so, the thing as it really is, namely, without that quality, is not that to which the common intention of the parties was directed, and the agreement is void. An error of this kind will not suffice to make the transaction void, unless it is such that according to the ordinary course of dealing and use of language the difference made by the absence of the quality wrongly supposed to exist amounts to a difference in kind; and the error is also common to both parties."[23]

Kerr also observes that "where there has been some common mistake as to some essential fact, forming an inducement to the contract, whether it be a mistake as to the subject-matter of the contract, or the price, or the terms, that is, where the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the contract is voidable at the election of either of the parties;"[24] but "mistake in matters which are only incidental to and are not of the essence of a transaction, and without, or in the absence of which it is reasonable to infer that the transaction would nevertheless have taken place, goes for nothing."[25]

The practical difficulty in all these cases is to determine whether the mistake or misapprehension is as to the substance of the contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.[26] A good illustration of this difficulty occurred in *Reg* v. *Hehir*,[27] in which the question arose incidentally in regard not to a contract, but to the transfer of possession. In that case, a £10 note had been given under the impression that it was only a £1 note, and Andrews, J., thought that the mistake was one of quality or value of an ordinary chattel which could receive no effect. He was "wholly unable to agree with the proposition that a man cannot take and be in lawful possession of a thing which he does not know the quality or value of, and believes to be of a different quality or value from its real quality or value." Madden, J., on the other hand, treated the mistake as one of identity. In his dissentient judgment, he said: "The chattel transferred had no intrinsic value. What is present in the mind on the delivery of a bank note is not the paper, *per se*,

[23] Poll. Cont., 462, 465.
[24] Kerr Fraud & M., 523.
[25] Kerr Fraud & M., 478.
[26] Kennedy *v.* Panama Mail Co., 2 Q. B., 587.
[27] (1895) 2 I. R., 709.

but the money which it represents, and into which it is convertible. It would take some argument to persuade me that one sovereign is the same identical thing *in rerum naturâ* as a pile of ten sovereigns, and I think the notes by which they are represented are essentially different also. The case would appear plainer if exchange were carried on here, as in some countries, by means of shells, or precious stones, each essentially different in nature as well as in conventional value, and if one of these stones had been mistaken for another. But looking at the substance and reality of the transaction as present to the minds of both parties, I think mistake between a £10 note and a £1 note is one of precisely the same character. . . . . A consent given, a contract entered into, or an act done, under, and in consequence of such a mistake (as to the identity of a thing) can have no legal consequences whatever." The decision of the case turned on quite another point; and neither view appears to have been right, and the mistake was apparently one of substance.

In *Thornton* v. *Kempster*,[28] a broker employed both by seller and buyer, negotiated the sale of hemp, but by mistake delivered to the defendant a sale-note describing the hemp sold as 'Riga Rhine,' and in that given to the plaintiff as St. Petersburgh clean hemp, and it was held that the difference in the description went to the substance of the contract, and there was no contract. To take an instance of quality, in *Josling* v. *Kingsford*,[29] the sale of oxalic acid was held void even after the use of some of it by the purchaser, as it was, on analysis afterwards, found to be chemically impure. So also in *Azemar* v. *Casella*,[30] the sale was of cotton according to sample which was of long-staple Salem, and the cotton offered for delivery was Western Madras, which was inferior in quality and required for its manufacture machinery different from that used for the former, and it was held that there was a difference in kind, which vitiated the contract.

The same rule is recognized in the United States.(F) In Louisiana, the Civil Code while recognizing that error as to

(F) A different view has sometimes been enunciated. Thus in *Hecht* v. *Batcheller*,[31] Morton, C.J., in delivering the opinion of the Supreme Court of Massachusetts, observed, "It is a general rule that, where parties assume to contract, and there is a mistake as to the existence or identity of the subject-matter, there is no contract, because of the want

[28] 5 Taunt., 786.
[29] 13 C. B., N. S., 447.
[30] 2 C. P. 431.
[31] 147 Mass., 335.

any quality of the object of the contract which is the principal cause of making the contract will invalidate it, makes a distinction between an error as to substance, and as to some substantial quality. It thus enacts, that "there is error as to the substance, when the object is of a totally different nature from that which is intended. Thus, if the object of the stipulation be supposed by one or both the parties to be an ingot of silver, and it really is a mass of some other metal that resembles silver, there is an error bearing on the substance of the object. The error bears on the substantial quality of the object, when such quality is that which gives it its greatest value. A contract relative to a vase supposed to be of gold, is void, if it be only plated with that metal."[32] This distinction is not definite, however, and has not been adopted in practice.

The general rule that a mistake as to the quality of the object of the contract may avoid the contract was the basis of the decision in *Sherwood* v. *Walker*,[33] in which the owners and the purchaser of a blooded cow believed that she was barren, and under that belief it was sold for a small sum; but before delivery it was discovered to be with calf, and therefore worth a large sum for breeding purposes. The majority of the Supreme Court of Michigan held that the mistake or misapprehension of the parties went to the whole substance of the sale, and avoided it. Morse J., in delivering the opinion of the majority, observed that "it must be considered as well settled that a party who

of the mutual assent necessary to create one; so that, in the case of a contract for the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or if he receives it, may, upon discovery of the mistake, return it, and recover back the price he has paid. But to produce this result, the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold. [34]" The observation in its general form was *ultra vires*, however, as the question in the case was only in regard to the sale of a promissory note, the makers of which were found by the parties soon after the sale to have made an assignment for the benefit of their creditors, and the court said, that that "did not extinguish the note, or destroy its identity. It remained an existing note, capable of being enforced, with every essential attribute going to its nature as a note which it had before. Its quality and value were impaired, but not its identity. The parties bought and sold what they intended, and their mistake was not as to the subject-matter of the sale, but as to its quality." The decision was therefore only as to the quality of the note affected not being such, that a mistake in regard to it could affect the validity of the sale. Most people would have considered that the mistake was really not as to any quality of the note, but as to the motives for the sale of it. At all events, the case is not an authority for the broad proposition laid down by the judge who delivered the opinion of the Court.

[32] Art. 1843, 1844 and 1845.
[33] 66 Mich., 568.
[34] Spurr *v.* Benedict, 99 Mass., 463; Bridgewater Iron Co. *v.* Enterprise Ins. Co., 134 Mass., 433.

has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded or the contract made upon the mistake of a material fact; such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual.[35] If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding." Referring to the facts of the particular case before him, he added: "It is true, she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not, in fact, the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow; and if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration; and it must be considered that there was no contract to sell, or sale of, the cow as she actually was."[36] Sherwood, J., alone dissented, and said that "there was no mistake of any such material fact by either of the parties in the case as would license the vendors to rescind. There was no difference between the parties, nor misapprehension as to the substance of the thing bargained for, which was a cow supposed to be barren by one party, and believed not to be by the other. As to the quality of the animal subsequently developed, both parties were equally ignorant, and as

[35] Harvey *v.* Harris, 112 Mass., 32; Byers *v.* Chapin, 28 Ohio, 300; Gibson *v.* Pelkie, 37 Mich., 380.

[36] *Vide* also Irwin *v.* Wilson, 45 Ohio, 426; Bluestone Coal Co. *v.* Bell; 18 S.E. Rep., (W. Va.,) 493 Thowing *v.* Lumber Co., 40 Minn., 184; Fritzler *v.* Robinson, 70 Iowa, 500.

to this each party took his chances. He agreed with the majority of the court that the right to rescind occurs whenever the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive of the parties in making the contract, yet it will remain binding."

On the other hand, it has been rightly held that shares in a company professing to have a certain valid contract with a Government are not to be considered different in their substance, if that contract does not turn out to be valid. This was held in *Kennedy* v. *Panama Mail Co.*,[37] on the ground that "there was a misapprehension as to that which was a material part of the motive inducing the applicant to ask for the shares, but not preventing the shares from being in substance those he applied for."

Mistake as to the quantity of object of contract.

49. The same considerations apply to a mistake of quantity. If, for instance, one of the parties intends to sell a certain quantity of an article, and the other intends to buy a different quantity, there is no contract as the acceptance in such a case varies from the terms of the offer.[38] Thus in *Henkel* v. *Pape*,[39] through a mistake of the Telegraph Office, the defendant was apprised that the plaintiff's offer was for fifty rifles, while it was really for three only; and on that account it was held that there was no contract for the purchase of fifty rifles. In *Jenks* v. *Fritz*[40] the mistake was as to the quantity of the land sold, and the sale was avoided, as the land had been sold by the acre, and the quantity therefore constituted a material ingredient in the contract.

Mistake as to the motives for the contract.

50. A mistake as to the object of a contract, or as to the quantity, quality or price of that object, is not to be confounded with a mistake as to the motives for the contract. Motives often determine the consent of one or both of the parties, and thus have an important influence on the formation of the contract, but they are not a part of the contract or its object, and a consent to them is not necessary for the existence or the validity of the contract. A mistake as to the motives

[37] 2 Q. B., 589.
[38] Pepper *v.* W. U. Tel. Co., 87 Tenn., 554.
[39] 6 Exch., 7.
[40] 1 Watts & S., 201.

therefore cannot affect the existence of the consent or the contract; nor, as a general rule, is it recognized to affect their adequacy or validity. Thus Kerr in his work on Fraud and Mistake sasy:[41] "When a party is mistaken in his motive for entering into a contract, or in his expectations respecting it, suchmistake does not affect the validity of the contract. If a man purchases a specific article, believing that it will answer a particular purpose to which he intends to put it, and it fails to do so, he is not the less on that account bound to pay for it."

The Indian Legislature appears to have taken the same view. The Explanation attached to s. 20 of the Indian Contract Act thus lays down, that an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact. Correctly speaking, an opinion as to the value of a thing is a matter of fact, but what is meant by the Explanation is, that for the purposes of the law of contracts, such an opinion shall not be deemed to be a matter of fact essential to the agreement. The opinion is certainly a motive of the contract, and the party entertaining it would not have entered into the contract if it were not for it, and the Explanation may, therefore, be taken to show that the Indian Legislature considered that a mistake as to the motives of a contract would not affect the contract.

The framers of the Louisiana Civil Code have taken the opposite view, and made the following provisions in the Code relating to the matter:

"(1824.) The reality of the cause is a kind of precedent condition to the contract, without which the consent would not have been given, because the motive beng that which determines the will, if there be no such cause where one was supposed to exist, or if it be falsely represented, there can be no valid consent.

"(1825.) The error in the cause of a contract to have the effect of invalidating it, must be on the principal cause, when there are several; this principal cause is called the *motive*, and means that consideration without which the contract would not have been made.

---

[41] P. 484.

"(1826). No error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it.

"(1827). But wherever the motive is apparent, although not made an express condition, if the error bears on that motive, the contract is void."

This was exactly the view of Puffendorf also, who considered that an error in the motive of a contract would annul the contract, if the party influenced by that motive had communicated the same to the other party, as in that case the parties would be considered as intending to make their agreement depend upon that motive as a kind of condition. He adduced, by way of example, a case in which upon receiving a false account of the death of one of my horses, I buy another, communicating at the same time to the seller the intelligence that I have received: and Puffendorf thought that in this case I might rescind the bargain, provided it had not been executed on either side, subject to indemnifying the seller if he had suffered anything from its non-execution.

Barbeyrac pointed out the inconsistency of that reasoning, for if it was true that we had made our agreement depend upon the truth of the intelligence; as soon as the intelligence proved false, the agreement would be void, *defectu conditionis*, and the seller consequently could have no claim to damages for the non-execution of it. Barbeyrac therefore was of opinion that an error in the motive would not produce any defect in the agreement. Pothier concurred in this view, and said "as in case of legacies, the circumstance of the motive by which the testator declares himself to be influenced being false, does not prevent the legacy being valid; for it is still true that the testator intended such a legacy, and it must not be concluded from what he has said of the motive that induced him to leave it, that he intended the legacy to depend upon the truth of that motive as a condition, unless such intention is otherwise sufficiently indicated: in the same manner, and for much stronger reasons, it should be decided with respect to agreements, that an error in the motive which induces a party to contract, does not affect the agreement and prevent its being valid; because there is much less reason to presume that the parties intended their agreement to depend upon that motive as upon a condition; conditions ought to be interpreted *prout sonant*, and conditions which can only be interposed by the

consent of two parties should be implied with much more difficulty than in case of legacies."[42]

Giorgio Giorgi speaks[43] of it as a trite principle that *l'errore sui motivi non vizia il consenso*,(r) adding, however, *che preso alla lettera ci sembra falso e pericoloso* (s) He argues strongly against the denial to the error concerning motives its proverbial influence on the validity of consent, on the ground that *i motivi del consenso potevano bene spesso trovarsi negli elementi materiali od esterni del contratto*(t); and that the sole reason for which error can vitiate consent is *esso errore cadde sul motivo determinante del contratto.*(u) He says: *La persona e la sostanza guardati materialmente bene sta che siano due elementi contrattuali molto diversi dal consenso; ma se li consideriamo psicologicamente, cioè a dire nell' animo di chi contrae*,(v) *noi vedremo che vi assumono tutti i caratteri di motivi determinanti del contratto: ed è a questa condizione soltanto, che l'errore sulla sostanza o sulle persone può viziare il consenso.* Even he, however, comes to the conclusion, that *dobbiamo ritener vera la massima che l'errore sui motivi non vizia il consenso, purchè s'intenda restrittivamente a quei soli motivi, che non furono la causa determinante del contratto.*(w)

Effect on consent of mistake of law.

51. The above rules and considerations are not deemed to apply in their entirety to an ignorance of law, which in some respects is different from ignorance of facts. It is an obvious principle, that for all practical purposes citizens must be presumed to know the law, and that they cannot be allowed to put forward ignorance of it as an excuse. This presumption of knowledge may often be at variance with the fact, but it is impossible without indulging it, to maintain the order or the institutions of society. The prohibition against the allegation of such ignorance

(r) The error concerning motives does not vitiate consent.

(s) Which taken literally appears to be false and dangerous.

(t) The motives of consent can be found very frequently in the material or external elements of the contract.

(u) That error is concerning the motives determining the contract.

(v) It is very clear that the person and the substance, if looked upon materially are two elements of a contract very different from consent; but if we consider them psychlogically, that is to say, with reference to the mind of him who contracts, we see that they assume all the characters of the motives determining the contract; and it is on this condition alone that the error concerning the substance or concerning the person can vitiate the consent.

(w) We ought to retain as true the maxim that the error concerning motives does not vitiate consent, because it is understood only as restricted to those motives which do not constitute the determining cause of the contract.

[42] I. Evans, Poth. Obl.; 15.

[43] IV. Giorg. Teo. Obbl., 75.

as an excuse rests directly on the ground, that it is impossible otherwise to uphold the goverment of any country. No other principle would be safe and practicable in the common interests of mankind. If ignorance of law were held sufficient to excuse any act or to entitle any person to relief, there is no knowing to what length it would be advanced. From the inherent difficulty of proof in such cases, all administration of justice would be impossible. The rule as to mistake of law is therefore one of public policy and expedience, and such rules ought, no doubt, to be applied generally with tenacity, the common good of the community requiring that they should not be relaxed. On that very ground, however, the rule is not to be extended more than absolutely necessary. It cannot but lead to irremediable hardship and injustice, if parties are to be always bound by acts done in ignorance of their civil rights. In *Moreland* v. *Atchison*,[44] Wheeler, J., observed that the general rule, was justified by considerations of public policy, and yet so harsh a rule founded upon a presumption so arbitrary ought to be modified in its application by every exception which can be admitted without defeating its policy.

This consideration appears to be altogether ignored by the statutory law of India, under which an ignorance or mistake of the law of the country does not excuse the penal character of an act, nor affect the validity of a contract induced by it. The Indian Contract Act[45] lays down broadly as to the law in force in British India, that a contract caused by a mistake of it is not voidable, because so caused ; and it is provided by an illustration that, if "A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation, the contract is not voidable."

This is not the case, however, with a mistake of the law of another country, which is generally deemed a mistake of fact;[46] as the presumption of the knowledge of the laws of one's own country does not apply to foreign law, which has always to be proved like a fact. The Indian Contract Act also provides that a mistake as to a law not in force in British India has the effect as a same mistake of fact.[47] There is an illustration also

[44] 19 Tex., 303.
[45] S. 21, Act IX. of 1872.
[46] Imperial, &c., Ass. of Trieste *v.* Funder, 21 Eng. W. R., 116.
Haven *v.* Foster. 9 Pick., 112.
Norton *v.* Marden, 15 Me., 45.
Bank of Chillicothe *v.* Dodge, 8 Barb., 233.
Lyle v. Shinnebarger, 17 Mo. App ; 66.
S. 6579 Cal. Civ. Code.
S. 890 Dak. Civ. Code.
[47] S., 21, Act IX of 1872.

given of the rule, which provides that if A and B make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France, the contract is voidable.

This distinction between the effect of a mistake of law, and a mistake of fact is in accordance with the general rule of the Roman Law. As observed by Paulus, *Regula est juris quidem ignorantiam cui que nocere, facti vero ignorantiam non nocere.* The Roman Law, however, admitted exceptions to this general rule ; and Paulus added that *minoribus XXV annis ius ignorare permissum est, quod et in feminis in quibusdam causis dicitur.* Soldiers also were included in the exception. Papinian refers to another exception when he says: *juris ignorantia non prodest adquirere volentibus, suum vero petentibus non nocet.*

The rule of the Indian Law, however, is absolute, and applicable alike to all persons and contracts. The rule of the English common law also was the same. At law, it is still considered settled, that a misunderstanding of the law will not vitiate a contract, where there is no misunderstanding of the facts. Kerr even says, that "the rule that mistake in matter of law cannot be admitted as a valid excuse either for doing an act prohibited by the law, or for the omission of a duty which it imposes, is common to all systems of law."[48]

That a mistake or ignorance of law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts appears to be generally recognized in the United States also.[49] The Louisiana Civil Code has enacted,[50] that subject to certain exceptions, and restrictions, error in law, as well as error in fact, invalidates a contract, where such error is its only or principal cause. Among the exceptions from the rule, the Code lays down that a contract, made for the purpose of avoiding litigation, cannot be rescinded for error of law. By way of a restriction of the rule, it is provided, that "although the party may have been ignorant of his right, yet if the contract, made under such error, fulfilled any such natural obligation as might from its nature induce a presumption that it was made in consequence of the obligation, and not from error of right, then such error shall not be alleg-

[48] Kerr. Fraud & M., 466.
[49] Bank of United States v. Daniel, 12 Pet. 56; Upton v. Tribilcock, 1 Otto., 45.
[50] Art. 1846.

ed to avoid the contract. . . . . If a party has an exception, that destroys the natural as well as the perfect obligation, and, through error of law, makes a promise or contract that destroys such exception, he may avail himself of such error; but if the exception destroys only the perfect, but not the natural obligation, error of law shall not avail to restore the exception." The courts of equity have in England, as in the United States, introduced some relaxation of the rule in cases of extreme hardship by restricting its application to those in which the mistake is purely one of law, and reference will be made to it in sequel.

Mistake of law distinguished from mistake of fact.

52. A mistake of law has been defined to be an erroneous conclusion as to the legal effect of known facts.[1] "A mistake of law," as observed by Dixon, C. J., in the opinion of the court in *Hurd* v. *Hall*,[2] "happens when a party, having full knowledge of the facts, comes to an erroneous conclusion as to their legal effect. It is a mistaken opinion or inference, arising from an imperfect or incorrect exercise of the judgment upon facts as they really are." As a general rule, a person is said to be under a mistake of law, when he is truly acquainted with the existence or non-existence of the facts, but is ignorant of their legal consequences.[3] The Louisiana Civil Code has actually enacted, that he is under an error of law, who is truly informed of the existence of facts, but who draws from them erroneous conclusions of law. Thus, in *Good* v. *Herr*,[4] the mistake that induced the contract was in the supposition that children of uncles, deceased at the death of an intestate dying without issue, brother, sister, father or mother, were entitled to a distributive share of the estate of the intestate, and was, therefore, a naked mistake of a principle of law, and not a ground of relief in equity.

The distinction between a mistake of fact, and a mistake of law, was well illustrated in *Trigg* v. *Read*,[5] in which the vendee of certain land entered into an agreement with the vendor for the rescision of a contract of sale upon the vendor's solicitation under the belief that the latter had no title to a moiety of the land, when, in fact, his title had been perfected by the Statute of Limitation, which fact was withheld by him; and the Supreme Court of Tennessee held that the mis-

[1] Anderson Dict.
[2] 12 Wis., 113.
[3] Mowatt *v.* Wright, 1 Wend., 355.
[4] 7 Watt & S., 253.
[5] 5 Humph., 529.

take was one of fact, observing that "if there had been a knowledge of the existence of the facts, and the parties had acted upon the belief, that they constituted no obligatory right either in ignorance that a Court of Chancery would specifically decree the contract against W, or under the belief that the possession was not protected under the Statute of Limitation, it would have been a mistake of law, and not of fact." Where all the facts and the particular of the vendor's title to the land sold were communicated to the purchaser, and he acting upon his lawyer's advice that the vendor had a saleable interest, purchased the land, it was held that the mistake being one of law only, would not avoid the sale.[6] So also, a sale of the county warra nts, showing on their face that under the law at the time they did not constitute a valid charge on the county treasury, was held not to be void, as "having purchased with a knowledge of the facts, and being presumed to know the law applicable to the facts, the plaintiff got precisely what he purchased."[7]

On the other hand, in *Williams* v. *Champion*,[8] the court held that a party having rights under a contract, and disclaiming them under a mistake as to their character, is not concluded by such disclaimer. So also where a husband and wife sold what they supposed was an undivided half interest in a tract of land, the purchaser also supposing he was buying only a half interest, it was held, on ascertaining that the whole belonged to the wife, that the conveyance should be set aside, as it would be grossly unjust to allow the purchaser to retain the whole where he had only paid for a half.[9] In *Martin* v. *McCormick*,[10] the term which was the object of the contract, contrary to the supposition of both parties had no existence; and Johnson, J., in delivering the opinion of the New York Court of Appeals, said: "In all that class of cases, where there is mutual error as to the existence of the subject-matter of the contract, a reversion may be had." Similarly, in *Cochrane* v. *Willis*,[11] there was a contract relating to a life-tenant's right to cut trees, both the parties not being aware, that the tenant, as found afterwards, had died before; and Bruce, L. J., said that "therefore there was substantially an absence of consideration and substantially a mistake, and it would be contrary to all the rules of equity and common law to give effect to such an

[6] Burkhauser *v.* Schmitt, 45 Wis., 314.
[7] Christy *v.* Sullivan, 50 Cal., 337.
[8] 6 Ohio., 169.
[9] Irick *v.* Fulton, 3 Gratt., 193.
[10] 8 N. Y., 331.
[11] 1 Ch. Ap., 58.

agreement, or to hold that a person ought to be bound by it." (G)

A mistake is thus deemed to be of law, only when it does not involve a mistake of any fact. Generally, therefore, it is held that, when the mistake is both of law and fact, it will be deemed to be a mistake of fact, and relief will be granted, even when the latter is the result of the former. This was the basis of the decision in *King* v. *Doolittle*[12], in which the Supreme Court of Tennessee said: "If a contract is entered into in good faith, by which it is mutually understood, that for an adequate consideration, the one party shall part with and, the other acquire a valid title to property, and it turn out that at the time of the contract, by the operation of some settled principle of law, of which they were alike ignorant, the supposed title was wholly valueless, or did not exist in legal contemplation in such case, the mistake is not a mere mistake at law; it nvolves, in some measure, a mistake of fact as well as of law, as the very idea of title comprehends as well matter of fact as of law. . . It is enough that there was a radical defect inherent in the subject-matter of the contract, of which the parties were mutually ignorant. . . The contract therefore was not what either of the parties understood and intended it should be." And this decision was followed in *Griffith* v. *Townley*, [13] in which Sherwood, C. J., in delivering the opinion of the court said: "In that case the mutual mistake arose because of an omission of an essential provision of the charter of a bank, the copy furnished being unintentionally imperfect. Here, the mutual mistake occurred because of the inadvertent insertion of words, of which both parties were ignorant; words in the order of sale at variance with the petition for that order, with the publication, and with the certificate of appraisement. The parties bargained for the fee, and there was, under the administration proceedings, no fee for sale. The subject-matter of their contract had, in legal contemplation, no more existence than if it had been a dwelling already consumed by fire, or a messuage already swept away by a flood." The decision, in this case, proceeded not on the

(G) These last two decisions may be justified on the principle that, when the mistake results in a belief of the existence of the right which forms the object of a contract, and which has no existence really, the contract may, as in the case of a mistake of fact, be held to be void on the ground of the non-existence of the object or of the consideration of the contract. There was no reference, however, made to that principle in those cases, nor in the other cases of mistake of law, to which reference has been made above.

[12] 1 Head, 77.

[13] 69 Mo., 13.

ground that there was a mistake of fact, but that there were such elements of absence of consideration, of reliance on the representations of the agent of the estate, of surprise, mutual mistake and unconscionable advantage, as should in equity and good conscience take the case out of the general rule.

Mistake as to the existence of a title or right.

53. The greatest conflict as to this matter has been in regard to mistakes as to title or right. They have sometimes been considered to be mistakes of law, this view being encouraged by the double sense in Latin of the word *jus*, which signified a right as well as law. Where the facts are known, it has been said that a mistake, as to the title, can be nothing but a mistake of law.[14] The weight of opinion is, however, in favour of the view that such a mistake is one of fact, this view being assisted by equitable considerations that may be urged in support of it.

The leading English case on the point is that of *Cooper* v. *Phibbs*,[15] in which Lord Westbury said: "It is said, *Ignorantia juris haud excusat*; but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But, when the word *jus* is used as denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of a matter of law, but, if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake."

In *Eaglesfield* v. *Marquis of Londonderry*,[16] Jessel, M. R., explaining the distinction between a representation of fact and of law, said: "A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, 'You may, she is a single woman of large fortune.' It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it had not been declared so by any court, and it afterwards turned out they were all mistaken, that the

[14] Jordan v. Stevens, 51 Me., 78.
[15] 2 Eng. and Ir. Ap., 170.
[16] 4 Ch. D., 702.

first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, 'Now, you see, the lady is single,' that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law. There is not a single fact connected with personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that that man was the first-born son after the marriage, or, in some countries, before. Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas. It is not the less a fact because that fact involves some knowledge or relation of law. There is hardly any fact which does not involve it. If you state that a man is in possession of an estate of ten thousand pounds a year, the notion of possession is a legal notion, and involves knowledge of law; nor can any other fact in connection with property be stated which does not involve such knowledge of law. To state that a man is entitled to ten thousand pounds consols involves all sorts of law."

Sir Frederick Pollock, speaking of a fundamental error, affecting not the whole substance of the transaction, but only its legal character, says: "It is apprehended that, on principle, a case of this kind must be treated in the same way as those already considered; that is, if the two parties to a transaction contemplate wholly different legal effects, there is no agreement."

In the United States also a mistake, as to the existence of a right or title, is generally held to be a mistake of fact.[17] Thus in *Blakeman* v. *Blakeman*,[18] the right of way conveyed had become extinguished by the purchase of the servient estate by A, the owner of the dominant estate. There was no ignorance or error as to the external facts, the mistake being solely as to the legal interest, the right of property held by A, and to be affected by the conveyance. This mistake was

[17] Wilson v. Life Ins. Co., 6 Md., 157; Toland v. Corey, 6 Utah, 392; Lovell v. Wall, 12 S. R., 659. Benson v. Markoe, 37 Minn., 30; Griffith v. Sebastian Co., 49 Ark, 24.

[18] 39 Conn., 320.

clearly one to which the term "mistake of law" would be ordinarily applied; and yet the court held it to be essentially a mistake of fact, and dealt with it as such.

In Story's Equity Jurisprudence, it is said, that "where the party acts upon the misapprehension that he has no title at all in thre property, it seems to involve in some measure a mistake of fact; that is, of the fact of ownership, arising from a mistake of law."[19] Dr. Pomeroy says: "A private legal right, title, estate, interest, duty, or liability is always a very complex conception. It necessarily depends so much upon conditions of fact, that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest, or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities may be properly regarded,—as in great measure they really are,—and may be dealt with as mistakes of fact. Courts have constantly felt and acted upon this view, though not always avowedly. . . . . Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights interests estates, duties, liabilities, or other relation, either of property or contract or personal status, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."[20]

Action of courts of equity in regard to mistake of law.

54. The same rules, in regard to a mistake of law, apply to courts of equity also. In *Good* v. *Herr*,[21] the decision proceeded on the principle that, where there should be a mutual mistake of law, without more, it should not be the subject of equitable relief. Relief against mistake is one of ordinary grounds of their jurisdiction, and they have, though rather covertly and indirectly, done a great deal to relax the rigidity and harshness of the rule as to mistakes of law. Their jurisdiction is indeed most frequently exercised in cases in which there is a mistake in the expression of contracts, but the considerations applicable to such mistakes are different from those in regard

[19] S. 122.

[20] 2 Pom. Eq. Jur., 1176, 1178.

[21] 7 Watts & S. 253.

to mistakes in the contract itself. The jurisdiction even when exercised, is usually restricted to the reforming or rectifying of the mistake, when it is of both parties, as "if the court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it as it was written, by mistake, when it exactly expressed the agreement, as understood by the other party, the writing, when so altered, would be just as far from expressing the agreement of the parties as it was before ; and the court would have engaged in the singular office, for a court of equity of doing right to one party at the expense of a precisely equal wrong to the other."[22]

In case of a mistake in the contract itself, courts of equity have used their influence, by treating some sorts of mistake usually known of law as if they were really of fact ; by the adoption of Papinian's restriction as to the non-excuse of the mistake of law; and by treating cases of undue hardship on the one party and undue advantage to the other as an index of fraud. Instances of the first have been mentioned above and will be mentioned below.

As an instance of the application of Papinian's restriction, reference may be made to the case of *Burrow* v. *Scammell*,[23] in which Bacon, V. C., said: "It cannot be disputed that courts of equity have at all times relieved against honest mistakes in contracts, where the literal effect and the specific performance of them would be to impose a burden not contemplated, and which it would be against all reason and justice to fix, upon the person who, without the imputation of fraud, has inadvertently committed an accidental mistake ; and also where not to correct the mistake would be to give an unconscionable advantage to either party. But no case has been referred to, nor, as I believe, can be found, in which the mistaking party has sought for, or could derive, any advantage beyond the mere relief from the burden." In the United States, it has even been enacted in the Louisiana Civil Code, that "error of law can never be alleged as the means of acquiring, though it may be invoked as the means of preventing loss or of recovering what has been given or paid under such error."[24]

As to the third mode of the exercise of equity jurisdiction it is generally the case, where the parties stand in unequal condition or relation. Relief, in such cases, is, strictly

[22] Diman v. Prov. R. Co., 5 R. I., 130. | [23] 19 Ch. D., 182.
[24] S. 1846.

speaking, given on the ground of fraud or undue influence. Thus, in *Champlin* v. *Laytin*, McCoun, V. C., observed, by way of illustration, that "if one is ignorant of a matter of law involved in the transaction, and the other, knowing him to be so, takes advantage of that circumstance to make the contract, there the court will relieve, though perhaps more properly on account of fraud in the one party than of ignorance of law in the other."[25] In *McCormick* v. *Miller*,[26] Mulkey, J., in delivering the opinion of the court, said: "Appellant was deliberately withholding a fact within his knowledge, unknown to the other contracting parties, vitally affecting the proposed contract, which common honesty and fair dealing required him to disclose, and this of itself was such a fraud upon their rights as vitiates the whole transaction." In *Pickering* v. *Pickering*,[27] Lord Langdale set aside certain agreements entered into under a mistake of law, on the ground that the parties were not on equal terms, and that the plaintiff acted under the influence of the defendant. The same was done in *Wheeler* v. *Smith*,[28] because the parties "did not stand on equal ground," and the plaintiff "did not act freely and with a proper understanding of his rights."

In *Jordan* v. *Stevens*,[29] Davis, J., in delivering the opinion of the court, said: "It is believed that, in nearly all such cases, where relief has been granted, in addition to the intrinsic equity in favour of the plaintiff, two facts have been found: 1. that there has been a marked disparity in the position and intelligence of the parties, so that they have not been on equal terms; 2. and that the party obtaining the property persuaded or induced the other to part with it, so that there has been undue influence on the one side, and undue confidence on the other." It appears to be settled that, as a general rule, a mistake of law, unconnected with a mistake of fact, and where there are no indications of fraud, imposition or undue advantage entering into the agreement, will not be corrected by a court of equity.[30] In *Champlin* v. *Laytin*,[31] Bronson, J., observed that there was no case in the English books which affirmed the doctrine that mere mistake in a matter of law, in the absence of all fraud, unfair circumvention, and undue influence, would furnish a sufficient ground for setting aside a contract, or otherwise relieving a party

[25] 6 Paige, 195.
[26] 102 Ill., 208.
[27] 2 Beav., 31.
[28] 9 How., 55.
[29] 51 Me., 78.
[30] Goodenow v. Ewer, 16 Cal., 461; Boggs v. Hargrave, 16 Cal., 559.
[31] 18 Wend., 407.

from the legal consequences of his acts. Dr. Bishop, after observing, that in some cases, "it is said that a mistake of law will, in exceptional circumstances, be permitted to avoid a contract, as, where it evidences fraud, imposition, or improper influence," said: "In all this class of cases, either the mistake was incorrectly termed one of law, or the real ground of relief was the fraud, the undue influence, or the other thing, whatever it may have been[32]".

Mistakes as to legal effect or construction of contracts.

55. An attempt was sometimes made by equity courts to distinguish mistakes due to a misapprehension of the legal effects of a document from those arising from the ignorance of the existence of law, and to give relief in case of the former, treating them as mistakes of fact. The ground generally advanced for this distinction was that every man was presumed to know the public law of the country, and that it was almost impossible to prove a negative "locked up in the bosom of the party chargeable with such knowledge," while, in case of a mistake as to legal rights when misconceived under the law, the facts are susceptible of proof in many instances.[33] Thus, in *Beauchamp* v. *Winn*[34], Lord Chelmsford observed that the ignorance of a matter of law, arising upon the doubtful construction of a grant, was different from the ignorance of a well known rule of law, and that there were "many cases to be found in which equity, upon a mere mistake of the law without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake." This was quoted with approval by Sir R. Collier in delivering the judgment of the Privy Council in *Daniell* v. *Sinclair*[35].

This, however, is the case only in very exceptionable cases, in which a denial of relief will work most unconscionably. In the United States, that view is taken in Georgia, where it is a settled rule that, when there is a difference between the legal effect produced by the words, and the effect intended to be produced by them, the words, with their mistaken effect shall yield, and the true intention shall prevail, and that this relief will be given by courts of equity[36]. In the other States, it appears to be established that an ignorance or mistake of law, by reason of which the parties do not understand the legal effect of their contract, does not avoid it, unless there is a

[32] Bish. Cont., 274 (n).
[33] State v. Paup., 13 Ark., 129.
[34] 6 Eng. and Ir.Ap., 223.
[35] 6 Ap. Cas., 190.
[36] Lucas v. Lucas, 30 Ga., 191; Clayton v. Bussey, 30 Ga., 946.

fraud.[37] Thus in *Hawralty* v. *Warren*[38], it was said that a mistake as to the legal effect of a document, would not be a sufficient ground of relief, unless it was caused by fraud. In *Shotwell* v. *Murray*[39], James Kent, the Chancellor, assumed it as a "settled principle of law and sound policy," that "a person cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts;" the ignorance in the particular case having been as to the effect of a prior judgment on a sale of land in execution of a former judgment held by the same person. In *Storrs* v. *Barker*[40], he again observed that "it would seem to be a wise principle of policy that ignorance of the law, with knowledge of the fact, cannot generally be set up as a defense; and it appears to be settled by a course of equity decisions that ignorance of one's legal right does not take the case out of the rule, when the circumstances would otherwise create an equitable bar to the legal title." A mistake in regard to the construction of a document stands on the same footing and is held to be a mistake of law,[41] unless the language employed is technical, in which case it has been relieved against as if it were of fact[42].

And in *Midland Ry. Co.* v. *Johnson*[43], Lord Chelmsford, after observing that mistake is one of the grounds for equitable interference and relief, said: "Then it must be a mistake not in matters of law, but a mistake of facts. The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be in law."

In *Hunt* v. *Rousmanier*, Marshall, C. J., observed[44] that the court were "unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both

[37] Porter *v.* Jeffries, 18 S. E. R. (S. C.), 229; Osborn *v.* Throckmorton, 18 S. E. (Va.) R., 285; Fish *v.* Cleland, 33 Ill., 243; Mellish *v.* Robertson, 25 Vt., 603; Clen *v.* Newcastle, 9 Ind., 488; Dodge *v.* Essex Ins. Co., 12 Gray, 65; Townsend *v.* Cowles, 31 Ala., 428; People *v.* Supervisors, 27 Cal., 655; Wheaton *v.* Wheaton, 2 Conn., 96; Wood *v.* Price, 46 Ill., 439; Goltra *v.* Sonasack, 53 Ill., 458; Martin *v.* Hamlin, 18 Mich., 354.

[38] 18 N. J. Eq., 124.

[39] 1 Johns. Ch., 512.

[40] 6 Johns. Ch., 170.

[41] Oswald *v.* Sproehnle, 16 Ill. Ap., 388; Sibert *v.* McAvoy, 15 Ill., 106; Nelson *v.* Davis, 40 Ind., 366; Oiler *v.* Gard, 23 Ind., 212.

[42] Canedy *v.* Marcy, 13 Gray, 373; McNaughten *v.* Partridge, 11 Ohio, 223; Cooke *v.* Husband, 11 Md., 492; Springs *v.* Harven, 3 Jones Eq., 96.

[43] 6 H. L. Ca., 811

[44] 8 Wheat., 216.

parties, to say that a court of equity is incapable of affording relief." Yet the relief is afforded only in exceptional cases, and when that case came again before the Supreme Court, Washington, J., in delivering the opinion of the court, held the general rule to be that a mistake arising from ignorance of law would not be "a ground for reforming a deed founded on such mistake; and, whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character."[45] After repeating the above observation of Marshall, C. J., he added,[46] that "where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a Court of Equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security, of a different character, to be given, or decree that to be done which the parties supposed would have been effected, by the instrument which was finally agreed upon." This statement of the rule was approved of in *The Bank* v. *Daniel*[47], in which Catron, J., in delivering the opinion of the Supreme Court declared it as well established "that mere mistakes of law are not remediable."

Mistake of a well settled principle of law not entitled to special relief.

56. It was held in some early cases that, if a party acting in ignorance of a plain and settled principle of law, should be induced to give up a portion of his indisputable property to another under the name of a compromise, a court of Equity would relieve him from the effect of his mistake, though it might not be able to do so, where there was a doubtful question.[48] Thus in *Beauchamp* v. *Winn*,[49] there was a mistake as to the legal effect of a grant, and Lord Chelmsford observed that, "although when a certain construction has been put by a court of law upon a deed, it must be taken that the legal construction was clear, yet the ignorance, before the decision, of what was the true construction, cannot, in my opinion, be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed." Beach, in his Commen-

---

[45] 1 Peters, 15.
[46] 1 Peters, 17.
[47] 12 Peters 55.
Webb *v.* Alexandria, 33 Gratt., 168.
[48] Naylor *v.* Winch, 1 Sim. & St., 555;
[49] 6 Eng. and Ir. App., 223.

taries on Modern Equity Jurisprudence says,[50] that "it has been said that where the law is confessedly doubtful and about which ignorance may well be supposed to exist, a person acting under a misapprehension of the law will not forfeit any of his legal rights by reason of such mistake." This theory so far as tenable, is so only because "when there is gross ignorance, or a plain and palpable mistake of a plain and familiar principle of law, it may well give rise to a presumption with admixtnre of other and even slight circumstances, that there has been undue influence, imposition, mental imbecility, surprise, or that the confidence of the party has been abused."[1] Similarly, Ligon J., in the opinion of the court in *Dill* v. *Shahan*,[2] speaking of relief given in equity observed, that "the mistake of law against which such relief will be granted must be gross and palpable, and such as would warrant the belief that undue advantage was taken of the party, owing either to his imbecility of mind or the exercise of some improper influence exerted over him by the party with whom he deals, or some other person, with his knowledge, consent, or procurement."

Apart from such presumptions, the theory has been generally disapproved. Thus in Story's Equity Jurisprudence, it is said, "The distinction between cases of mistake of a plain and settled principle of law, and cases of mistake of a principle of law, not plain to persons generally, but which is yet constructively certain, as a foundation of title, is not of itself very intelligible, or, practically speaking, very easy of application, considered as an independent element of decision. In contemplation of law, all its rules and principles are deemed certain, although they have not, as yet, been recognized by public adjudications. This doctrine proceeds upon the theoretical ground, that *id certum est quod certum reddi potest*; and that decisions do not make the law, but only promulgate it. Besides; what are to be deemed plain and settled principles? Are they such as have been long and uniformly establ ished by adjudications only? Or is a single decision sufficient? What degree of clearness constitutes the line of demarcation? If there have been decisions different ways at different times, which is to prevail? If a majority of the profession hold one doctrine, and a minority another, is the rule to be deemed doubtful or is it to be deemed certain? Take the case of the construction of a will. Every person is presumed to know the law; and

[50] I. 42. | [1] Rankin v. Mortimere, 7 Watts, 372. | [2] 25 Ala., 694.

though opinions may differ upon the construction of the will before an adjudication is made; yet, when it is made, it is supposed always to have been certain."[3]

Turley, *J.*, in delivering the opinion of the Court in *Trigg* v. *Read*[4], said:—"These strictures upon the proposition asserted by the English court are, in our opinion, well taken and unanswerable, and they are sustained, as we have seen, by the Supreme Court of the United States. We therefore think the principle, as settled in the United States, to be, that an ignorance of the law, however plain and settled the principles may be, and a consequent mistake as to title founded upon such ignorance, furnishes no ground to rescind agreements or to set aside solemn acts of the parties, when they have been made with a full knowledge of the facts, unless they be tainted by imposition, misrepresentation, undue influence, misplaced confidence, or suspicion. Such is the law when the party acts with a knowledge of the facts constituting his right or title." So also in *Good* v. *Herr*[5], Rogers, *J.*, in delivering the opinion of the Court, observed that it was of no consequence, whether the mistake was of a plain and familiar principle, or the reverse; whether it was a case of heirship, or any other misapprehension of law; and added: "We fully agree with Mr. Justice Story, that the distinction between cases of mistake of a plain and settled principle of law, and cases of mistake of a principle of law not plain to persons generally, but what is yet constructively certain as a foundation of title, is not of itself very intelligible, or, practically speaking, very easy of application, considered as an independent element of decision. In contemplation of law, all its rules and principles are deemed certain, although they have not as yet been recognized by public adjudication . . . . . We grant that, where there is a mistake of a clear, well-established and well-known principle of law, whether common or statute law (for in this respect we can conceive no difference), equity will lay hold of slight circumstances to raise a presumption that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused. But it is obvious that, in such cases, the mistake of itself is not the foundation of relief, but the relief is had on entirely independent grounds, so as not to impinge the general rule. We therefore are of the opinion that in no case is ignorance or mistake of the law, with a full knowledge of the facts, *per se*, a ground for equitable relief."

[3] Sec. 126. | [4] 5 Humph., 529. | [5] 7 Watts and S., 253.

Effect of mistake of law in European countries.

57. The Codes of European countries give a recognition to errors of law greater even than that given by courts of equity in England. The French law makes no distinction between errors of fact and errors of law. The provision in S. 1110 in regard to the nullity or rather the voidability of a contract on the ground of error does not contain any reference to such distinction. There also the question has arisen chiefly in cases in which the mistake of law has led to a mistake in regard to a right which is the object of a contract. Those in favour of the validity of such a contract contend that *chacun étant présumé connaître la loi, on ne peut jamais invoquer cette espèce d'erreur; que les articles 1235, 1356 et 2052, par application de ce principe, ne permettent pas d'invoquer la nullité des actes dans les divers cas prévus par ces articles; qu'il faut en conclure que l'erreur de droit ne saurait jamais être invoquée.*[6] This contention, however, is generally held not to be good, on grounds which Rogron has summed up as follows[7]: *que si l'erreur de droit est telle qu'elle ait été la cause du contrat, cette cause étant fausse doit entraîner la nullité du contrat, aux termes des articles* 1131, 1109 *et* 1110*; que, dans l'espèce, l'erreur intervenue sur la nature et l'étendue d'un droit n'en a pas moins porté sur la substance de la chose, soit que le consentement ait été donné par erreur de droit, soit qu'il l'ait été par erreur de fait; que si, pour repousser la nullité qui résulte dans ce cas des dispositions précitées, on invoque les articles* 1235, 1356 *et* 2052, *il est facile de voir que ces articles consacrent des exceptions résultant de ce que, dans les actes sur lesquels disposent ces articles, l'engagement, même dans le cas d'erreur de droit, ne manquerait pas de cause, soit à l'égard d'un payement qui ne pourrait être répété, lorsqu'il y avait obligation naturelle d'acquitter la dette, soit à l'égard de la transaction, puisque l'avantage de prévenir ou terminer un procès serait une cause suffisante.*

The Spanish law is the same, and as it does not contain any reference to the distinction between a mistake of fact and a mistake of law, it will evidently be construed in the same way as the corresponding provision of the French law.

The Italian Code expressly provides that *L'errore di diritto produce la nullità del contratto solo quando ne è la causa unica o principale.*[8](y) This rule embodies the very general principle

(y) The error of law produces the nullity of the contract only when it is the sole and principal cause of it.

[6] Rog. Civ. Code, 1021. | [7] Rog. Civ. Code, 1022. | [8] S. 1109.

of natural equity on which error is recognized as a vice of consent, but there appears to be no good reason why this rule is formulated so differently from that as to the mistake of fact, in which the criterion of its influence on the consent to a contract is made to depend on *dagli elementi materiali o esterni dei contratti: dalla sostanza, e dalla persona.*[z] The practical effect of the two rules is the same, as the word *sostanza* has beeno ften held to be *quella qualità del l'oggeto contrattuale, che è stato il motivo determinante del contratto.*[a] Thus Giorgio Giorgi, in his work on the Theory of Obligations says:[9] *Tenuto fermo questo concetto, la formula "errore sulla sostanza" viene a comprendere tutti quegli errori di fatto, i quali mentre considerandoli psicologicamente sono le cause determinanti del contratto, considerati invece estrinsecamente cadono sull' oggetto del contratto medesimo. Il rimanente capoverso poi dell' articolo* 1110, *parlando dell' errore sulla persona e riducendo l'azione di nullità alla sola ipotesi, in cui la considerazione di essa persona sia stata la causa del contratto, completa il pensiero del legislatore; e dimostra in modo vie più palese l'intendimento di lui. Intendimento, torniamo a ripeterlo, di rendere invalido quel consenso, di cui un errore di fatto fu il motivo, o se così vogliamo dire, la causa determinante.*[b] It has been contended that it is not the Article 1109 that ought to be construed liberally, but the Article 1110 that should receive a restricted signification, and be restricted to the cases in which the mistake of law *oltre ad essere la causa unica o principale del contratto, cada sulla sosstanza o sulla persona.*[c] Giorgio Giorgi, in his work on the Theory of Obligations,[10] says that he would not have scrupled to adopt that view: *se non avessimo creduto che l'articolo* 1110 *resta privo di retto senso giuridico, qualora non s'interpreti con molta larghezza.*[d]

(*z*) The elements material or external of the contract; the substance and the person.

(*a*) That quality of the object of contract which has been the motive determining to the contract.

(*b*) This conception firmly held, the formula *error concerning substance,* comprehends all those errors of fact which, if considered psychologically are the causes determining to the contract, but considered, instead extrinsically concern the object of the contract itself. The remaining paragraph of Article 1110, speaking of the error concerning the person and reducing the action of nullity to the sole hypothesis, in which the consideration of the same person may have been the cause of the contract, completes the idea of the legislator, and shows, in a way much more clearly, his intention,—an intention, we return to repeat, of rendering invalid the consent, of which an error of fact was the motive or, if we wish to say so, the determining cause.

(*c*) Besides being the only or principal cause of the contract, should concern the substance or the person.

(*d*) If he had not believed that Article 1110 would remain deprived of its correct juridical sense, if not interpreted very freely.

---

[9] IV, 74.

[10] IV, 76.

Effect of mistake on transfer of ownership.

58. The above rules apply not only to contracts, in the limited sense of that expression, but, in the main, also to transfers of property, and conveyances in pursuance of them, and to all contracts of that class generally known as executed. They all require the consent of the parties, the concurrence of their wills, like ordinary contracts. The chief additional element to be considered in their case is that of the delivery of the object of the contract, and this delivery does not supply the place or dispense with the necessity of the concurrence of wills. Delivery is, indeed, one of the chief means of derivative acquisition. Among the Romans, corporeal things of whatever kind, *tradi potest et a domino tradita alienatur.* [11] The rule being based, as observed by Gaius in his Institutes, on the principle, *nihil tam conveniens est naturali aequitati, quam voluntatem domini, volentis rem suam in alium transferre, ratam haberi.*

But *traditio* alone could not transfer ownership without a corresponding mental intention which was always considered an essential constituent of it. As observed by Paul, *nunquam nuda traditio transfert dominium, sed ita, si venditio aut aliqua iusta causa præcesserit, propter quam traditio sequeretur.* How broadly the words *iusta causa* were understood, is evident from what Rudolph Sohm observes in his work on the Institutes of Roman Law as to no delivery being a *traditio* in the legal sense, unless it is accompanied by an intention to transfer ownership. This intention to transfer ownership involves a will to give ownership, and a consent to its being taken by the person to whom the *traditio* is made. If there is no such will or consent, mere delivery cannot effect the transfer of ownership.

The real question, therefore, in all such cases, is whether a mistake as to the thing delivered, interferes with, or is a bar to, the existence of the intention or consent, which, coupled with *traditio*, is sufficient to transfer the property in that thing. A mistake of this sort is thus of importance only so far as it makes the delivery otherwise than in pursuance of the concurrence of wills to the transfer of ownership. If the article delivered is different from that as to which the minds of the parties meet, there will be no concurrence as to it, and its deliverey alone will not effect the transfer of its ownership.

---

[11] Jus. Inst. II., i. 40.

59. This rule is applicable in case of transfer of non-specific chattels. Thus in *Gardner* v. *Lane*,[12] there was a contract for the sale of 135 barrels of mackerel No. 1, and of the barrels delivered, and supposed to contain mackerel No. 1, 45 contained mackerel No. 3 and 48 only salt; and property in these barrels delivered by mistake was held not to be transferred to the vendee. Bigelow, C. J., in delivering the opinion of the Supreme Court of Massachusetts, said: "the minds of the parties must meet, and there must be a mutual assent to the transfer of certain specified property, before any change of title to it can be effected . . . . Where parties to a contract of sale agree to sell and purchase a certain kind or description of property not yet ascertained, distinguished, or set apart, and subsequently a delivery is made, by mistake, of articles differing in their nature or quality from those agreed to be sold, no title passes by such delivery. They are not included within the contract of sale; the vendor has not agreed to sell nor the vendee to purchase them. . . . . Delivery of itself can pass no title; it can be effective and operative only when made as incidental to and in pursuance of a previous contract of sale . . . . The delivery of different articles from those embraced in the contract is inoperative, for the reason that there is no agreement for their purchase and sale." The distinction is great, pointed out the Court "between an agreement to sell and deliver a specified article, concerning the quality of which the parties were deceived or mistaken, and an agreement to sell one article and a delivery by mistake of a wholly different article, which did not form the subject-matter of the agreement. In the former the title passes at the election of the vendee; in the latter it does not."

Transfer of ownership in case of non-specific chattels.

The cases, in which it is held that if the article delivered is *bonâ fide* consumed or otherwise disposed of by the person to whom it is delivered, the person delivering it cannot recover back the same, are not inconsistent with this rule. They do not proceed on the principle that there was a transfer of proprietary right in such cases, but on other considerations which do not derogate from the force of that principle. Thus in *Hills* v. *Snell*,[13] a baker, who had ordered flour of A, received by a warehouseman's mistake, the flour of B, which was more valuable, and he was held not liable for the extra value. The decision did not, however, proceed on the ground that the proprietary right in the flour vested in the

[12] 9 Allen, 492. | [13] 104 Mass., 173.

baker; but on the ground that the baker in good faith consumed it, and that delivery by the warehouseman was a sufficient authority in the circumstances for his consuming it as against B. In fact Wells, J., in delivering the opinion of the court, distinctly admitted "that it was so delivered by mistake might have entitled the plaintiffs to reclaim the property from one having it in possession, or to recover its value from one who had disposed of it with knowledge of the mistake."

Transfer of ownership in case of specific articles.

60. The rule has been extended even to the transfer of specific articles. Their delivery also will not effect a transfer of their ownership, when there is a mistake as to them, a mistake either as to their identity, or as to those qualities with reference to which their transfer was consented to. Thus, if a thing is not of that kind or does not answer the description, with reference to which it was sold, the delivery of that thing, even in pursuance of the sale, will not effect a transfer of its ownership. Mr. Clarke, in his work on Contracts, says[14]: "Suppose a person sells another, and the latter believes that he is buying, this bar of gold, this case of champagne, or this barrel of oysters. The bar turns out to be brass, the case to contain sherry, the barrel to contain oatmeal. The parties are honestly mistaken as to the subject-matter of the contract, but their mistake has nothing to do with their respective rights. These depend on the answer to the question: Was the article sold a bar of metal or a bar of gold, a case of wine or a case of champagne, a barrel of provisions or a barrel of oysters? A contract for a bar of gold is not performed by the delivery of a bar of brass. A contract for a bar of metal leaves each party to take his chance as to the quality of the thing contracted to be sold, but this, again, would not be performed by the delivery of a bar of wood painted to look like metal."

The case is still clearer when the mistake is as to the identity of the thing. Thus, a delivery of a sovereign for a shilling, as in the case supposed in the argument and referred to in the decision of the majority of judges in the case of *Reg.* v. *Middleton*,[15] or as in the case of *Reg.* v. *Ashwell*,[16] involved a mistake in regard to the identity of the coin, and was held not sufficient to transfer the property in the sovereign to the receiver of it. In the former case, seven eminent Judges, referring to the case of a person handing to a cabman a sovereign by mistake for

[14] P. 296. | [15] 2 C. C. Res., 38. | [16] 16 Q. B. D., 190.

a shilling, observed, in their decision, that they were "decidedly of opinion that the property in the sovereign would not vest in the cabman." So in *Reg.* v. *Ashwell*, Cave, J., observed that, "as there was a mistake as to the identity of the coin, no property passed." The observation was not material to the final conviction ; but none of the other judges dissented from it, the difference among the judges being as to whether the transfer of the possession of the sovereign took place at the time when Ashwell received it, or when he came to know of its being a sovereign. So also, the delivery by mistake, of a note of £10 for that of £1 was, in the similar case of *Reg.* v. *Hehir*,[17] not deemed to have the effect of transferring the proprietary right in the note. In that case,[304] Johnson and Andrews, JJ., actually observed that the property in the £10 note did not pass to Hehir. In *Chapman* v. *Cole*,[18] a ten-dollar gold piece of Moffat's issue of California coins, and not United States' issue was, by mistake of the giver and receiver, passed as a half-dollar coin; and it was held that there was a transfer only of possession and not of property, and that it could be recovered by the giver from a person to whom the receiver had passed it on without a knowledge of its real value; though, current coin might not be so recoverable, on account of the peculiarity relating to the transfer of ownership in it. Metcalf, J., in delivering the opinion of the court, said: "There was a mistake as to the identity of the subject of the agreement, and, in such case, there is no assent of the parties, and no binding transaction."

The same principle was sometimes applied in other cases, in which there was no mistake in regard to the identity of the thing given. Thus in *Reg.* v. *Middleton*,[19] the sum of £8 odd was given, by a mistake of a Post Office clerk, to Middleton, who was entitled to 10 shillings only. Seven judges, in their joint decision, laid down that the case was undistinguishable from that of a person handing to a cabman a sovereign, by mistake for a shilling, and said : "There was no contract to render it (the sum given) his which required to be rescinded; there was no gift of it to him, for there was no intention to give it to him or to any one. It was simply a handing it over by a pure mistake, and no property passed. As this was money, we cannot test the case by seeing whether an innocent purchaser could have held the property. But

[17] (1895) 2 I. R., 709. | [18] 12 Gray., 141. | [19] 2 C. C. Res., 38.

let us suppose that a purchaser of beans goes to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant, on the ground that he had bought it from one who had the property in the coffee, though subject to be divested? We do not remember any case in which such a point has arisen, but surely there can be no doubt he could not; and that on the principle enunciated by Lord Abinger in *Chanter* v. *Hopkins*,[20] when he says: 'If a man offers to buy peas of another, and he sends him beans, he does not perform his contract, but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him any thing else in their stead, it is a non-performance of it.'" It is submitted, however, that there was, in this case, no mistake as to the identity, or even as to any essential quality of the money given. The clerk intended to give the money that was given. The mistake was as to the amount of money which the clerk considered Middleton entitled to. He had looked at a wrong advice, and, on that account, believed that Middleton was entitled to receive the sum which he therefore intended to give, and which was thus given, to him. The reference in the judges' decision to the case of beans and coffee, and to that of peas and beans referred to by Lord Abinger, was not relevant, as such cases are not of a transfer of a definite specific article, and more like the case of barrels in *Gardner* v. *Lane* than that of the sovereign, to which the judges likened it.

Similarly, in *Wolfstein* v. *People*,[21] a large sum was paid to a person for a smaller one, by a mistake, as to his right to receive the same, and the court said: "It will not do to say that the owner parts with the property voluntarily, and, therefore, there is no unlawful taking. There may be the physical act of the owner handing that which is his to another; but there is absent the intellectual and intelligent assent to the transfer, upon which the consent must necessarily depend." It is clear, however, that there was an intellectual and intelligent assent to the transfer of the sum given, and the assent

[20] 4 M. & W., 404. | [21] 6 Hun., 121.

was given not on account of a mistake in regard to that sum itself, but in regard to the right of its recipient to receive the same ; a mistake which, therefore, was not so much as to the identity of the thing given, but as to the motive for its giving.

Recovery of a thing given under mistake.

61. The question of the transfer of ownership has often arisen in cases in which money or other thing is paid or given by one person to another under a mistake. Roman and French jurists often held that the ownership would be transferred in such cases notwithstanding the mistake. Thus Cujas, in contending that money paid, under a mistake of law, could not be recovered back, as its recovery would be in the nature of a gain, relied on the fact that that could not be called mine, which I had already paid to another ; that it had already become the property of another person, and that, therefore, when I reclaimed it, I was demanding what was not mine, but his. D'Aguesseau who held, that money so paid might be recovered, based the title to recovery on general considerations of equity, and not on the ground of the continued proprietary right of the giver ; observing "who can doubt but that money which is paid immediately becomes, *summo jure*, the property of the person receiving it ?"[22] This is the case, however, only when the mistake is as to the non-essential qualities of the thing given or as to the motives for the giving. And this is the character of the mistake generally in such cases. The mistake may, however, not be such, but in regard to the identity or the essential qualities of the thing ; and there is no sufficient authority for the proposition that the property in the thing given will be transferred, even in the case of such a mistake.

In *Brisbane* v. *Dacres*,[23] the payment was under a mistake as to the right of the Admiral to receive one-third of a certain freight, and the court held that the money paid could not be recovered ; Mansfield, C. J., observing that the maxim *Volenti non fit injuria* applied strongly to the case, and justly so, as the mistake was such as could not affect the validity of consent, or interfere with the transfer of the right of ownership of the money paid. The maxim has been held to apply in other cases also. In some cases, it was, however, held not to apply, but this was only when the mistake was in regard to an error in *corpore* or in *substantia*. Thus, in *Northrop* v. *Graves*,[24]

[22] II. Evans, Poth. Obl., 420.
[23] 5 Taunt., 143.
[24] 19 Conn., 548.

Church, C. J., in delivering the opinion of the court, after referring to the contention based on that maxim, said: "we agree that men should not complain of the consequences of their deliberate and voluntary acts; but we do not agree that acts performed under the influence of essential and controlling mistakes are voluntary, within the meaning of the maxim referred to."

Practical difficulties have arisen in such cases, as the real distinction in regard to the character of the qualities, in respect of which the mistake has been made, is not sufficiently adverted to always. Great importance, on the other hand, is attached as to whether the mistake is one of fact or law, though the nature of the mistake is the same in both these cases. The mind quite as much, and no more, assents to the payment made under a mistake of law, than if it were made under a mistake of fact. The delusion is the same in both cases; in both alike, the mind is influenced by false motives; nor is there any difference in regard to the principles on which the rule of recovery in such cases is based. If there is justice in the payer's demand for recovery, and injustice or unconscientiousness in the payee's withholding of it, in case the payment is made under a mistake of fact, it will be the same when the payment is made under a mistake of law. It is settled, however, that, in the former case, there is a right of recovery, though, to avoid the question of the transfer of title, that right is generally based on the inequity of a person retaining a thing so given to him. Thus, in *Townsend* v. *Crowdy*,[25] the mistake was one of fact on the part of the payer, who, along with the payee, was under an impression that the money paid was due, and, though the payee shared the same impression, yet Byles, J., observed that "that being so, it was manifestly against conscience that the defendant should retain it." So also in *Kelly* v. *Solari*,[26] Parke, B., said: "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it." Parke, B., further observed in this case, that "if the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person

[25] 8 C. B. N. S., 495. | [26] 9 M. & W., 58.

receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it." There will be no mistake in such a case, as "mistake in any proper sense is excluded where there is a conscious doubt accompanied with an alternative intention or authority which is to be appropriated, so to speak, according to the event." [27] Besides, there will be no equitable considerations in such a case to require a refund.

The right of recovery in case of a mistake of fact is quite as fully recognized in the United States also. Thus it has been repeatedly held in Missouri, that where there has been an accounting and settlement between parties on the basis of merchants' book entries, and afterwards an error is discovered in the account of crediting a single item twice or wrongly adding a column of figures, an action at law will lie to recover the balance paid by reason of such mistake. [28] So also an indorser of a note is allowed to recover money paid by him under the mistaken belief that the note had been duly presented for payment. [29]

So absolute is the rule of recovery in a case of a mistake of fact, that it was laid down in *Kelly* v. *Solari*, as well as in other cases, that even negligence would not interfere with the recovery; and if there was an actual mistake at the time of the payment, it would be immaterial in regard to the right of recovery, that the person making the mistake had means of easily avoiding it and finding out the real facts, or even that he had known and only forgotten them. In *Komby* v. *Central National Bank*, [30] Wagner, J., said: "If the money is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying had been in omitting to use due diligence to inquire into the facts. The imputation of negligence would not bar the plaintiff's action." So also in *Lyle* v. *Shinnebarger*, [31] the court said: "whether the money was paid without any fault or negligence of plaintiff, or through his negligence, if it was through a mistake of facts, makes no difference, and does not alter the legal relations of the parties."

It has been held in some cases that a recovery cannot be had where the person paying has access to information which

[27] Poll. & Wr. Poss., 103.
[28] Budd *v.* Eyerman, 10 Mo. App., 437.
Davis *v.* Krum, 12 Mo. App., 279.
Hanson *v.* Jones, 20 Mo. App., 585.
[29] Talbot *v.* National Bank, 129 Mass., 67.
[30] 51 Mo., 375.
[31] 17 Mo. App., 66.

he, by his own laches neglects to acquire;[32] and in *Milnes* v. *Duncan*,[33] Bayley, *J.*, observed, that "if a party pay money under a mistake of the real facts, and no laches is imputable to him, in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money." The weight of authority, however, is clearly against any such limitation, and in favor of the view here advanced, and the mere fact of the mistake having been caused by negligence is not generally considered a bar to recovery,[34] at least where the payee can be put in *statu quo*[35] In *Merchants' National Bank* v. *National Eagle Bank*,[36] Colt, J., observed that "it is well settled by recent decisions that money paid to the holder of a check or draft drawn without funds may be recovered back, if paid by the drawee under a mistake of fact, and though the rule was originally subject to the limitation that it must be shewn that the party seeking to recover back had been guilty of no negligence, it is now held that the plaintiff in such cases is not precluded from recovery by laches in not availing himself of the means of knowledge in his power."

And in *Lewellen* v. *Garrett*,[37] it was even held that if a party once had a knowledge of the real fact, but at the time of the transaction it slipped from his mind, and the matter was consummated under a mistake, he could recover back. The decision in *Boylston National Bank* v. *Richardson*[38] is not against this view, as the plaintiff was held not entitled to recover; and though the teller of a bank saw fit to pay a cheque without taking the precaution to inform himself of the state of the account of the drawer whose balance on deposit was not sufficient to meet it, it was held there was nothing in the transaction which bore the character of a mistake of fact, in a legal sense, but only that of laches.

It was further contended in the case of *Kelly* v. *Solari*, that the money could not be recovered, except where it was unconscientious to retain it, and Rolfe, B., thought "that wherever it is paid under a mistake of fact, and the party would

---

[32] Wheeler *v.* Hatheway, 58 Mich., 77.
Buffalo *v.* O'Mally, 61 Wis, 255.
Brummit *v.* McGuire, 107 N.C., 351.

[33] 6 B. & C., 671.

[34] Brown *v.* College Corner, 56 Ind., 110.
Kingston *v.* Bank, 40 N. Y., 391.

[35] Lawrence *v.* American Nat. Bank, 54 N. Y., 432.
Devine *v.* Edwards, 101 Ill., 138.
Koontz *v.* Central Nat. Bank, 51 Mo., 275.
Wilson *v* Barker, 50 Maine, 447.

[36] 101 Mass., 281.

[37] 58 Ind., 442.

[38] 101 Mass, 287.

not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it." The decision did not proceed, however, on that ground, and that view has not been taken in subsequent cases.

Mr. Beach in his recent work on the Modern law of Contracts,[38a] indeed, says that "money paid by mistake of fact cannot be reclaimed when the defendant received it in good faith, in satisfaction of an equitable claim, nor when it was due in honor and conscience."[39] The two cases cited by him, do not appear, however, to support at least the second part of his observation.

The French Civil Code lays down broadly without any mention of law or fact, that *Lorsqu'une personne qui, par erreur, se croyait débitrice, a acquitté une dette, elle a le droit de répétition contre le créancier.*[40] The Italian Civil Code[41] also enacts that *Chi per errore si credeva debitore, quando abbia pagato il debito, ha il diritto della ripetizione contro il creditore.* (e) The Egyptian Civil Code lays down that "he who has received what was not due to him is bound to restore it,"[42] adding an exception which is now recognized even in the English law, that "if the voluntary payment has been made in virtue of a duty, even though a duty not sanctioned by law, restitution is not due."[43] Even the Indian law,[44] which makes so sharp a distinction in other cases between a mistake of fact and a mistake of law, lays down in general terms that "a person to whom money has been paid, or any thing delivered, by mistake, must repay or return it."

In English law the general rule as to the money paid under a mistake of law is no doubt that it is not recoverable. The rule is attempted to be justified only on the ground that such a mistake does not receive any effect,[45] specially on the ground of public policy.[46] It is contended in support of it,

(e) Who by mistake believing himself to be a debtor, pays the debt, has the right of recovering it from the creditor.

[38a] P. 798.
[39] Moore v. Eddowes, 2 Ad. & E., 133. Farmer v. Arundel, 2 Wm. Bl., 824.
[40] S. 1377.
[41] S. 1146.
[42] S. 206.
[43] S. 207.
[44] S. 72, Act. IX of 1872.
[45] Lowry v. Bourdieu, Doug., 468; Bilbie v. Lumley, 3 East, 469.
[46] Freeman v. Curtis, 51 Me., 140; Deysher v. Triebel, 64 Pa. St., 383; Real Estate Sav. Institution v. Linder, 74 Pa.St., 371; Silliman v. Wing, 7 Hill., 159; Tyler v. Smith, 18 B. Mon., 798; Covington v. Powell, 2 Met., 229; Bacon v. Bacon, 17 Pick. 134.

that great inconvenience would arise if a mistake of law were held sufficient to give a right of recovery. When doubtful questions of law arise, the defendant has an option either to litigate the question or submit to the demand and pay the money, and it is said that it would be most mischievous and unfair if he who has acquiesced in the right by such payment should be at liberty, at any time within the period of limitation, to rip up the matter and recover back the money.

Thus in *Rogers* v. *Ingham*,[47] a claim by one legatee against another for certain money paid to the latter by his consent was held not to lie. James, L. J., said that if relief could be given for mistake in such cases, "it would open a fearful amount of litigation and evil in the cases of distribution of estates, and it would be difficult to say what limit could be placed to this kind of claim, if it could be made after an executor or trustee had distributed the whole estate among the persons supposed to be entitled, every one of them having knowledge of all the facts, and having given a release. The thing has never been done, and it is not a thing which in my opinion is to be encouraged. Where people have a knowledge of all the facts, and take advice, and whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be re-opened by one of the parties saying: 'You have received your money by mistake, I acquiesced in your receipt of it under that mistake, and, therefore, I ask you to give it to me back.'" Mellish, J., further observed that "nothing would be more mischievous than to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might, years afterwards, be recovered, because perhaps some Court of Justice, upon a similar contract, gave to it a different construction from that which the parties had put on it." In *Peter* v. *Lancaster*,[48] Gilchrist, J., observed that "every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the State should furnish him with legal remedies to recover it back." In *Clark* v. *Dutcher*,[49] Sutherland, J. considered "the current or weight of authorities as

[47] 3 Ch. D., 357

[48] 14 N. H., 382.

[49] 9 Cow., 674.

clearly establishing the position, that when money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not." The chief limitation to this rule is that of a mistake of foreign law, which, as observed above in S. 51, is always dealt with as a mistake of fact, and money paid on account of which may always be recovered. "The plaintiffs then stand," said Johnson, J., in *Bank of Chillicothe* v. *Dodge*,[50] "in precisely the same situation as though the money had been paid by them under a mistake as to material facts;" as "when one misunderstands or mistakes a foreign law, it is considered *ignorantia facti excusat*."[1]

In some cases, the refusal to allow recovery is so inequitable, however, that the rule of policy has to give way to some extent to equitable considerations. A recovery is thus allowed even of money paid under a mistake of law, when it is fraudulent and unconscientious for the recipient to retain it; and retention is deemed such when he has not even a moral or natural right to that money. And full effect may be given to the doctrine of public policy underlying that rule without extending it to cases in which it will be inequitable for the receiver of the money to retain it. As observed by Evans in his notes on Pothier's work on Obligations,[2] "the effect of the doctrine is carried sufficiently far for the purposes of public utility, by holding that no man shall exempt himself from a duty, or shelter himself from the consequences of infringing a prohibition imposed by the law, or acquire an advantage in opposition to the legal rights and interests of another, by pretending error or ignorance of the law, without its following as a consequence, that the ignorance of one man under no moral obligation, and intending no gratuitous donation, shall be to another a title of adventitious acquisition." Similarly, Church, C. J., in delivering the opinion of the court in *Northrop* v. *Graves*,[3] said "that a party may not urge his ignorance of the law as an excuse or palliation of a crime, or even of a fault, we may admit; that he may not, by reason of such ignorance or mistake, obtain any right or advantage over another, we may admit; but we do not admit that such

[50] 8 Barb., 233.
[1] Lyle *v.* Shinnebarger, 17 Mo. Ap., 66.
[2] II Evans Poth. Obl., 392.
[3] 19 Conn., 548.

other may obtain or secure an unjust advantage over him by reason of his ignorance or mistake, even of the law."

This was the view taken by the majority of the Roman lawyers in regard to a mistake of law. *Constat id demum condici posse alicui, quod vel non ex justâ causâ ad eum pervenit, vel redit ad non justam causam. Ex his omnibus causis quæ jure non valuerunt, vel non habuerunt effectum, secutâ per errorem solutione, condictioni locus erit.* Dioclesian and Maximilian gave their authority to the opposite view maintained by Cujas and others, in regard to a payment under an error of law, according to which money so paid could not be reclaimed. Pothier also followed that view. Vinnius, Huber and D'Aguesseau, however, took the earlier view, and relying on the Roman maxim *juris error in damnis amittendæ rei fuæ non nocet*, said, who will support Dioclesian and Maximilian; the jurists and the spirit of equity itself, exclaiming, on the other side, "that an error in the law shall not injure those who are seeking their own, or which is the same thing, shall not injure any person in regard to the incurring a loss."[4]

Cujas contended that the object of a person who reclaimed what he had paid was to regain what he had lost, not to avoid losing what belonged to him, that his solicitude then related to gain and not to loss; and that a person mistaking the law was assisted so far as that he should not lose, not so far as that he should be relieved from having lost. As explained above, D'Aguesseau pointed out that the recovery in such cases was allowed not because of any continued proprietary right of the giver in the money paid; as, if so, there could be no recovery even when the payment was under a mistake of fact. In referring to the distinction of Cujas, D'Aguesseau said that it came to this, "that if the error of law appear before the payment, there is a right of retention, so that the error shall not hurt; but if the payment is complete, if the loss has happened, if the object of a person mistaking the law, is not that he may keep what is his own, but that he may recover that which is now become another's, then he comes too late, as he can only complain of having been deceived and circumvented by himself."[5]

The entire argument has been answered at length by D'Aguesseau, who says: "Although it may with some degree of subtilty be said, that a person seeking to recover what he has lost, is catching at a gain, yet in truth he

[4] II Evans Poth. Obl., 417.

[5] II Evans Poth. Obl., 419.

only desires to repair an injury which he suffers; he sues that he may not continue to suffer a loss, not that he may acquire a gain (*ne perdiderit, non ut lucretur*). But what is the difference, if you merely attend to natural equity, between a loss which is future and one which is past; so that a person who is repairing a loss already passed, shall be said to acquire a gain, and one who wards off a loss that has not arrived, shall only be said to avoid a loss? Neither of them acquires anything, neither of them is made any richer; the one endeavours not to lose, the other to be relieved from having lost; the one, whilst the loss is still impending, keeps what he was about to have lost, the other recovers what he has already lost without a cause."

That money paid under a mistake of law can be recovered back, where there was no moral or honorable obligation to pay the same, is not altogether without authority in the English law also. In *Moses* v. *McFerlan*,[6] the leading authority in favor of the view that a person entitled *ex æquo et bono* to recover, may recover; Lord Mansfield said: "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action (*indebitatus assumpsit*) founded in the equity of the plaintiff's case, as if it were upon a contract." But the existence of any right in that person will prevent the creation of any obligation to refund (*H*).

And the principle of that decision though sometimes disapproved, has been often followed in cases in which the payment was made under a mistake of law. Thus, in *Northrop* v. *Graves*,[8] the court approved of the rule laid down in that case, and said: "We do not decide that money paid by a mere mistake in point of law, can be recovered back; as if it had been paid by an infant, by a *feme covert*, or by a person after the statute of limitations has barred an action, or when any other merely legal defence existed against a claim for the money so paid, and which might be honestly retained. But we mean distinctly to assert that, when money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the

(*H*) In *Brisbane* v. *Dacres*,[7] Gibbs, J., said: "I think, on principle, that money which is paid to a man who claims it as his right, with a knowledge of all the facts, cannot be recovered back"; adding that the weight of authorities was in favor of that view, and that the *dicta* that went beyond it, were not supported or called for by the facts of the cases. As observed by Mansfield, C. J., however, there was nothing contrary to *equum et bonum* in the payment in that case.

[6] 2 Burr., 1005. | [7] 5 Taunt., 143. | [8] 19 Conn., 548.

recipient has no right in good conscience to retain, it may be recovered back, in an action of *indebitatus assumpsit*, whether such mistake be one of fact or of law ; and this we insist may be done, both upon the principle of Christian morals and the common law."

In *Culbreath* v. *Culbreath*,[9] Nisbet, J., in delivering the opinion of the court, said : "When money is paid to another, under a mistake as to the payor's legal obligation to pay, and the payee's legal right to receive it, and there is no consideration, moral, or honorary, or benevolent, between the parties, by the ties of natural justice, the payor's right to recover it back is perfect, and the payee's obligation to refund is also perfect—it becomes a debt. It is a case fully within the range of the *ex æquo et bono* rule. This is that case. It falls within none of the exceptions mentioned by Lord Mansfield. It was not paid as a debt due in honor or honesty, as in case of a debt barred by statute—it is not paid as a donation—it was not paid as a debt contracted in violation of public law ; for example, money fairly lost at play. In all such cases it is conscientious for the defendant to keep it. In this case there is no right, or equity, or conscience upon which the defendant can plant himself." The court admitted, however, that "a recovery cannot be had unless it is proven that the plaintiff acted upon a mistake of the law ;" and that the action for recovery "is not maintainable where money is paid through mere ignorance of the law, or in fulfilment of a moral obligation, or on a contract against public law, or on any account which will make it consistent with equity and good conscience for the defendant to retain it." The difference between a mistake and an ignorance is not generally admitted, but there appears to be no doubt that recovery is not allowed in the other cases referred to by the court. Recovery is not allowed, where payment is made to a person on account of a claim of right by him but against which there was a valid legal defence, of which the party making the payment was unaware at the time. Similarly in *Ray* v. *Bank of Kentucky*,[10] it was held that where money was paid under a clear and palpable mistake of either law or fact, essentially bearing upon and affecting the contract, without cause or consideration, and which in law, honor or conscience was not due and payable, it might be recovered back.

[9] 7 Ga., 64.

[10] 3 B. Mon., 510.

Another distinction has recently been made as to the right of recovery in cases in which the mistaken payment was made not in pursuance of an agreeement, but without consideration and as of free gift. Thus it has been held in *Pickslay* v. *Starr*,[11] that one who delivers a Christmas gift in the shape of a cheque to an employee, according to habit formed of previous years, though by mistake, and in forgetfulness of the fact that the employee's salary had been raised, and the amount of the cheque is charged to the employer's account a few days latter without notice to him of that fact for some months, the donor cannot avoid the gift on the ground of mistake. Gray, J., in delivering the opinion of the court, said: "This is not like the case where parties come to some agreement, in the belief that a certain state of facts exists, and money is paid by the one to the other in consequence thereof, and it subsequently appears that there was a mistake with regard to the facts. Money when so paid is deemed to have been received by the one to whom it is paid to the use of the one paying it. The mutual error, which affected the agreement between the parties, requires that they should be remitted to their original rights. In such a case, in equity and in justice, the money does not belong to the party receiving it. . . . . A gift, however, requires no consideration and depends upon no agreement, but upon the voluntary act of the donor only, and is accomplished by a delivery of the subject of the gift. It would be a very harsh rule to lay down, that a party, receiving a gift under the circumstances of the present case might incur, an unknown and unsuspected obligation, if required to return the fund."

Effect of mistake on transfer of rightful possession.

62. The same rules apply to a transfer of a right to possession or of a rightful possession—a possession lawful and valid against all persons including even the person previously entitled to and making a transfer of it. Consent of the parties is as essential to a transfer of such possession as to a transfer of the right of ownership; and the existence and non-existence of consent will, in such a case, have the same effect as in the case of a sale or conveyance. A mistake, if such as to prevent a concurrence of wills in the case of these latter, will prevent the same in case of the former also, and thus avoid the transfer of rightful possession as that of ownership.

[11] 149 N. Y., 432.

Nor is it material whether the mistake is in regard to the nature of the transaction leading to the transfer, or in regard to the transferee or the object transferred.

So far is the rule carried, that, even a transfer of ownership in a thing by its delivery, when unsuccessful, does not effect a transfer of the right of possession of that thing, because, in such a case, there is no consent to the transfer of possession otherwise than as incident to property. The transfer operates as a transfer of all the interest which the parties contemplate and consent to, or of no interest at all. In cases, in which property cannot pass by a transfer, there is no reason why that transfer should pass possession, which is a part and symbol of property, when neither party intended to divorce possession from property. Similarly, Mr. Wright observes that, if a sovereign "was handed to him by some one else who gave him six sovereigns by mistake for five, or the sovereign by mistake for a shilling, or who gave him the sovereign mistaking him for another person, then inasmuch as an essential element of change of possession by delivery—namely consent to the change of possession—is wanting by reason of the mistake, the reception of the possession by a voluntary act is in law a taking and is trespassory, though innocent at first." [12]

Rightful possession distinct from possession.

63. Sir Frederick Pollock, speaking of the cases of such mistake, says,[13] that the receiver "acquires a possession which is provisionally excusable, and becomes either rightful or merely trespassory according to the intent with which he acts on discovering the truth . . . . The possession, being without consent, is of a trespassory nature, but is excusable so long as it is exercised in good faith." So also Gibson, J., in *Reg.* v. *Hehir*,[14] said: "Until discovery, the relation of the taker to the chattel, which he holds without consciousness of its identity, is, against the owner, custody or detention only. So far as he has acted under the mistake, he is protected. This protection extends to his custody of the chattel and to his conduct in parting with the chattel if he has done so. The delivery under mutual mistake of identity does not work an estoppel in the sense that the property must be taken to pass. But the taker is excused in respect of everything attributable to the mistake for which the owner is responsible. While the chattel

[12] Poll. & Wr. Poss., 212.

[13] Poll. & Wr. Poss., 107, 105.

[14] [1895] 2 I. R., 728.

remains in the taker's hands he is under a duty to give it up on demand. His detention of the chattel till discovery is lawful; but it is not necessary for his protection that such physical detention should be enlarged into possession, though, if he had parted with the chattel in ignorance, he would be protected even as to the property, notwithstanding that by reason of the non-existence of contract, the property had not passed to him. It appears to me that the lawfulness of the detention while the mistake as to identity continues does not draw with it as a consequence that upon discovery the taker can lawfully turn detention into possession and appropriate the chattel."

Whatever may be said as to the qualification about the exercise of the possession in good faith, and the inability of the taker even on the discovery of the chattel to turn the so-called detention into possession and to appropriate the chattel, the detention, thus acquired, so long as it lasts, and is not interfered with by the person giving the same, is, from the time of the discovery, a full legal possession. Such legal possession is, however, essentially distinct from rightful possession or right to possession for the transfer of which consent is necessary. In contrast to the right of possessing, or as it is sometimes called *jus possidendi*, legal possession is held to involve a right of possession, *jus possessionis*. For the transfer of this mere legal possession, which is *the possession* for purposes of law, no act or will of the possessor is necessary. Its transfer depends entirely on the act and will of the transferee. It may be taken by a person not only without the knowledge or consent of the party having it, but even against his will. A thief or robber is quite as much in possession of a watch as the person from whom he stole or robbed it, and that from the moment when he acquired actual power over it, and determined to exercise that power for his own sake. Taking even the strictest view of possession, his *corpus* and *animus* alone are sufficient for full possession which receives recognition, and even protection, from law. Thus, in case of a physical loss of it, Roman prætors allowed their interdicts, and modern judges also would allow its recovery, at least, in case of immovable property, without regard to the title or ownership. Such possession forms the basis of *usucapio* and prescription, and even, in case of movable property, its loss may put an end to the vendor's lien or right of stoppage in *transitu*. A person having such possession over a thing may, for the prevention or

compensation of all injury to it, take in his own name all civil and criminal proceedings which the law allows to an owner. Even the owner himself may commit theft of a thing from the person in possession. This is possession in the eye of the law, and it would be strange if it were not.

Possession may be transferred by mere physical delivery.

64. Legal possession may be transferrred not only without any act or will of the person having it, but also by delivery from him. Mere delivery, will, however, effect a transfer of it only in its physical aspect, generally designated as detention or custody. A mere physical act of delivery can transfer the physical control of what is delivered, and for such act no intention or other mental condition is necessary. The contrary is often advanced. Thus Lord Coleridge in *Reg.* v. *Ashwell*,[15] observed: "It seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law any more than in sense a delivery and receipt, unless the giver and receiver intend to give and to receive respectively what is respectively given and received. It is intelligent delivery, as I think, which the law speaks of, not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose, if I say that all acts, to carry legal consequences must be acts of the mind; and to hold the contrary, to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing and did not intend to do—to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn." And the observation was cited with approval by several Judges in *Reg.* v. *Hehir*,[16] in which Gibson further observed[17] that "a delivery by a man in delirium or asleep, or hypnotised, would be void because unaccompanied by intelligent volition." This may be so in regard to the transfer of the right of possession in the thing delivered; but intelligence and consciousness have no effect in the transfer of mere possession. No delivery, howsoever intelligent, can transfer possession, as apart from detention. The *animus*, a union of which with detention, is necessary to constitute possession, is a state of mind exclusively of the transferee.

With detention transferred, it is the *animus* of the transferee alone that is important, and that can make him possessor.

[15] 16 Q. B. D., 224. [16] [1895] II. I. R., 732, 735, 755. [17] P. 727.

For this *animus*, knowledge and consciousness of the thing of which the possession is transferred are necessary, but only on the part of the transferee. Until he is conscious of the thing, and elects to exercise his power of control over it for his own sake, he will not have acquired possession over that thing. As observed by Cave, J., in *Reg.* v. *Ashwell*,[18] a man has not possession of that of the existence of which he is unaware; and if a chattel has, without his knowledge, been placed in his custody, his rights and liabilities, as a possessor of that chattel, do not arise until he is aware of the existence of the chattel, and has assented to the possession of it. In *Cartwright* v. *Green*,[19] and in *Merry* v. *Green*,[20] the hidden contents of the drawer were rightly held not to have been in the possession of the receiver of the bureau till they came to his notice, though, from the moment of the receipt of the bureau, they were in his custody.

The intellectual element constituting *animus* does not consist or admit of delivery, and it is immaterial for the transfer of the possession, whether the transferor retains it after the transfer or not. It is not even necessary that the transferor should, at the time of the delivery, or at any other time, not have a will, or have a will not to exercise his power of control for his own sake. If he had this will before the transfer of the physical control, there would be an abandonment of possession on his part, without a transfer of it to the person to whom that control has been transferred. If he should have this will subsequent to the transfer of the physical control, it would be entirely immaterial unless acquiesced in by the transferee.

The contrary has sometimes been maintained. Thus, in *The Queen.* v. *Hehir*, Holmes, J., drew an argument in favor of the opposite view from the fact that the giving over of a thing to a wife or a servant does not place the recipient necessarily in possession of that thing.[21] He thus said: "A servant who, after having received without any guilty intention a chattel from his master to be employed in the service, or dealt with according to the directions, of the latter, fraudulently converts it to his own use is undoubtedly a trespasser and thief at common law. Once this is admitted, it follows as a necessary inference that to constitute such a giving of possession as excludes from the taking the possibility of trespass and larceny, something more is required than mere

[18] 16 Q. B. D., 201.
[19] 8 Ves., 405.
[20] 7 M. & W., 623.
[21] (1895) 2 I. R., 732.

manual or physical delivery. I cannot conceive in what this 'something more' consists, if it be not the mental intention that accompanies the outward act." This argument is clearly untenable, however. In the case supposed, the possession of a servant falls short of legal possession, because he has not simply received the chattel, but received it "to be employed in the service, or dealt with according to the directions of the master." There is, in such a case, not a mere physical delivery, which is sufficient, when supplemented with the necessary *animus*, for the transfer of legal possession; but a delivery actually coupled with an *animus* on the part of the receiver to exercise the control over the property for another person. A possession such as excludes from the taking the possibility of trespass and larceny will be not possession but rightful possession, and any argument from the requirements of such a possession as to those of a legal possession can hardly be right. The "something more required" to turn the servant's detention into his possession consists, indeed, in a mental intention, but not in the mental intention of the master that must accompany "the outward act," but in the mental intention of the transferee, which he may have, at any time after "the outward act," to exercise the physical control transferred to him by that act, for his own sake, in the substitution of an *animus* to exercise the control over the chattel for oneself instead of that for one's master.

Mistake has no effect on transfer of mere possession.

65. A mistake as to the object delivered, cannot affect the character of the delivery, and, therefore, the transfer of the possession of that object. Whatever the character of the mistake, the possession is transferred all the same. Sir Frederick Pollock broadly observes[22] that, where an act is done under a mistake, the mistake will not prevent the act from having any effect, which it can have by itself, and which it is intended to have by the party doing it. As an illustration of the proposition, he adds that, if A gives money to B as a gift, and B takes it as a loan, B does not thereby become A's debtor, though the money is not the less effectually delivered to B. In support of this view, reference may be made to the circumstance that, when a sovereign is given by mistake for a shilling, the giver cannot claim the return of the sovereign, and can recover only the difference, the nineteen shillings paid in excess.

[22] Poll. Con., 448.

In *The Queen.* v. *Hehir*,[23] one Leech gave to the accused Hehir, along with another note and cash, a £10 note by mistake for £1 note, and Palles, C. B., referring to the effect of the subsequent discovery of mistake by Hehir, said: "I cannot see any difference between the case here and that of a mistake in counting notes, and of a person receiving nine more £1 notes than he or the giver intended. It is quite plain that in the latter case the obligation of the receiver would have been to return nine only of the notes, and I cannot believe that there was any greater obligation upon the prisoner in the present case. For instance, had he offered to return the £10 note upon payment to him of £1, and had Leech refused him that £1, I believe that he might lawfully have retained the £10, at least until he had a reasonable opportunity of changing it, and I further hold that if, under those circumstances, he had changed the note and tendered £9 to Leech, he would have been under no liability, civil or criminal. But if this is so, he must have had the lawful possession antecedent to the discovery of the mistake; and whatever effect discovery may have upon his future acts, it cannot, as it appears to me, change the character of his antecedent possession, and, by relation back, render that antecedent possession, which at one time was his, the possession of Leech."

It was contended in this case, that there could be no transfer of the possession of the note, as there would, in such a case, be no intention to transfer the note given. Apart from the non-necessity of an intention for the transference of possession, it is not correct to deny the existence of the intention in such cases. Thus Johnson, J., in his judgment in the case, said: "If Leech did not intend to give Hehir possession of the two particular bank notes, which he placed in his hand, what did he intend to give him? Admittedly, and by an 'intelligent' act of his own mind, he intended to give Hehir the possession of and also the property in one of the two particular notes: what different intention (does it in any way appear) had he then and there as to the other of these two particular notes, both of which, by the same act, at the same instant of time, he gave and intended to give into Hehir's hand?" So also Andrews, J., in delivering his judgment, said: "If he had known it was a £10 note, doubtless he would not have given it, but, in my opinion, that only shows that his intention arose from a mistake; it does not show that the intention did

[23] (1895) 2 I. R, 758.

not exist. The existence of the intention cannot be got rid of by saying, however truly, that it would not have existed if he had known what at the time he did not know, that it was a £10 note. He in fact openly and visibly handed the actual note in question to the prisoner, knowing that he was handing it to him, and the prisoner in fact took it knowing that he was taking it. In neither case can the fact and knowledge which existed be annihilated by the absence of another fact, *viz.*, the knowledge that it was a £10 note or by the mistaken belief that it was a £1 note."

A similar argument in *Reg.* v. *Middleton*,[24] as to the absence of intention for the transferring of a certain amount of money, was met in a similar way by Bramwell, B. It was contended in the case that there was no intent to part with the property because the post-office clerk never intended to give to Middleton what did not belong to him, and the learned Baron said: "A fallacy is involved in this way of stating the matter. No doubt the clerk did not intend to do an act of the sort described and give to Middleton what did not belong to him, yet he intended to do the act he did. What he did he did not do involuntarily nor accidentally, but on purpose. . . If the reasoning as to not intending to give this money is correct, then, as it is certain that the post-office clerk did not intend to give Middleton 10*s.*, it follows that he intended to give him nothing. That cannot be. In truth, he intended to give him what he gave, because he made the mistake."

Almost every case in support of the theory that a mistake as to a thing prevents the transfer of its ownership is in favor of the view that it does not prevent the transfer of its possession. In *Reg* v. *Hehir*, Palles, C. B., pointed out that the case of *Reg* v. *Middleton* was "a distinct authority that a mistake in the subject-matter of a gift or bailment, sufficient to prevent the passing of the property in the subject-matter, does not necessarily prevent the possession passing where there has been a manual delivery." And in support of this, he relied on the passage in the judgment of the seven Judges likening the case to the delivery of a sovereign by mistake for a shilling, as to which he observed that, even if it were no more than a mere *dictum*, unnecessary to the decision of the case, it would, by reason of the number and position of the Judges who expressed it, be of the very highest

[24] 2 C. C. Res., 55.

authority, but that it was more than that, and appeared to involve "the very *ratio decidendi* upon which, in that case, the conviction was sustained. There were two questions there, :—(1), whether the property in the sovereign passed to the prisoner: (2), the wholly independent question—equally important upon the matter involved—if not, did its possession, as distinct from the property therein, pass? The decision involved the affirmance of two distinct propositions of law, each material to the decision; 1, that the property did not pass; but 2, that the possession did pass; because it is admitted that it is upon this assumption only that the question whether the acceptance of the coin by the cabman could depend upon the existence of the *animus furandi* at the time he took the coin."[25]

The contrary has sometimes been maintained, but evidently on account of a confusion between possession and rightful possession. Thus Sir Frederick Pollock, speaking of a case in which the giver intends to pass possession for a limited purpose, says, "If the receiver, knowing the giver's real intention, intends to obtain the thing in order to convert it to his own use, there is no real consent and no transfer of rightful possession. The intent with which the receiver apprehends the thing is repugnant to that with which the giver puts it in his power; he therefore takes as a trespasser, and may be a thief. As in every case of taking by trespass (*de bonis asportatis*) he acquires possession in law, though a wrongful possession, as distinguished from bare physical detention or custody."[26] It was on account of the forgetfulness of the distinction between the two, that Gibson, J., in *Reg.* v. *Hehir*, observed that, as a general rule, legal possession imported knowledge and consent, and enunciated the following propositions as correct:—"(1) Where delivery takes place under such common error as displaces contract, then, as between owner and taker, the owner cannot be deemed to be dispossessed or the taker possessed, until discovery and election by the latter, the intermediate relation of the taker to the chattel, as against the owner, being excusable detention only. (2) Where delivery takes place in intended performance of a supposed contract to transfer property, if, by reason of common error and absence of mutual assent the property does not pass, the owner's possession, which neither party intended to deal with as detached from property, is not lawfully divested as between the owner and the taker.

[25] (1895) 2 I. R. 753. [26] Poll. & Wr. Poss., 101.

The owner's consent, necessary to legalise possession on transfer, must be an intelligent consent to the transfer of the particular chattel to the particular person." [27] These propositions are correct as regards rightful possession, but have no application in regard to the transfer of mere physical possession.

The confusion between the two is, however, general. In this very case of *Reg.* v. *Hehir*, Andrews, J., took a different view of the guilt of the accused, and considered that even a mistake of the denomination or value of a currency note was not a mistake of substance ; but so far as the question of possession is concerned he also appears to have shared in that confusion, and to have entertained the notion that rightful possession is the only possession in the eye of the law. He thus said that he could not at all agree " that if a man takes into his possession without reservation a chattel openly handed to him, the quality and value of which he does not know, and believes to be different from what they really are, his possession can in any rational sense be said to commence only when at some subsequent time to which no limit is assigned, he becomes aware of its quality and value. In the interval the taker is knowingly in possession of the chattel in fact, and why, if he received it innocently from the owner, is not that a lawful possession ? Unquestionably it is not an unlawful possession, and therefore it must come to this that, though he received it unconditionally and had retained it in his sole custody in the interval he was not in possession of it at all." [28]

Subjective incapacity to contract.

66. Reference has been made in S. 22 to the incapacity to consent arising from the incompetency to understand the act consented to. Reference is not made generally in the law of contracts to such incompetency as a necessary condition of consent, but this may be, because the law of contracts usually discusses only the vices or rather the vitiating causes of consent, which invalidate consent, and not the conditions of the existence of consent, without which there can be no consent. Incompetence to consent, whether arising from infancy, insanity or inebriety, does not invalidate consent, but interferes with its existence, and is, therefore, not discussed in the law of contracts. There are cases, however, in which there may be no natural incapacity to understand an act and therefore to consent to it, but a juridical incapacity legal or judicial, to give consent.

[27] (1895) 2 I. R., 731.

[28] (1895) 2 I. R. 743.

The German Civil Code[29] thus enacts, *Die Willenserklärung eines Geschäftsunfähigen ist nichtig. Nichtig ist auch eine Willenserklärung, die im Zustande der Bewusstlosigkeit oder vorübergehender Störung der Geistesthätigkeit abgegeben wird.*[(a)] And *Geschäftsunfähig* is said to be :—

1. *Wer nicht das siebente Lebensjahr vollendet hat* ;
2. *Wer sich in einem die freie Willensbestimmung ausschliessenden Zustande krankhafter Störung der Geistesthätigkeit befindet, sofern nicht der Zustand seiner Natur nach ein vorübergehender ist* ;
3. *Wer wegen Geisteskrankheit entmündigt ist.* [(b)]

The Spanish Civil Code lays down that unemancipated minors, idiots, lunatics, and the deaf and dumb persons who cannot write, and in certain cases provided for by law, married women are not competent to give consent. According to the letter of the Code[30] consent given by such persons will not be consent, but correctly speaking, the incompetency to consent in these cases should not affect the existence of consent but only its validity, and thus like coercion or fraud constitute only a vice of it.

In most Codes, this juridical incapacity is deemed to have no concern with and to be independent of consent, and is referred directly to the contract resulting from it. The incapacity is spoken of, not as of giving consent but of making a contract. The contract made by persons under such incapacity is held to be void or voidable, not because of the non-existence or non-adequacy of their consent, but because they have been expressly declared by law to be incapable of making a contract. This incapacity is held to arise from various circumstances, which are not the same in any two countries, and due not only to immaturity or unsoundness of intellect, but to political, social, and even professional status of one or both of the parties to a contract. On grounds of public policy, law requires in persons binding themselves by a contract a higher degree of intelligence than that of understanding the nature of the act,

(*a*) The declaration of will of one incapable of business is null. Null is also a declaration of will given in a condition of unconsciousness or temporary derangement of the activity of mind.

(*b*) 1. Who has not completed his seventh year of life :

2. Who is in a condition of diseased derangement of mental activity, excluding the free determination of the will, as far as the condition, according to its nature, is not temporary.

3. Who on account of mental derangement is placed under another's control.

[29] S. 105. | [30] S. 1263.

and does not allow to their consent and agreement the binding effect of a contract, unless they are able to understand not only the act and its nature but also its effects and consequences on their interests.

Not satisfied with the natural incompetency of consent, the law of contracts recognizes what may be called legal minority and insanity as the most prominent forms of the contractual subjective incapacity. To avoid the difficulty of arriving at a decision in each case in regard to the existence or non-existence of sufficient mental intelligence, and feeling certain that, as a general rule, persons become competent to form a rational opinion as to the effect of acts on their interests about the same age, the law of each country recognizes or fixes that age as the age of majority, after attaining to which they may be able to enter into contracts. The certainty thus attained is considered sufficient for all practical purposes.

No such certainty can, however, be attained in regard to insanity. The Indian Law lays down a general criterion in regard to it, by providing that "a person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests."[31] Most systems of law do not consider this criterion sufficiently definite and satisfactory, and require a more certain test of the incapacity; as, for instance, that of a formal interdict by a court, the interdict in such cases being not the cause of the incapacity, but a conclusive evidence of it until it is duly superseded. Any such test will, however, exclude intoxication, which, while a person is deprived of reason on account of it, is generally deemed sufficient to avoid a contract.

Various forms of the natural incompetence of a lighter sort are also recognized by law as personal disqualifications for entering into a contract, but they are too indefinite to be determined by any general rule of law, and their recognition is made to depend on a declaration by the Executive as in India, or on a judicial order as in the case of the *inabilitati* in the Italian Law. These causes of incapacity, both legal and judicial, are in the main, for the protection of individuals, and to be distinguished from those grounds of disqualification which are for the protection of the society. As instances of these latter, reference may be made to alienage or foreign nationality, to the married condition of a female, to the pro-

[31] S. 12, Act IX of 1872.

fession of a barrister-at-law or physician, and to penal condemnation, which all have been and still are recognized in the English Law, to a greater or less extent, and absolutely or subject to certain conditions. Competency of these persons to understand or consent to any act is never denied, and the disqualification to enter into contracts rests on considerations of an utterly different character.

The effect of these two sorts of disqualification is not quite settled, but appears to be different. In the case of the latter, the contract entered into is generally held void. In the case of the former, as a general rule, only the person incompetent can take advantage of his incompetence, and a contract entered into by him will not necessarily be void, but one that may be ratified or avoided by him on the cessation of the incompetence.

The French Civil Code thus enacts: *Les incapables de contracter sont:—les mineurs;—les interdits;—les femmes mariées, dans les cas exprimés par la loi;—et généralement tous ceux à qui la loi a interdit certains contrats*,[32] but that "*le mineur, l'interdit et la femme mariée ne peuvent attaquer, pour cause d'incapacité, leurs engagements, que dans les cas prévus par la loi. Les personnes capables de s'engager ne peuvent opposer l'incapacité du mineur, de l'interdit ou de la femme mariée, avec qui elles ont contracté.*[33] The Italian Civil Code enacts the same, but specifies the *inabilitati* as among the incompetent, and expressly adds that *l'incapacità però derivante da interdizione per causa di pena si può opporre da chiunque vi ha interesse.*[34](f) This last exception is enacted by the Louisiana Civil Code also.[35]

It has been maintained in Italy that the Code has specified only cases of legal incapacity, as *La conclusione di un serio accordo giuridico con persona incapace naturalmente è un caso tanto fuori del mondo, che il legislatore, il quale si occupa soltanto de eo quod plerumque fit, ha creduto meglio di non parlarne, ed ha pretermesso quasi come inutile ogni disposizione in proposito.* (g)[36] Notwithstanding the silence of the Legislature, natural incapacity

(f) However, the incapacity derived from interdiction on account of penality can be opposed by any one who has interest in it.

(g) The conclusion of a serious juridical accord with a person naturally incapable is a case so much outside the world that the legislator who occupies himself only with that which often happens has believed it to be better not to talk of it, and has omitted all dispositions concerning it as useless. Since without the natural capacity of contracting there is no power of consenting, the absence of such capacity is always attended by the radical nullity of the contractual tie, or, to speak otherwise, is opposed to the existence of the obligation.

[32] S. 1124.
[33] S. 1125.
[34] S. S. 1106, 1107.
[35] Art. 1796.
[36] IV Giorg. Teo. Obbl., 6.

disqualifies a person from contracting. *Poichè senza capacità naturale di contrattare non vi ha potenza di consentire, il difetto di tale capacità va sempre congiunto con la nullità radicale del vincolo contrattuale, o, come altrimenti si dice, osta alla sussistenza della obbligazione*, there being left to *ai principii generali della scienza la cura di governare l'incapacità naturale: quella incapacità che senza ministero di legge scritta, ma in virtù dei canoni immutabili e necessarii della equita naturale, deriva dal difetto della potenza di consentire.* (r)

Under the English common law, contracts by infants, [37] and insane and drunken [38] persons were held only voidable and not void. In the case of the latter it appears now to be the rule, that the contract will not even be voidable, unless the insane person "can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about." [39] In regard to the contracts by an infant, distinctions have been made on the ground of their nature or their effect on the minor's interests, a different rule being applied according as they were purely for his benefit or for necessaries, or to his detriment and disadvantage. The Common Law rule has been modified materially by the Infants' Relief Act, 1874, which provides as follows: "All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity enter, except such as now by law are voidable. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

The Indian Contract Act goes still further and enacts that an agreement may be a contract, only if made by the free consent of parties competent to contract; [40] and that no person shall be

(r) To the general principles of science the care of governing natural incapacity, which incapacity without being ministered to by written law, but in virtue of immutable and necessary canons of natural equity arises from the defect of the power of consenting.

[37] Williams v. Moor, 11 M.& W., 265.
[38] Mathews v. Baxter, 8 Exch., 132.
[39] Imperial Loan Co. v. Stone, (1892,) 1 Q. B. 601.
[40] S. 10, Act IX of 1872.

so competent unless he is of sound mind and of the age of majority according to the law to which he is subject, and not disqualified from contracting by any such law.[41] It has been held even under this Act on the analogy of the English law, that a contract entered into by a minor is not necessarily void, and may be enforced by him.[42] The question of the exact effect of incompetence of the parties on the contract does not depend in any way on the analogy of the vice of consent, and need not therefore be discussed in this treatise.

Consent distinguished from free consent in law of torts.

67. In the law of torts, also, it is the free consent of a person that prevents the harm caused to him being a wrong. It does not appear to be explained in any work on the law of torts, when consent is said to be free; but it is observed by Sir Frederick Pollock, that on general principles, it is too obvious to need dwelling upon, that the license obtained by fraud is of no effect. As an illustration of this principle, reference is often made to the case of *Davies* v. *Marshall*,[43] in which the action was for obstructing light from entering the plaintiff's house, for preventing the smoke from being carried off from the plaintiff's chimneys, by raising buildings in the defendant's land above the level of the plaintiff's house, for depriving the plaintiff's house of support by pulling down certain adjoining buildings of the defendant; and the consent to the building which caused these injuries to the plaintiff's house was held not to be a defence, on the ground that it had been given on account of false representations made by the defendant that these injuries would not result from the defendant's act of building, &c. There appears, however, to be nothing in the court's decision to support the view that consent obtained by fraud was treated as not being consent at all. In *Johnson* v. *Girdwood*,[44] consent to a wrong induced by fraud, duress or conspiracy, was said to be no answer to an action upon the wrong by the party so consenting against the party who procured the consent.

Mr. Innes in his work on the principles of the Law of Torts[45] speaks of valid consent, and says that a person is not said to give valid consent to the conduct of another, as it affects him, when he is deceived as to the facts upon the statement

[41] S. 11, Act IX of 1872.
[42] Sashi Bhusan *v.* Jadu Nath, I. L. R. XI Cal., 552; Hanmant *v.* Jayarao, I. L. R. XIII. Bom., 50.
[43] 10 C. B. N. S., 697.
[44] 28 N. Y. Supp., 651.
[45] S. 11.

of which his assent is based. The effect of force or threats on consent is not referred to at all, though it is said that consent will not be valid even when it is unintelligent.[46] It is evident that a consent not valid is not the less a consent, and that fraud is not deemed to affect the existence as distinct from the adequacy of consent, because a consent to the doing of anything unlawful is also held to be invalid, and it is impossible to deny the existence of consent in that case.

In a well considered article on consent in the Madras Law Journal,[47] it is pointed out that "while a want of real consent may in some cases notwithstanding an apparent consent have the effect of rendering an agreement void, such real want of consent will not render a person liable for a tort if he has been induced to act by an apparent consent of the other party;" and that "the reason for this difference is to be found in the fact that while in the law of contracts consent is a source of right, it is a ground for exemption from liability in the law of torts, while the law may justly require stricter proof of real consent in the case of contracts it is satisfied with proof even of apparent consent provided the party acting upon the consent has no reasonable cause for suspecting that the consent is only apparent." There may be no objection to this proposition if the words real and apparent, as applied to consent, are taken to refer only to free and not free, to valid and invalid respectively, that is to denote merely the absence of some qualification necessary to render consent operative in the law of torts. There appears, however, to be no authority in support of that proposition, if those words are held to refer, as they appear to do, to the existence or non-existence of consent itself.

Consent distinguished from free consent in criminal law.

68. The question of the distinction between a consent and a free consent has great importance in the criminal law, and has been most prolific of discussion there. There are *dicta* in favor of the view that a consent not sufficient for the purposes of criminal law is not real consent. Thus in *Reg.* v. *Woodhurst*,[48] Lush, J., in summing up to the jury observed: "Consent means consent of will, and if the child (just above 10 years of age) submitted under the influence of terror, or because she felt herself in the power of the man, her father, there was no real consent." As observed in *Astley* v. *Reynolds*[49] the rule *volenti non fit injuria* is applied only where the party had

[46] S. 10.
[47] V. 114.
[48] 12 Cox. C. C., 443.
[49] 2 Strange, 915.

his freedom of exercising his will. In *Reg.* v. *Dee*,[50] Lawson, J., said that "to constitute consent there must be the free exercise of the will of a conscious agent; and therefore, if the connection be with an idiot incapable of giving consent, or with a woman in a state of unconsciousness, it is rape; in like manner if the consent be extorted by duress or threats of violence it is no consent."

It appears, however, never to have been directly held that consent for its existence as such, requires anything other than concurrence of wills. On the other hand, English jurists in some cases directly treat consent as a simple fact, holding that the consent even of a child to an act which will otherwise be an assault, prevents the act from being indictable. Thus actual consent is often contrasted with legal consent, and held to exist where legal consent could not be given.[1] Bramwell, B., in *Reg.* v. *Middleton*,[2] observed that there was "certainly a difference between the privy taking of property without the knowledge of the owner, or its forcible taking, and its taking with consent by means of a fraud. The latter, perhaps, may properly be made a crime; but it is a different crime from the other taking." The preamble to the statute 33 Hen. 8, c. 1, draws a distinction between goods taken by stealth, and goods "delivered by the owner willingly, on being deceived by false tokens."

Sir James Stephen in his Digest of Criminal Law does not say that only a freely given consent is consent, but merely that for the purpose of Articles 225-230 of the Digest, dealing with the effect of consent on bodily injuries, "the word consent means a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents;" and that "consent is said to be given freely when it is not procured by force, fraud, or threats of whatever nature."[3] On the other hand, speaking of certain acts constituting an assault, he says that the acts must be "without the consent of the person assaulted, or with such consent if it is obtained by fraud."[4] Similarly in speaking of abduction, he says: "If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such person."[5] If consent obtained by fraud were considered

---

[50] 15 Cox. C. C., 579.
[1] Reg. *v.* Read, 1 Den. C. C., 381. Reg. *v.* Webb, 2 Car. & K., 933.
[2] 2 C. C. Res., 54.
[3] Art., 224.
[4] Art., 262.
[5] Art., 279.

by Stephen as no consent, there could be no necessity or occasion for these provisions.

In *Whittaker* v. *State*,[6] Orton, J., in delivering the opinion of the Supreme Court of Wisconsin, said: "When the mind is subjugated as well as the body, so that the power of volition and the mental capacity to either consent or dissent is gone, then the act may be said to be 'against the will,' and so also it may be said to be 'without consent.' But when the mind is left free to exercise the will, and to consent or dissent, then by consent responsibility for the act is incurred. Where there is no such mental capacity, the quality of the act is indifferent; there can be no consent or dissent, and consequently no responsibility. The physical power may be overcome, and the utmost resistance be unavailing; yet the mind may remain free to approve or disapprove, consent or dissent." Livingston's Penal Code, after laying down that "whoever enters a house secretly, or by force, or threats, or fraud, during the night, or in like manner enters a house by day, and conceals himself therein until the night, with the intent in either case of committing a crime, is guilty of the crime of housebreaking," provides that: "the qualifications of secrecy, force, or fraud, as applied to the entry, in the description of this offence, are intended to exclude every kind of entry but one made by the free consent of the occupant, or of one authorized to give such consent for him, fairly obtained and expressly or impliedly given."[7]

This is evident chiefly from the treatment of the offence of rape. Thus the Criminal Code of Canada, the latest code passed after a long practical experience of several other codes, defines rape[8] as "the act of a man having carnal knowledge of a woman without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act." The German Penal Code clearly distinguishes the offence of sexual intercourse with a woman while she does not or cannot consent, from that when she does consent but on account of his fraud. The former is punishable under s. 176, which provides the punishment of penal servitude up to ten years for any person, who—

(1) *Mit Gewalt unzüchtige Handlungen an einer Frauensperson vornimmt oder dieselbe durch Drohung mit gegen-*

[6] 50 Wis., 518. | [7] Arts. 605, 606. | [8] S. 266.

würtiger Gefahr für Leib oder Leben zur Duldung unzüchtiger Handlungen nöthigt oder ;

(2) *Eine in einem willenlosen oder bewusstlosen Zustande befindliche oder eine geisteskranke Frauensperson zum ausserehelichen Beischlafe missbraucht.* (*g*)

On the other hand, connection induced by fraud is punishable only when it falls within s. 179, which provides a maximum punishment of five years for *wer eine Frauensperson zur Gestattung des Beischlafs dadurch verleitet, dass er eine Trauung vorspiegelt, oder einen anderen Irrthum in ihr erregt oder benutzt in welchem sie den Beischlaf für einen ehelichen hielt.* (*h*)

The existence of consent as distinguished from free consent is apparent chiefly in cases in which consent is held to be a sufficient ground for mitigating the penalty of an offence, even though it would not be sufficient, as not being free and intelligent, to justify or excuse an act. Several cases of this sort are mentioned in sequel.

Consent distinguished from free and intelligent consent in the Indian Penal Code.

69. The Indian Legislature also has adopted the same view. The authors of the first draft of the Indian Penal Code, generally used the expressions 'free' and 'intelligent' as qualifications of consent, and defined them separately. The expression 'free consent' was thus defined to mean "consent given to a party who has not obtained that consent by directly or indirectly putting the consenting party in fear of injury."[9] The word intelligent was used by way of a subjective qualification, intelligent consent being defined to mean "a consent given by a person who is not, from youth, mental imbecility, derangement, intoxication or passion, unable to understand the nature and consequences of that to which he gives his consent."[10] The conceptions of fraud or mistake or of a knowledge of the latter by the other party were not referred to as a general qualification of consent ; though they were mentioned in some of the special provisions relating to consent or its absence. H. Seton

(*g*) (1) Commits by force unchaste acts on a female or compels such person to submit to such unchaste acts by threats of immediate danger to life or limb, or

(2) by cohabitation commits an abuse on a female not married (to him) who is in a state of absence of volition or of unconsciousness, or of unsound mind.

(*h*) Who misleads a female to allow cohabitation by pretending a marriage, or by creating or availing himself of any other error on her part under which she considers the cohabitation to be lawful.

[9] S. 30.

[10] S. 31.

questioned whether the word "consent" did not necessarily import the capacity of the party giving it, thus implying that the definition was unnecessary. The Indian Commissioners in their first report (para. 92) observed that they did not think it was so, but at any rate it could do no harm. G. Norton observed [11] that it was arbitrary and inconsistent to attribute to 'intelligent consent' that consent "which may have been given under decepton." The Commissioners did not, however, take that view, and said: "Sir H. Seton, we conceive, would construe the word 'consent,' which he appears to consider sufficient by itself, to include consent given under deception, supposing the party to be capable of consenting at all, or able to understand the nature and consequences of that to which he gives his consent;" but adding that they did "not think it would be proper to consider a consent given under deception as not an intelligent consent."

The expressions free and intelligent were finally omitted, but apparently not on the ground that only a free and intelligent consent was consent, but because it was decided that no other consent should be recognized as such for the purpose of the Indian Penal Code. The Draft of 1856 first adopted the arrangement on which the present S. 90 is modelled, and in fact the very enactment of that section indicates that, as a general rule, apart from the positive dictates of the Code, a consent is real and complete, even though it is given on account of fear or by a lunatic.

The definition of rape in the Indian Penal Code also bears out the same view, because S. 375 expressly enacts that sexual intercourse with a woman is rape even if it is "with her consent, when her consent has been obtained by putting her in fear of death or of hurt." If consent obtained by such a fear were not consent, there could be no necessity for such an enactment, after it had been provided that sexual intercourse with a woman without her consent was rape. In regard to fraud, the same may be argued from the provision as to the false personation of husband in the definition of rape, and from the provisions contained in S.S. 493 and 496 of the Indian Penal Code, which could not be required, if consent obtained by fraud was not consent even for the purposes of that definition.

---

[11] Indian Law Commissioners' First Report, para. 92.

CHAPTER IV.

Expression of Consent.

Necessity of the expression.

70. Having discussed the real intellectual nature of consent, reference must now be made to its physical external aspect, to the mode of its expression; because no operation of the mind can receive legal effect until it receives an expression. It is a general principle that consent consists not only of an internal act, but also of an external declaration. *Se la volontà rimanesse puro fatto psicologico, la sua esistenza non acquisterebbe mai estrinseca certezza, e non darebbe ragione alla legge ed alla scienza del diritto, di occuparsi di un fatto, che rimarrebbe coperto dalle tenebre del segreto. La manifestazione del consenso è dunque necessaria: ed è ciò che nel linguaggio giuridico ne costituisce la forma.*[1](a) Kessler, in his work on Consent,[2] lays great stress on this requirement of consent. He says: "*Die Einwilligung ist eine Willenserklärung, bedarf mithin der aüsserlichen Manifestation durch irgend eine entsprechende Handlung (Wort oder thatsächliches Verhalten).*"(b) After observing that until expressed, consent is really only an idea of consent, he adds: "*So lange der Entschluss sich nicht durch die Handlung geäussert hat, ist eben noch kein Wille da.*(c) In explaining the necessity of the expression, he says:[3] "*Da nun der Mensch auch in der Rechtswelt nie durch blosse Vorstellungen, sondern nur durch Willensacte zu wirken vermag, und da der Unterschied zwischen beiden eben in der Manifestation des Willens durch die Handlung besteht: so ergiebt sich auch für die Einwilligung die Nothwendigkeit der Erklärung.*"(d)

The expression though in agreement, is not identical, with consent.

71. This expression of consent must, to receive legal effect, be in agreement with consent itself. This legal effect presupposes that the consent which is expressed is the actual consent of the person consenting. "A declaration

(a) If the will (consent) remained a pure psychological fact. its existence would never acquire an intrinsic certainty, and would not give any reason to law and the science of right to occupy itself with, a fact that remained hidden under a cloud of secrecy. The manfestation of consent is therefore necessary, and it is that which, in juridical language, is termed the *form*.

(b) Consent is a declaration of will, requiring accordingly the external manifestation through any corresponding act (word or actual conduct).

(c) So long as the determination has not been expressed by an act it is not a will.

(d) Now as men in this world can never work through mere ideas, but only through a voluntary act, and the difference between the two consists in the manifestation of the will by an act, there arises for consent the necessity of expression (or declaration).

[1] III. Giorg. Teo. Obbl., 150. | [2] P. 100. | [3] Kess. Einw., 101.

which demonstrably doesnot answer to the will," as observed by Salkowski in his Institutes of Roman Private Law,[4] "has in law just as little signification as a will that is not declared at all." As "the inward element of the direction of will eludes examination, the legal result is already annexed by the provisions of law to the fact of the declaration, as the outward manifestation of the will; and that which is declared is regarded as having been actually intended, so long as no proof is afforded from external circumstances that free will directed to the substance, or to the legal result of the declaration, has been absent."[5] In *O'Brien* v. *Cunard steamship Co.*,[6] Knowlton, J., in delivering the opinion of the Supreme Court of Massachusetts said: "If the plaintiff's behaviour was such as to indicate consent on her part he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented he could be guided only by her overt acts and the manifestations of her feelings."

The declaration of consent, though necessary for the legal operation of consent, is not identical with it and must be kept essentially distinct therefrom. It is not so much consent as the conscious permission, the absence of which, according to Stephen's terminology, is necessary to constitute rape.[7] In fact, like permission, there may be a declaration of consent even when there is no consent, as there may be consent, which is not declared. The distinction between the consent and its declaration is most marked, when the two are coerced or compelled by actual or threatened violence. When consent is thus coerced, there is no absence of consent, and the person consenting really makes his choice of the act he consents to, on a full recognition of the necessity of consenting to that act, though force or terror may have formed the motive of his choice. "Quite real consent," as observed by Sir Frederick Pollock, "may be brought about by compulsion or fraud."[8] On the other hand, when the declaration is coerced, there is no consent corresponding to it, and if it can receive any legal effect, it may do so only by virtue of the principle of estoppel. The declaration will be false, but the non-existence of consent will sometimes not be practically material, as the person making a declaration is generally estopped from denying its existence, at least as against persons who may have acted on the faith of

---

[4] P. 94 (Whit. Eng. Trans).
[5] Salk. Inst. Rom. L. 90 (Whit. Eng. Trans).
[6] 154 Mass., 27.
[7] Dig. Cr. L., Art. 270.
[8] Poll. Jur., 153.

that declaration.(d) Thus in *Whittaker* v. *State*,[11] Orton, J., in delivering the opinion of the Supreme Court of Wisconsin, observed that "the expression of consent may be compelled or coerced by threatened violence, and yet there be no consent of the mind." Such expression of consent has no legal effect at all, and should be carefully distinguished from real consent forced by fear of death or by duress, which is genuine consent, though legal effect may be denied to it by any particular law.[12]

Consent may be implied.

72. This expression must primarily and usually be by means of language, signs or words calculated *a bella posta* to clearly convey the notion of the concurrence of wills. In such a case, it is called direct, and the consent directly expressed is designated as express. Consent may, however, also be expressed by means of signs or external acts, *i quali non sono destinati (per indole loro) a manifestare la volontà, ma la manifestano accidentalmente, perchè incompatibili con volontà diversa.*[13] (e) It is thus on the principle of contradiction that the efficacy of tacit consent depends; *si argomenta il consenso, perchè il dissenso starebbe in contradizione coi fatti,*[14] (f) *sparisca l' incompatibilità, e di consenso tacito non si potrà più parlare.*[15] (g) This mode of expression is called indirect, and the consent thus expressed as implied or tacit.

The signs and acts generally used in giving the expression are positive. They may assume a negative form also in the shape of silence, which is often significant upon the question of a man's intention. It is a general saying, that intention "is manifested by what he does, and by what he says when doing; and sometimes as significantly by what he omits to do or to say."[16] That silence may be equivalent in some cases to speech is recognized in the Indian Contract Act.[17] The principle relating to the inference of consent from silence

(d) It is of such a false expression of consent, that Mr. Beale, Jr., speaks in his Article on consent in the *Harvard Law Review*[9] when he speaks of a "seeming consent extorted by force or terror," in which "the body is forced to act without a real agreement of the mind." The *Madras Law Journal*[10] in its review of that article evidently takes this observation to refer to consent itself, when observing that even Mr. Beale admits that "consent extorted by force or terror is no real consent," it goes on to argue that consent given under a fundamental error must *a fortiori* not be real consent.

(e) Which are not destined according to their nature to manifest the will, but manifest it accidentally because of their incompatibility with a different will.

(f) Consent is inferred, because dissent would be in contradiction with the facts.

(g) Remove the incompatibility, and you will not be able to talk any more of consent.

[9] VIII., 331.
[10] V. 111.
[11] 50 Wis., 518.
[12] III. Russ. Cr., 225.
[13] III. Giorg. Teo. Obbl., 151.
[14] III. Giorg. Teo. Obbl., 190.
[15] III. Giorg. Teo. Obbl., 192.
[16] De Bonneval *v.* De Bonneval, 1 Curt., 856.
[17] Act IX of 1872, S. 17, Expl.

is of a most general application. The Arabian prophet observing that a virgin must be consulted in everything which concerns herself, said: "if she is silent, it signifies assent;" and Mahomedan jurists of all the schools hold that smiling, laughing, or remaining silent must be construed to imply consent. This is, no doubt, partly as her assent is rather to be presumed in cases in which modesty must be a bar to an express declaration by her of her wish, but the operation of the saying is not restricted to the case of marriage, and extends also to other contracts between adults. Thus, Najim-al-Misri, author of the *Ashabah-van-nazáir*, enumerates thirty-seven cases in which silence is held equivalent to consent, and his renowned commentator Hamavi adds eighteen others to the list.

Qui tacet non utique fatetur, was a maxim of the Roman Law. The canonical law, on the other hand, said: *qui tacet consentire videtur*. Later jurists also are divided between the two opinions, some holding that *de silentio consensum non inferente*, while others go so far as to maintain that *il silenzio potesse equivalere a consenso.*(k) It is argued that *il slienzio offre sempre una prova negativa ed equivoca,*(l) but as observed by Giorgio Giorgi in his work on the Theory of Obligations,[18] this is an error, *il silenzio volontario, oggi come anticamente, non è equivoco, quando sia accompagnato dall' obbligo di rendere manifesto il dissenso.*(m) The correct doctrine of the modern law, however, is *qui tacet, quam loqui pottuit e debuit, consentire videtur*. The word *potuit* is used to indicate that if the silence is not voluntary, but forced, it will be absurd to treat it as an act of will, and therefore to draw any inference from it as to the intention or consent of the person keeping silence. The word *debuit*, on the other hand, denotes that if there is no obligation to speak, the silence will not be incompatible with the *volontà contraria alla presunta adesione.*[19](n)

So strong may be the signification by means of acts sometimes, as even to negative a direct expression to the contrary. Thus a coy girl may consent to her lover's proposal by a "no" uttered so as to denote a modest but real yes. *Non quod dictum, sed*

(k) Silence can be equivalent to consent.
(l) Silence offers always a proof negative and equivocal.
(m) Voluntary silence, to-day as in old times, is not equivocal, when accompanied by the obligation of rendering manifest the dissent.
(n) Will contrary to the presumed agreement.

[18] III., 196.

[19] III. Giorg. Tec. Obbl. 194.

quod factum est, inspicitur is a maxim of law as well as of reason and good sense.[20] In *Croft* v. *Lumley*,[21] money was paid as rent. The person receiving it, took it saying he did so as compensation for use. The majority of the judges consulted by the House of Lords held that he must be deemed to have agreed to receive it as rent. Martin, B., observed that what that person said to the contrary was immaterial.[22] Channell, B., observed that "what he did, not what he said, was the all-important matter."[23] Coleridge, J., said that the "act and the declaration were inconsistent with each other, and when that is the case, the former is to be regarded as binding, and not the latter."[24] It may be observed, however, that this view was not concurred in by the Lords who spoke in the House, the final decision having turned on another point. The view taken by the judges appears to be accepted by text-writers. Thus Leake, in his Digest of the Law of Contracts,[25] says: "In judging of intention from a person's words and conduct, where his acts are inconsistent with his words, the former are, in general, accepted as a more reliable guide to the intention than the latter; and the conduct may in some cases determine the intention even in opposition to the words."

In questions of domicile also, the direct expression is often held to give way to the indication of acts,[26] as "a person's purpose may be more certainly inferred from his acts than from his language."[27] Thus in the case of *in re Steer*,[28] a person had expressly declared his intention of not renouncing "his domicile of origin as an Englishman," and it was contended that there was no case in which an intention had been presumed in opposition to an express declaration; and though the decision proceeded on other grounds, Pollock, C. B., observed that, "his acts show an intention to live and die at Hamburg, and that is not affected by the declaration." In *Drevon* v. *Drevon*,[29] Kindersley, V. C., speaking of a person's declaration to go back to, or remain in, a certain place, observed that there was no doubt that upon the cases, the courts naturally were disposed to give less weight to them than to the acts of the person.

---

[20] Croft v. Lumley, 6 H. L. Cas., 722.
[21] 6 H. L. Cas., 672.
[22] P. 722.
[23] P. 694.
[24] P. 734.
[25] P. 13.
[26] Jac. Dom., 555.
[27] Dicey Dom., 122.
[28] 3 Hur. & N., 594.
[29] 34 L. J., Ch., 129.

Consent may be implied in contracts.

73. Conduct often takes the place of words for the expression of consent in the making of contracts. As observed above, it is only a promise that can become a contract, and it is a general principle that both the proposal and acceptance which are the essence of a promise may either or both be made otherwise than in words, and when so made are said to be implied. In British India this has been expressly enacted by the Legislature.[30] To say that the law implies a contract, is merely to say that the law looks at the evidence, and holds that the parties, by their conduct, have shewn an intention, the one to offer his goods or services, and the other to accept and pay for them; exactly as they might have shewn that intention by words. It is comparatively seldom, and only in the more serious classes of transactions, that the whole of any promise or acceptance is actually expressed; sometimes nothing at all is said: sometimes only the leading terms of the contract are mentioned, and the rest left to be understood from the conduct of the parties and the nature of the transaction.

Thus taking from a tradesman's shop with his cognizance, goods exposed there for sale, implies a consent to pay for them the notified, and in default of notice, a reasonable price, even though a word may not be spoken on either side.[31] Taking possession of property in accordance with a letter offering to sell it implies an acceptance of the offer.[32] So also sending goods in response to an order, implies an acceptance of the offer to buy contained in the order.[33] So if a man takes a place in a stage-carriage, there is involved in the act, a consent on his part to pay the hire for it, and, on the part of the carriage proprietor a consent to carry him in a certain manner and at a certain price. On the same principle, the performance of services requested in an offer by advertisement or otherwise, implies a consent to the acceptance of the offer. Even allowing a person to do a work, except in cases in which gratuitous service may be presumed, implies a consent to pay for the work.

In these cases, a consent to the entire offer is implied. Generally, however, something is written or said, and the contract is so far express, but something more is left to be implied. This is the case most often in mercantile contracts, as "mer-

---

[30] S. 9, Act. IX. of 1872.
[31] Stoudenmire, 81 Ala., 242.
[32] Dent *v.* Steamship Co., 49 N. Y., 390.
[33] Crook *v.* Cowang, 64 N. C., 743; Briggs *v.* Sizer, 30 N. Y., 652.

chants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract."[34]

Consent may be implied in non-contract law.

74. And as in the law of contracts, so consent may be implied in non-contract law. Sir Frederick Pollock, often referring to the maxim *volenti non fit injuria* and to the defence of leave and licence, observes that neither "provides in terms for the state of things in which there is not specific will or assent to suffer something which, if inflicted against the party's will, would be a wrong, but only conduct showing that, for one reason or another, he is content to abide the chance of it."[35] This, however, does not indicate that consent must always be in words, and the learned author immediately goes on to observe that the case of express consent is comparatively rare in our books. As a fact, in the common intercourse of life between friends and neighbours, tacit consent is constantly given and acted on. In the law of wrongful trespass, for instance, a license to enter on land may be inferred from entries made in course of friendly visits extending over a long period of time.[36] So also consent is often presumed from absolute necessity. Thus a mere agreement to sell does not necessarily import a license to enter on the premises;[37] but if a man makes a lease reserving the trees, the law will imply a consent to his entering and shewing them to the purchaser.[38]

Consent may be implied in criminal law.

75. This is admitted by judges as well as legislatures in the criminal law also. Thus in *McQuirk v. State*,[39] Somerville, J., said:—"The consent given by the prosecutrix may have been implied as well as express, and the defendant would be justified in assuming the existence of such consent if the conduct of the prosecutrix towards him at the time of the occurrence was of such a nature as to create in his mind the honest and reasonable belief that she had consented by yielding her will freely to the commission of the act. Any resistance on the woman's part falling short of this measure would be insufficient to overcome the implication of consent." So also Art. 628, of Livingston's Criminal Code for Louisiana,

---

[34] Humfrey *v.* Dale, 7 E. & B., 266.
[35] Poll., Torts, 144.
[36] Martin *v.* Houghton, 45 Barb., 258.
[37] Eggleston *v.* Ry. Co., 35 Barb, 162. Fagan *v.* Scott, 14 Hun., 162.
[38] Harmon *v.* Harmon, 61 Me., 222.
[39] 84 Ala., 435.

expressly provides that in case of offences relating to property, consent is presumed to have been given, whenever the consideration is received, and the property is let, or put in the power of the person to whom by the purport of the contract it appears to be transferred, although such consideration should prove worthless or fraudulent. It is also presumed to have been given whenever credit has been given for the price, however short the time.

In the Indian Penal Code it is expressly provided in regard to most of the cases in which consent may form a justification for the commission of a criminal act, that the consent may be express or implied.[40] The only occasion in which the word consent is used without the qualification of "express or implied" is the last clause of S.87, which is evidently not to be construed without reference to its first clause. In the definition of theft also, it is expressly provided that the consent mentioned in the definition may be express or implied. There is no such mention, however, in the definitions of criminal force, kidnapping and rape ; and it may be argued that though ordinarily the word consent includes implied as well as express consent, yet the mention of consent being "express or implied" in some cases, must be deemed to warrant the inference that in other cases express consent is required. The omission wherever made appears to be made inadvertently, and it does not appear that implied consent will not be deemed to be consent in any section of the Code.

Implied consent distinguished from constructive consent.

76. The expression implied consent is, like implied contract, sometimes applied to cases in which there is no consent, but the existence of consent is presumed as a fact or by law. In the former case, consent would have been given if asked, and the presumption is made on account of the probabilities of human conduct ; and the absence of consent is due only to accidental causes, for instance, to the non-presence on the spot of the person whose consent is in question. In the latter case, there is an utter incapability of valid consent, and no asking would have obtained it ; and consent is not so much presumed to actually exist, as held to apply on account of the beneficial tendency of the act in question. In the former case, consent may thus be designated as presumed, in the latter as constructive.

---

[40] Ss. 87, 88, and 89.

As to the former, Giulio Crivellari speaking of theft in his work on Fundamental conceptions of law, says :[41] *Si discute se possa valere anche il consenso presunto, e si sostiene che in circostanze eccezionali potrà questo consenso valere ad escludere il dolo quando la buona fede del contrettatore proceda da una giusta credulità, specie ove sia ragionata sopra rapporti di particolare amicizia, scompagnata da mistero o violenza, e susseguita dalla restituzione. L'annuenza tacita o presunta del proprietario fa cessare il furto, perchè si suppone che chi prende la roba abbia ragione di credere che il proprietario acconsenta.* (o) Francesco Carrara also after observing broadly that tacit consent excludes *malefizio*, lays down the same qualified rule in regard to the *presunto*.[42]

This sort of consent is recognized expressly in the Indian Penal Code in the illustration (*m*), attached to S. 378 of the Indian Penal Code, which provides that A, being on friendly terms with Z, goes into Z's library in Z's absence and takes away a book without Z's express consent, for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft. There would, of course, be no occasion for any such presumption of consent, if Z were present and could be referred to at once, and the book were taken away without his knowledge, and without reference to him.

In cases where law contemplates consent, as apart from belief of consent, as is usually the case in the law of larceny in England, the legal operation of consent will not be allowed to any legal presumption of consent which may be warranted by the circumstances. This was evidently the basis of the decision in *Com* v. *Butterick*,[43] on the authority of which Mr. Rapalje, in his work on Larceny, says :[44] "While the express consent of the owner of the property to the use of it made by defendant would be a good defence, yet upon trial of one charged with embezzlement of property deposited with him for another purpose, by pledging it as security for his own debt, it is immaterial that the relations between

(o) People discuss if a presumed consent can also hold good, and maintain that in exceptional circumstances this consent can be good enough to exclude *dolus*, when the good faith of the person removing (the thing) proceeds from a just credulity, specially where it may be inferred from the relation of particular friendship, free of (all) mystery or violence, and followed by restitution. The tacit or presumed assent of the proprietor prevents there being theft, because it is supposed that he who takes the thing has reason to believe that the proprietor would consent.

[41] Criv. Concet. Fond., Art. 1671.
[42] Carr. Prog., Art. 2034.
[43] 100 Mass., 1.
[44] P. 533.

the owner and the defendant were such that the latter had a right to presume that the owner would ratify such a use of his property, or that he would have consented to such a use of it if he had been asked at the time, or that at the time he deposited it with defendant he had no objection to such a use of it by him; and questions asked of the owner as a witness, to prove these facts, were properly excluded."

In case of constructive consent, there is no act warranting an inference as to the existence of consent, and in fact, *ex hypothesi*, there can be no consent; and a presumption of consent by law means only that notwithstanding the absence of consent to the act, the law treats the case, as if there were consent to it. Surgical operations in cases of sudden collapse or unconsciousness on account of violent hurt, are sometimes excused on the ground of such consent. In some systems of law, such consent is not recognized at all; but wherever recognized, it must be carefully distinguished from real consent, from which it differs as a quasi-contract differs from a real contract, and designated quasi-consent or constructive consent.[45]

Consent implied from non-resistance.

77. Submission as explained in Sec. II. is not consent. It may, however, be evidence of consent, though, whether it will be sufficient evidence of it in any case, will depend on the circumstances of that case. Speaking of rape, Coleridge, J., observed in *Reg.* v. *Day*,[46] that "it would be too much to say, that an adult submitting quietly to an outrage of this description, was not consenting; on the other hand, the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can, by no means, be taken to be such a consent as will justify the prisoner in point of law." So strong is the effect of non-resistance, that it has even been held, that though a woman object in words to a man's intercourse with her, yet if she makes no outcry and no resistance, she must be held by her conduct to consent to the intercourse.[47] This presumption will have no place, however, in case of a child, as absence of outcry can, in any case, be only an indication of consent, and cannot constitute consent itself.[48] In *Conners* v. *State*,[49] Lyon, J., said, that "voluntary submission of the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape . . . . . If the

[45] Innes Torts, S. 10.
[46] 9 C. & P., 722.
[47] Reynolds v. People, 41 How. Prac., 179; Brown v. Com., 82 Va., 653.
[48] People v. Knight, 43 Pac., R. (Cal), 6.
[49] 47 Wis., 523.

carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had been theretofore employed, it is no rape."

It was in some cases even held that resistance to sexual intercourse by a woman must have been as hard as she could make, and continued up to the last moment, as weakness or cessation of resistance would imply consent. The presumption of consent from the absence of this utmost resistance was sometimes considered even as one actually of law, it having been said, that the 'prosecution was bound to resist to the utmost,'[50] that the resistance must be to the extent of the woman's ability.[1] Thus, in *State* v. *Burgdorf*,[2] it was said. "Any consent of the woman, however reluctant, is fatal to a conviction. The passive policy will not do. There must be no consent. There must be the utmost reluctance and resistance." In *People* v. *Abbot*,[3] Cowen, J., observed, that, "any fact, tending to the inference, that there was not the utmost reluctance, and the utmost resistance, would always be received to negative the offence of rape on the ground of consent to the intercourse."

In *People* v. *Dohring*,[4] a verdict for rape was set aside, because the Judge, at the trial, refused to direct the jury that to convict they must be satisfied that the woman resisted the defendant to the extent of her ability on the occasion; as the Court was of opinion that by the law of the State, there could be a rape "only where the act is against her will, that if she is conscious of what is attempted, and has the possession of natural, mental, and physical powers in usual degree, is not overawed by the number of assailants, nor terrified by threats of death, or the like, nor in such place and position as that resistance is useless, she must resist until exhausted or overpowered, for a jury to find that it is against her will." Folger, J., in delivering the opinion of the Court, said: "Certainly, if a female, apprehending the purpose of a man to be that of having carnal knowledge of her person, and remaining conscious, does not use all her own powers of resistance and defence, and all her powers of calling others to her aid, and does yield before being overcome by greater force or by fear, or being surrounded by hostile numbers, a jury may infer that at some time in the course of the act, it was not against her will. . . Whatever the circumstances may be, there must be the greatest

[50] People *v.* Morrison, 1 Parker Cr. R., 625.
[1] Anderson *v.* State, 104 Ind., 467. Mathews *v.* State, 19 Neb., 330.
[2] 53 Mo., 65.
[3] 19 Wend., (N. Y. 192.
[4] 59 N. Y., 374.

effort of which she is capable therein, to foil the pursuer and preserve the sanctity of her person. . . Can the mind conceive of a woman, in the possession of her faculties and powers, revoltingly unwilling that this deed should be done upon her, who would not resist so hard and so long as she was able? And if a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant? If consent, though not express, enters into her conduct, there is no rape. The yielding to overpowering force is submission, but not consent; if the force be short of that, there may be consent, or the act may not be against her will." The decision in this case proceeded to some extent on the ground that in New York State, the statutes made a distinction between a rape on a woman, and the act of carnal intercourse without her consent with a woman made insensible by the administration of that which produces stupor, which latter offence is not rape.

This decision, and the view on which it is based, has not been followed, however, and the contrary had been often held even before. Thus in *People* v. *Connor*,[5] the same Court said: "It is thus seen that the extent of the resistance required of an assaulted female is governed by the circumstances of the case, and the grounds which she has for apprehending the infliction of great bodily harm. When an assault is committed by the sudden and unexpected exercise of overpowering force upon a timid and unexperienced girl, under circumstances indicating the power and will of the aggressor to effect his object, and an intention to use any means necessary to accomplish it, it would seem to present a case for a jury to say whether the fear naturally inspired by such circumstances had not taken away or impaired the ability of the assaulted party to make effectual resistance to the assault. It is quite impossible to lay down any general rule which shall define the exact line of conduct which should be pursued by an assaulted female, under all circumstances, as the power and strength of the aggressor, and the physical and mental ability of the female to interpose resistance to the unlawful assault, and the situation of the parties, must vary in each case. What should be the proper measure of resistance in one case, would be inapplicable to another situation accompanied by differing circumstances."

---

[5] 26 N. Y., 281.

It is quite an established doctrine now that utmost resistance by the woman is not necessary to constitute rape; and where resistance would only endanger life, or necessarily result in serious bodily harm, and not in any sense protect the woman's honor, and where the parties are so situated with reference to others, that outcry, however, much persisted in, can do no good, because it cannot be heard, the utmost possible resistance and outcry are not absolutely necessary ingredients of the crime, for the reason that the law does not require any one to do a vain thing, or that from which only harm can result.

Thus in *State* v. *Shields*[6] the defendant requested the court to charge the jury, that to constitute the crime of rape it was necessary that the prosecutrix should have manifested the utmost reluctance, and should have made the utmost resistance. The Supreme Court of Connecticut held, however, that the request was properly refused. After observing that the request in substance was that inasmuch as non-consent was to be proved by the resistance made, if the resistance fell short of the extremest limit that could have been made, the deficiency necessarily showed consent, and should have been so charged as a matter of law, the Court said: "The fallacy lies in the assumption that the deficiency in such cases necessarily shews consent. If the failure to make extreme resistance was intentional, in order that the assailant might accomplish his purpose, it would shew consent, but without such intent it shews nothing important whatsoever" (B)

(B) The Supreme Court further said:—"While it may be expected in such cases from the nature of the crime that the utmost reluctance would be manifested and the utmost resistance made which the circumstances of a particular case would allow, still, to hold as a matter of law that such manifestation and resistance are essential to the existence of the crime, so that the crime could not be committed if they were wanting, would be going farther than any well-considered case in criminal law has hitherto gone. Such manifestation and resistance may have been prevented by terror caused by threats of instant death, or by the exhibition of brutal force which rendered resistance utterly useless, and other causes which may have prevented such extreme opposition and resistance as the request makes essential. The importance of resistance is simply to show two elements in the crime, carnal knowledge by force by one of the parties, and non-consent thereto by the other. These are essential elements, and the jury must be fully satisfied of their existence in every case by the resistance of the complainant, if she had the use of her faculties and physical powers at the time, and was not prevented by terror or the exhibition of brutal force. So far resistance by the complainant is important and necessary, but to make the crime hinge on the uttermost exertion the woman was physically capable of making, would be a reproach to the law as well as to common sense. Such a test it would be exceedingly difficult, if not impossible, to apply in a given case. A complainant may have exerted herself to the uttermost limit of her strength, and may have continued to do so until the crime was consummated, still a jury, sitting coolly in deliberation upon the transaction, could not possibly determine

[6] 45 Conn., 256.

Similarly, the Supreme Court of Massachusetts in *Com.* v. *McDonald*,[7] approved of an instruction to a jury, "that there was no rule of law requiring a jury to be satisfied that the woman, according to their measure of her strength, used all the physical force in opposition, of which she was capable." In *Bailey* v. *Com.*,[8] Lacy, J., in delivering the opinion of the Supreme Court of Virginia said: "In the ordinary case, when the woman is awake, of mature years, of sound mind, and not in fear, a failure to oppose the carnal act is consent. . . On the other hand, it has been held that, in this age, to compel a frail woman or girl of fourteen to abandon her reason, and measure all her strength with a robust man, knowing the effect will be to make her present deplorable condition the more wretched, yet not to preserve her virtue, on pain of being otherwise deemed a prostitute, instead of the victim of an outrage, is asking too much of virtue and giving too much to vice. She must resist, and her resistance must not be a mere pretence: If the girl is very young, and of a mind not enlightened on the question, this consideration will lead the court to demand less clear opposition than in the case of an older and more intelligent female, or even lead to a conviction where there was no apparent opposition. In a case when in the dead hour of darkness and of night, in a house where there is no help, save from three sleeping children, the oldest eight or ten years old, with the knowledge that her mother and older sister are beyond call and beyond reach, a girl fourteen years of age sees her stepfather preparing himself to come to bed to her, asserting his unlawful desires toward her, and she finds courage to forbid him to enter her bed, she has perhaps expressed her refusal to consent to the unlawful cohabitation to a great an extent as the law will require, before holding the unnatural ravisher to the law's penalties."

The present doctrine in fact appears to be that if the woman's will is subdued to submission by duress or menace, the intercourse must be deemed to be against her will,[9] and that where the woman is paralyzed from fear and terrified into submission this submission and failure to make resistance or outcry will

---

whether or not the limit of her strength had been reached. They could never ascertain to any great degree of certainty what effect the excitement and terror may have upon her physical system. Such excitement takes away the strength of one, and multiplies the strength of another.'

---

[7] 110 Mass., 405.
[8] 82 Va., 107.
[9] Pollard v. State, 2 Iowa., 567.
State v. Ruth., 21. Kan., 583.

not constitute consent, and the intercourse shall be rape notwithstanding.[10] Thus in *Reg.* v. *Hallet*,[11] Coleridge, J., in summing up to the jury said: "That the offence of rape would not have been committed, if there was non-resistance on her part, but that non-resistance proceeded merely from being overpowered by actual force, or from her not being able from want of strength to resist any longer, or that from the number of the prisoners she considered resistance dangerous and absolutely useless."

In *Huber* v. *State*,[12] the Supreme Court of Indiana indeed observed, that "Resistance or opposition by mere words is not enough. The resistance must be by acts, and reasonably proportionate to the strength and opportunities of the woman." But McCabe, J., in delivering the opinion of that Court in *Ransbottom* v. *State*,[13] after quoting that observation, said: "When, however, fear or violence overcomes resistance, a different rule applies. There was evidence from which the jury were justified in believing that resistance was prevented by fear produced by appellant's threats, taking into consideration, as they had a right to do, the circumstances of getting her to the lonely, strange house, late in the darkness of the night, all unexpected to her, whereat she was the only female, surrounded by a trio of strange young men: and that she had been brought there under base, false pretences, practised on her mother and herself by one of the trio, with circumstances pointing suspiciously at the other two as at least cognizant of the fraud, if not accomplices; she being but a mere child, inexperienced, and ignorant of the true relation of the sexes, barely over the age fixed by law at which consent implied from non-resistance takes out of the act the deep, dark, felonious hue. These circumstances, together with her size, appearance, and her intelligence, were all proper matters to be considered in determining whether resistance on her part was rendered less effective or wholly averted by fear. The evidence was of such a character as to justify the jury in finding that it was. The case of *Eberhart* v. *State*,[14] and numerous authorities there cited, are very much in point here, and support the conclusion here reached."

Dr. Bishop broadly observes that "violence inflicted by the man on the woman, producing unconsciousness, or overcoming her

[10] People v. Clemons, 37 Hun., 581.
Pleasant v. State, 13 Ark., 360.
Sharp v. State, 15 Tex. App., 171

[11] 9 C. & P., 751.
[12] 126 Ind., 186.
[13] 43 N. E. Rep., 218.
[14] 134 Ind., 651.

mind by fright, will render his carnal act rape, though she makes no resistance."[15] In Greenleaf's work on Evidence, it is laid down that "the better rule is that it is not necessary that the woman should use all the physical force she has in resistance, but the resistance must be real, and must have been overcome by the force of the defendant." [16] If her refusal to consent was honest and she was indeed earnest therein, she might resort to remonstrance, to promises, or to a variety of other means, rather than to an expenditure of physical strength which she knew would be useless.[17] But to rebut the presumption of consent, the resistance must not be a mere pretence, but in good faith.[18] Where the resistance by the woman is of so equivocal a character as to suggest actual consent, or a not very decided opposition, a conviction for rape cannot be sustained.[19] In *Curby* v. *Territory*,[20] it has recently been held that sexual intercourse with a woman of discretion, to constitute rape, must be accomplished after resort by her to every reasonable means at hand to prevent the act; and if she remains neutral or passive, the offence is not committed.

The French law also is the same. There also it is necessary that the violence should have been entire and complete, that no hesitation of the victim should have come to its aid, and that she should have ceded only to force.[21] On account of the difficulty of establishing this violence, there also the jurists established certain presumptions, whence they inferred its existence. It was thus considered necessary for rape: (1) *qu'une résistance constante et toujours égale eût été opposée par la personne prétendue violée; car il suffit que cette résistance ait fléchi quelques instants pour faire présumer le consentement;* (2) *qu'une inégalité évidente existât entre ses forces et celles de l'assaillant; car on ne peut supposer la violence lorsqu'elle avait les moyens de résister et qu'elle ne les a pas employés;* (3) *qu'elle eût poussé des cris et appelé des secours;* (4) *enfin, que quelques traces empreintes sur la personne témoignassent de la force brutale à laquelle elle avait dû céder.*(*p*)[22] Even among

(*p*) 1. That a resistance continuous and always equal should have been opposed by the person alleged to have been ravished, for it is sufficient to warrant a presumption of consent that the resistance should have wavered for a few minutes; (2) that there should be an evident inequality between her forces and those of the assailant, for one cannot suppose that there is violence when she had means of resistance and did not employ them; (3) that she should have uttered cries and called for help: (4) finally, that there should be traces left on the person witnessing brutal force to which she has had to cede.

[15] 2 Bis. Cr. L., 651.
[16] III, 226.
[17] Austine *v.* People, 110 Ill., 248.
[18] Reg. *v.* Reedland, 4 Fost. and F., 967.
[19] People *v.* Brown, 47 Cal., 450.
[20] 42 Pac. R., 953.
[21] IV Adolph. & Helie, 315.
[22] Boerius, Decis., 247.

Romans, Damhouderius said : *Vim in raptu tùm fieri intelligitur quando mulier magnâ clamore imploravit alicujus opem et auxilium.* There also modern legislation, *a cessé de définir les preuves, et de lier les juges par des présomptions légales,* (*q*)[23] but these rules are still considered to be a valuable guide to magistrates in the administration of Criminal Justice, *d'utiles précautions recueillies par l'expérience pour conduire à la découverte de la vérité.*(*r*).

Obligation to have an act done does not involve consent to the doing of that act.

78. It is often that a person with his full consent enters into a certain relation with another, which gives to both a new status, involving several rights and duties in respect of numerous acts during the continuance of that relation, and sometimes even after the relation has come to an end. The consent to the entering into that relation does not involve a consent to the doing of all the acts which have to be done, and he has to put up with, in the discharge of his obligations resulting from that relation. The contrary has sometimes been maintained. Thus Pollock, C. B., in *Morgan* v. *Ravey*,[24] observed that "the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him." The correct view appears to be that the implication or inference in such cases is of an obligation of doing what is to be done, but not of a promise of which the consent is an essential constituent.

The question has arisen often in regard to the duties involved in and resulting from the marital relation. Thus in *Reg.* v. *Clarence*,[25] it was contended that the wife must be deemed to have consented to the marital intercourse with the husband, as it was imposed upon the wife by the marriage contract. Pollock, B., in speaking of the case of a man having connection with his wife as distinguished from that with another woman, said :—"It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her con-

(*q*) Has ceased to define the proofs, and to tie the Judges to legal presumptions.
(*r*) Useful precautions collected by experience for help in the discovery of truth.

[23] IV. Adolph. & Helie, 315.
[24] 6 Hurl. & N., 276.
[25] 22 Q. B. D., 23.

sent. As is said by Lord Hale in his Pleas of the Crown :[25] 'By their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.'" The contention was, however, not accepted. Field, J., said: "There may be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime. Suppose a wife for reasons of health refused to consent to intercourse, and the husband induced a third person to assist him while he forcibly perpetrated the act, would any one say that the matrimonial consent would render this no crime? And there is the great authority of Lord Stowell for saying that the husband has no right to the person of his wife if her health is endangered." The question was fully discussed, however, by Hawkins, J., who said: "By the marriage contract a wife no doubt confers upon her husband an irrevocable privilege to have sexual intercourse with her during such time as the ordinary relations created by such contract subsist between them. But this marital privilege does not justify a husband in endangering his wife's health and causing her grievous bodily harm, by exercising his marital privilege when he is suffering from venereal disorder of such a character that the natural consequence of such communion will be to communicate the disease to her. . . . . In my judgment wilfully to place his diseased person in contact with hers without her express consent amounts to an assault. It has been argued that to hold this would be to hold that a man who suffering from gonorrhœa has communion with his wife might be guilty of the crime of rape. I do not think this would be so. Rape consists in a man having sexual intercourse with a woman without her consent, and the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the mere act of sexual communion is lawful; but there is a wide difference between a simple act of communion which is lawful, and an act of communion combined with infectious contagion endangering health and causing harm, which is unlawful. It may be said that assuming a man to be diseased, still as he cannot have communion with his wife without contact, the communication of the disease is the result of a lawful act, and, therefore, cannot be criminal. My reply to this argument is that if a person having a privilege of which he may avail himself or not at his will and pleasure, cannot exercise it

[25] I., 629.

without at the same time doing something not included in this privilege and which is unlawful and dangerous to another, he must either forego his privilege or take the consequences of his unlawful conduct. . . . The sexual communion between them is by virtue of the irrevocable privilege conferred once for all on the husband at the time of the marriage, and not at all by virtue of a consent given upon each act of communion, as is the case between unmarried persons. My judgment is based on the fact that the wrongful act charged against the prisoner was not involved in or sanctioned by his marital privilege and for which no consent was ever given at all. . . . The wife submits to her husband's embraces because at the time of marriage she gave him an irrevocable right to her person. The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed upon her by law. Consent is immaterial. In the case of unmarried persons, however, consent is necessary previous to every act of communion, and if a common prostitute were to charge with a criminal offence a man who in having connection with her had infected her with disease, few juries would under ordinary circumstances hesitate to find that each party entered into the immoral communion tacitly consenting to take all risks."

79. A person's consent to an act is generally deemed to be a consent to the accruing of all its natural and ordinary consequences as may have been within his knowledge and contemplation. In fact, "for simplicity's sake we commonly reckon the immediate and usual consequences of an act, when to all appearance they are intended and follow as intended, as part of the act itself. In the act of shooting, for example, the man's own act stops, if we are to speak with strict precision, at pulling the trigger, but the discharge of the gun in the direction given to the barrel by the man's aim is counted as part of the act." [26] The consent to an act must necessarily extend to all such consequences of the act. Even Kessler, referring to his general illustration of A permitting another to shoot at something of his with a bet as to the non-success of the shot, admits that A *würde die Zerstörung der Sache nur dann gewollt haben, wenn er sie als eine sichere Folge des Schusses vorausgesehen hätte.*[27] (s)

Consent to an act implies consent to its natural and contemplated consequences.

(s) A would only then have willed the destruction of the thing, if he could have foreseen that as the certain consequence of the shot.

[26] Poll. Jur., 147.

[27] Kess, Einw., 25.

Consent cannot extend however to the other consequences of the act. In regard to them, Kessler adds: *So kann man höchstens noch von einem Zulassen des Erfolges reden. Das "Wollen Müssen" aller möglichen Folgen, wenn man die Ursache wolle, welches Rödenbeck als gleichwerthig mit dem Wollen behauptet, ist, wie Hälschner zutreffend bemerkt, eine Vergewaltigung des Begriffs.*[t] Kessler goes on to observe that it is even possible that A to prevent B's success in the bet may do something to prevent the shot, which he has consented to, really taking effect. *Auch dann würde nach wie vor eine wegen Einwilligung des Verletzten straflose Sachbeschädigung vorliegen. Es würde aber gegen den Sinn der Sprache sein, in diesem Falle zu behaupten, A habe die Zerstörung der Sache, die zu hindern er thätlich bemüht gewesen ist, gewollt, oder auch nur in dieselbe eingewilligt.*[u] [28] Even the necessary consequences of an act are, however, really separate from that act, and therefore the consent to the consequences is really only a result of the consent to the act by implication, and not identical with the consent to the act itself. *Es darf aber auch ein Wollen des verletzenden Erfolges nicht in die Definition aufgenommen werden.*[v]

Strictly speaking, there can indeed be no consent to the consequences of an act as distinct from the act. *Mann im strengen psycologischen Sinne ein Ereignis überhaupt nicht wollen kann,*[w] and in speaking of a consent to the consequences, the expression is understood in its popular metaphorical signification.

Thus understood the doctrine is generally agreed upon. For example, in *The Reg.* v. *Clarence*,[29] Field, J., said: "Had then, the harm inflicted upon or occasioned to the prisoner's wife been one of the consequences of an ordinary natural and

(*t*) We can, at most, speak of his having taken into consideration the possibility of the event. The being bound to will all the possible consequences when we will the cause, which Rödenbeck maintains as equivalent to willing, is, as Hälschner correctly remarks, a violent use of the conception.

(*u*) Even now, as before, there would be mischief which would not be penal on account of the consent of the injured party. It would be, however, against the sense of the language, to maintain in such a case, that A had willed or even consented to the destruction of the thing, whereas he had actually given himself trouble to prevent it.

(*v*) A willing of the injurious consequences dare not, however, even be taken into the definition (of consent).

(*w*) In the strict philosophical sense, we cannot at all will an event.

[28] Kess. Einw., 25.

[29] 22 Q. B. D., 58.

healthy connection, or had she known or had reasonable grounds for thinking that her husband was in a diseased condition, her consent to the consequences would, I think, be implied, and so no offence would have been committed. In the same way I think that, if a man knowingly consorts with a prostitute who gains her livelihood by promiscuous intercourse, it may well be implied that he accepts all the consequences. Also, had the prisoner in this case not been aware of his condition, his act would not have been malicious or an assault, for, as he would have had no reason to suppose that his wife would do other than consent, he would have a right to act upon the implication."

In some cases, the doctrine has been carried too far. It has, for instance, been held that where it is an offence to take a girl out of her parents' possession against their will; if they have encouraged her in a lax course of life, the encouragement will be deemed to be a consent sufficient to bar a prosecution. Thus in *R.* v. *Primelt*,[30] the Chief Justice in summing up to the jury said, "that if the mother had by her conduct countenanced the daughter in a lax course of life, by permitting her to go out alone at night and to dance at public houses, this was not a case that came within the intent of the statute; but was one where what had occurred, though unknown to her, could not be said to have happened against her will." The acquittal in *Reg* v. *Frazer*[31] also proceeded on the same principle, Pollock, C. B., observing, that "a father is bound to take reasonable care of his child, and this man's conduct in regard to the management of his daughter causes a doubt as to whether she really was taken away against the will of the father." These cases are, however, not so much of real implied consent, as of a presumption of consent, which like all other presumptions of fact may be rebutted.

Recognition of the implied consent to consequences in law of contracts.

80. The application of this doctrine is recognized to its fullest extent in the law of contracts. Thus a consent given to a Railway Company to its use of a certain land for a right of way was held to carry consent with it to the company draining and overflowing the land in the proper use of that right,[32] though not to its being negligent in the construction or maintenance of the

[30] 1 F. & F., 51.
[31] 8 Cox. C. C., 446.
[32] Kemp. *v.* Railroad Co., 156 Pa. St. 430.

way.[33] In *North and West Branch Ry. Co.* v. *Swank*,[34] it was held that an agreement between a landowner and a Railroad Company to sell the latter a right of way across the premises of the former would cover all damages of whatever sort, suffered by the landowner, all for which he was legally entitled to compensation. The same principle was recognized in *Hoffeditz* v. *Southern Penn. R. & Min. Co.*[35]

In *Updegrove* v. *Penn, S. V. R. Co.*,[36] the agreement for the release by the plaintiff in favor of the Ry. Co. of a right of way expressly released the Company from all claims for damages by reason of the taking and using of the land for the railroad, or by reason of the construction and maintenance of the said railroad on and over the said land. The plaintiff claimed damages on the ground that some of his land was repeatedly overflowed and rendered unfit for cultivation, by reason of the construction of a ditch and culvert by the Railroad Company, which, he alleged, threw upon his land water which would otherwise not have flowed there. The trial judge instructed the jury, that "these ditches and culverts, and this discharge of water is the result, the necessary result, of the construction of that road." This instruction was upheld, with the remark that "a release of the right of way to a railroad company would be a vain thing if the company is to be subsequently subjected to litigation for every injury or damage resulting to the property by reason of the construction of the road," and that "all these matters are supposed to be in the contemplation of the parties when the company pays its money for the right of way and obtains a release therefor."

Recognition of the implied consent to consequences in law of torts.

81. Nor is it in the law of contracts only that the implied consent to the consequences is recognized. It is recognized equally in the law of torts. It has thus in some cases been held that a voluntary spectator, who is present merely for the purpose of witnessing a display, must be held to consent to it, and suffers no legal wrong if accidentally injured without negligence on the part of any one,[37] even if the show be unauthorized, as he takes the risk;[38] but such consent would, of course, not be presumed in the case of a person going on the highway. The contrary has sometimes been held even in regard to spectators,[39] but the non-liability

[33] McMinn *v* Pittsburgh V. & C. Ry. Co., 147 Pa. St., 5.
[34] 105 Pa. St., 555.
[35] 139 Pa. St., 264.
[36] 132 Pa. St., 540.
[37] Waixel *v.* Harrison, 37 Ill. App., 323.
[38] Scanlon *v.* Wedger, 156 Mass., 462.
[39] Dowell *v.* Guthrie, 99 Mo., 653. Bradley *v.* Andrews, 51 Vt., 530.

in their case is based on the general principle of taking a dangerous risk. Sir Frederick Pollock on the same principle, in his work on Torts, says: "If I go and watch a firework-maker for my own amusement, and the shop is blown up, it seems I shall have no cause of action, even if he was handling his materials unskilfully." [40]

The decision in *Ilott* v. *Wilkes*,[41] proceeded on a similar principle. It was held in that case, that a trespasser having knowledge that there were spring-guns in a wood, although he was ignorant of the particular spots where they were placed, could not maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off. The case is no longer an authority, as setting spring-guns, except by night in a dwelling-house for the protection thereof, has been made a criminal offence; but as pointed out by Sir Frederick Pollock, "it has not been doubted in subsequent authorities that on the law as it stood, and the facts as they came before the court, it was well decided." The principle of the decision was explained most clearly by Bayley, J., who said: "It is sufficient for a party generally to say, there are spring-guns in this wood; and if another then takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his own peril, and must take the consequences of his own act. The maxim of law, *volenti non fit injuria*, applies; for he voluntarily exposes himself to the mischief which has happened. . . . The case of a man keeping on his own premises a furious dog, or bull, is to a certain degree analogous to this. Suppose such a person were to give a notice that in his premises there is a furious bull, and that it is dangerous for any person to enter, and a wrong-doer, who had read this notice, enters, and the bull attacks him, it is clear that he could maintain no action for the consequences of his own act. So, also, if a trespasser enters into the yard of another, over the entrance to which notice is given, that there is a furious dog loose, and that it is dangerous for any person to enter in without one of the servants or the owner. If the wrong-doer, having read that notice, and knowing, therefore, that he is likely to be injured, in the absence of the owner enters the yard, and is worried by the dog, (which in such a case would be a mere engine without dis-

[40] P. 149.

[41] 3. B. & Ald., 304.

cretion,) it is clear that the party could not maintain any action for the injury sustained by the dog, because the answer would be, as in this case, that he could not have a remedy for an injury which he had voluntarily incurred." So also Holroyd J., said: "If the placing of the spring-guns be not of itself an unlawful act, and only becomes so in respect of the consequences which result from it, the party who so enters, with full knowledge of the danger, is himself the cause of the mischief that ensues, and falls within the principle of law, *volenti non fit injuria;* for as he knew that the spring-guns were placed there, he can have no right of action for an injury which resulted from his own act alone."

Doctrine of obvious risks in England.

82. The doctrine of obvious risks by a servant or workman is also based on the same principle of implied consent to the consequences. It would be unjust in any case, that one who freely and voluntarily assumed a known risk for which another was, in a general sense, culpably responsible, should hold that other responsible in damages for the consequences of his own exposure. Thus in *Woodley* v. *Metropolitan District Ry. Co.*,[42] Cockburn, C. J., in the Court of Appeal said: "That which would be negligence in a company, with reference to the state of their premises or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises in ignorance of the existence of the danger, will give no such right to one, who being aware of the danger, voluntarily encounters it, and fails to take the extra care necessary for avoiding it." So also in *Thomas* v. *Quartermaine*,[43] Bowen, L. J., citing the maxim *volenti non fit injuria* said: "The duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognisant of the full extent of the danger, and voluntarily run the risk."

The correctness of the general proposition is admitted on all sides, the difference of opinion being only as to its application, as to whether there is an actual incurring the risk in any case, and if so, whether the incurring is voluntary. In regard to the fact of incurring also, it appears to be agreed upon that it is not equivalent to, but involves something more than knowledge; and that mere knowledge by a person of the real state of things may not be a

[42] 2 Ex. D., 384. | [43] 18 Q. B. D., 685.

conclusive defence in an action by that person for an injury caused to him in that state. As referred to in S. 19, it has been repeatedly held that the maxim is not *scienti non fit injuria*, but *volenti*. There was no difference of opinion in regard to this point among the Judges in *Thomas* v. *Quartermaine*. Lord Esher, M. R., considered that there was nothing beyond knowledge in the circumstances of the case to excuse the defendant from the effect of his negligence. Bowen, L. J., also observed that it was "no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as leads necessarily to the conclusion that the whole risk was voluntarily incurred. There may be a perception of the existence of the danger without comprehension of the risk: as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily." He added, however, that "where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, *viz.*, that the risk has been voluntarily encountered, the defence seems to me complete. . . Knowledge is not conclusive where it is consistent with the facts that, from its imperfect character or otherwise, the entire risk, though in one sense known, was not voluntarily encountered; but here, on the plain facts of the case, knowledge on the plaintiff's part can mean only one thing. For many months the plaintiff, a man of full intelligence, had seen this vat—known all about it—appreciated its danger—elected to continue working near it. It seems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a voluntary encountering of the risk." Fry, L. J., also took the same view, and speaking of the willingness of the plaintiff to assume the danger, said: "This willingness, if assumed with full knowledge, may lessen or remove any duty of the employer to the employed,

and may thus prevent the arising of any cause of action, though in the discharge of the work undertaken the workman may have been guilty of no negligence. . . . . The duty which a master owes to one servant may be quite different to that which he owes to another : it may vary with the knowledge, the experience, the skill, and the powers of the workman. In the present case I think that the master owed no duty in respect of the vat in question towards a workman who voluntarily continued to work on the property with a full knowledge of the defect and of the danger thence resulting."

In *Yarmouth* v. *France*,[44] Lopes, L. J., took the same view, saying: "His constant complaints may be regarded as evidence of his thorough appreciation of the risk he was incurring and of his willingness to incur that risk rather than relinquish his employment. After complaining he remains in the service for a long time, knowing the risk and knowing that no steps had been taken to prevent its continuance. This is more consistent with his acquiescence in a disregard of his complaints, and with a willingness to incur the risk, than with the contrary view." It was the contrary view, however, that prevailed, as Esher, M. R., and Lindley, L. J., concurred in it. The latter said : "If in any case it can be shewn as a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But, in the cases mentioned in the Act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot in my opinion be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it because he does not refuse to face it : nor can it in my opinion be held that there is no case to submit to a jury on the question whether he has agreed to incur it or has voluntarily incurred it or not, simply because, though he protested, he went on as before."(C)

(C) In *Membery* v. *G. W. Ry. Co.*,[45] Lords Halsbury and Bramwell held that the plaintiff had assumed the risk, the former observing that the man obviously encountered a known risk which he had encountered for a period of seven years, and therefore he was not entitled to recover, upon the ground that he was voluntarily incurring the risk—he knew that the risk existed ; and further, he was himself doing the very thing which caused danger and ultimately injury to himself. The decision did not proceed, however, on that ground.

[44] 19 Q. B. D., 647. | [45] 14 App. Cas., 168.

All these cases were under the Employers' Liability Act, 1880, and it was argued in them that the application of the rule of the voluntary assumption of obvious risks was excluded by that Act. The argument did not prevail however, and it was held in all of them that the defence based on the maxim *volenti non fit injuria* was not affected by that Act. Thus in the case of *Thomas* v. *Quartermaine*, Fry, L. J., expressed it as his opinion "that the statute was intended to place the workman in the same position as a stranger lawfully on the property by the invitation of the occupier, but in no higher or better position; that the maxim *volenti non fit injuria* would apply under apposite circumstances to such a person; and that consequently it applies under the like circumstances to a servant suing under the statute."

Doctrine of obvious risks in the United States.

83. The same doctrine is recognized in the United States also. As a general rule, it is considered there that a servant who knows that his employment is dangerous in any given particular, whether proceeding from defective machinery, defective methods of work, insufficient help, the negligence of fellow-servants, or any other cause, accepts the risk of being hurt by reason of such cause or danger, and if hurt cannot recover damages, whether the danger was a natural incident of the employment, or arose from the negligence of the master. It is not even considered material how the servant acquired his knowledge, the rule being held to be that where the servant knows the default of his master in providing defective or unsuitable or dangerous machinery or appliances, but nevertheless voluntarily enters upon the employment, or after acquiring such knowledge continues therein, the maxim, *volenti non fit injuria* applies, and there can be no recovery of damages from the master for any hurt to the servant arising from such default.[46] The rule has been held to apply often in cases of an unguarded well, scuttle-hole, or shaft, descending from the floor of a manufacturing or business establishment, of overhead railway bridges, and unblocked rails, as well as in those of laborers employed in and about an excavation

[46] Trainor v. Philadelphia R. Co., 137 Past., 148.
Baltimore R. Co. v. Sticker, 51 Md., 47.
Coal Creek Mining Co. v. Davis, 90 Tenn., 711.
Hogele v. Wilson, 31 Pac. R., 469.
La Pierre v. Chicago R. Co., 99 Mich., 212.

in earth, sand or gravel; and chiefly in case of exposed machinery.

Thus in *Fitzgerald* v. *Connecticut River P. Co.*,[47] the Court said: "It is well settled that a servant assumes the obvious risks of the service into which he enters, even if the business be ever so dangerous, and if it might easily be conducted more safely by the employer. This is implied in his voluntary undertaking, and it comes within a principle which has a much broader general application, and which is expressed in the maxim, *volenti non fit injuria*. The reason on which it is founded is, that whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is. . . . . The rule of law, briefly stated, is this: one who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure."

As to the nature of the assumption of risks, the court observed: "One does not voluntarily assume a risk who merely knows that there is some danger, without appreciating the danger. On the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture."

The doctrine of obvious risks was well explained in *Sullivan* v. *India Mfg. Co.*,[48] in which the court said: "Though it is a part of the implied contract between master and servant (where there is only an implied contract) that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His

[47] 155 Mass., 155. | [48] 113 Mass., 396.

assent has dispensed with the performance, on the part of the master, of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected." So also in *Leary* v. *Boston R. R. Co.*,[49] Devens, J., said: "The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions."

In *O'Maley* v. *South Boston Gaslight Co.*,[50] the Court said: "The doctrine of assumption of the risk of his employment by an employee has usually been considered from the point of view of a contract, express or implied; but as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim, *volenti non fit injuria*. One who, knowing and appreciating a danger voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other." The duty violated in this case was a statutory one. The Court in overruling the contention that the doctrine of obvious risks would not apply to such a duty said:—"It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place and from the kind or quality of the machinery used. We have no doubt that one may expressly contract to take the obvious risks of danger from inferior or defective machinery, as well since the enactment of this statute as before."

The same has been held still more recently by the Supreme Court of Massachusetts in *Goodridge* v. *Washington Mills Co.*,[1] and by the New York Court of Appeal in *Knisley*

[49] 139 Mass., 580. | [50] 158 Mass., 135. | [1] 160 Mass., 234.

v. *Pratt*.[2] To sustain a right of action by the employee in such cases, it is necessary to hold that where the statute imposes a duty upon the employer the performance of which will afford greater protection to the employee, it is not possible for the latter to waive the protection of the statute under the common law doctrine of obvious risks. The New York Court, however, regarded "this as a new and startling doctrine, calculated to establish a measure of liability unknown to the common law, and which is contrary to the decision of Massachusetts and England under similar statutes." It was contended in this last case, "that the Factory Act is passed to regulate the employment of women and children, and imposes upon the employer certain duties, and subjects him to specified penalties in case of default; that a sound public policy requires the rigid enforcement of this Act, and it would contravene that policy to permit an employee, by implied contract or promise, to waive the protection of the statute." This contention was overruled, and the court said: "We think this proposition is essentially unsound, and proceeds upon theories that cannot be maintained. It is difficult to perceive any difference in the quality and character of a cause of action,—whether it has its origin in the ancient principles of the common law, in the formulated rules of modern decisions, or in the declared will of the legislature. Public policy in each case requires its rigid enforcement, and it was never urged in the common law action for negligence that the rule requiring the employee to assume the obvious risks of the business was in contravention of that policy."

Exact character of the voluntariness of the assumption of risks.

84. The main question in these cases of the assumption of risks is, as already observed, whether the assumption is in any particular case voluntary, because a consent of the workman or labourer to the injury resulting to him will be implied only if the assumption is such. The word voluntary, as generally used, implies merely the absence of coercion. Thus voluntary appearance in judicial proceedings before a foreign tribunal operates in some cases as a waiver of the jurisdiction of that tribunal over those proceedings; and a person is said to appear voluntarily if he does so without duress of person or goods.[3] An acknowledgment is generally

[2] 148 N. Y., 372.

[3] Voinet v. Barrett, 55 L. J. Q. B., 39.

said to be voluntary, when it is made without coercion.[4] In particular cases and particular classes of cases the word has a somewhat narrower or broader signification. Thus in regard even to acknowledgment, a voluntary acknowledgment has been held not to be equivalent to that made by a married woman "of her own free will and accord, without fear, constraint or persuasion of her husband."[5] The question as to when a payment is voluntary has been already discussed in S. 61. In cases of accident insurance, a voluntary exposure to obvious risks of injury implies conscious intentional exposure, something which one is willing to take the risk of.[6] "It is not such exposure as men usually are going to take;—such as is incident to the ordinary habits and customs of life;" but "something beyond the ordinary, or a wanton, a piece of gross carelessness, as we would term such in our designation of a person's conduct in the usual walks of life."[7] In cases of the assumption of obvious risks by a servant or workman, a very restricted construction has been put on the word voluntarily, and almost any reasonable fear is held to exclude voluntariness.

In *Woodley* v. *Metropolitan D. R. Co.*,[8] Cockburn, C. J., in his judgment, indeed, said: "With a full knowledge of the danger, he (Woodley) continued in the employment, and had been working in the tunnel for a fortnight when the accident happened. . . . . If he becomes aware of the danger which has been concealed from him, and which he had not the means of becoming acquainted with before he entered on the employment, or of the want of the necessary means to prevent mischief, his proper course is to quit the employment. If he continues in it, he is in the same position as though he had accepted it with a full knowledge of its danger in the first instance, and must be taken to waive his right to call upon the employer to do what is necessary for his protection, or in the alternative to quit the service. If he continues to take the benefit of the employment, he must take it subject to its disadvantages. If a man chooses to accept the employment, or to continue in it with a knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned. Morally

---

[4] Brown *v.* Farran, 3 Ohio, 153.
[5] Scott *v.* Simons, 79 Ala., 357.
[6] Keene *v.* New England, Mut. Acc. Ass., 161 Mass., 149.
[7] Manufacturers' Accident Indemnity Co. *v.* Dorgan, 58 Fed. Rep, 945.
[8] 2 Ex. D., 388.

speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance. The workman who depends on his employment for the bread of himself and his family is thus tempted to incur risks to which, as a matter of humanity, he ought not to be exposed. But looking at the matter in a legal point of view, if a man, for the sake of the employment, takes it or continues in it with a knowledge of its risks, he must trust to himself to keep clear of injury."

A stricter view appears to have been taken in subsequent cases. Thus in *Yarmouth* v. *France*,[9] Lindley, L. J., said: "If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before in order to avoid dismissal, a jury may in my opinion properly find that he had not agreed to take the risk and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred. *A fortiori* might the jury properly come to such a conclusion if it was proved that the workman was told by his superintendent not to mind, and that if any accident happened the employer must make it good. Such an additional circumstance would go far to negative the inference that the complaining workman took the risk upon himself."

In *Thrussell* v. *Handyside*[10] Hawkins, J., also said: "It is difficult to say, where a man is lawfully working, subject to the orders of his employers, and to the risk of dismissal if he disobeys, that if, after asking for and failing to obtain protection from the danger caused by other people's work, he suffers injury, the maxim *Volenti non fit injuria* applies. It is true that he knows of the danger, but he does not wilfully incur it. *Scienti*, as was pointed out in *Thomas* v. *Quartermaine* and in *Yarmouth* v. *France*, is not equivalent to *Volenti*. It cannot be said, where a man is lawfully engaged in work, and is in danger of dismissal if he leaves his work, that he wilfully incurs any risk which he may encounter in the course of such work, and here the plaintiff had asked the defendants' men to take care. It is different where there is no duty to be performed, and a man takes his chance of the danger, for there he voluntarily encounters the risk. If the plaintiff could have gone away from the dangerous place

[9] 19 Q. B. D., 661.

[10] 20 Q. B. D., 359.

without incurring the risk of losing his means of livelihood, the case might have been different; but he was obliged to be there; his poverty, not his will, consented to incur the danger."

In *Membery* v. *Great Western Ry. Co.*, Lord Bramwell proposed to base his decision on a very liberal construction of the word "voluntarily"; on the view that voluntariness can be excluded only by physical constraint, and that where a person can take his option to do a thing or not, to do it and does it, he does it voluntarily. He said,[11] "I hold that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies. What is *volens?* willing; and a man is willing when he wills to do a thing and does it. No doubt a man, popularly speaking, is said to do a thing unwillingly, with no good will, but if he does it, no matter what his dislike is, he prefers doing it to leaving it alone. He wills to do it. He does not will not to do it. I suppose *nolens* is the opposite of *volens*, its negative. There are two men, one refuses to do work, wills not to do it; and does not do it. The other grumbles, but wills to do it, and does it. Are both men *nolentes*, unwilling? Suppose an extra shilling induced the man who did the work. Is he *nolens*, or has the shilling made him *volens?* There seems to be a strange notion, either that a man who does a thing and grumbles is *nolens*, is unwilling, has not the will to do it, or that there is something intermediate between *nolens* and *volens*, something like a man being without a will, and yet who wills. If the shilling made him *volens*, why does not the desire to continue employed do so? If he would have a right to refuse the work and his discharge would be wrongful, with a remedy to him, why does not his preference of certain to an uncertain law not make him *volens* as much as any other motive? The master says, here is the work, do it or let it alone. If you do it, I pay you; if not, I do not. If he has engaged him, he says, I discharge you if you do not do it; I think I am right; if wrong, I am liable to an action. The master says this, 'the servant does the work and earns his wages, and is paid, but is hurt.'" The other lords did not, however, concur in that view, Lord Herschell expressly declining to express any opinion on the point, and the case being decided on other grounds.

---

[11] 14 Ap. Cas., 187.

Consent to an act implies consent to everything necessary to do that act.

85. Mr. Mayne observes that "the mere fact of an adult placing himself under treatment in a surgical case would carry with it an implied readiness to submit to everything that was necessary for a cure."[12] It is on this very principle that an agent, having authority to do an act, has authority to do every thing lawful which is necessary in order to do that act.[13] Authorizing a person to do an act is, so far as this question is concerned, consenting to his doing that act; and it is a general principle, even if the authority be impliedly conferred, that it must involve an authority and consent to do everything necessary to effect the purpose for which the agency was created.

On the same principle, it is sometimes maintained that a consent to an act or event implies a consent to what is done to bring on that act or event. Ortmann even goes so far as to broadly maintain that *wer die Wirkung will, muss auch die Ursache wollen.*(x)[14] This is no doubt condemned by Kessler, who says: *man kann den Erfolg wollen in dem Sinne, in welchem dies irgend von dem Erfolge einer fremden Handlung gesagt werden kann, ohne in dessen Herbeiführung einzuwilligen. So mancher von Zahnweh Geplagte will den kranken Zahn gerne los sein ; damit hat er noch längst nicht in das Ausziehen eingewilligt.*(y)[15] No jurist, however, has maintained that by consenting to a consequence we do not consent to its cause, when that is the only and inevitable cause of that consequence. It will be almost absurd to say that a consent to certain papers being burnt, does not imply a consent to the application of a lighted match to them ; or that a consent to a person shooting does not imply a consent to his pulling the trigger with intent to shoot.

Consent not implied from non-prevention.

86 Consent of a person to an act shall not necessarily be implied merely from his not taking steps to prevent the doing of it. Remaining passive intentionally to an act likely to

(x) Who wills the effect must also will the cause.

(y) We can will the consequences, in the sense in which this can in any way be said of the consequences of another person's act, without consenting to the bringing about of that act. Thus many a person troubled with toothache, wills to be rid of the diseased tooth ; he has therewith, however, by far not consented to the drawing out of it.

[12] Mayne Cr. L. 400.
[13] S. 188, Act IX of 1872.
[14] Goltd. A. XXV, 118.
[15] Kess. Einw., 25.

take place, after knowledge of that likelihood, and thus allowing it to proceed, with a view to the discovery of the offender or of the evidence of the offence does not import a consent to that act. Any presumption of consent that the passivity might warrant would be rebutted by the object with which the passivity was adopted ; and it would indeed be strange to infer consent to an act from conduct directed exclusively to the punishment of that act.

It will be the same, even if the information of the intended commission of the offence is communicated by one of the real confederates of the person who commits the offence. This generally takes place in cases of contemplated burglary, when the owner of the house in which the burglary is proposed to be committed, on receiving information, only takes steps to secure the offenders in the very commission of the offence. And it has been repeatedly held that if a person knows that a burglary is to be committed in his house, and merely takes no steps to prevent it, but lies in wait to catch the burglar, he is not to be deemed to consent to the entry.[16]

Thus in *Thompson* v. *State*,[17] it was held that the fact that the owner upon being advised of the intended burglary made no effort to prevent it, but provided a force to secure the arrest of the burglars, did not involve a consent to the entrance, and would not affect their criminality. In this case, stress was laid on the circumstance that the owner had not made any agreement with the confederate giving the information by which he was to bring the burglars to his house. The rule will be the same, even if there is such an agreement. Where a man to whom the persons who had planned the burglary of a store communicated their plan, informed the police, and was advised to continue in the plot and keep the police informed, and the police with the consent of the owner of the property secreted themselves in the store on the night when the burglary was to take place and captured them; it was held that no inducements were offered to them to commit it, nor were they encouraged to commit the same, and the mere consent of the owner of the property, to the police occupying the store in order to arrest them did not constitute a consent to the entry.[18]

---

[16] State v. Covington, 2 Bailey, 569. State v. Sneff, 22 Neb., 481.

[17] 18 Ind., 386.

[18] People v. Morton, 4 Utah., 407.

In *The Empress* v. *Troylukho Nath*,[19] the accused asked the proprietor's godown-keeper to take out more goods than had actually been sold through the firm with which the accused was connected, telling him that the profits would be divided between them; and the godown-keeper having obtained the owner's permission assented, and the accused was arrested taking out the excess goods by the police, who had been communicated with, and the High Court upheld his conviction for abetment of theft under section $\frac{379}{116}$, Jackson, J., in his judgment observing, that "the circumstance—that owing to the property being removed with the knowledge of the owner, the technical offence of theft had not been committed—does not save the prisoner from the consequence of the abetment." There appears to have been no argument on behalf of the accused before the High Court, and the question as to whether consent could be implied from knowledge was apparently not discussed, and the observation in regard to there being no theft was a mere *dictum*; and in the face of the general *consensus* of opinion, such a knowledge alone could not, in the circumstances be held to import consent, and mere knowledge of the owner is quite immaterial for theft.

In Germany the high authority of Binding is against this view, and he considers that there is in such cases an express consent to the taking away of the thing though not to its appropriation, and therefore there will be no theft but only *unterschlagung* (embezzlement).[20] The weight of opinion appears, however, to be against him; and Olshausen, in his Commentary on the German Penal Code,[21] observing that a mere handing over of a thing is not to be deemed a consent to its removal by the receiver thereof, adds: *ebensowenig ist jede Nichtverhinderung der Wegnahme mit Zustimmung identisch*,(z) and gives the following illustration in support of the rule, *Der Käufer einer Quantität Spreu suchte den mit der Zumessung beauftragten Arbeiter zu veranlassen, ihm statt dessen Raps zuzumessen; letzterer ging im Einverständnisse seines Herrn soweit darauf ein, als er es geschehen liess, dass der*

(z) Still less can the non-prevention of taking away be identical with consent.

[19] I. L. R., IV. Cal., 366.

[20] II Bind. Norm., 555.

[21] P. 880.

Käufer selbst des Rapses sich bemächtigte ; es erfolgte Verurtheilung des Käufers wegen Diebstahl [a].

There appears to be a difference on the point among Italian jurists. Paolo says, *potere agire di furto anche colui che essendo presente al furto che si commeteva a suo danno prohibere potuit et non prohibuit.* Francesco Carrara admits *che l'annuenza tacita e presunta del proprietario fa cessare il furto, perchè supponiamo la ipotesi che chi prendera la roba avesse ragione di credere che il proprietario consentisse.*[22] [b] He added, however, that this did not destroy the general rule which recognized theft even in *ablazione* (removal) committed in the presence of the proprietor.

87. The rule goes much beyond mere passivity. No consent will be implied, even if a person learning that a crime is to be committed against him, instead of trying to prevent it, lays traps to catch the offender. These traps are usually laid by providing facilities for the commission of the crime. As observed by Dr. Wharton, the circumstance of the owner laying a trap, such as putting out lights or lessening the difficulties of entrance, does not preclude a prosecution for burglary.[23] If one simply leave marked property in such a position that if stolen, it can be identified ; or if, while keeping his door fastened, he put out the lights and collects a party of armed friends, to seize the expected burglar ; the existence of such traps forms no defence. The fact that facilities for committing an offence are afforded, or even that temptations to its commission are put in the way of the offender by one who is seeking to entrap him, will not affect the question of his guilt, or relieve him from legal responsibility for the crime.

Consent to an act not implied by providing facilities for it to catch the doer.

(*a*) The purchaser of a quantity of husks sought to persuade the labourer entrusted with the measuring out of it to give him rapeseed instead. The latter, in understanding with his master, allowed this to take place, so that the purchaser possessed himself of the rapeseed, and the purchaser was convicted of theft.

(*b*) The assent tacit and presumed of the proprietor prevented (the taking) being theft, as we assume the hypothesis that he who took the thing had reason to believe that the proprietor would consent.

22 Carr. Prog., Art. 2034 (*n*).

23 1 Whart. Cr. L., 164.

The leading case in support of this view is *The King* v. *Egginton*[24] in which the owner of a property, on being informed by his watchman that he had been solicited to take part in a robbery of the master's house, told the servant to go on with the business and consented to his opening a door leading to the front yard, and also marked all the property he left in the place where the robbers were expected, to come with a view to apprehend them, and this conduct of the owner was held not to negative the offence, on the ground that "he only gave them a greater facility to commit the larceny than they otherwise might have had; and that this could no more be considered as an assent than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts; that there was no distinguishing between the degrees of facility a thief might have given to him; that Boulton (the owner) never meant that the prisoners should take away his property."

Referring to that case, Stephens in his Digest of Criminal Law,[25] gives the following illustration as a correct statement of the present law on the subject. "A instigates B, C's servant, to help A to steal money in C's desk. B tells his master, C. C, in order to detect A, tells B to go on with the business, and so arranges matters as to give A and B opportunities to break open the desk and take the money. This is theft in A."

It has often been held that where the owner of certain property on learning that an attempt is to be made to steal it, should leave it exposed or place it in some position in expectation that it will be stolen from there by one whom he suspects to be a thief, he shall not thereby be held to have consented to the unlawful taking of the property.[26] In *Reg* v. *Ady*,[27] the defence was that the prosecutor, a clergyman, had gone to a magistrate with the accused, knowing well who he was, and simply for the purpose of entrapping him into the commission of an offence, and of making evidence to support a case against him. Patteson, J., said however, "If the defendant did obtain the money by false pretences, and knew them to be false at the time, it does not signify whether they intended to entrap him or not." In *R.* v. *Williams*,[28] overtures were made by a person to a

---

[24] Leach C. C., 913.
[25] P. 257.
[26] Reg. v. Lyons, Car. & M., 217.
[27] 7 Car. & P., 140.
[28] 1 C. & K., 195.

servant of a publican to induce him to join in robbing his master's till. The servant communicated the matter to the master, and by his direction, some weeks after, opened a communication with that person, in consequence of which that person came to the master's premises, where the servant had, by the master's direction, placed some money marked by the master, in order that it might be taken up by the thief, and it being so taken up, the offence was held to be larceny.

The same rule is acted upon in the United States also. Thus, in *Williams* v. *State*,[29] Bleckley, J., observed: "It seems to be settled law that traps may be set to catch the guilty. Opportunity to commit crime may, by design, be rendered the most complete, and if the accused embrace it he will still be criminal. Property may be left exposed for the express purpose that a suspected thief may commit himself by stealing it. The owner is not bound to take any measures for security. He may repose upon the law alone, and the law will not inquire into his motive for trusting it." In *State* v. *Jansen*,[30] a detective having disclosed to the police the place of an intended burglary, the proprietor of the building, upon the direction of the police, left the rear-door, usually locked and barred, unfastened, but closed, and in the night the accused with the detective entered that door, the accused lifting the latch and opening it, and he was arrested by the police and the proprietor lying in wait inside, and it was held that there was no such consent to the entrance as to negative the offence of burglary.

The same was held in *State* v. *Stickney*,[31] in which the appellant personally performed every act which was essential to the burglarious breaking; and Johnston, J., in delivering the opinion of the Supreme Court of Kansas, said: "The fact that B was willing to assist in and facilitate the detection and arrest of a criminal does not amount to a consent to the commission of the crime, nor will the mere fact that there was a detective with and apparently assisting appellant in the commission of the crime constitute a defence. . . . If the outside lock was broken by appellant, and an entry effected by him with the intent to commit crime, he cannot escape responsibility by the mere fact that the inside bar was not fastened, nor because the owner of the building was lying in wait to discover and apprehend the criminal." In *State* v. *Duncan*,[32] it was held

[29] 55 Ga. 391.
[30] 22 Kan., 498.
[31] 53 Kan., 308.
[32] 8 Rob., 562.

that where one had been notified of a design to steal his goods, he, neither ratifying nor suggesting, might, in order to detect the thief, direct an agent to encourage the design and afford facilities for the completion of the crime; and that such facilities would not affect the criminal liability of the thief.(4) In *Pigg* v. *State*,[34] it was held that if the design was originated by the thief, and the owner merely afforded an opportunity and provided for his discovery, the guilt would be complete.

The same view appears to be taken in European countries. Francesco Carrara refers to a case in Germany in which a shopman, informed of the contemplated theft of his property, rather than prevent it facilitated it, and the highest court held that there was no theft, as *il ladro si impadroniva delle cose altrui mentre il proprietario voleva che cosi fosse.* (b) The Italian jurist, however, does not concur in that view, and says:[35] *E vero che nel momento del furto il proprietario voleva che uno dei ladri rubasse. Ma lo voleva per potere denunziare l'altro, farlo punire e ricuperare le cos sue: dunque l'animo di abbandonare il possesso in lui non vi fu, e si scambia la volontà di portare il ladro alla pena, col consenso alla distrazione del possesso e del dominio. Non mancavano dunque gli estremi obiettivi del furto; e non mancavano gli stremi subiettivi, perchè il ladro niente sapeva che il padrone tollerasse il rubamento per poi denunciarlo. D'altronde il dubbio è in termini risoluto dalla l.* 20, C. *de furtis*; *sul fondamento della quale Struvio,*[36] *alla regola del consenso del padrone appone la limitazione nisi dominus ideo patiatur fieri contrectationem ut in ipso facto furem deprehendat. Uguale problema potrebbe proporsi in tema di adulterio e crederei con identica soluzione.* (c)

(4) The decision in Allen *v.* State [33] is not against this view, as in that case not only was the key, with which the lock was opened, furnished by the master to the servant directly for the purpose of furthering the scheme for the robbery from the locked room, but the servant had turned the bolt; and the acquittal proceeded on the ground that there was no breaking actual or constructive.

(b) The thief took possession of the things, while the proprietor wished that he should do so.

(c) It is true that at the moment of the theft, the proprietor wished that one of the thieves should steal. He wished this, however, in order to be able to denounce the other, to have him punished, and to recover his own things. The intention of giving possession was therefore not present, and the will to bring the thief to punishment is mistaken for consent to the transfer of possession and ownership. There were not wanting therefore the objective essentials of theft, and there were not wanting likewise the

[33] 40 Ala., 334.
[34] 43 Tex, 108.
[35] Carr. Prog., S. 2034 (n).
[36] Syntagma Juris Civilis exercitat: 48. lib. 47, tit. 2, S. 15, p. 759.

Creating opportunity for an act does not imply consent to it.

88. Even creating an opportunity for the commission of an act is not an implied consent to that act. Thus Dr. Wharton says: "When to the constitution of an offence it is necessary that it should be committed without the consent of the party assailed, it is no defence that opportunities for the consummation of the offence, were offered by Government or by prosecution. Exposing of marked goods, by their owner, to a supposed thief, has been repeatedly held not to bar a prosecution for larceny."

It has thus been held, that it is no defence to an indictment for soliciting a servant to rob his master, that the servant sought out the defendant with the express purpose of receiving a solicitation, that the defendant might be convicted.[37] So also, where a person, having heard of the practice of a highway man to rob a certain stage accompanied it in a post-chaise for the purpose of apprehending him, and when he came up, and presented a weapon and demanded money, gave him some; and then with a weapon which he carried for that purpose, and with the assistance of the passengers of the stage, captured the robber, and it was held that the offence of robbery was committed.[38]

The same has been held repeatedly in the United States. It has thus been held there, that merely furnishing opportunities to commit larceny, for the purpose of entrapping the one who proves guilty will not prevent his conviction.[39] If a man is suspected of an intent to steal, and another, to try him, leaves his property in his way, which he takes, he is guilty of larceny. But it would not be so, if the master had directed the servant to deliver the property to the thief, instead of furnishing facilities for his arriving at the place where it was kept.[40] In *People* v. *Hanselman*,[41] a police officer for the purpose of discovering the person who had been committing some crimes, feigned drunkenness and pretended to fall in an

---

subjective essentials, as the thief did not know that the owner tolerated the theft only in order to denounce him. The doubt is moreover solved in the terms of l. 20 Chapter on Theft, on the ground of which Struvio to the rule of the consent of the owner adds the limitation, "unless the owner allowed the removal to take place, so that he might seize the thief." A similar question can be raised on the subject of adultery, and I believe with a similar solution.

---

[37] I Whart. Cr. L., 164.
[38] Reg. *v.* Quail, 4 F. & F., 1076.
[39] Norden's Case, Fost., 129.
[40] Varner *v.* State, 72 Ga., 745.
[41] Dodge *v.* Brittain, Meige, 84.

alley in a drunken stupor, and while so lying in a perfectly conscious condition, a person whom he had not suspected came up to him and took some money out of his pocket, he making no resistance, it was held that there was no such consent as to prevent the taking being larceny. The Court said: "We do not think there is such consent, where there is mere passive submission on the part of the owner of the goods taken, and no indication that he wishes them taken, and no active measures of inducement employed for the purpose of leading into temptation."[42]

It is on the same principle, that sending decoy letters is held not to imply a consent to their being taken by the person to whom they are addressed, and who takes them. It has been repeatedly held, that the circumstance of the letter stolen being a decoy letter, is no defence against a charge of larceny.[43] Thus, in *Reg.* v. *Gardner,*[44] an officer in Postal Department intending to try the honesty of a post-mistress, sent a letter by post, addressed to a fictitious person and a fictitious street, putting two marked coins in the letter, so as to pass her hands. Her taking out the marked money was held to be larceny. And it will be so, even though the letter may, on account of the manner of its posting[45] or otherwise, not constitute a mail letter, and its stealing, therefore, may not be punishable as the larceny of a mail letter.[46]

There was a difference among Roman Lawyers on the point. Gaius[47] said, that, "if Titius solicit my slave to steal my property, and convey it to him, and my slave inform me of it, and I, wishing to detect Titius in *flagrante delicto*, permit my slave to convey my goods to him," there would be no theft, as I consented to his dealing with my property. This was in accordance with the opinion of the jurists of the Sabinian School. Ulpian's opinion was, however, different, and Justinian finally decided that there was no consent in such cases. And Kessler points out that it will make no difference in the law that the person solicited is a servant and not a slave, adding *Ich würde kein Bedenken tragen, ihn als Dieb zu bestrafen.* (e)

(e) I would have no scruple to punish him as a thief.

[42] 76 Cal., 460.
[43] United States v. Foye, 1 Curt. C. C., 364.
United States v. Cottingham, 3 Blatchf., 470..,
[44] 1 Car. & K., 628.
[45] Reg. v. Shephard, Dears C. C. 606.
[46] United States v. Mathews, 35 Fed. Rep., 890; Connor v. People, 18 Colo., 373.
[47] III., S. 198.

89. Consent will not be implied from encouraging or even co-operating by agents in the doing of a criminal act with a view to the discovery of the offender, so long as the doer is not induced or urged to the act by the person against whom the act is done, or by his agent. Thus, if the owner, in order to detect a number of men in the act of stealing, directs a servant to appear to encourage the design, and lead them on till the offence is complete, so long as he does not induce the original intent, but only provides for its discovery, after it is formed, the criminality of the thieves will not be affected.[45] In *Reg.* v. *Bannen*,[46] a person was convicted of feloniously making dies, though he got them made by a person, who, before making them, applied to the mint, and received instructions to make them. In *Com.* v. *Hollister*,[47] Brown had informed the chief of Police and Spencer, into whose pay office the robbery was to be committed, of the purpose and plan of the alleged confederates, and of the time they had fixed for the consummation of the offence, and was co-operating with the police and the intended victims of the plot for the purpose of detecting those engaged therein; and it was held, that it did not follow that two of the confederates, who, without any suspicion that Brown was acting the part of a detective and informer, feloniously took and carried away packages of money, were any the less guilty of larceny.

Encouraging or co-operating in an act to discover the doer, does not imply consent to it.

90. Inducing a person to do an act, however, implies a consent to the act. It has been repeatedly held, that, if the design of an act is originated by a person against whom the act is to be done or by his agent, and is suggested by him to the person who does the same merely adopting the suggestion, the latter is deemed to do it with the implied consent of the originator.[48] In *The King* v. *Egginton*,[49] the Court laid great stress on the circumstance that although Boulton, the owner of the things stolen, "had permitted or suffered the meditated offence to be committed, he had not done any thing originally to induce it; . . . that the design originated with the prisoners; and that all Boulton did was to prevent their design being carried into

Inducing a person to an act implies consent to the act.

[45] Rex. *v.* Whittingham, Leach C.C., 912; Comm *v.* Nott., 135 Mass., 269.
[46] 1 Car. & K., 295.
[47] 157 Pa., 13.
[48] O'Brien *v.* State, 6 Tex. App., 665.
[49] Leach C. C., 922.

undetected execution; which differed the case greatly from what it might have been if he had employed his servant to suggest the perpetration of the offence originally to the prisoners."

In *People* v. *McCord*,[50] the proprietor of a store, with some other persons and a detective stationed themselves in the store, and another person acting as a detective left a window unfastened, through which the accused entered, when he was arrested, and indicted for burglary. He was acquitted, however, on the ground that the crime was instigated by a *confidante* of the proprietor with his acquiescence, and the accused was merely aiding and abetting him. Campbell, J., in delivering the opinion of the court, said: "He was not the active agent in the crime, but guilty of aiding and abetting Flint, and therefore only guilty if Flint was guilty. It would be absurd to hold Flint guilty of burglary. He did what he was expected to do, and had no such intention as would hold him responsible. It may be true that a person does not lose the character of an injured party by merely waiting and watching for expected developments. . . . . It would be a disgrace to the law if a person who has taken active measures to persuade another to enter his premises and take his property can treat the taking as a crime, or qualify any of the acts done by invitation as criminal. What is authorized to be done is no wrong in law to the instigator. In this case, Flint was active in the matter, and the circumstances are clear that it was by such authority as would exonerate him and his victim from criminal responsibility."

In *Johnson* v. *State*,[1] the court said: "The fact of such conspiracy once being established, the subsequent consent of the owner (or those acting for him) for the conspirators to enter the building will not affect their guilt in the least, unless the evidence shows that Higgins and Garwood, or the detective employed by them, suggested the offence, or in some way created the original intent or agreement to commit the offence as charged." In *Connor* v. *People*,[2] the scheme to rob the Express Company was instigated by the superiors of H., and suggested by him to the person charged with robbery, and even communicated to the officers of the Company, who consented to it, and it was, therefore, held, that the offence of robbery was

[50] 76 Mich., 200.

[1] 3 Tex.. App., 593.

[2] 18 Colo., 373.

not committed. (*E*) It has been repeatedly held that the employment of spies is justifiable only so long as the person thus employed "instigates offences no further than by pretending to concur with the perpetrators." [3]

Soliciting a person to do an act implies consent to it.

91. To imply consent on the part of a person, it is not necessary even that he should have originated the idea of the offence. Mere soliciting a person to do an act will imply consent to the doing of the act, even if the idea of doing the act should have originated with the person doing it. Thus in *Williams* v. *State*,[4] the design originated with the thief himself, who, however, was invited to the place, where cotton was given him with the owner's consent by his agent; and Bleckley, J., in delivering the opinion of the Supreme Court of Georgia, observed: "Can the owner directly, through his agent, solicit the suspected party to come forward and commit the criminal act, and then complain of it as a crime, especially where the agent, to whom he has entrusted the conduct of the transaction, puts his own hand into the *corpus delicti*, and assists the accused to perform one or more of the acts necessary to constitute the offence? Should not the owner and his agent, after making every thing ready and easy, wait passively and let the would-be criminal perpetrate the offence for himself in each and every essential part of it? It would seem to us that this is the safer law, as well as the sounder morality, and we think it accords with the authorities. It is difficult to see how a man may solicit another to commit a crime upon his property, and when the act to which he was invited has been done, be heard to say that he did not consent to it. In the present case, but for the owner's incitement, through his agent, the accused may have repented of the contemplated wickedness before it had developed into act. It may have stopped at sin, without putting on the body of crime. To stimulate unlawful intentions, with the motive of bringing

(*E*) Goddard, J., in delivering the opinion of the Supreme Court of Colorado, said: "We do not wish to be understood as intimating that the services of a detective cannot be legitimately employed in the discovery of the perpetrators of a crime that has been or is being, committed, but we do say that when in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime and instigate others to take partin its commission in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible, but criminal, and ought to be rebuked rather than encouraged by the courts."

[3] Reg. v. Mullins, 3 Cox, C. C. 531; Queen-Empress v. Mona Puna, I. L. R., XVI Bom., 669.

[4] 55 Ga., 391.

them to punishable maturity, is a dangerous practice. Much better is it to wait and see if they will not expire. Humanity is weak ; even strong men are sometimes unprepared to cope with temptation and resist encouragement to evil." So also, where detectives, who had been working up a case against a person, went into a bank, and then went out and told him that they wanted more help and solicited him to go in to help them, and he followed them in, it was held that he was not guilty of burglary, [5] as the detectives could not be considered in any other light, than as the servants and the agents of the bankers in communication with whom they had been acting.

No question of consent where criminal act is done by injured person.

92. The question of consent cannot arise in cases where the act constituting the offence is done by the person injured or by a person who actually is, or should be deemed to be, an agent of his. No other person can be made liable for the acts of the victim or his agent. [6] Any other person can be charged with the act, only as his accomplice, and to constitute a person the accomplice of another in an offence, it is necessary that there should be an intentional co-operation in the commission of that offence. There can, of course, be no such co-operation when the intention of the person doing the act is not to commit an offence, but to secure the conviction of another person for the commission of an offence by that act. In *State* v. *Jansen* [7] Brewer, J., observed, that "the act of a detective may, perhaps, not be imputable to the defendant, as there is a want of community of motive." The law is quite clear, however, against treating as an accomplice a person who participates in an act done by another, with a motive the very opposite of that other. Thus if one pretending by way of artifice to be an accomplice, but believed by the accused to be a real accomplice, performs at the instance of the owner of the goods, acts amounting to the physical constituents of larceny, the pretended accomplice represents the owner and not the accused, although the accused may have concurred in the acts and thought he prompted them, and therefore the accused cannot be held guilty on account of them. Speaking of such an accomplice Bleckley, J., in *Williams* v. *State* [8] observed that "that person was in mental and moral concert with the owner, not with the

---

[5] Speiden *v.* State, 3 Tex. Ct. App., 156.

[6] State *v.* Douglas, 44 Kan., 618.

[7] 22 Kan., 498.

[8] 55 Ga., 391.

accused. It is incredible that he was engaged in stealing during this transaction. There was no guilty taking or carrying done by him. The defendant is responsible alone for such taking and carrying away as were done by himself. The acts of the counterfeit accomplice proceeded from the joint will of himself and the accused. He, with the owner, was running on the line of detection and arrest. The accused had a supposed ally, but not a real one. The pretended accomplice could do no act, which would render the defendant guilty, for the former was making no effort to become guilty himself." A spy is both in fact and in principle entirely distinct from an accomplice, and while the latter confesses himself a criminal, the former may be an honest man. (*F*) In *Reg* v. *Despard*,[10] Lord Ellenborough observed, that these persons did not partake of the criminal contamination of accomplices who enter into "communication with the conspirators with an original purpose of discovering their secret designs, and disclosing them for the benefit of the public."

Excluding the case of an accomplice, it is a general principle, that to convict a person of an offence, it must appear that he himself did all that was necessary to constitute that offence. Thus where no criminal act is done by the person charged, as, for instance, the door is opened and he called to enter by an agent of the owner of the building, or the owner's property is given to him by the agent,[12] though only with a view to secure evidence of his guilt, there will of course be no offence.

On the same principle, a conviction for burglary in a court-room was set aside in *Saunders* v. *People*,[13] in which a policeman had on the offender's request left open the door of the court-

(*F*) In *Reg.* v. *Mullins*,[9] Maule, J., in distinguishing between the two, said: "As to P and D, they were persons who, understanding as they say, that there were dangerous designs entertained by certain Chartist Societies, joined the meetings, and pretended to sympathize with the views of the conspirators, in order that they might communicate their designs to Government. They joined the scheme for the purpose of defeating it, and may be called spies. B, and B, on the other hand, were really Chartists, concurring fully in the criminal designs of the rest for a certain time, until getting alarmed, or for some other cause, they turned upon their former associates, and gave information against them. These persons may be truly called accomplices." And this was quoted with approval in *Queen-Empress* v. *Javecharam*,[11] in which Jardine, J., in delivering the judgment of the Court, said: "M appears from his own account to have been the first instigator of the present offence; not merely a spy, who knowing of criminal doings, or doings which will culminate in a crime, merely pretends to concur with the perpetrators."

[9] 3 Cox C. C., 530.
[10] 28 State Trials, 489.
[11] I. L. R., XIX Bom., 363.
[12] People *v.* Collins, 53 Cal., 185.
[13] 38 Mich., 218.

room under his superior's sanction, with a view that the offender might take away certain bonds from there. In *Sanders* v. *State*,[14] the prosecutor was informed that certain persons were coming to his smoke-house on a specified night to steal his meat, and he and others concealed themselves near by to watch; the smoke-house door was opened, and the house entered, when immediately the parties on watch closed in and arrested two of the intruders in the smoke-house. It was claimed that what was done was by the consent of the prosecutor, in pursuance of a plot arranged between him and one Ellison. It was held that if the breaking of the house, or the removal of the meat was an act done by Ellison with the consent of the prosecutor, and the intruders only aided and abetted him, they would not be guilty; but if the plan or plot was only to detect the crime, and not bring it about, they would be guilty, if in fact they feloniously broke and entered, or with a felonious intent, and without the prosecutor's consent, removed any part of the meat; that a man might direct a servant to appear to encourage the design of the thieves, and to lead them on till the offence should be complete, so long as he did not induce the original intent, but only provided for its discovery after it was formed; that if a man was suspected of an intent to steal, and another to try him, left property in his way, which he took, he would be guilty of larceny; but that would not be the case, if the master had directed the servant to deliver the property to the thief, instead of directing him to furnish facilities for his arriving at the place where it was kept.[15]

In *State* v. *Hays*,[16] a detective went with the accused to a store in the night-time, having previously informed the police of his intention. The accused raised the window, and the decoy entered and handed out some goods to him, and the Supreme Court of Missouri held that as the accused did not enter the warehouse either actually or constructively, he did not commit the crime of burglary, no matter what his intent was.

It will be the same, even if the communication is not made to the master, but a servant in the interests of his master communicates to the police the intention to commit the offence, and under the instructions of the police encourages or facilitates the commission of the offence. In *R.* v. *Johnson*,[17] Maule, J., said, that Cole the groom acting under the directions

[14] *Vide* 30 Am. Rep., 130 (n).
[15] Kemp v. State, 11 Humph., 320.
[16] 16 S. W. R., 514.
[17] 1 Car. & M., 218.

of the police must be taken to have been acting under the directions of his master; and that as he not only facilitated the commission of the offence, but actually lifted the latch of the door, and admitted the offender who entered an open door, the latter did not do any act that could make his entrance a burglary; and the acquittal was mainly based on that ground.

In *Rex* v. *Bigley*,[18] a charge of burglary was maintained in the Irish Court against certain persons, though the proprietor of the house had, on being apprised of their purpose, provided a force for their reception, and on their knocking at the door, himself opened it, whereupon the prisoners rushed in, locked the door, and were proceeding further into the house, when his men overpowered and secured them. It was contended that there was neither force not fraud in the entrance, as the owner voluntarily, and with a knowledge of their intention, had opened his door to the prisoners so that a material ingredient of the crime of burglary was wanting. The Judges were unanimous, however, that the offence was completed; but the decision does not appear to rest on sound principles.

[18] 1 Craw. & D., 202.

CHAPTER V.

The Scope of Consent.

Consent is merely to an act.

93. We must now consider the scope and the extent of consent, the orbit of its operation, and the extent of its effect. This involves an enquiry as to what it is that is consented to, when consent is given. It must, in the first place, be made clear that what is consented to is an act, including in that term also the intentional omission of an act. Consent cannot be given merely to a thing or to a person or to any state or condition of things or persons. Strictly speaking there can be no consent even to an event or to the consequences of an act, though as observed above a consent to them is generally spoken of even by lawyers and jurists. The Indian Contract Act has, no doubt, defined consent as an agreement of two or more persons upon the same thing in the same sense. It is clear, however, from the context, that the word thing in that definition isused in its most comprehensive sense, in which it means rather an act than its physical object.

Consent can be only to another's act.

94. Consent can besides be only to an act of another person. It concerns *vielmehr auf nichts mehr und nichts weniger als auf die Handlung des Anderen.*[1] (a) The very definition of consent proposed by Kessler, as *erklärte Uebereinstimmung des Willens einer Person mit der . . . Handlung eines Anderen,*[2] (b) makes it plain that the act consented to must be of another person. One may wish for or intend one's own act, but he cannot be said to consent to it. SS. 87 and 88 of the Indian Penal Code indeed speak of a person's consent to suffer or to take the risk of harm, but to suffer or take the risk of harm is not an act, and the consent in such cases is really to another person doing the act which must or is likely to cause that harm.

Distinction between consent and will.

95. The operation of the mind in regard to one's own act corresponding to the consent to another person's act is designated volition or willing. Thus "will" is the state of mind in

(a) Nothing more or less than the act of the other.

(b) The declared agreement of the will of one person with the . . . act of another.

[1] Kess. Einw., 26.

[2] *Vide* Supra, P. 6.

favor of a man doing an act which he intends and decides to do, and a man is said to will one's own acts as he is said to consent to another's acts. The cause of consent like that of will is separate and independent of consent, and a person may consent to an act of another as he may will his own acts, even though he does not wish for or approve of them.

This distinction between will and consent was long ignored in the English law, and the two words often used synonymously. Strange as it may appear, no distinction was made even between the opposition to a person's will and the mere absence of his consent. Thus the Statute of Westminster I Ch. 13, provided that no man "should ravish a maiden within age, neither by her own consent, nor without consent, nor a wife or maiden of full age, nor other woman, against her will." Ten years later the Statute of Westminister II, Ch. 34, provided that "if a man should ravish a woman, married, maiden or other woman, where she did not consent neither before nor after," he should be punished with death, at the appeal of the party; and, likewise, "where a man ravisheth a woman, married lady, maiden, or other woman, with force, although she consent afterward, she should have a similar sentence upon prosecution in behalf of the king."

Notwithstanding that, however, every standard writer on criminal law defined rape as the carnal knowledge of a woman by a man forcibly and against her will; which clearly indicated not merely the absence of consent, but the existence of a will in the woman, which should have opposed the carnal knowledge.

This definition was adopted even by Judges in the United States, as well as by some of the Legislatures there. The expressions "without her consent," and "against her will" came there also to be used and understood as synonymous with each other. In *Whittaker* v. *State*,[3] Orton, J., observed, "In the law, and in defining the crime of rape, the terms 'against her will' and 'without her consent' are used convertibly. And they are so used in the statutes of many of the States, as in Massachusetts, Vermont, Ohio and New Jersey." As pointed out by Gray, J., in delivering the opinion of the Supreme Court of Massachusetts in *Com.* v. *Burke*,[4] "the earlier and more weighty authority shows that the words 'against her will,' in the standard definitions, mean exactly the same thing

[3] 50 Wis., 518.

[4] 105 Mass., 376.

as 'without her consent;' and that the distinction between these phrases, as applied to this crime, which has been suggested in some modern books, is unfounded."

This confusion was due partly to the circumstance that most of the acts having a legal operation and giving rise to rights and duties, are of a compound nature, consisting of several physical movements by one person or more. Viewed with reference to the movements of different persons, the act is said to be of those persons respectively, and sometimes even designated by different words. The giving of a thing by one person to another is a taking of it by that other. In cases of kidnapping or enticing a person, there is an act by the person kidnapped or enticed which consists generally in going away from his guardian's control. In cases of sexual intercourse, there is often an act by the woman as well as one by the man, though there is no special word for the woman's act. So far is the doctrine carried that when a person to whom a an act is done is passive and does nothing against it, his passivity and omission are deemed to be his acts, and designated as permitting or submitting to that act, corresponding to *dulding* of the German jurisprudence. A person giving or taking a thing unconsciously to or from a person is thus said to give or take that thing without his consent, when what is meant is really only that it is given or taken without a conscious volition on his part, or without the consent of the person to whom it is given or from whom it is taken. The distinction has considerable importance in case of larceny, which includes most of the offences relating to the transfer of movable property; the offence being deemed theft when the act is looked from the point of view of the person taking the thing transferre d, and extortion or cheating when the act is looked from the point of view of the person giving it. In such cases, if a thing is given to any person unconsciously and without advertence thereto, there cannot but have been a will to give it, but there may not have been a consent to its taking by any person. So also if a person takes a thing from another unconsciously and without knowing of it, he may have taken it without his own will, but there must have been consent to his taking it on behalf of the giver. Similarly in cases of rape, while will and consent are both operations of the woman's mind in regard to the act of intercourse with her, *will* has reference to her own part of the physical movements constituting that act, while consent has reference to the man's part of those

movements, and the intercourse may be rape when there is no consent of hers to his part of the act, or when he does it against her inclination to her own part of the act.

General recognition of the distinction between consent and will.

96. The distinction between the opposition to will and the absence of consent was, however, distinctly recognized in some cases of rape even in England. Thus, in *Reg.* v. *Fletcher*,[5] Lord Campbell, C. J., who delivered the leading decision, speaking of the proper definition of the crime of rape, said: "Is it carnal knowledge of a woman against her will, or is it sufficient, if it be without the consent of the prosecutrix? If it must be against her will, then the the crime was not proved in this case; but if the offence is complete where it was by force and without her consent, then the offence proved that was charged in the indictment, and the prisoner was properly convicted." In *Reg.* v. *Charles Fletcher*,[6] the indictment charged the prisoner with having committed the offence of rape against the girl's will and without her consent; and Pollock, C. B., in the judgment of the Court of Criminal Appeal, observed more than once, that there was no evidence in the case "to establish either that the connection was against her will or without her consent." In the United States also, in *People* v. *Crosswell*,[7] Cooley, J., in delivering the opinion of the Supreme Court of Michigan, even observed; "We are aware of no adjudged case that will justify us in construing the words 'against her will' as equivalent in meaning with 'without her intelligent assent,' nor do we think sound reason will sanction it."

In regard to rape, the distinction is most clearly recognized in the Indian Penal Code and the New York Penal Code, according to which, rape may be either against the will of the female with whom the intercourse is had, or without her consent.[8] In explaining the distinction between these alternative expressions, Mr. Mayne says,[9] that the phrase against one's will "implies mental opposition to an act which is anticipated before it takes place. If a man suddenly receives an unexpected blow, he is struck without his consent, but not against his will, which he has no opportunity of exercising." This does not appear, however, to exhaust the difference between the two expressions, which appear to indicate different conditions of

[5] 8 Cox C. C., 134.
[6] 10 Cox C. C., 248.
[7] 13 Mich., 427.
[8] I. P. C., S. 375; N. Y. P. C., S. 278.
[9] Mayne Cr. L., 581.

things. She may have a will for intercourse without consenting to it, as she may consent to it without having a will for it, and the intercourse will be rape if there is no consent, but not if there is no will. Mere absence of will, unlike absence of consent will not constitute rape, as will has reference to an act of her own, and its absence can interfere with her acting, or with the nature or legal character of her act, without necessarily affecting the legal character of the act of another person which he *ex hypothesi* will do with her consent. It will be different, however, if the act consented to by her is done not in the absence of her will, but against (*i. e.*, in active opposition to) her will, as will comes into play immediately prior to her act, and if against the act, must from its nature be held to indicate a revocation of her prior consent to the act.

This distinction between the opposition to will and the absence of consent is clearly recognized in the Continental Codes in regard to other offences also. Thus, in speaking of the cognate offence of assault against the modesty of a woman, R. Garraud says, that *la jurisprudence profitant de l'absence de toute détermination precise et légale, paraît décider aujourd'hui que l'attentat à la pudeur existe toutes les fois que l'acte a été commis malgré la volonté ou même sans le consentement de la victime.*[10]

The Continental Codes appear to make a distinction even between the absence of consent and the absence of will. Thus it appears, that in case of offences directly against the person of the individual affected the act to constitute an offence is generally required to be against the will of that individual; and in other cases, in which it concerns only his property the act may be an offence even if it is only without his will; while to be an offence against persons other than those directly affected by it, it need only be without their consent. In the German Penal Code, for instance, the carrying away of a female is abduction only when she is carried against her will (*wider ihren Willen entführt*);[11] while carrying away a minor female with her will may be an offence if she is carried without will (*ohne Einwilligung*) of her parents or guardian.[12] On the other hand, for causing abortion under Art. 220 of the Code, if the embryo is expelled or killed from the woman's womb

[10] IV. Gar. Dr. Pen., 482.

[11] Art. 236.

[12] Art. 237.

without her knowledge or will (*ohne deren Wissen oder Willen*). So also as a general rule, to constitute theft, *die Aufhebung des Gewahrsams des Anderen muss ohne dessen Willen geschehen*,[13] (c) and not necessarily against her will. And it is frequently laid down by jurists that the words *ohne Willen* have not the same signification as *wider Willen*, and that while for abortion it is sufficient that the consent is wanting, and it is not necessary that *sie ihre Nichteinwilligung ernstlich zu erkennen gegeben habe*;[14] (d) in case of abduction *Mangelnde Zustimmung genügt zur Erfüllung des Thatbestandes nicht*.[15] (e)

Consent to one act is not consent to another act.

97. It is also evident that consent to one act is not a consent to another act, or to anything beyond that act. "Where one person," says Jaggard in his work on Torts, "has consenetd to conduct on the part of another, which but for such consent would be a tort, the conduct must fall within the limit of such consent, or liability will attach. Here is applied the general principle that, the authority ceasing, the exemption from liability ceases. . . . . License to do what would otherwise be a nuisance or a trespass is, co-extensive with the limits of the authority conferred."[16] Thus consent to the use of a certain force is not consent to the use of a different force. A consent to ordinary bleeding as a bleeding, would not be consent to the cutting away of a life artery.[17] Consent to a person entering one part of a house is not consent to his entering another part of the house.[18] So also consent that a physician should conduct an autopsy at a tomb is not a license to remove any part of the remains, for example, the skull.[19] In *Fitzgerald* v. *Cavin*,[20] the action was for an assault by squeezing the plaintiff's testicles, and it was held that the plea of consent would be tenable, only if the act was no other than what the plaintiff had reason to suppose it would be.

On the same principle, a woman's consent to a medical operation is not deemed a consent to an act of sexual

(c) The deprivation of the possession of another must take place without his will.
(d) She must seriously have made known her unwillingness.
(e) Want of consent is not enough for the completion of the act (constituting) the offence.

13 Olshaus. Komm. S. G. B., 879.
14 Olshaus. Komm. S. G. B., 786.
15 Olshaus. Komm., S. G. B., 850.
16 P. 202.
17 II. Bish. Cr. L., 41.
18 Living. La. Pen. Code, Art. 607.
19 Palmer *v.* Broder, 78 Wis., 483.
20 110 Mass., 153.

assault. In *Reg.* v. *Stanton*,[21] a woman consented to have an injection given by her medical attendant, but while applying that, he commenced sexual intercourse with her, and continued it till she, feeling something warm pressed against her person, resisted. He then stopped, and it was held that the offence of rape or assault with intent to commit rape had not been committed. This decision did not proceed, however, on the ground that copulation was not without her consent, but on the ground that there was no force, which was necessary for both the offences, Coleridge, J., observing in his summing up, that "at most it could only be an attempt by surprise to get possession of the person of the prosecutrix, and that is not an assault with intent to commit a rape, but is an assault."

It has sometimes even been held that a woman's consent to sexual intercourse with a person is not consent to his infecting her by the act with a contagious disease. This was the ground of the decision in *Reg.* v. *Bennett*,[22] as explained in *Hegarty* v. *Shine*,[23] and by some of the judges in *Reg.* v. *Clarence*.[24] In this last case, however, the majority of the Court disapproved of that decision, and the fallacy of the rule in its application to cases of this sort was explained by Wills, J., who observed that "to separate the act (of intercourse) into two portions, as was suggested in one of the Irish cases, and to say that there was consent to so much of it as did not consist in the administration of an animal poison, seems to me a subtlety, of an extreme kind. There is, under the circumstances just as much and just as little consent to one part of the transaction as to the rest of it. No one can doubt that in this case, had the truth been known, there could have been no consent to even a distant approach of it . . . . . If the conviction be upheld on the ground of the difference between the thing consented to and the thing done, the principle will extend to many, perhaps most cases, of seduction, and to other forms of illicit intercourse, including, at least theoretically, the case of prostitution ; and if such difference be the true ground upon which to base a confirmation of the conviction, knowledge of his or her condition on the part of the person affected is immaterial. It is the knowledge or want of knowledge on the part of the person who suffers from contagion alone that is the material element." Thus Field, J., re-

[21] 1 C. & K., 415.
[22] 4 Fost. & F., 1105.
[23] 2 L. R. Ir., 273 ; 4 L. R. Ir., 288.
[24] 22 Q. B. D., 23.

ferring to the decision in *Reg.* v. *Bennett*, said:—"As I understand, that very learned Judge Willes, never meant to say that any fraud must vitiate the consent, but that a consent obtained to one act is not a consent to an act of a different nature, and if obtained by a fraud as to its nature would not render the act lawful." Referring to the argument, that "connection with a diseased man and connection with a sound man are things so essentially different, that the wife's submission without knowledge of the facts is no consent at all," Willes, J., further said: "It is said that such a case rests upon the same footing with the consent to a supposed surgical operation, or to connection with a man erroneously supposed to be the woman's husband . . . . . If we are invited to apply the analogy of the cases in which a man has procured intercourse by personating a husband, or by representing that he was performing a surgical operation, we have to ask ourselves whether the procurement of intercourse by suppressing the fact that the man is diseased is more nearly allied to the procurement of intercourse by misrepresentation as to who the man is or as to what is being done, or to misrepresentation of a thousand kinds in respect of which it has never yet occurred to any one to suggest that intercourse so procured was an assault or a rape. There are plenty of such instances in which the knowledge of the truth would have made the victim as ready to accept the embraces of a man stricken with small-pox or leprosy. Take, for example, the case of a man without a single good quality, a gaol-bird, heartless, mean and cruel, without the smallest intention of doing anything but possessing himself of the person of his victim, but successfully representing himself as a man of good family and connections prevented by some temporary obstacle from contracting an immediate marriage, and with conscious hypocrisy acting the part of a devoted lover, and in this fashion, or perhaps under the guise of affected religious fervour, effecting the ruin of his victim. In all that induces consent there is not less difference between the man to whom the woman supposes she is yielding herself and the man by whom she is really betrayed, than there is between the man bodily sound and the man afflicted with a contagious disease. Is there to be a distinction in this respect between an act of intercourse with a wife who on this special occasion would have had a right to refuse her consent, and certainly would have refused it had she known the truth, and the intercourse taking place under the general consent inferred from a

bigamous marriage obtained by the false representation that the man was capable of contracting a legal marriage? In such a case the man can give no title of wife to the woman whose person he obtains by the false representation that he is unmarried, and by a ceremony which, under the circumstances, is absolutely void. Where is the difference between consent obtained by the suppression of the fact that the act of intercourse may produce a foul disease, and consent obtained by the suppression of the fact that it will certainly make the woman a concubine, and while destroying her status as a virgin withhold from her the title and rights of a wife? Where is the distinction between the mistake of fact which induces the woman to consent to intercourse with a man supposed to be sound in body, but not really so, and the mistake of fact which induces her to consent to intercourse with a man whom she believes to be her lawful husband but who is none? Many women would think that of two cruel wrongs the bigamist had committed the worse."

Identity of act how far affected by difference of subjective and objective incidents.

98 In fact, the correctness of the proposition that consent to one act is not consent to another in never denied, in the abstract; all the differences that have arisen in connection with it being in its application, in the determination of the identity of the act consented to. An act is not an elementary notion. In its strict sense, it indeed denotes a mere bodily movement, a muscular contraction. It is, however, immediately preceded by an exertion of the will, and accompanied by a consciousness on the part of the doer of the act as to the purpose of that exertion; and both this exertion and consciousness are considered as essential constituents of the act. So far is the principle sometimes carried, that when an offence consists in doing without consent a certain act for a certain purpose, the act is deemed to have been done without consent, unless the consent to the doing of the act was given with a knowledge that it would be done for that purpose. The German Penal Code, for instance, provides for the punishment of a person, who kidnaps a minor unmarried female with her will, yet without the consent of her parents or guardian, to bring her to unchastity or to marriage;[25] and it is considered that *die Einwilligung der Eltern, &c., ist zu verstehen als Einwilligung in die Entfernung, ihrer*

[25] S. 237.

Tochter zum Zwecke der Unzucht o. d. Ehe; demnach schliesst die Einwilligung in die Entfernung, unter Ausschluss jener Zwecke keineswegs die Möglichkeit einer Entführung aus.[26] (f)

Most acts are also followed by consequences, connected with it in various degrees of proximity and directness. Strictly speaking, the entire chain of physical sequences which an act sets in motion is no part of the act. To take the case of a person killing by a pistol, the only act of that person is to contract the muscles of his arm and forefinger in a certain way whereby he is enabled to raise the weapon, point it at the person killed, and pull the trigger. What follows on that, are all consequences. The contact of the flint and steel, the ignition of the powder, the flight of the ball towards the victim, the wound and subsequent death with the numberless incidents included in them, are consequences of the act. These all, however, are generally treated as a part of the act. The burial, the agonies of his relations, the succession to his property, the litigation between his heirs, and the suicide of one of them for dismissal of his claim, are also consequences of that same act, but they are not treated as a part of the act. No definite line can be drawn between the consequences which may and which may not be considered as a part of the act. However indefinite the ordinary distinction between the proximate and the remote consequences of an act in the law of damages, that distinction has no importance for determining what consequences of an act may be considered a part of the act itself, as several consequences of an act otherwise proximate would be too remote for such treatment. The treatment will, however, affect the identity of an act, as an act with certain of its consequences included in it, will not necessarily be the same with the act including all or other consequences.

There are other incidents also of an act, which may affect its identity. These incidents may have reference to the agency, object, instrument, time, locality or any other relation. For example, an act must necessarily be done by some person, and an act done by one person is apparently a different act from that done by another. An act may also be

(f) The consent of the parents is to be understood as the consent to the taking away of their daughter for the purpose of unchastity or of marriage; therefore the consent to the kidnapping, exclusive of those purposes, does not exclude the possibility of abduction.

[26] II. Hälschner, 244.

done to or for another person and to or for some object, and with one thing or another. And any difference in such person, object or thing may affect the identity of the act, and make it a different act. These differences have however, not the same importance always, and in some cases may be altogether ignored from consideration. As observed above in Chapter II. these are different in different branches of law, and in fact vary even for different matters falling within the same branch. For instance, even the identity of the doer is not important in certain contracts, and the motives of the parties and the quality of the thing contracted for may, generally speaking, be unimportant in all. On the other hand, the identity and the motives are of particular importance in criminal law, and the quality of the thing affected of first importance in the law of torts. Practically, therefore, only those differences are held to affect the identity of an act as are of importance for the purposes of the particular matter under consideration at the time; and the act is held to be the same, notwithstanding differences in all other matters. The important point in such cases is whether the differences in any case, in regard to the incidents which may be considered a part of the act, are sufficiently important to affect the identity of the act. If they are not, the acts will be considered to be the same, and a consent to the one will be deemed to be a consent to the other also, even though the two be really different.

Separate acts how far deemed one and the same.

99. Similarly different acts may be so performed at or near the same time or place, or to the same person or thing that the elements of difference may have no importance for the purpose under consideration, and for that purpose may be deemed to be one act, as different material articles are in law often deemed to be one thing. As observed by Mr. Herman in his Commentaries on Estoppel,[27] "the rule is, that all acts of the same nature, performed at the sametime, are regarded as one act in law." Thus different purchases and dealings running over for years are often held to constitute one purchase and one demand respectively.[28] Even the amounts due on a book-account, though considerable in number, are generally regarded as constituting one debt and one indivisible demand.[29] In the law of torts, an act causing injuries to different properties or different rights is generally.

---

[27] P. 250.

[28] Chand Res. Jud., 652.

[29] Chand Res. Jud., 655.

looked upon as one act, even though the properties may be situate at a distance from each other; though a different rule is sometimes held to apply to injuries to a person, or to different persons.[30]

In the Indian Criminal Law, this general rule is expressly enacted in a very comprehensive form. The Indian Penal Code provides that except where a contrary appears from the context, words, which, in the Code, refer to acts done extend also to illegal omissions;[31] and that the words, act and omission denote as well series of acts and series of omissions, as a single act and a single omission respectively.

And this is recognized in every system of jurisprudence. Thus the removal at the same time of several articles from the same place constitutes one act, even though the articles belong to different persons.[32] In *Reg.* v. *Giddins*,[33] two persons were assaulted and robbed of their respective properties at the same time, and Tindal, C. J., said that it was all one act and one entire transaction. It is but one offence, because the act is one continuous act—the same transaction, and the gist of the offence being the felonious taking of the property, it does not appear how the legal quality is in any manner affected by the fact that the property stolen, instead of belonging to one person, is the several property of different persons; the particular ownership of the property having to be charged in the indictment not to give character to the taking but merely by way of description of the particular offence. The same has been held in *State* v. *Hennessey*[34] and in *State* v. *Warren*,[35] in the latter of which, Robinson, J., in delivering the opinion of the Supreme Court of Maryland, said: "Upon principle, it would seem clear that the stealing of several articles at the same time, whether belonging to the same person or to several persons, constituted but one offence. It is but one offence, because the act is one continuous act—the same transaction; and the gist of the offence being the felonious taking of the property, we do not see how the legal quality is in any manner affected by the fact that the property stolen, instead of belonging to one person, is the several property of different persons." In *Hudson* v. *State*,[36] Winkler, J.

---

30 Chand Res. Jud., 631-636.
31 S. 32.
32 Fulmer v. Com., 97 Pa., 503.
Wilson v. State, 45 Tex., 76.
Jackson v. State, 14 Ind., 327.
Lorton v. State, 7 Mo., 55.
Fisher v. Com., 1 Bush., 211.
33 1 Car & M., 634.
34 23 Ohio, 339.
35 77 Md., 121.
36 9 Tex. Ct. App., 151

in delivering the opinion of the court, said: "That when various articles are stolen at the same time and place, the transaction is not divisible, but is one transaction . . . . . But we must not be understood as holding that different articles taken from different persons and from different places, as from different rooms of a house occupied by different persons, would necessarily be one transaction; but, on the contrary, that property thus situated would, on proper averments and proof, support different prosecutions. For example, if a thief should enter the room of one lodger at a hotel, and should there perpetrate a theft, and should then pass to the room of another lodger and there commit another theft, these would be different thefts."

The words referring to time and place are, however, construed most liberally, properties in the different rooms of an ordinary dwelling-house being considered as in one place. Thus Dr. Bishop, in his work on Criminal Law, says:[37] "It seems to be deemed that if an offender breaks the same house at different times during the same night, all is or may be regarded as one burglary[38] . . . . . A man may violate the prohibiting statute by 'exercising his ordinary calling' in a single act. Thereupon if he continues to perform like acts throughout the day, does he commit more offences than one? The judicial answer to this question is that he does not." In *Crepps* v. *Durden*,[39] Lord Mansfield said: "On the construction of the Act of Parliament (29 Car. 2, c. 7.) the offence is 'exercising his ordinary trade upon the Lord's day'; and that without any fractions of a day, hours or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consist of one or a number of particular acts. There is no idea conveyed by the act itself, that, if a tailor sews on the Lord's day, every stitch he takes is a separate offence; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that there are so many separate and distinct offences. There can be but one entire offence on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day; killing a single hare is an offence; but the killing ten more in the same day will not multiply the offence, or the penalty imposed by the statute for killing one."

---

[37] P. P. 480, 479.

[38] P. v. Gibson, 58 Mich., 368.

[39] 2 Cowp. 640.

In *Woodford* v. *People*,[40] a fire was kindled in a shed to burn a number of dwelling-houses, and an indictment for arson charging their burning as a single act was sustained, even though the several houses could not burn at the same instant, and could not occupy precisely the same place. Church, C. J., observed, "that if a person should shoot three persons by a single shot, a single count for the murder of the three would be good,[41] although they might not all have died at the same time.[42]" On a similar principle, having in one's possession at the same time several forged bank notes of different banks with the intent to pass them as genuine, constitutes only one offence.[43]

The rule was attempted to be carried to an extreme length in *The Queen* v. *Castro*,[44] in which the indictment contained two counts, the one alleging perjury to have been committed at the trial of an action of ejectment in the Court of Common Pleas, the other alleging it to have been previously committed in an affidavit sworn before the Court of Chancery relating to the same matter. It was contended that the two courts were ancillary to each other, and the steps taken in the two formed one proceeding for gaining possession of the lands claimed, and that all the false statements constituted but one crime. The contention was not allowed, however, for reasons given most clearly by Bramwell, L. J., who observed that the point made on behalf of the plaintiff was, that "if a man brings a suit, or several suits, with a view to establish a certain proposition which will entitle him to certain property, although he may tell an infinite number of untruths upon his solemn oath or upon more than one solemn oath, at a distance of time from each other, and varied in form as much as they can be, he commits but one perjury, because the substance of his statement is this, 'I am the person entitled to that estate;' and, therefore, that if he says at one time under one oath, 'I seduced a particular woman,' it really only means, 'I am the person entitled to that estate,' and is a mere modification of the same statement and a varied way of putting it; and that, if he afterwards says, 'I was placed at a particular school,' that, again, merely means, 'I am the

[40] 62 N. Y., 117.
[41] *Vide* to same effect, Ben v. State, Clem. 22 Ala., 9; *v.* State, 42 Ind., 420; Womack *v.* State, 7 Cold., 409 Contra, People *v.* Alibez, 49 Cal. 452.
[42] *Vide* to similar effect, Reg. v. Trueman, 8 Car. & P., 727.
[43] State *v.* Benham, 7 Conn., 414
[44] 5 Q. B. D., 490.

person entitled to the estate,' and is a mere modification of the mode of stating the proposition. I really should have thought it impossible that such an argument as that could be presented in a court of justice. The counsel for the plaintiff in error were driven to admit that, according to their argument, if a man were indicted and convicted of having made a false statement upon oath, he would have power to make with impunity as many false statements with reference to the same subject-matter as he pleased. It is enough to state the proposition to perceive that it cannot be true. It was argued that it would be monstrous that a man should be punished twice for what was practically one perjury. To my mind it would be monstrous, if he could not be punished twice. On the contrary, I think that if, unwarned by the first prosecution, he persists in the crime of perjury by telling fresh untruths, not only ought he to be punished again, but he ought to be punished more than he was upon the first occasion. I can understand that if a witness at the beginning of an examination said, 'I am A. B,' and at the end repeated the words, there might be injustice in saying that he had committed two perjuries; possibly it might be also unjust to charge him with two perjuries, if he had merely repeated the statement at some interval of time. But suppose that a witness were to say falsely, with the view of proving an *alibi*, 'I saw the prisoner upon a certain occasion,' and suppose that he afterwards were to say upon his oath that he had not been convicted of felony, when in truth he had been so convicted, I see no reason why he should not be punished twice for the two distinct false matters to which he pledged his solemn oath."

Robberies of different individual passengers in a stage have been held to constitute distinct offences, though committed at the same place and in rapid succession.[45] It has also been held that one who harbours several felons, who had committed a joint crime, is guilty of a separate offence for each person whom he harbours.[46]

Consent to taking of one article is not consent to taking of another article.

100. As observed above, several articles are often held to be only one article for the purposes of the act having reference to them. Consent to the taking of one article is not consent to the taking of any other and separate article. The question has

[45] *In re* Allison, 13 Colo., 525.

[46] The Queen *v.* Richards, 2 Q. B. D. 311.

generally arisen in cases in which the other article is concealed in the article given or intended to be given, and the person giving that article is not aware of the existence of the concealed article, and has no intention of giving the article given with all its contents. In such a case, if the person receiving that article, appropriates or converts to his own use the article concealed in it, the appropriation will be criminal and an offence. There will be no consent to justify its appropriation or conversion. The confusion in the English law on the subject was due to the circumstance, that the common law did not recognize the offence of criminal misappropriation, the more serious cases of it being, rather than not punished at all, dealt with as larceny. The essence of larceny, however, was the taking of a thing from the possession of another *animi furandi*. The conviction for larceny in such cases could, therefore, proceed only on the basis that the possession of the thing appropriated did not pass to the offender by its delivery along with the article in which it was concealed, and that it remained in the possession of the giver till its existence became known, when it was deemed to have been taken by the person appropriating it.

This constructive theory of taking and possession was not correct, but it was necessitated by the existing state of the law in regard to larceny and misappropriation. It was attempted to be justified on the ground that there could not be a transfer of the possession of a thing given without a knowledge or consciousness even of its existence. The question of the existence or non-existence of consent in such cases, came into the discussion only, as the fact of the transfer of the possession of a thing was considered generally, though incorrectly,[47] not to depend directly on the knowledge of that thing, but on a consent to its transfer. And it was held that there could be no consent to the receipt of the possession of an unknown article, as the article was an essential part of the act of receipt, and therefore the act of its receipt could not be said to be known while the thing was unknown, and there could be no consent to an act which was not known.

Thus in *Cartwright* v. *Green*,[48] a bureau had been delivered to a person for repairs, and Lord Eldon, in delivering the

---

[47] Vide Supra, S. S. 64, 65.

[48] 8 Ves., 405.

judgment of the Court, said: "From all the cases in Hawkins, there is no doubt, this bureau being delivered to the defendant for no other purpose than repair, if he broke open any part, which it was not necessary to touch for the purpose of repair, but with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases, as not being warranted by the purpose for which it was delivered. If a pocket-book containing bank notes was left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket and the notes out of the pocket-book, there is not the least doubt, that it is a felony. So, if the pocket-book was left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly, but not being entrusted with it for the purpose of opening it, and that is felony according to the modern cases."

In *Merry* v. *Green*,[49] the facts were the same, except that the bureau had been sold. It was contended that there was a delivery along with it also of the money in it to the purchaser as his own property, which gave him a lawful possession of the money also, and that, therefore, his subsequent misappropriation of the money did not constitute a felony. Parke, B., who delivered the judgment of the court, said: "Though there was a delivery of the secretary and a lawful property in it thereby vested in the plaintiff there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence: and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this."

These cases have been repeatedly approved and followed. Thus in *Queen* v. *Ashwell*,[50] Cave, J., observed that they had established "the principle that a man has not possession of that of the existence of which he is unaware. A man cannot without his consent be made to incur the responsibilities towards the real owner which arise even from the simple possession of a chattel without further title, and

[49] 7 M. & W., 623. | [50] 16 Q. B. D., 201.

if a chattel has, without his knowledge, been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel, and has assented to the possession of it. . . . In my judgment, a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. Now, a man does not consent to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in *Merry* v. *Green*, was not in possession of the purse and money until he knew of their existence."

In *Huthmacher* v. *Harris's Administrators*,[1] it was held by the Supreme Court of Pennsylvania that the sale of a drill machine, which unknown to the parties contained money and other valuables, did not pass title to them, though title was passed to every constituent part of the object of sale. Woodward, J., in delivering the opinion of the Court, observed that the contents of the machine were to be distinguished from its constituent parts, and said: "A sale of a coat does not give title to the pocket-book which may happen to be temporarily deposited in it, nor the sale of a chest of drawers a title to the deposits therein. In these cases, and many others that are easily imagined, the contents are not essential to the existence or usefulness of the thing contracted for, and not being within the contemplation or intention of the contracting parties, do not pass by the sale."

Consent may be conditioned or limited in any manner.

101. Consent to an act is sometimes given conditionally, conditioned to the act being done only in certain cases, or in the case of certain events or acts taking place or not. Such consent is the basis of conditional and reciprocal contracts. Nor is it wanting in non-contract law, in which also a consent to the doing of an act subject to certain conditions is not consent to the act, unless and until those conditions exist. Thus in *Reg.* v. *Hands*,[2] a person was indicted for committing a larceny from what is known as an "automatic box," which was so constructed that, if one put a penny into it and pushed a knob in accordance with the directions on the box, a cigarette was ejected on to a bracket and presented to the giver of the penny. Certain persons put in the box a piece of metal

[1] 38 Pa., 491.

[2] 16 Cox, C. C., 188.

which was of no value, but which produced the same effect as the placing of a penny would produce. A cigarette was ejected which they appropriated; and their conviction for larceny was sustained. Lord Coleridge, C. J., with whom the other judges concurred, said: "In a case of that class it appears to me there clearly was larceny. The means by which the cigarette was made to come out of the box were fraudulent, and the cigarette so made to come out was appropriated." So where a woman consented to the connection for a small sum of money which the man refused to pay, and he then had forcible connection with her, it was held to be rape.[3]

So also if an act is generally done subject to any limitations or restrictions, a consent to the act shall be deemed as given subject to those limitations and restrictions. Thus, if two men were to begin boxing with gloves, one would not be justified in throwing aside the gloves, and striking with his fist. Similarly, the players in a fencing match would be bound to di-continue the moment the button fell off the foil of either. On the same principle, all the recognised rules to a contest must be observed, for they enter into the estimate of the risk in giving the consent. Where two men are sparring, every blow must be fair.[4] And so it is laid down by East, "That in cases of friendly contests with weapons, which, though not of a deadly nature, may yet breed danger, there should be due warning given that each party may start upon equal terms. For, if two were engaged to play at cudgels, and the one made a blow at the other, likely to hurt, before he was upon his guard, and without warning, from whence death ensued; the want of due and friendly caution would make such act amount to manslaughter."[5]

Consent to an act is to the act as usually done.

102. Even where consent is given absolutely to an act, it will be construed to refer only to the act as usually understood and as usually done. The difference in the manner of doing it may be so material as to affect the identity of the act consented to, and make the act different from that to which consent was given. Thus a woman's consent to an act of sexual intercourse, will not justify the intercourse if it is performed in a brutal manner.[6] On the same principle, consent to operate a threshing machine with a damper down does not bar an action for damages

[3] S. v. Long, 93 N. C., 542.
[4] Mayne Cr. L., 394.
[5] East P. C., 269.
[6] Richie v. State, 58 Ind., 355.

resulting from operating it with the damper open in a high wind.[7] Similarly, participants in a violent game assume only the risk ordinarily incidental to their sport, but such ordinary risk does not include wrongful and intentional inflictions of injury.[8]

As observed by Mr. Starling in commenting on section 87 of the Indian Penal Code, "the consent given being to take a certain kind of risk, the amount of risk must not be increased, nor the kind thereof changed; and this involves the necessity that both parties should strictly observe all the rules of the game or pastime in which they are engaged, though, of course, it is quite competent to either party in the course of the game to take upon himself a greater amount of risk than he agreed to at first." So also, consent to the performance of a surgical operation for the cure or extirpation of disease will, in the law, justify the use of force; but cannot bar an action by the patient for intentional violence or negligence on the part of the physician.

Consent to an act is not consent to the consequences of that act.

103. Consent to an act is not a consent to all the consequences of that act. The contrary is often maintained on the analogy of the doctrine relating to intention. An intention to do an act is generally held to be an intention to produce the natural consequences of that act, and this on the ground of a presumption that every person knows the consequences of his acts, and may, therefore, be deemed to have intended them.

Several German jurists have taken that view of consent. Thus Hälschner says,[9] *Die Verletzung des Einwilligenden setzt voraus dass dieser die Verletzung nicht nurwünscht, sondern will, beabsichtigt, darum auch mit dem Bewusstsein handelt, sie selbstthätig zu verursachen, indem er, einen Anderen anstiftet und sich desselben zur Verwirklichung seiner Absicht bedient.*(i) Rödenbeck goes still further, and says, *der Getödtete ist bei der Tödtung eines Einwilligenden die Seele des Un-*

(i) The injury to the consenting person presupposes that he not only wishes the injury, but wills, intends it, and, therefore, acts with the consciousness of causing it to himself, in as much as he instigates another, and avails himself of the same for the realization of his intention.

7 Garrison v. Graybill, 52 Mo. App., 580.

8 Jagg. Torts 202.

9 Ger. S. xxxv, 76 ff.

ternelmens, der Tödtende nur sein Werkzeug(j)[10] According to him when a man wills a cause he must will all the possible consequences of it, which even Hälschner observes is making violence of the conception. Ortmann on the other hand says [11], "*Wer die Wirkung will, muss auch die Ursache wollen* (k)[12] These views are not shared, however, by other jurists. Thus, Luden says that it is not to be overlooked that consent *die Verletzung keineswegs immer vorhanden ist, wenn der Verletzte in die Handlung gewilligt hat, welche die Verletzung zur Folge gehabt hat.*[13(l)] The correct rule appears to be that laid down by Breithaupt, who appears to think that consent to an act is consent only to such consequences of it, as were intended by the person giving the consent, and not to such as may have occurred to him merely as possible. Thus he in his Work on *Volenti non fit injuria*[14] says: *Wenn nun Jemand in die Vornahme einer Handlung willigt, welche an und für sich durchaus nicht verletzend ist, und diesealsdann eine weitere Handlung zur Folge hat, durch welche eine Verletzung eintritt, so ist kein Spielraum für die Anwendung unseres Satzes, da der Verletzte in die Handlung nur insoweit eingewilligt hat, als dieselbe ohne eine Vorletzung zuzufügen ausgeführt werden sollte. Ob ihm hierbei selbst die Möglichkeit vorgeschwobt hat, dass falls die Handlung anders als in der beabsichtigten Weise zur Ausführung käme, ein ihn verletzender Erfolg eintreten könnte, ist vollständig gleichgiltig, da dieser Erfolg gar nicht beabsichtigt und in Folge dessen nach unseren obigen Ausführungen, eine Einwilligung in denselben unmöglich war. Diese kann aber nur zu etwas Beabsichtigtem gegeben werden und es genügt durchaus nicht, dass der Verletzte sich vielleicht bewusst war, dass er sich durch die Ertheilung der Einwilligung einer Gefahr aussetzt.* Kessler lays down broadly that *Die Einwilligung ist kein Wollen des Erfolges;* (m) but even he admits that *würde A* (n) *die Zerstörung der Sache nur dann 'gewollt haben, wenn er sie als eine sichere Folge des Schusses vorausgesehen hätte.*

(j) In case of the killing of a consenting person, the person killed is the soul of the undertaking, and the person killing only his tool.

(k) Who wills the effect must also will the cause.

(l) to the injury is by no means always present when the injured person has consented to the act, which has caused the injury.

(m) Consent is not willing the consequences.

(n) A would have willed the destruction of the thing only when he had foreseen it as a certain consequence of the shot.

[10] Kess Einw., 24.
[11] Goltd. A; xxv, 118.
[12] Kess. Einw., 23.
[13] Luden Hanob., 323.
[14] P. 26.
[15] Kess. Einw, 25.

CHAPTER VI.

Effect of Consent.

Consent can be only to a future act.

104. Consent can only be to an act which is to be done. The act may have reference to any other past act, event or transaction, but it can receive consent only so long as it has not been done. The most important development of consent is contract, and a contract is to do or not to do something in future. Even in the case of a contract in discharge or satisfaction of a previous contract, the act consented to is that of discharge or satisfaction, and not of the previous contract. So also in the case of a tort. Kessler broadly observes that *Die Einwilligung muss der Handlung vorausgehen*, (a) and gives as a reason for it, that *nur wenn dass Interesse schon preisgegeben war, konnte es nicht verletzt werden.*[1] (b) Breithaupt in his work on *Volenti non fit injuria*[2] discusses this question at length and says : *die betreffende Verletzung, in welche eingewilligt wird, eine erst beabsichtigte sein muss. Sie darf also noch nicht ausgeführt sein, wenn überhaupt die dazu gegebene Einwilligung das in Rede stehende Rechtsverhältniss mit dem Satze volenti non fit iniuria soll in Zusammenhang bringen dürfen. Ist die Handlung ohne eine vorhergegangene Einwilligung begangen, so ist sie selbst in den Fällen, wo das Gesetz ausdrücklich bestimmt, dass durch die Einwilligung der verbrecherische Charakter wegfällt, dennoch strafbar, wenn auch der Verletzende erklärt, dass er damit einverstanden ist. Der Staat hat es allerdings in das Belieben des Verletzten stellen wollen, die in Rede stehende Handlung als ein Delikt entstehen zu lassen, indem er ihm gestattete, seine Rechte an dem betreffenden Rechtsgute ganz nach freiem Belieben auf einen Andern zu übertragen, sodass dieser also weiter nichts als sein Rechtsnachfolger ist. Diese Uebertragung muss sich aber nothwendiger Weise in einem Willensakte äussern ; solange dieser noch nicht stattgefunden hat, ist der ursprüngliche Eigenthümer immer noch der allein verfügungsberechtigte. Hat also Jemand, solange dieser Rechtszustand anhält, sich*

(a) Consent must precede the act.

(b) It is only when the interest had already been sacrificed that it could not be injured.

[1] Kess. Einw., 104.

[2] P. 22.

einen Eingriff in diese Rechtssphäre des Andern erlaubt, so muss er nach dem Willen des Staates strafbar sein, weil der in seinem Recht gestörte seine Dispositionsbefugniss über dasselbe bei Begehung der Handlung noch nicht auf ihn übertragen hatte. Der Staatswille stellt also diese Handlung als strafbar hin, da dieselbe in der Gestalt, wie sie begangen wurde, ihres Deliktscharakters nicht entkleidet worden ist. Ist nun eine Handlung, sowie sie vorliegt, einmal durch die bestehende Rechtsordnung, als strafbar hingestellt, so muss sie diesen Charakter für alle Zeiten behalten. . . . . Der Fall, wo der Thäter mit gutem Grunde annehmen durfte, dass die Einwilligung nachträglich eintreten würde, und der in Hoffnung darauf die Handlung vorgenommen hat, bildet streng genommen keine Ausnahme von dem soeben aufgestellten Prinzip. Denn wenn die Einwilligung in diesem Falle nachträglich erfolgt, so ist der Thäter nicht aus dem Grunde straflos, dass sie noch nach Begehung der Handlung ertheilt wurde, sondern deshalb, weil der Handelnde schon vor der Begehung die Ueberzeugung hatte, dass er im Einverständniss mit dem Willen des Andern handelte. Es ist also rechtlich die Situation ebenso, als wenn die Genehmigung vorher ertheilt worden wäre. Selbst dann, wenn die Einwilligung unter diesen Umständen nach Begehung der That verweigert werden würde, müssen wegen der bona fides des Thäters die Wirkungen der ertheilten Einwilligung eintreten.[a]

(a) The injury in question which is consented to must be one as yet only intended. It dare therefore have not yet been committed, if the consent given to it is at all to bring the existing legal status into connection with the sentence *volenti non fit injuria*. If the act has been committed without previous consent, then it is punishable even in those cases where the law expressly declares that the criminal character is removed through consent, and although the injured person declares that he is agreeable to it. The State has indeed wished to place it at the free will of the injured person to allow the act in question to appear as a *delict* (offence), inasmuch as it permits to him to transfer his rights to the interest (good) in question quite at his own free will to the other, so that this one is nothing else than his successor in law. This transfer must, however, necessarily manifest itself by an external act of will, as long as this has not taken place, the original proprietor is still the only one entitled to dispose (of it). If anybody therefore under takes an attack against the legal sphere of another as long as this legal status still continues, so must he be punishable according to the will of the State, because the person disturbed in his rights, had not yet transferred to him (the same) his authority of disposal concerning it (the thing) at the time of the commission of the act. The will of the State therefore lays down the act as punishable, as the same in the form in which it it was committed, had not yet been divested of its character as a *delict*. If now an act as it is present has once been laid down by the existing law as punishable, it must retain this character for all time. . . . . Strictly speaking, there is no exception from this principle just laid down in the case where the doer supposes on good grounds that consent would subsequently be given, and on the strength of this undertakes the act. For, if consent follows in this case, the doer is exempt from the punishment not on the ground that it (consent) was given after the commission of the act, but because the acting person had the conviction even before the commission that he acted in agreement with the will of the other. The legal situation is accordingly just the same, as if consent had been given previously. Even when under such circumstances, consent should be refused after the commission of the act, there would enter the effect of consent as given, owing to the *bonâ fides* of the doer.

The principle, however, has special application in criminal law. To negative an offence, the consent to the act constituting the same, must have been given prior to the doing of that act. An acquiescence or approval of an act already done, may be a sanction, a ratification, or a waiver, but strictly speaking, will not be a consent. It has thus been held that a person may be convicted of forgery, though the person whose name was forged ratified his act.[3]

The question has generally arisen in cases of rape and of assault with intent to commit rape, in which sometimes there is an opposition to the assault, but during the struggle the woman softens, and gives consent to the intercourse before it is commenced. Consent thus given after the assault, and before penetration, is a good defence to the charge of rape;[4] yet after the offence has been completed by penetration, no submission or consent of the woman will avail the offender; and consent after the intercourse is completed is *a fortiori* no defence.[5]

In *State* v. *Hartigan*,[6] the consent was given after the assault and before the penetration, the intercourse taking place with her consent. It was held that the offence of assault with intent to ravish had been committed; "for the consent does not undo what was done before." Kellogg, J., in delivering the opinion of the Supreme Court of Vermont in the case, said: "It has never been regarded as a legal excuse for the consummated offence that the woman consented after the fact, and we regard this principle as being applicable to the case of an assault with an intent to commit a rape as well as to the higher offence." It thus appears to be a settled rule that when the offence has been made complete by penetration, no remission by the woman or consent from her, however quickly following, can avail the man.[7] In *Wright* v. *State*,[8] it was held to make no difference, if "she assented after the fact, or she was taken first with her own consent, and afterwards forced against her will."

Speaking of husband's consent in regard to the offence of adultery, Mr. Mayne in his work on the Criminial Law of India[8a] observes, that "if there was no consent or connivance, up to the time the act was committed, then the offence is

---

[3] Countee *v.* State, 33 S. W. Rep. 127.
[4] Reg. *v.* Hallett, 9 Car. & P., 748.
[5] Com. *v.* McDonald, 110 Mass., 405.
[6] 32 Vt., 607.
[7] Com. *v.* Slattery, 147 Mass., 423. State *v.* Bagan, 41 Minn., 285.
[8] 4 Humph., 194.
[8a] P. 803.

complete, and it is difficult to see how it can be obliterated by any subsequent consent."

It has been repeatedly held by the Supreme Court of Iowa, that an assault with intent to commit rape is complete in pursuing and seizing a woman with the intention of having sexual intercourse with her, against her will, and notwithstanding her resistance, although she subsequently consents.[9] In the case first cited, Adams, J., in delivering the opinion of the Court, observed that if the conviction for rape "is prevented by reason of evidence of the woman's consent, yet if, before the consent was given, it appears that the defendant used such force as to evince an intention to commit rape, the defendant may be convicted of an assault with an intent to commit rape."

In *Reg.* v. *Page*,[10] the girl awoke after penetration, but while connection was being had with her and before it was at an end. She did not then show any resistance, and Coleridge, J., instructed the jury that there was not such an absence of consent *throughout* as to justify a conviction of the offence of rape. In *Brown* v. *People*,[11] it was held that there would be no rape if consent was given during any part of the act of intercourse.[12] In *Pomeroy* v. *State*,[13] Howk, C.J., in delivering the opinion of the Court, said:—"The evidence wholly fails to show that Rebecca ever consented to, or even had knowledge of the act of sexual intercourse, until after it was fully accomplished. In such a case the force required by the statute is in the wrongful act." There was no question in these cases of the effect of consent given after the penetration, and so far as that question is concerned, the observations must be deemed to have been *ultra vires*.

Consent distinguished from subsequent approval.

105. The above rule is of quite a general application. Some confusion has, however, been introduced into the matter by a vague use of the word consent for sanction and ratification in the law of contracts, and for waiver in the law of torts. It is the consent of a person on attaining his majority, which is generally said to make binding on him a contract entered into by him while under age. It is the consent of a principal to a contract entered into by his agent without authority from him, that

[9] State v. Atherton, 50 Iowa, 189.
State v. Delong, 65 N. W. Rep., 402.
[10] 2 Cox C. C., 133.
[11] 36 Mich., 203.
[12] *Vide* to similar effect,
State v. Ward, 73 Iowa., 532.
[13] 94 Ind., 96.

is said to make the contract binding on the principal. So may a party to a contract be said to consent to its breach, when he acquiesces in it, and does not care to sue for damages. Even the sufferer from a tort, may waive it or accept something in satisfaction of it; and the waiver may, in ordinary language, be said to be a consent to the tort, which without anything further will bar an action in respect of it. This incorrect view of the word consent can, however, find no room in the criminal law, as the doctrine of relation back does not apply to criminal proceedings.[14] Adverting to the distinction between *Einwilligung* and *Vollmacht*, Kessler observes[15] that the *ratihabitio mandato comparatur* does not hold good here.

In the criminal law, a consent given subsequently to an act can operate only as a pardon of that act, but that law does not recognize the principle even of private pardon. *Eine nachträglich erklärte Einwilligung würde nur die Bedeutung einer Privatverzeihung haben, welche das Strafrecht bekanntlich principiell nicht respectirt.*[16](a) Breithaupt in his work on *Volenti non fit injuria*[17] thus says that *Eine nachträglich etwa von dem Verletzten ertheilte Einwilligung kann eine privatrechtliche Wirkung zwischen den beiden unmittelbar betheiligten Interessenten haben, und zwar kann sie den Charakter einer persönlichen Verzeihung an sich tragen, oder sie kann den Thäter von der Pflicht, civilrechtlich Ersatz zu leisten, befreien, hierauf beshränkt sich aber auch ihre Wirkung, kriminell strafbar bleibtsie, weil das jus publicum, das privatorum pactis mutari nequit sie für strafbar erklärt, und der Deliktscharakter ihr durch den Willen des Verletzten auf keinen Fall genommen werdenkann.*(b)

The public have a right to see that penal laws are strictly enforced, and it is only in a few exceptional cases that the Legislature has left their enforcement to the will of the individual. In India it is only in case of defamation, offences

(a) A subsequently declared consent would have only the significance of a private pardon, which the penal law, as is well known, does not respect on principle.

(b) A subsequent consent per chance granted by the injured can have an effect in civil law, between the directly concerned interested parties, and indeed it may bear with it the character of a personal pardon, or it may release the doer from the obligation of making reparation from a civil point of view, but to this alone will it, however, limit its effect; it remains criminally punishable, because public law, which an agreement of private persons cannot change, declares it punishable, and the character of an offence can in no case be taken from it by the will of the injured.

[14] State v. Hartigan, 32 Vt., 611.
[15] Kess. Einw., 104.
[16] Kess. Einw., 104.
[17] P. 22.

relating to breach of contract, and some of the offences relating to marriage, that a criminal court cannot take cognizance of them without a complaint from some person aggrieved by the offence.[18] When a complaint is once made, the absence of the complainant does not necessarily result in an acquittal of the offender even in the pettiest cases.[19] It is only in case of trivial offences, punishable with fine only or with imprisonment for less than six months, that the complainant may withdraw the complaint, but even then only with the permission of the court, obtained on shewing that there are sufficient grounds for the withdrawal.[20]

The omission in such cases of the individual to take action for the punishment of the offender saves the latter from punishment, but the legal effect of this non-punishment is not quite the same with that of the non-commission of the offence, as would be the case, if a consent subsequently expressed could, like that previously given, altogether exclude criminality. The person aggrieved may also compound assault, wrongful confinement, criminal trespass, and a few other offences, but they are all of a private character ; and in case of any aggravation of the offence of voluntarily causing hurt, there can be no compounding without the permission of the court before which the prosecution for the offence may be pending. The compounding, moreover, does not contemplate mere consent of the aggrieved person, but also the receipt by him of some consideration or gratification not necessarily of a pecuniary character, for dropping the prosecution.[21] The Spanish Penal Code provides that the husband can, at all times, remit the penalty inflicted on his wife for adultery, by reuniting himself anew to her ;[22] and the French law also appears to be the same. The effect even of such provisions is not to remove or undo the criminality of the wife.

Nor is compounding allowed in cases of theft and rape, as that generally involves an approval of, or what is ordinarily called consent to, a prior offence. This consent, therefore, does not affect those offences in any way, and is entirely inoperative in their case. Consent could hardly fail to involve a screening of the offender from legal punishment, or at least not proceeding against him for the purpose of bringing him to it ; and a consent thus given in consideration of money or other gra-

[18] Act X. of 1882, ss. 198, 199.
[19] Act X of 1882, s. 247.
[20] Act X. of 1882, s. 248.
[21] Murray *v.* The Queen-Empress. I. L. R., XXI Cal., 112, 115.
[22] Art. 360.

tification paid or promised, so far from purging the offence, may often constitute a fresh offence; and it is settled law, that a subsequent agreement to receive compensation for the injury caused by the offence will not be deemed such a consent to the act constituting the offence, as may affect its criminality.[23] In cases of theft, even the restitution of the property stolen may, in some cases, be an offence in both the giver and the receiver, and the restitution is not recognized in any case as affecting or excusing the criminality of the act of theft in any way.

As to rape, the 13 Edw. 1, St. 1 c. 34 expressly provided that, "If a man ravish a woman, where she neither consented, neither before or after, *Ayt* Judgment *de vyet* member; if she assent after, yet the king shall have the *nul*." That statute has been repealed, but the law remains the same, and consent subsequently given does not exculpate the offender.

Consent must exist at the time of the act.

106. It is a general doctrine that consent to be operative must exist at the time of the doing of the act consented to. It is an ordinary principle of German Jurists that *die Einwilligung muss zur Zeit der Handlung fortdauern.*[24(a)] Thus Breithaupt in his work on *Volenti non fit injuria*[25] says: *Erforderlich ist auch, dass zwischen der Ertheilung der Einwilligung und der Zufügung der Verletzung zeitliche Kontinuität herrschen muss. Deshalb ist eine Einwilligung, von welcher nicht unmittelbar darauf Gebrauch gemacht wird, nicht mehr wirksam; eine Berufung auf dieselbe würde dem Verletzenden nur in dem Falle gestattet sein, wo die Fortdauer der Einwilligung erklärt wird*[(b)] Consent may, therefore, be withdrawn at any time before the act consented to is done, and a consent thus withdrawn will have no existence at the time of the act, and not exclude or excuse the criminality of the act. For example, Ortmann says, "that *ein Gut durch die Einwilligung in die Verletzung, bis zum etwaigen Widerrufe dieser Einwilligung die Eigenschaft eines geschützten Rechtsgutes verliere.*[(c)] This is a direct result of the principle that

(*a*) Consent must continue at the time of the act.

(*b*) It is also necessary that a continuity of time must exist between the granting of the consent and the causing of the injury. Therefore the consent of which no use is made directly, is no more effective. A person committing the injury would be allowed to rely on it only where the continuity of the consent had been declared.

(*c*) An interest through consent to the injury loses the quality of an interest protected by law, until consent, as is possible, be withdrawn.

[23] State *v.* Hammond, 77 Mo., 157.

[24] Kess. Einw., 108.

[25] P. 32.

the consent to a person doing an act does not give that person a right to the doing of that act. Breithaupt in his work on *Volenti non fit iniuria*[26] says: *Wenn nun auch der Thäter auf Grund der gehörig ertheilten Einwilligung seitens des Berechtigten in die Lage versetzt wird, an ihm die Verletzung auszuführen ohne dadurch seine Subjektivität zu beeinträchtigen, so erhält der Erstere jedoch kein absolutes erzwingbares Recht auf Vornahme der Verletzung, da dasselbe ihm jederzeit durch die Zurücknahme der Einwilligung wieder entzogen werden kann. Dieses Rechtes begiebt sich der Einwilligende mit der Ertheilung durchaus nicht, sodass es unrichtig wäre zu sagen, er sei nun auch auf jeden Fall verpflichtet, sich die in Rede stehende Verletzung gefallen zu lassen. Respektirt daher der Thäter einen vor Vornahme der Verletzung etwa erfolgten Widerruf der Einwilligung nicht, so kann er sich nicht mehr auf letztere berufen, er ist vielmehr mit der poena ordinaria zu bestrafen.*[(a)]

The rule is acted upon in the English law also. Thus, where there is evidence tending to show that the prosecutrix consented to sexual intercourse with a man, but withdrew such consent before the consummation of the intercourse, the man may be found guilty of rape.[27] On the trial of a man for rape on his step-daughter, a girl of twelve years, and small for her age, it was held that it would be rape, if she in the first instance consented to the sexual intercourse with him, but after the commencement of the sexual intercourse, withdrew her consent, and he forcibly continued it with knowledge of her dissent. In *Stephen* v. *State*,[28] the intercourse was had with a girl above the age of consent, which, in that case, was ten years. The court said, that as her passions had not arrived at a maturity to authorize a supposition of sexual intercourse with her consent, and her person had been most shamefully outraged, the jury ought to seize upon the slightest proof of resistance—notwithstanding she may have been enticed to give her consent in the first instance—even the

(*a*) If now the doer on the grounds of a properly given consent on the part of the entitled person is placed in the position of committing the injury without thereby infringing his subjectivity, so does, however, the former receive no absolutely enforceable right to the undertaking of the injury, as the same can be again taken away from him at any time by the withdrawal of consent. The consenting person does not at all give up this right with the granting of consent, so that it would be wrong to say that he was bound in every case to allow the injury in question to be committed on him. If, therefore, the doer does not respect the recall of consent before undertaking the injury, so can he not rely upon the latter (consent), he is rather to be punished with the ordinary punishment.

[26] P. 32.

[27] State v. McCaffrey, 63 Iowa., 479.

[28] 11 Ga., 225.

usual struggles of a modest maiden, young and inexperienced in such mysteries, to find, in just such a case, that the act was against her will, and that the presumption of law was so strong as to amount to proof of force.

In German Law, Kessler goes even beyond this, and says *die Einwilligung muss unmittelbar vor der That erklärt werden.*[29(g)] After observing that it is not the withdrawal of the consent, but its continuance that will require a declaration; he adds that strictly speaking there is neither a *Wiederruf noch eine Fortdauer der ächten Einwilligung, sondern nur einen einzigen Act der Einwilligung im Momente der Handlung.*[30(h)]

This will be specially so, when the act is such as can be done only in the immediate presence of the person giving the consent. To illustrate this, Kessler says, that if A one evening to please B, a medical man, expresses his willingness to undergo an operation after being given chloroform, by way of experiment, and B afraid of A withdrawing his consent, administers chloroform to him, while he is asleep in the night, and performs the operation, he will not be liable to punishment according to Ortmann, but that every one will be agreed that he ought to be punished.

Even Kessler admits, however, that an earlier expression of consent may have a practical significance so far that *ihretwegen unter Umständen schon ein bloss passives Verhalten desjenigen, der sie abgegeben hat, unmittelbar vor der That sich als ausdrückliche Einwilligung darstellt, während dies ohne seine vorangegangene Erklärung nicht der Fall sein würde.*[31(i)] And this will be so chiefly if the act consented to may be done in the absence of the consenting person. Thus Kessler says, "*Praktisch abgeschwächt wird die Wichtigkeit dieses Erfordernisses bei Handlungen, die in Abwesenheit des Einwilligenden geschehen können, dadurch, dass der gute Glaube des Thäters an die Fortdauer der Einwilligung gleich dieser die Strafbarkeit aus-*

(g) Consent must be declared immediately before the act.

(h) Withdrawal nor a continuance of real consent, but only a particular act of consent at the moment of the act.

(i) On account of it, under circumstances, the mere passive conduct of him who has given it (his consent) directly before the act (consented to), represents itself as an express consent, while that without his previous declaration would not be the case.

29 Kess. Einw., 109. | 30 Kess. Einw., 110. | 31 Kess. Einw., 110.

schliesst. [32] [j] And the case will be different if the person who had given the consent before, should be present, but unconscious. Thus, Kessler says, [33] *Der gute Glaube an die Fortdauer der effectiven Einwilligung kommt hier nicht als möglich in Frage. Straflosigkeit kann daher nur eintreten, wenn der Thäter ehrlich überzeugt war, dass der Andere bei vorhandenem Bewusstsein einwilligen würde.* [k]

And the previously expressed consent would not be of importance as a proof of his good faith, and it would be a strong indication to the contrary, *wenn er den bloss Schlafenden zu wecken unterlassen hätte*[l]; and if the unconsciousness is simply that of sleep, as in the case of the surgical operation mentioned in the illustration given above, there would be no question that there was no consent.

Consent must be of person to whom harm is caused.

107. In matters of civil law, a third person's consent is sometimes essential to the validity of a transaction, but this is generally as the transaction affects some right of that person; or because that person represents entirely or partially a party to the transaction, and gives the consent to supply or supplement the consent required of that party. As an instance of the former, a person may by a will or deed devise or assign another person's property to some one, and the devise or assignment will not take effect without the consent of that person. Nor may a part-owner make a contract in regard to the joint property without his co-sharer's consent. As an instance of the latter, reference may be made to contracts by adult minors and insane persons, which are not valid unless consented to by their curators or committees of management. In certain systems of law, even females who have attained majority, require the consent of their guardians to their marriage, and after marriage the consent of their husbands to certain contracts affecting their property, though the number of these is steadily decreasing.

(j) The importance of this requirement will be practically weakened in case of acts, which can take place in the absence of the person consenting, inasmuch as the good faith of the doer in the continuance of consent, like consent itself, excludes penality.

(k) The honest belief in the continuance of effective consent does not come into question here as possible. Immunity from punishment could, therefore, only exist, if the doer were honestly convinced, that the other would consent in case of existing consciousness.

(l) When he has omitted to awaken a person merely sleeping.

[32] Kess. Einw., 111.

[33] Kess. Einw., 111.

This system of representative consent is in case of minors, insane persons and others unconscious at the time, recognized in the criminal law also, and will be referred to in sequel. In section 361 of the Indian Penal Code, the consent of some person legally authorized to consent on behalf of the person kidnapped is mentioned as equivalent to the consent of that person himself; but the legal authority to consent otherwise than as an agent (whose consent is really that of the person himself) can exist in the case only of minors or insane persons. As an apt illustration of the necessity of the consent of a guardian to the act of a minor in the criminal law, reference may be made to Article 399 of the Spanish Penal Code, which provides a punishment for a minor who should contract a marriage without the consent of his father or mother or of persons who take their place for that purpose.

Apart from such cases, it is clear, as a general rule, from the very nature of consent, that the consent to negative an injury must be of the person to whom the harm is caused by the act constituting the injury. The act, though directed against one person may sometimes cause harm to other persons also; but then it will, as regards each, constitute a distinct injury, and the consent of each person will have an effect on it only so far as it is an injury against himself. Thus seduction of an unmarried girl is an injury to her as well as to her father, and the consent of either cannot bar an action for damages by the other.

In criminal law, this recognition of an act as an offence against several persons is not frequent, as the harm caused by the act to others than the person directly injured, is often of too remote or slight a character to be taken cognizance of by law. The same principle is applicable, however, to different offences, when they are recognised by law as resulting from the same act as causing injury directly to several persons. Thus, sexual intercourse with a married woman, may constitute the offence of rape, adultery, or fornication. The rape is an offence against the woman herself, and it is her consent alone that can prevent the intercourse from amounting to that offence. Her husband's consent and even positive help will be immaterial, except so far as it may make the husband guilty of abetting the offence. In fact, under the present law, a husband having intercourse with his wife under a certain age, may himself be guilty of rape. The rule is different, however, in the case of adultery, which is

an offence against the husband, and which, at least in British India, can exist only if the husband did not consent to, or connive at, the intercourse. The woman's consent in case of it is entirely immaterial, the offence being committed, equally whether she consented to the intercourse or not;[34] though in certain systems of law, she will, in case of its being committed with her consent, be deemed an abettor of the offence and punishable as such. The offence of fornication wherever recognized, is neither against the woman nor against her husband, but against the society; and so the consent of both the former will be immaterial, and the person guilty of that offence punished without any regard to it.

So also carrying away a young woman may constitute the offence of abduction or kidnapping from British India, or of kidnapping her from her father, or of enticing her away from her husband. Now, abduction and kidnapping from British India are offences essentially against herself, and cannot exist if she consented to go and did go with her consent. For abduction, it is indeed necessary that she may be compelled by force, or induced by deceitful means, to go from any place; and if she consents to go, unwillingness of or even opposition by all her relations together, shall not render possible the existence of compulsion or of enticement by deceitful means. On the other hand, kidnapping her from her father is an offence against the father's right of guardianship, and cannot exist where she is taken with his consent, and no consent by her will prevent such kidnapping from being an offence, or excuse its criminality.

This distinction is recognized in almost every system of law. The latter offence was, for instance, in French law, particularly called *raptus in parentes*, as in such a case, *la personne ravie était sous la puissance de ses père et mère, tuteur ou curateur; c'est contre eux que le rapt était commis; et le consentement de cette personne n'effaçait nullement le délit, parce que la séduction paraissait plus odieuse encore que la contrainte.*[35] Livingstone's Code expressly laid down, that "if any female, under the age of fourteen years, be taken away from her father, mother, tutor, or other person having legal charge of her person, without their consent, either for the purpose of marriage, concubinage, or prostitution, it is an

[34] State *v.* Sanders, 30 Iowa, 582. State *v.* Donovan, 61 Iowa, 278.

[35] IV. Adolph. and Helie, 491.

abduction, although the female should consent, and although a marriage should afterwards take place between the parties."[36]

The same is the case in regard to the enticing away of a married woman, which is an offence essentially against the husband, and it has been held, can exist only when there is no consent or connivance on the part of the husband.[37] The wife's own voluntary determination to leave the husband is, on a charge of that offence, entirely immaterial.[37] Even her willingness and consent, evidenced by her solicitations of the man, and actual complicity in going away, are no defence for the man.[38]

An assault against a woman is recognised as an offence only against her, and though it may cause harm to her husband, yet his assent is not a defence against an indictment for it.[39] The question has not arisen in regard to other offences, but when it arises will no doubt be disposed of in the same way. It has thus been held, that on a prosecution of a postmaster's assistant, it need not be shown that the embezzlement was without the postmaster's consent[40], as the offence being against the Government the consent of the postmaster is quite immaterial.

So also trespass in a place of sepulture with the knowledge that the feelings of any person are likely to be wounded by it is an offence, even though the trespass be effected with the consent of the owner of that place. In *Queen-Empress* v. *Subhan*,[41] Knox, J., based that decision on the ground that he saw "no reason for restricting the original meaning of the word (trespass), which covered any injury or offence done, and to couple it with entry upon property." It may, however, be justified on the principle that the consent of the owner could not affect the criminal character of the act as against the person whose feelings were offended by the disturbance of graves in that place.

So far is the principle carried, that a person's consent can have no effect in regard to any property after the cessation of his interest in it, as he would not be the person injured by any act then done to or in respect of that property. Thus it has been held, that the consent of a person will not defeat an indictment for larceny

---

[36] Art. 458.
[37] Queen *v.* Srimotee Poldee 1 W. R. Cr., 45.
[38] The Queen *v.* Kumarasami, 2 M. H. C. R., 331.
[39] State *v.* Poyland, 24 Kan., 186.
[40] Faust *v.* United States, 163 U. S., 452.
[41] I. L. R., XVIII All., 385.

committed after his death of what was his property, as he will not be the person who will then be affected by it.[42]

In the English law, larceny being an offence essentially against ownership, it may be considered a general rule, that a person taking a thing from another who is merely in charge of it, and thus has no power to make a valid transfer of it, may be guilty of larceny. The principle is recognized in the United States also. Thus in *State* v. *McCartey*,[43] it was held that the fact of the accused having obtained the property by consent of a person entrusted with it by the owner, under such circumstances as rendered the custodian guilty of embezzlement, would not prevent the accused from being convicted of larceny. So where the cashier of a bank was charged with embezzling, abstracting and wilfully misapplying the moneys and funds of the bank, with intent to injure and defraud the bank; it was held, that in order to disprove the averment of intent, he could not prove that his taking the funds and using them in stock speculations were known to and sanctioned by the president and some of the directors of the bank, and that his dealings therewith were intended for the account and benefit of the bank, and believed by him to have been sanctioned by them, although there was no resolution of the board of directors authorizing or sanctioning them.[44]

In *English* v. *State*,[45] a horse was taken away from the possession of a person, who was not the owner but held it for him, and the Supreme Court of Texas held that the taking if without the consent of either of them, might constitute larceny. This does not appear to be generally accepted as correct. Thus the Revised Saxony Penal Code of 1868[46] expressly enacted that, *Sind Inhaber und Eigenthümer verschiedene Personen, so schliesst schon die Einwilligung des Einen von Beiden den Begriff des Diebstahls aus.*(a) And it is a general rule, that where two persons stand in the position of the owner, the consent of even one of them, will prevent the taking being larceny. Thus where the indictment connected A, B, and C, with the ownership and possession of property, two of whom were special owners, and the jury was charged to convict if the taking was without the consent of A, B, or C, or either of them, the

(a) If the possessor and the proprietor are different persons, the consent of one of the two will already exclude the conception of theft.

[42] Sneed *v.* State, 4 Tex. App., 514.
[43] 17 Minn., 76.
[44] U. S. *v.* Taintor, 11 Blatchf., 374.
[45] 15 S. W. Rep. 649.
[46] Art. 272.

instruction was held to be wrong, as authorizing conviction if any one of the three failed to consent.[47] Where the real owner is not known, however, the person in possession will be deemed to be the heir, and his consent will be sufficient to negative larceny. Thus where the owner of a heifer was unknown, and it was taken from the possession of a person, on whose premises it ranged astray, it was held, that he would be the person injured by the theft, and his consent would be necessary to prevent the taking being a theft.[48]

In India theft is an offence essentially against possession, and the consent of the person in possession to the taking of the thing will prevent the taking being larceny. The possession of wife or servant on behalf of the husband or master is deemed to be the possession of the latter himself, and therefore if his property is taken from the possession of the wife or servant, the consent of the latter will not be sufficient to avoid the criminality of the taking. Thus, as a general rule, the consent of a wife to the removal of her husband's goods does not affect the criminality of the removal, unless the goods are such as may be deemed to be hers, or in her power of disposal. So the illustration (n) attached to the definition of theft in the Indian Penal Code[49] provides as follows: "A asks charity from Z's wife. She gives A money, food, and clothes, which A knows to belong to Z her husband. Here it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft." On the other hand, the illustration (o) runs: "A is the paramour of Z's wife. She gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft."

The same has been held in the case of a servant also. Thus in *Reg* v. *Hanmanta*[50] the consent of a Government Inspector of forests to the removal of wood by a person from a forest in his charge was held not to affect the offence of theft committed by that person on account of the removal. Melvill, J., in delivering the judgment of a Division Bench of the Bombay High Court, said: "The fraudulent consent of the Inspector does not affect the case against those concerned in

[47] Woods *v.* State, 26 Tex. App., 490. Jones *v.* State, 28 Tex. App., 42.
[48] Spruill *v.* State, 10 Tex. App., 695.
[49] S. 378.
[50] I. L. R., I Bom., 610.

the dishonest removal of the wood. The Inspector was a servant of Government, and the wood was in his possession on account of Government. The possession of the Inspector was, therefore, the possession of Government, and a consent, which he was not authorized to give, cannot be construed in favor of the accomplice of his breach of trust into the consent of Government."

This is in accordance with the general principle that the consent to the removal of a thing to exclude criminal liability must be of the person who can dispose of that thing. Thus Rüdorff in his Commentary in the German Penal Code [1] says: *Jedoch muss der einwilligende Inhaber Dispositionsbefugniss haben. Deshalb wurde Diebstahl angenommen, obwohl ein mit dem Verkauf betrautes Kind Waaren aus dem Laden der Eltern unentgeltlich hingegeben hatte. Die Wegnahme kann auch durch Vermittelung Dritter als Werrzeuge (Kinder, Unzurechnungsfähige oder Getäuschter) geschehen, in welchem Falle der sie Benutzende als Wegnehmender erscheint.*(a)

Effect of consent not affected by motive of its giving.

108. Whatever may be the legal effect assigned to consent in any case, consent will produce that effect, howsoever it may have been given. The motive with which consent is given in any case is immaterial. It may have been given with the greatest reluctance, and still it will have the same effect.[2] A maid-servant reluctant to the point of tears consented to an examination by a physician, at the request of her mistress, to see if she was with child, and it was held that she could not recover for it.[3] If the view here advanced is correct, Mr. Mayne can hardly be right in observing in his work on the Criminal Law of India,[4] that "an unwilling consent is not a consent at all." Nor has he cited any authority in support of that view.

The question in regard to the effect on consent of motives for giving it arises most often in cases in which absence of consent is essential to an offence; and to secure acquittal on a charge of such offence, it will only be necessary

(a) The possessor who consents must, however, have the authority to dispose. It was therefore considered to be theft, although a child entrusted with the sale had given away goods from the shop of the parents free of charge. The removal may also take place by means of third parties as tools (children, incapable or deceived persons), in which case the person making use of them appears as the remover.

[1] P. 521.

[2] Conners *v.* State, 47 Wis., 523. Reynolds *v.* State, 27 Neb., 90. People *v.* Morrison, 1 Park. Cr. R., 626. Auschicks *v.* State, 6 Tex. Ct. App., 524.

[3] Latter *v.* Braddell, 50 L. J. Q. B., 148.

[4] P. 802.

to show that there was consent. Thus where a person found in possession of stolen property, said that he would rather be whipped than stand a chance of being sent to jail; and on his earnest entreaties a person gave him a few stripes with a switch and released him; it was held not to be an assault, even though he was afterwards judicially punished, and had given his consent only with a view to be saved the punishment for his offence of theft.[5]

This principle often comes into operation in what are called decoy cases. It is held in them, that even though consent is given to a criminal act merely with a view to the detection of its doer, the act will be deemed to have been consented to, and on that grou nd to be free from criminality Thus where a prisoner of war was allowed to go beyond the limits of his parole for the detection of a person who was supposed to have been instrumental in the escape of several other prisoners from the same place, that person was held not to have committed any offence, by assisting that prisoner to escape out of the limits of his parole,[6] as there was no escape or intention to escape in that case. So if the owner of a property consents to another person taking that property with a view to prosecute that person, there is no theft, as for theft it is necessary that the property should be taken without the owner's consent Nor can robbery be held to have been committed, if the victim and another person arrange that the former should meet the latter and the offender at a certain place, and go through the form of being robbed for some purpose of their own.[7] And where several persons arranged among themselves that two strangers should be procured to rob one of them who should be stationed at a designated place in the highway for that purpose, with a view to obtaining the reward offered for the apprehension of robbers, the court held that no robbery had been committed,[8] as the property would not have been taken in such a case without the consent of the person robbed. In such cases, if the owner give up the property demanded to the person demanding it with threats, not on account of the fear created by them, but with a view to secure his conviction, there will be no offence committed,[9] even apart from the question of consent.

---

[5] State *v.* Beck, 1 Hill, 363.
[6] Rex. *v.* Martin, Russ. & R., 196.
[7] People *v.* Clough, 59 Cal., 438.
[8] Rex *v.* McDaniel, Foster, 121.
[9] Rex *v.* Fuller, Russ. & R., 408.
People *v.* Gardiner, 25 N.Y. (Supp.), 1072.

Similarly if certain property is delivered to a person by a servant by the master's directions with a view to fix the guilt on him, its taking by that person cannot be larceny,[10] as the taking in such a case is with the master's consent, and there is something more in the giving than rendering facility to the commission of the offence. The acquittal in *Reg.* v. *Lawrance* [11] proceeded on the supposition, that the deed had been given by the owner's clerk into the prisoner's hands, and the Recorder directed the jury that they should acquit the prisoner unless they were satisfied that the clerk did not deliver it in his hand, but that he might be found guilty "if the deed was laid by the clerk on the table and taken up by the prisoner." This distinction has not always been respected however; and in *The Queen* v. *Middleton*, [12] Bramwell, B., observed, that "it is impossible to say that there was a taking here sufficient to constitute larceny, because the money was picked up, but that if it had been put in the prisoner's hand there was not such a taking."

In *Williams* v. *State*,[13] the agent of the owner of a cotton plantation informed him that the accused would come that night to take some cotton, and the owner said "let him have it, and I will be there at the getting," and on taking up his position with armed friends he told the agent to bring the accused from the wood a short distance off where the accused then was. The accused came and had just moved with a basket of cotton the agent gave him, when halt was cried, and throwing away the basket, he ran away. The court held that as the cotton was delivered by the agent there was no theft, and Bleckley, J., said: "There was no trespass committed in the taking. There was no taking without the owner's consent. True, the consent was given for a purpose quite aside from any design to part with the property, but, if given at all, and the intended larceny was cut off as soon as the owner could, after delivery, cry halt, and fire off the guns, what taking was there which could, with any truth, be said to be without his consent?"

In *Dodge* v. *Brittain*, [14] the Supreme Court of Tennessee said: "Receiving goods, with the owner's consent, from his servant, is not larceny, it being of the essence of the offence that the

[10] Kemp v. State, 11 Humph., 320.
State v. Chambers, 6 Ala., 855.
State v. Covington, 2 Bail. L., 569.

[11] 4 Cox C. C., 438.

[12] 2 C. C. Res., 56.

[13] 55 Ga., 391.

[14] Meigs, 83.

goods be taken against the will of the owner *invito domino*." In *Dodd* v. *Hamilton*,[15] a slave was sent with some money to a certain place where the owner of the money and others were lying in wait, and the slave was approached by a third person who was seized by the owner, and the money found lying on the ground, without any evidence to show that such person intended to take it, the Court held that even if it had been found in his possession it would not be larceny, because the owner had consented to its passing into his possession.

The decision in *Reg.* v. *Williams*,[16] appears to be rather against this view, as there a person was convicted of theft of some coin, on the ground that he had made propositions to a bar-tender to rob the master's till, and the matter being communicated to the master, he directed the servant to send for that person and carry out the design. That person came to the shop, and according to the agreement he had made, pretended to purchase drinks, and was given by way of an excess of change by the bar-tender, the coin which he took up as soon as out of the tender's hands, and a part of which was marked.

Consent must have come to the knowledge of the doer of the act.

109. In the law of contracts, an expression of consent has operation from the moment it is expressed, though in some cases it may be withdrawn before it has come to the knowledge of the person for whom it is meant. The same doctrine is held to apply generally in the criminal law also. The mention in that law is everywhere of the existence or non-existence of consent; and never of its communication to, or its knowledge by, the person acting on it. In India, the consent of the owner of the goods taken was assumed to be sufficient to negative the offence of theft, even though it was not known to the person taking them, and had been given merely to secure his conviction.[17] Eminent German jurists have agreed with that view.[18] Authority is not wanting, however, in favor of the opposite view also. Thus Böhlou and Jahrke point out that the very ground of the application of the doctrine *Volenti non fit injuria* to such cases is that *der dolus Seitens der Thäters ausgeschlossen wird; d. h. durch die ihm bekannte Einwilligung setzt er sich nicht in Wider-*

[15] Taylor's N. C., Term Rep., 31.
[16] 1 Car. & K., 195.
[17] The Empress v. Troylukho Nath, I. L R., IV. Cal., 366.
[18] Schütze Lehrb., Art. 33 & 35 Anm. 8. II. Bind. Norm., 558.

spruch zu der Subjectivität des Verletzten.[19](l) Kessler maintains that there is no complete consent to a person doing anything before its communication to that person, that "*die noch nicht zur Kenntiss des Adressaten gelangte Einwilligungserklärung keine Wirkung haben darf; ja dass sie überhaupt noch keine Erklärung, sondern nur der erste Schritt zu einer solchen ist.*"[21](m)

To illustrate the rule, he gives the following example: A in his hunting grounds is often troubled by a dog of a neighbour B, which comes over there, the law not allowing a dog so doing to be shot. He therefore sends a message to B, asking him to take more care of the dog, as otherwise A will shoot the dog at the next opportunity. B tells the messenger that he has nothing to do with the dog, and A may kill the same. The messenger scarcely leaves B, when B regrets the reply, and sends another messenger to withdraw it. The messenger of B overtakes A's messenger on the way, but in the meantime A has in his anger shot the dog. If the disposal of the dog in question were a civil transaction, the question whether the dog had been shot before or after B made his statement to the first messenger would be of importance according to the doctrine concerning the concluding of contracts between absent parties. *Da hier aber civilrechtliche Gesichtspunkte nicht in Betracht kommen, ist A unter allen Umständen für strafbar zu erklären. Seine Straflosigkeit würde dem Zwecke des Gesetzes, den Eigenthümer davor zu sichern, dass ohne seinen Willen seine Sachen von Unbefugten zerstört werden, schnurstracks zuwiderlaufen.*(n)[22]

And so far is the doctrine carried by him, that he does not consider it enough that the consent should have come to the knowledge of the person acting on it, but must have so come with the will of the person consenting; *die Einwilligungserklärung muss nicht nur zu Ohren des Thäters gekommeln,*

(*l*) Dolus is excluded on the part of the doer; that is, through the consent known to him, he does not place himself in opposition to the subjectivity of the injured person.

(*m*) The declaration of will which has not yet reached the knowledge of the person addressed can have no effect; and that it is indeed not at all a declaration but only the first step to it.

(*n*) Here, however, the point of view of civil rights does not come into consideration, (and) A is under all circumstances to be declared punishable. His immunity from punishment would run directly counter to the object of law, which is to secure for the owner, that without his will his things should not be destroyed by any one unauthorized.

[19] Breit. Volen., 21.

[21] Kess. Einw., 106.

[22] Kess. Einw., 107.

sondern auch an ihn gerichtet gewesen sein.[o][23] And according to him, this follows from the character of consent as a *Dispositions actes*,[p] and from the object of the penal law. Thus he adds:[24] *Spricht jemand seine Einwilligung aus, aber unter der Voraussetzung, dass der in Aussicht genommene Thäter dies nicht erfahren werde, so liegt überhaupt keine Einwilligung, sondern nur das Reden von einer solchen vor. Die etwa auf Grund eines hinterbrachten derartigen Geredes vollführte That bleibt strafbar. Hat freilich der Thäter im guten Glauben an eine für ihn bestimmte Einwilligungserklärung gehandelt, so ist er selbstverständlich straflos, aber nicht wegen vorhandener Einwilligung, sondern wegen mangelnden dolus.*[q] This view of Kessler does not appear to be correct however. Even Breithaupt here parts company from him, and in his work on *Volenti non fit injuria*[25] says: *Warum in dem Falle, wo der Thäter durch einen Dritten Kenntniss davon erhält, dass ein Anderer ernstlich sich mit der verletzung einverstanden erklärt hat, bei Zufügung derselben der dolus weniger ausgeschlossen sein soll, als in dem Fall, wo dem Thäter die Einwilligung unmittelbar zugeht, erscheint uns nicht recht einleuchtend.*[r]

Mere belief as to absence of consent not equivalent to its absence.

110. In cases in which the absence of a person's consent to an act is the gist of an offence, mere ignorance by the offender of the consent to that act will not be sufficient to make that act an offence. It is necessary that the act should really have been without the consent of the person against whom it was done, and the absence of whose consent formed the gist. This has generally been held in larceny cases, where the owner sometimes consents to a person taking away his property, with a view to the discovery of the

(*o*) The declaration of consent must not only have come to the ears of the doer, but should also have been intended for him.

(*p*) Act of disposal.

(*q*) If anybody declares his consent, but under the supposition, that it will not reach the doer in view, there will be no consent at all, but only a talk about it. An act done on the strength of a rumour of that sort carried to the doer, remains punishable. If the doer has of course acted in the honest belief, that the declaration of consent was intended for him, he shall naturally be free from punishment, but not on account of consent having been given, but because there would be no *dolus* (criminal intent).

(*r*) It does not appear clear to us why dolus should be less excluded in a case where the doer has received information from a third party that another has seriously declared himself to be agreeable to an injury, than in the case where consent is directly given to the doer.

[23] Kess, Einw., 107.

[24] Kess. Einw., 107.

[25] P. 25.

offender, and the proof of his guilt. There is no offence committed in such cases on account of the taking, even though it is taken with a full belief that the owner is not aware of, and a consenting party to, the taking. The person taking may be morally as guilty as if the owner had not consented, but a necessary ingredient of legal guilt will be wanting, and no offence will have been committed in law.

The weight of opinion in the Roman law also was in favour of that view. Pomponius, who professed to belong to the subjective school, indeed maintained that there was theft committed when the person removing the thing supposed that the proprietor did not consent to the removal, and he thus found theft in the opinion or belief of the person acting, even when there was no theft in reality. Gaius laid down, however, *sed et si credat aliquis invito domino se rem contrectare domino autem volente id fiat, dicitur furtum non fieri.* Ulpian held the same, and Justinian also required for theft the actual absence of the proprietor's consent. In modern Italy, Francesco Carrara has also taken the same view, and says: *È iniquo punire dove risulta che del delitto mancarono gli estremi, e la pena fondare sopra un sospetto o sopra la sola intenzione.*[26](s) He further observes[27]: *È tanto necessario al furto il dissenso del proprietario che Ulpiano alla* (*l.* 46, s. 8, *ff. de furtis*) *fa la ipotesi di alcuno che abbia rubato ad altri una cosa credendo che egli non volesse mentre in fatto era contentissimo; e decide essere non furto.*(t)

In *Williams* v. *State*,[28] Bleckley, J., observed, that "if the property was delivered by the owner's direction, and with his consent, it can make no difference legally, although it does morally, that the accused did not know of such direction and consent. Suppose the owner, instead of acting by his agent, had acted in person and delivered the cotton from his own hands, the defendant not knowing him to be the owner, but believing him to be another thief and a confederate with himself in the supposed larceny, would not an essential element of legal larceny be wanting?"

(s) It is unjust to punish where it results that the essentials of the offense are wanting, and (equally so) to base the punishment on suspicion or mere intention.

(t) So necessary is the dissent of the proprietor to theft, that Ulpian in treating of theft gives the case of one who had robbed another of a thing believing that he did not wish it, while in fact he was most contented, and decides that it is not theft.

[26] Carr. Prog., Art. 2034 (n).

[27] Carr. Prog., Art. 2034.

[28] 55 Ga., 391.

Similarly it has been held, that if a man be robbed by his own consent, even though the robbers do not know of his consent, there is no crime. This is supported clearly by the decision in *Rex* v. *McDaniel*,[29] in which the consent was not known to the persons enticed to a certain place on the highway to rob one Solomon, yet they were acquitted on the ground that they took his money with his consent. This decision was followed in *United States* v. *Whittier*,[30] in which Judge Dillon observed: "There is a class of cases in respect of larceny and robbery, in which it is held that, where one person procures, or originally induces the commission of the act by another, the person who does the act cannot be convicted of these particular crimes, although he supposed he was taking the property without the consent or against the will of the owner."

Belief of absence of consent how far deemed equivalent to consent in India.

111. The same view is taken generally in British India also. For kidnapping and rape, it is necessary that there should be no consent. For wrongful restraint and compulsory labour it is quite as necessary that the person restrained or compelled should not be agreed to it. Nor can there be adultery or the enticing away of a married woman, if the husband is a consenting party to the intercourse or enticing. For criminal force also the absence of consent has been made a statutory essential, though for assault it may not be so. Any gesture or preparation may constitute assault, provided "it will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person," and the apprehension will depend not so much on the absence of consent, as on a belief of its absence.

Under the Indian Penal Code, it is not necessary, however, to constitute theft that the article taken should be moved without the consent of any person, but that it should be moved with an intent to take it out of the possession of any person without that person's consent. The question in India, therefore, in regard to theft is not of the absence of consent, but of the existence of an intention to take without consent, for which, of course, a belief of the absence of that intention will be sufficient. This view is borne out not only by the language of the definition;

[29] 1 Fost., 121. | [30] 5 Dill., 35.

but also by illustrations (*m*) and (*n*), in both of which the criminal act of taking a thing is said not to be an offence, if the person taking it believed that he had implied consent to its taking. These illustrations appear beyond doubt, to refer to the cases in which there is no theft, because there is a belief as to the existence of consent; the real existence of consent not being referred to, and therefore treated apparently as immaterial. In the same way, in illustration (*o*), a person taking valuable property of his mistress' husband from her, believing her to have no authority from the husband to give it, is said to commit theft, without any reference to the real fact of her having authority or not. In all the three illustrations, the offence of the person taking the property is made to depend exclusively on the belief of that person as to the owner's consent, and not on the existence or non-existence of the consent.

And this view is in accordance also with the direction in which all criminal law is advancing, the direction of replacing the objective elements of an offence with the subjective, and substituting the feelings and ideas of the doer of the act for the conditions of the things to, and the circumstances in, which the act is done. Even in countries in which the commission of theft depends on the absence of consent, and not merely on the absence of a belief in its existence, a *bonâ fide* belief in its existence will also negative the offence. Binding, who on principle declares it to be indifferent in case of offences relating to property whether the consent is declared before or after, says that *bei jeder erwarteten Einwilligung der Vorsatz und somit auch die Rechts, widrigkeit aufgehoben wird.*[31] (*u*)

(*u*) In every case of expected consent, the wrongful intention and accordingly the illegality is removed.

[31] II Bind. Norm., 539.

CHAPTER VII.

Objective Disqualifications of Consent.

Consent caused by fear or misconception of fact is not consent in criminal law.

112. It has been stated above in S. 14 that there can be no consent to an act which is not known to the person consenting, and in S. 25 that consent will not be deemed to be sufficient for the purpose of the law of contracts, if it is not free, but has been induced by coercion, undue influence, fraud, misrepresentation or mistake. The principle underlying that statement is of a general application, and may be said broadly to apply in the case of non-contract law also. In S. 67 a reference has been made to its effect in the law of torts. Nor is it less applicable in the law of crimes. There are similar provisions recognized as affecting the adequacy of consent in the criminal law. The exact character of these provisions is different in different countries ; to some extent, because increased experience and the more humane ideas which are coming into recognition every day are leading gradually to fresh developments in them. Starting from the original Roman and Common law notion that the consent of a person to an act is a complete justification of it as against that person, practical requirements of justice have introduced one exception after another, so that the notion is now restricted to rather narrow limits. It has come to be generally considered as settled that consent obtained by force (including fear), or by a mistake (including fraud) as to the nature of the act consented to, is altogether inoperative, while the law is not quite settled as to the effect on it of undue influence or mistake as to matters incidentally connected with the act. Speaking of consent as avoiding the criminality of acts causing bodily injuries, Stephen in his Digest of Criminal Law[1] observes that effect belongs only to a consent freely given, and that consent is said to be given freely when it is not procured by force, fraud, or threats of whatever nature.

General recognition of the principle in the Indian Penal Code.

113. This principle as to the effect on consent of fear or misconception is recognized to its fullest extent in the Indian Penal Code, which broadly provides, that "a consent is not such as is intended by any section of this Code, if the consent is given by a person under fear of injury, or

[1] Art. 224.

under a misconception of fact." It has sometimes been attempted to narrow the application of this principle by restricting it to offences, of which the absence of consent has been expressly made an essential constituent, and by excluding from its operation offences, certain constituents of which can exist only in the absence of consent. Reference has been made in S. 7 to some such offences, as having the absence of consent for their essential constituent. Thus there can be no wrongful restraint or confinement of a person who consents and is willing to stay at the place where he is. Nor can an act be an assault or insult to a person, if it is consented to by that person.

It is contended that in such cases, actual consent will be sufficient to avoid the criminality of the acts constituting those offences, and that the provision of the Indian Penal Code negativing the consent caused by fear or misconception will have no effect in regard to such offences, as in their case consent cannot be deemed to be intended by any section of the Code. Mr. Mayne thus observes,[2] that "many children under the age of twelve are perfectly aware of the nature of such acts, and willing to submit to them," and "in such a case, although this willingness could not supply the element of consent, it would negative the idea that such an act would cause either fear or annoyance." So also, aft r observing that an act of indecency committed by one male with another, unless amounting either to attempting or abetting an offence under S. 377 of the Code, if consented to by that other with full knowledge, will not be an offence, he says[3] "and the infancy of the consenting party would make no difference." He further adds that consent also negatives the possibility of the act intended being a crime under S. 354 of the Code.

There appear to be no sufficient grounds, however, in support of this view. Nor is there any reason for so radical a difference in the treatment of offences, which are all agreed so far that the absence of consent is an essential constituent of theirs, and which differ only in the circumstance that in some of them, that constituent is recognized expressly by statute, while in others it has not been considered necessary to do so, as its force rests in the nature of things. The controversies in regard to the effect of a minor's consent on assault against her could not have escaped the attention of those, who took part at different times in the framing of the Code; and the words

[2] Mayne Cr. L., 583.

[3] Mayne Cr. L., 583.

"intended by any section" appear to have been used deliberately instead of "mentioned in any section," as though consent is not mentioned in the definitions of wrongful restraint and assault, it cannot be said not to have been intended by them. Mr. Collett also, in his Comments on the Indian Penal Code, dissents from Mr. Mayne's view on the ground, that "an indecent assault without consent must necessarily cause injury, fear, or annoyance to its object, and where that object is legally incompetent to consent, what has to be alone regarded is the wrongful intent or *mens rea* of the accused."[4]

It may be urged that there is no legal incompetency to consent on the part of any one, though the consent by certain persons and in certain circumstances is not considered adequate in certain branches of law. This very inadequacy, however, constitutes an incompetency; and the provision as to the effect on consent of fear or misconception, and in fact even of the subjective disqualifications of consent referred to in the next chapter, may be taken to be most general, and without any reserve or limitation.

Knowledge by person acting on consent of its having been given by fear or misconception.

114. The general proposition in the Indian Penal Code as to the effect of fear or misconception on consent, is qualified by the important proviso, that it "will apply only if the person doing the act knows, or has reason to believe that the consent was given in consequence of such fear or misconception." This qualificative proviso is a recent development of the general principles relating to consent. The Common law did not recognize it in any shape. It was a general rule of that law that a party to a contract was not bound to see that the other party was not under any mistake; and that so long as he did nothing to cause the mistake, he was able to enforce the contract as entirely valid. For example, in *Smith* v. *Hughes*,[5] Blackburn, J., observed that he agreed "that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may

[4] Coll. Com. P. C., 253.

[5] 6 Q. B., 597.

be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."

Courts of equity, however, have for some time recognized the importance of the vendor's knowledge that the purchase is under a mistake, even though the mistake has not been induced by any act of his. Thus Anson in his work on Contracts[6] says, that "a series of equity cases illustrate the rule that when one man knows that another understands his promise in a different sense to that in which he makes it, the transaction will not be allowed to stand." Even if the courts of Common law recognized the contract in such a case, they would only award damages for non-performance; the courts of equity would, however, always decline to compel specific performance of them. Thus in *Webster* v. *Cecil*,[7] the latter refused an offer of the former of £2,000 for certain plots of land, and intending to offer them for £2,100, by a clerical error offered them for £1,200. Webster accepted by return of post, and on Cecil attempting to correct the error sued for specific performance. This was refused, however, as Webster had merely snapped at an offer which he must have perfectly well known to be made by mistake. The decision in *Garrard* v. *Frankel*[8] and in *Harris* v. *Pepperell*,[9] proceeded on the same principle, on the principle "that the Court will not hold the plaintiff bound by the defendant's acceptance of an offer which did not express the plaintiff's real intention, and which the defendant could not, in the circumstances, have reasonably supposed to express it."[10]

On general principles, it is clear that a person who gives consent to the doing of an act has no right to complain if that act is done, even though injury accrue to him from its doing. There is no reason, at least, why a person, who, relying on the consent so given, does an act, should suffer simply because it turns out that the consent was given under a fear of injury or misconception of fact. In such a case, even if it were a question merely of a civil wrong, of the two persons, both innocent, the one who gave the consent would suffer, rather than the person who acted in reliance on that consent. It may well be different, however, if the vice or rather the defective

[6] P. 139.
[7] 30 Beav., 62.
[8] 30 Beav., 445.
[9] 5 Eq., 1.
[10] Poll. Cont., 460.

character of the consent is knowingly caused by or even known to the person, who, knowing of the vice or defect, acts on that consent. A person who knowing that the consent is defective or bad, acts on it cannot claim to have acted innocently, cannot claim the exemption that he would have had if he had acted without such knowledge. So far as he is concerned, consent may well be deemed not to have existed, and his act dealt with as if there were no consent.

Recognition of the provision in English criminal law.

115. Nor is this provision, in its application to the criminal law, peculiar to the Indian Penal Code. The importance of a knowledge of the consent having, in any case, been caused by fear or mistake, is recognized in the English criminal law also. Thus, in Roscoe's work on the Law of Evidence in criminal cases,[11] it is said : "that the true rule must be, that where the man is led from the conduct of the woman to believe that he is not committing a crime known to the law, the act of connection cannot under such circumstances amount to rape. In order to constitute rape there must, it would appear, be an intent to have connection with the woman notwithstanding her resistance." In the case of *Reg.* v. *Urry*, tried at Lincoln Spring Assizes, 1873, the above passage was approved of by Denman, J. In *Reg.* v. *Thurborn*,[12] Parke, B., observed that the guilt of the accused must depend upon the circumstances as they appeared to him.

So also in *The Queen* v. *Clarence*,[13] Field, J., observed : "The actual circumstances were that the prisoner, knowing he had a foul and infectious disease upon him, and that the infection of his wife would be the natural and reasonable consequence of intercourse, solicited intercourse. He also knew that his wife consented to it in ignorance of his condition. Under these circumstances, I think that her consent to the intercourse in fact was given upon the implied condition that, to the knowledge of the prisoner, the nature of the intercourse was that to which she had bound herself to consent and had been accustomed to consent, *i.e.*, a natural and healthy connection. But the intercourse which the prisoner imposed upon his wife was of a different nature—one which, in all probability, would communicate to her a foul disease, and to which the jury have found

[11] P. 855.

[12] 1 Den. C. C., 387.

[13] 22 Q. B. D., 58.

that she would not have consented had she known the state of his health. It seems to me, therefore, to follow that, the mere consent of the prisoner's wife to an act, innocent in itself, and in no way injurious to her, was no consent at all to what the prisoner did, and moreover that he obtained such consent as she gave by wilfully suppressing the fact that he was suffering from disease . . . . . The result, therefore, at which I have arrived is, that there was no consent in fact by the prisoner's wife to the prisoner's act of intercourse, because although he knew, yet his wife did not know, and he wilfully left her in ignorance as to the real nature and character of that act."

Coercion and fraud will not necessarily avoid consent.

116. Apart from this qualification as to knowledge, the rule prescribed in the Indian Penal Code is of a most comprehensive character. Under its general words, the consent being vicious when it is given under fear or misconception of fact, it will be immaterial what is the cause of the fear or misconception, and if it has been caused by any person, whether the person doing the act in reliance on it or any other is the cause of it. Nor will it be material in either case, whether the fear or misconception has been caused knowingly or wilfully, maliciously or fraudulently, with intent to injure any person, or merely to please oneself. Coercion and fraud will thus often prevent consent induced by them from being consent for the purposes of the Code. This is not absolutely necessary, however, because even a person employing coercion, or practising fraud on another, and thereby inducing that other's consent, may not know that that other has been frightened or misled, and in default of such knowledge the consent induced by and on account of the said fright and misleading, will not be vitiated, or in any way rendered inadequate.

Fear may be caused by duress.

117. Fear as a cause of the vitiation of consent is not really different from duress and coercion, to which reference has already been made as affecting freedom of consent in the law of contracts. Consent is generally said to be caused by duress, but really that is only a remote cause of consent, being an immediate cause of the fear which it creates, and which in its turn causes the consent. In some cases duress and coercion may cause a consent directly and without creating fear, but the consent in that case will be only apparent or physical, a

mere external indication or declaration similar to that of consent, produced by physical causes quite independent of all real will. The framers of the Indian Penal Code have, in speaking of consent caused by fear, only used a correct expression to designate the consent, held to be not free in the law of contracts, as resulting from duress.

The present signification of the term duress in the law of contracts is explained above in S. 25, and is much the same in the law of crimes. Here also it is not restricted to actual violence but includes menaces and threats; and a woman's consent caused by them to a man having intercourse with her or taking her property will not prevent the intercourse and the taking from being rape and theft respectively. Thus in *Reg.* v. *Day*,[14] Coleridge, J., said that if the submission of the girl (aged ten years) to the intercourse with her was not voluntary, but the result of fear, the intercourse would be rape.

In fact consent to sexual intercourse induced by threats has often been held to be equivalent even to the force required to render the intercourse a rape,[15] and in *Don Moran* v. *People*,[16] Christiancy, C. J., in delivering the opinion of the Court, pointed out that "the requirement of force would be satisfied by any sexual intercourse to which the woman may have been induced to yield, only through the constraint produced by the fear of great bodily harm, or danger to life or limb, which the prisoner has, for the purpose of overcoming her will, caused her to apprehend, as the consequence of her refusal, and without which she would not have yielded." "We think," went on the learned Judge, "it is well and properly settled that the terms, 'by force,' do not necessarily imply the positive exertion of actual physical force in the act of compelling submission of the female to the sexual connection; but that force or violence threatened as the result of non-compliance, and for the purpose of preventing resistance, or extorting consent, if it be such as to create a real apprehension of dangerous consequences, or great bodily harm, or such as in any manner to overpower the mind of the victim so that she dare not resist, is, and upon all sound principles must be, regarded, for this purpose, as in all respects equivalent to force actually exerted for the same purpose[17]."

---

[14] 9 C. & P., 722.
[15] S. v. Reid, 39 Minn., 277.
S. v. Cunningham, 100 Mo., 382.
[16] 25 Mich., 356.
[17] Wright v. State, 4 Humph., 194.
Pleasant v. State, 13 Ark., 360.
Strang v. People, 24 Mich., 1.

The same was held in *State* v. *Ruth*,[18] in which the Supreme Court of Kansas said: "The court declared that the force necessary to constitute the crime of rape might be mental or physical force, or both combined, and that if a person by threats, or by placing a female in fear of death, violence or bodily harm, induces her to submit to his desires, and while under this influence ravishes her, this is as much a forcible ravishing as if a person, by reason of his superior strength, would hold a woman and forcibly ravish her. We understand the court to simply mean that the act must be committed, either (1) by physical force against the will of the female, or (2) with her acquiescence procured by threats or violence. On the contrary, the court was asked to declare that the offence charged could not be committed unless there was the utmost reluctance and the utmost resistance on the part of the female. The distinction between the two theories is broad and well-defined. Under the former, acquiescence, induced by mental terror and fear of violence, supersedes the necessity of physical resistance. Under the latter, there must be actual physical resistance. The female when assailed must persist, though she knows resistance will be vain; she must fight, though she may believe this course will bring upon her other and perhaps greater violence; she must cry aloud, though she knows no relief is near; she must arouse her sleeping infant sisters to be witnesses to the outrage, though she knows they can render her no aid. Under the former, the force may be either actual or constructive, while under the latter it must be actual. The weight of reason and authority is with the view of the court below."[19]

The same view is taken by French jurists. Thus, R. Garraud in his treatise on French Penal Law, says,[20] *Que cette forme de contrainte, qui résulte de menaces de nature à inspirer à la victime de l'attentat la crainte sérieuse et immédiate d'exposer sa personne ou celle de ses proches à un mal considérable et présent, puisse et doive être assimilée, en législation, à la contrainte physique elle-même, c'est ce que nous admettrions volontiers.*(a) Doubts were sometimes felt there as to the

(a) We willingly admit that this form of constraint, by menaces of such a nature as to inspire the victim of the assault with a serious and immediate fear of exposing her person or the person of those near to her to a great and present evil, can and ought to be assimilated in legislation to physical constraint itself.

[18] 21 Kans., 583.

[19] Turner *v.* People, 33 Mich., 363.

[20] IV, 464.

correctness of placing moral violence on the same level with the material, and of admitting that a female consenting to surrender herself to a man, under the pressure even of the gravest menaces, can claim to have been violated by him, as there was no special provision in that behalf in the Code Pénal. The Code, however, did not contain any definition of rape, and it appeared also difficult to believe that it was intended to leave without repression the carnal intercourse obtained by means of grave menaces but without the employment of physical violence. R. Garraud expresses it as his opinion as well as the general opinion of jurists and judges, that it is just that among the circumstances which take away her liberty, the employment of moral violence like that of physical violence, is provided for and punished by the French Law. In speaking of abduction, he further observes,[21] that menaces which constitute a moral constraint are a form of private violence, and there is no doubt that their use ought to be assimilated to that of physical violence itself, if they are such as to weigh over the will of a minor with a force which he has not been able to resist.

118. Nor are even direct menaces or threats necessary. Fear so long as it is of an injury may have been caused by any thing or condition of things. It will vitiate consent even when it is a result of one's own dependent or subordinate position, or of the power and influence of another over oneself. Thus it has been held that a woman's consent to the intercourse, when induced by the influence of a person in whose power she feels herself, is not a defence against a charge of rape.[22]

Fear may be result of one's dependent position.

So also the non-resistance by a young pupil to an act of outrage on her modesty by her schoolmaster on her person will not exculpate him on a charge of indecent assault.[23] In *Reg* v. *Jones*,[24] a father was indicted for rape of his daughter, and Channel, B., held that as he had established a reign of terror in the family, in consequence whereof the daughter remained passive, and did not resist him, he was guilty. In *Bailey* v. *Com.*,[25] it was a stepfather having

[21] P. 648.

[22] Reg. v. Woodhurst, 12 Cox C. C., 443.
Pleasant v. State, 13 Ark., 360.
Wright v. State, 4 Humph., 194.

[23] Reg v. Rosinski, 1 Mood. C. C., 19.
Rex. v. Nichol, Russ. & R., 130.
Reg. v. McGavaran, 6 Cox C. C., 64.

[24] 4 L. T. (N. S.), 154.

[25] 82. Va., 107.
To same effect, Sharp v. State, 15 Tex. App., 171.

authority over his daughter, who was charged with the offence of rape on her, and Lacy, J., in delivering the opinion of the Supreme Court of Virginia, observed that "though a man lay no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dares not resist, he is guilty of rape by having the unlawful intercourse."

Character of the injury causing fear.

119. There has been some conflict of opinion even as to the character of the injury, a fear of which will vitiate consent. In the case of *State* v. *Ruth*,[26] it was held that fear would negative consent only when the injury causing the fear should be so serious, that by fear and terror, the power of volition and physical resistance is wholly lost. Dr. Wharton says,[27] "where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gauged by her own capacity), the consummated act is rape.[28]"

The New York Penal Code provides that threats to prevent resistance to the intercourse will make the intercourse rape, only when they are of immediate and great bodily harm, which she has reasonable cause to believe will be inflicted upon her.[29] The California Penal Code enacts the same, but the immediate and great bodily harm there must be such as is "accompanied by apparent power of execution."[30]

The language used in some of the cases is not distinct, but there appears to have been entertained a notion that to vitiate consent, a fear of ordinary violence will not be sufficient. Thus in *McQuirk* v. *State*,[31] Somerville, J., in delivering the opinion of the Supreme Court of Alabama said: "An acquiescence obtained by duress, or fear of personal violence, will avail nothing, the law regarding such submission as no consent at all. If the mind of the woman is overpowered by a display of physical force, through threats, expressed, or implied, or otherwise, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man would be rape." In *Croghan* v. *State*,[32] Cole J., observed, that "if the circumstances show that this consent was obtained by the use of force, and

---

[26] 21 Kans., 583.
[27] 1 Whar. Cr. L., 518.
[28] Sharp v. State, 15 Tex. App., 171. State v. Fernald, 55 N. W. R., (Iowa), 534. People v. Flynn, 96 Mich., 276. King v. Com., 20 S. W. R. (Ky.,) 224.
[29] S. 278.
[30] S. 261.
[31] 84 Ala., 435.
[32] 22 Wis., 444.

the woman's will was overcome by fear of personal injury, then the crime becomes one of higher degree." In *Bailey* v. *Com.*,[33] Lacy, J., in delivering the opinion of the Court, observed that "a consent induced by fear of bodily harm or personal violence is no consent."

In some cases it has been directly held that threats of mere prosecution or of loss of reputation will not nullify the consent.[34] There appears to be no case, however, in which fear of injury to property has been held not sufficient to vitiate consent in the criminal law, though, considering the nature of things, this may well have been so. Mr. Starling, in his work on the Criminal law of India, observes that 'Although it is not so stated, it is surmised that there must be fear of injury to the person, and not to property; for the consent to be given is apparently part of a contract.[35]" This statement is supported merely by a reference to the effect of duress of goods on consent in the early English law of contracts, which has been explained above in S. 29. In the Indian Penal Code, the term injury is, however, defined to denote any harm whatever illegally caused to any person, in body, mind, reputation or property; and there appears to be no sufficient reason for any limitation of the term. Fear of illegal loss of honor or property may therefore evidently be sufficient to make consent inoperative for the purposes of the Code.

120. The injury, a fear of which will nullify consent, must however consist of some harm other than that contemplated to result from the act, the consent to which is in question. Mr. Starling thus says: Fear must be "of an injury other than that which it is supposed will be the result if a proposed course of treatment is adopted, an injury other than that which may be the natural result of the state the patient is in. It must, in fact, be the consequence of a threat of injury to be done, external to and unconnected with the injury which may be suffered."[36]

Fear must be of some harm other than that contemplated from the act consented to.

In the United States, this has been held directly in *Strang* v. *People*,[37] in which the threat was that if she would refuse, he

---

33 82 Va., 107.
34 Perkins v. State, 65 Ind., 317. Haley v. State, 49 Ark., 147.
35 P. 98.
36 Starl. Cr. L., 98.
37 24 Mich., 1.

would take her to a place whence she could never get back; and this decision was approved of in *Don Moran* v. *People*.[38]

Scope of misconception of fact in Indian criminal law.

121. The provision as to the vitiating effect on consent of a misconception of fact, laid down in the Indian Penal Code, goes much beyond that recognized in the law of contracts. The language of the provision is most comprehensive, and there are no restrictions in the Code as to the nature of the misconception or of the fact to which it should relate, such as are expressly laid down in the Indian Contract Act, with reference to the effect of mistake on consent in the law of contracts. No distinction is made even between a unilateral or bilateral misconception, nor between a mistake of the person giving the consent himself, and between one induced by the party who acts on the consent, or by a third person.

Mr. Nelson, in his commentary on the Indian Penal Code, referring to the expression "misconception of fact," observes that "it means a misconception consequent upon a wilful misrepresentation made to the consenting party."[39] Such a misrepresentation may indeed lead to a misconception, but there appears to be no sufficient reason for restricting the misconception to that consequent upon a wilful misrepresentation, as there may certainly be a misconception without even a word being uttered to the consenting party by any one.

The question of the construction of the expression appears to have arisen only in the case of *Queen* v. *Punai Fattama*,[40] in which the consent to be bitten by a snake of a certain person, had been given under the belief that that person could heal a snake-bite wound or ward off its effects; and it was held to be given under a misconception of fact, Jackson, J., even observing that the consent was not such as could satisfy the requirements of Exception 5 of s. 300 of the Indian Penal Code. "The consent of the coolies to be bitten," said the learned Judge, "is in my opinion, under the law, no consent, because it was founded on a misconception of facts, and the prisoners knew that the consent was given in consequence of such misconception. The coolies believed that the jugglers had

[38] 25 Mich., 356.

[39] P. 101.

[40] III. B. L. R. A. Cr., 25.

power by charms to cure snake-bites. The jugglers pretended that they had such power, when they had no such power, and the consent to be bitten was given by the coolies only under the misconception that the jugglers possessed some such power. The jugglers then knew that the consent of the coolies was given under a misconception of facts as to their power over snakes."

This decision favours a broad construction of the expression. It is difficult, however, to think that the provision as to misconception can be taken in its literal broadness. Thus construed, the misconception of a person giving a thing to some one as to the quality or value of that thing or as to the means or position of that one, shall make the latter guilty of theft by negativing the consent of the giver. So also, a misconception as to the health or habits of a man with whom an adult widow consents, on account of that misconception, to have sexual intercourse or to go anywhere, shall make him guilty of rape or abduction. It may even be argued that if the provision were intended to be understood so broadly, there could be no occasion for retaining in the definition of rape, the fourth clause relating to the intercourse with a woman by personation of her husband. The provision in the Indian law concerning misconception should evidently be so construed as not to involve any such consequences; and in restricting its construction and scope, help may evidently be taken with the greatest advantage from the general practice of the English courts.

Effect of mistake on consent in English criminal law.

122. In the English criminal law, the question of the effect of mistake on consent has arisen generally in cases of larceny, rape, and assault. It is considerably complicated, however, by such constituents of those offences, as are not required in the Indian law, or as have no bearing on consent. Thus, larceny has reference mainly to the property in things, as theft has to their possession. Besides the gist of larceny is the taking of another person's property, and it is quite as necessary for it, that the taking should be *animo furandi* as *invito domini*, and that the *animus* must exist at the time of the taking, the acquittal often proceeding on the ground of its non-existence at that time. So also in cases of rape, the requirement of the absence of consent is only a recent substitution for that of the existence of force, and most of the decisions turn on the ground of the

earlier requirement. Nor is the absence of consent a *sine quâ non* of the offence even at present, as sexual intercourse may often be rape, even when it is had with the consent of the woman. The conception of assault also in England is essentially different from that in India, and it is often maintained that the absence of consent is not an essential element of assault in the English law. These circumstances are to be carefully borne in mind in drawing any inference from the English cases as to the effect of mistake on consent.

Effect of mistake on consent in larceny cases.

123. To speak more particularly of larceny cases, in which the question has arisen most frequently, strictly speaking, there is hardly room, when a person gives a thing to another, for a talk of his consent to that other taking that thing. In French law, the question of consent does not directly arise in such cases, it being held that there is no theft in them, as the first essential constituent of that offence is *soustraction* or *Contrectatio*, the taking away of the thing the object of the offence, is wanting. It is a general rule of French law, that there can be no *soustraction* of a thing which is given; as A. Blanche states [41] in general words, that for *soustraire* it is necessary *la prendre, l'enlever, la ravir* from its lawful possession; and when the thing has been *remise* (delivered), without necessity by him or by any other person to him who appropriates the same, it is not *appréhendée*, it is not *soustraite*, it does not become the object of a theft. The Court of Cassation [A] has repeatedly laid down that there is no *soustraction*, in the precise and legal sense of that word, in cases where the thing *a été remise volontairement par le propriétaire à la personne inculpee.*[(a)] Nor is it considered material that the thing is delivered only for a short time or even for a momentary purpose, and to be returned after that time

(*A*) Thus the Court of Cassation in acquitting Bordet [42] who had received and retained a bill of one hundred francs from a workman who had seen it fall from the pocket of a coat sold and delivered, said that the *apprehension* of the object stolen not having taking place on the part of the person who later on appropriated it, the character of theft disappeared. [43]

(*a*) Has been voluntarily delivered by the proprietor to the offender.

[41] V. Blanch. Etud. Prat 626.

[42] On 11th July 1862.

[43] V. Blanch. Etud. Prat. 628.

or purpose to the person having it. This was the case in the prosecution against Prost to whom Dotte had given a twenty franc piece to see at his convenience, and who finally refused to return it alleging that it was not Dotte's. He was convicted on the ground that Dotte *n'a consenti à se désister de la possession de la pièce d'or que Prost avait désiré examiner, qu'il ne la lui a pas abandonnée, même temporairement, qu'il s'est borné à une simple remise sous ses yeux et sous la condition implicite d'une restitution immédiate.* (*c*) The conviction was quashed, however, on the ground that that would give to the word *soustraction* a sense different from its legal one, and identify it virtually with retention which differed essentially from it, the Court of Cassation laying down that a *remise volontaire de la chose, quelle que soit sa durée, exclut nécessairement le fait de la soustraction,*[44](*d*) and that the act imputed to the offender in that case was more than a retention.

The decision is different, however, when the delivery is not voluntary ; but necessary, as for example, when a debtor on pretext of offering payment of the money due from him, asks for a production of the *titre constitutif* of his obligation, or for the receipt of the amount he is going to pay, and afterwards fraudulently refuses to restore that as well as to pay. The Court of Cassation in Paris has in such cases held that though there is no *soustraction* and therefore theft in the sense of Art. 379, when the thing taken away has been delivered, even momentarily but voluntarily, by the proprietor, to him who has taken it to appropriate it to himself ; it is otherwise when the delivery is necessary and forced, *telle que la communication au débiteur du billet ou de la quittance qu'il vient d' acquitter*, in which case the possessor of the title does not really dispossess himself of it, but only places it before the eyes of the debtor; as such delivery is often indispensable to the making of the payment, and there does not result from it any fault which may be imputed to the possessor ; and that, therefore, the debtor who possesses himself of the *billet* or of the receipt, and who takes it away, commits a true *soustraction.*[45] The correct view appears to be that there is no delivery in

(*c*) had consented to abandon his possession of the piece of gold only as Prost had desired to examine it, that he had abandoned it only temporarily, that he had limited it only to a simple delivery under his eyes, and under the implicit condition of an immediate restitution.

(*d*) Voluntary delivery of the thing, whatever its duration may be, necessarily excludes the act of soustraction.

[44] V. Blanch. Etud. Prat. 627.

[45] V. Gar. Dr. Pen., 90

such a case, but only a production or exhibition of the documents ; and the debtor is no more in possession of them than a traveller at an hotel is in possession of the spoons and forks he may be using at the *table d'hôte*.

The usual shape the question has assumed is whether the giving of a thing to a person involves a consent to his taking it, when the giver is under a mistake as to the identity of the person to whom it is given or as to the nature of the thing given itself. The correct answer to this must, of course, be in the negative. The analogy of the law of contracts ought to be deemed applicable in such a case, and in fact the question of the transfer of the thing thus given is one to be determined mainly by that law. If I give a thing to A, mistaking him for B, even apart from law, and as a matter of mere common sense, I cannot be deemed to consent to B taking that thing. So also if I give to A one thing, mistaking it for another, common sense dictates that I cannot be held to consent to A taking the thing given. There can be no consent in such cases, though on account of my mistake I may sometimes be estopped from alleging my non-consent.

It has sometimes been held that in such a case, even if the property is received with a knowledge of the mistake, there is no larceny. Thus the cases of *Rex* v. *Adams*,[46] and *Rex* v. *Atkinson*[47] appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, is enough to prevent the crime from being larceny. In *Reg.* v. *Middleton*[48] also, it was contended that if the owner having power to dispose of the property intended to part with it, that would prevent the crime from being larceny, though the intention was inoperative and no property passed. Cleasby, J., actually took that view, and in his dissentient judgment said :[49] " The cases show, no doubt, beyond question, that where the transaction is of such a nature that the property in the chattel actually passes (though subject to be resumed by reason of fraud or trick), there is no taking, and therefore no larceny. But they do not show the converse, *viz.*, that when the property does not pass there is larceny. On the contrary, they appear to me to show that where there is an intention to part with the property along

[46] II. Russ. Crimes, 206.
[47] 2 East P. C , 673.
[48] 2 C. C. Res., 38.
[49] 2 C. C. Res , 68.

with the possession, though the fraud is of such a nature as to prevent that intention from operating, there is still no larceny. This seems so clearly to follow from the cardinal rule that there must be a taking against the will of the owner, that the cases rather assume that the intention to transfer the property governs the case, than expressly decide it. For how can there be a taking against the will of the owner, where the owner hands over the possession, intending by doing so to part with the entire property." The majority of the judges dissented, however, from that view, and observed that they "ought not to feel bound by two cases (cited above) which, as far as we can perceive, stand alone, and seem contrary both to principle and justice." They considered that in almost all the cases on the subject, the property had actually passed, or at least, the court thought it had passed; and said: "It has been often decided that where the true owner did part with the physical possession of a chattel to the prisoner, and therefore in one sense the taking of the possession was not against his will, yet if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is sufficient taking."

Effect of delivery by an agent.

124. The conviction in some of these cases proceeded on the ground that the giving was by an agent who had no authority to give the thing to the person to whom it was given, and whose giving therefore could of course not imply a consent on behalf of the owner to the taking of the thing by that person. Thus in *Rex.* v. *Longstreeth*,[50] Longstreeth was convicted of larceny for taking delivery of the chests of tea consigned to Creighton from a porter in the employ of the carriers, who had authority to deliver them to Creighton alone, and to whom Longstreeth pretended to be Creighton. As a natural result of this principle, wherever the agent's authority on account of the nature of the agency or otherwise was held to be general and co-equal with the owner's, as in the case of *Reg.* v. *Jackson*,[1] a delivery by the agent was held sufficient to pass the property in the thing given, and to avoid a conviction for the larceny of that thing.

The leading case in favor of this view is that of *Reg.* v. *Prince*,[2] in which the wife of Henry Allen received from the

[50] 1 Mood. C. C., 137.

[1] 1 Mood. C. C., 119.

[2] 1 C. C. Res., 155.

cashier of a Bank certain money which her husband was entitled to receive, by presenting to him a forged order of payment from the husband. Bovill, C. J., said "that the bank clerk had a general authority to part with both the property in and possession of his master's money, on receiving what he believed to be a genuine order." Blackburn, J., said "where the servant has an authority co-equal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession, the offence so committed will be larceny. . . . . The cashier holds the money of the bank with a general authority from the bank to deal with it. He has authority to part with it on receiving what he believes to be a genuine order. Of the genuineness he is the judge; and if under a mistake he parts with money, he none the less intends to part with the property in it, and thus the offence is not, according to the cases, larceny, but an obtaining by false pretences." The learned judge himself added, however, that "the distinction is inscrutable to my mind, but it exists in the cases." It is further to be borne in mind that the mistake in this case was not as to the identity of the person or the thing, but as to the right of the wife to receive the money, and this distinction has special importance, because, as explained above in sections 58-60, while a mistake of the first sort prevents a transfer of the thing given, a mistake as to the motive receives no legal effect whatever.[3]

In *Reg.* v. *Middleton*[4] also, no doubt, Bovill, C. J., Kelly, C. B., and Keating, J., did not concur in the view of the majority, and supported the conviction on the ground that the clerk who delivered the money had only a limited authority to part with it to the person named in the letter of advice, and therefore no property passed to Middleton, and he obtained the possession *animo furandi*. Bovill, C. J., in delivering his own and Justice Keating's decision, said: "In all these and other similar cases, many of which are collected in 2 Russell on Crimes, 211 to 215, the property was considered to be taken without the consent and against the will of the owner, though the possession was parted with by the voluntary act of the servant, to whom the property had been intrusted for a special

[3] Supra, S. 50.

[4] 2 C. C. Res., 38.

purpose. And where property is so taken by the prisoner knowingly, with intent to deprive the owner of it and feloniously to appropriate it to himself, he may, in our opinion, be properly convicted of larceny." He added, however, that "the case is very different where the goods are parted with by the owner himself, or by a person having authority to act for him, and where he or such agent intends to part with the property in the goods; for then, although the goods be obtained by fraud, or forgery, or false pretences, it is not a taking against the will of the owner, which is necessary in order to constitute larceny." Kelly, C. B., distinguishing the case of *R.* v. *Prince* on the ground of the decision in *R.* v. *Longstreeth*, said that the latter "decision governs the present case, and conclusively shows that if a servant delivers to the wrong person a chattel which it was no part of his duty and which he had no authority to deliver to any but the owner, and the receiver takes it, knowing that it is not his own but belongs to another, and *animo furandi*, such receiver, although the delivery is made in the ordinary performance of the duty of the servant, is guilty of larceny."

The mistake in this case also was really not as to the identity of the payee or as to the money paid, but as to the payee's right to receive that sum of money, and therefore the decision is not relevant to the present controversy. The fallacy of the principle underlying the views of the three judges was exposed, however, by the other judges who held that the authority of the clerk was general, and if the views of the three judges were right, Middleton would be entitled to an acquittal.[5] Bramwell, B., thus observed: "It is said that here the *dominus* was *invitus*; that the *dominus* was not the post-office clerk, but the Post-Master-General or the Queen; and that therefore it was an unauthorised act in the post-office clerk, and so a trespass in Middleton *invito domino*. I think one answer to this is, that the post-office clerk had authority to decide under what circumstances he would part with the money with which he was intrusted. But I also think that for the purposes of this question, the lawful possessor of the chattel, having authority to transfer the property, must be considered as the *dominus* within this rule, at least when acting *bonâ fide*. It is unreasonable that a man should be a thief or not, not according to his act and intention, but according to a matter which has nothing to do with them, and of which he has no know-

[5] 2 C. C. Res., 57.

ledge. According to this, if I give a cabman a sovereign for a shilling by mistake, he taking it *animo furandi*, it is no larceny; but if I tell my servant to take a shilling out of my purse, and he by mistake takes a sovereign, and gives it to the cabman, who takes it *animo furandi*, the cabman is a thief. It is ludicrous to say that if a man, instead of himself paying, tells his wife to do so, and she gives the sovereign for a shilling, the cabman is guilty of larceny, but not if the husband gives it." Brett, J., likewise said:[6] "Where there is a delivery of the goods by the owner there can be no felony if the owner intend to part with the property in the goods, however fraudulent the means by which such delivery was procured. When the delivery is made by a servant or agent of the owner, and the servant or agent has an authority to pass the possession of and the property in the goods as if the owner were present, the same rule is applicable as if the delivery had been made by the master. But if the delivery be by a servant or agent whose authority is limited, extending only to pass the possession and not to pass the property, then the proposition applicable is that which applies when the master delivers only the possession and not the property. Although the servant delivers the goods, intending to pass both possession and property, the prisoner may be convicted of larceny if he obtained the delivery by fraud; just as if by fraud he obtained delivery from the owner who intended by such delivery to give possession only, and not to pass the property. I cannot agree with a judgment which decides that even though the clerk had a general authority to part with the possession of and property in the money, an authority equal to that of the Postmaster-General if he had been present, and even though the clerk intended to part with the possession of and property in the money, yet that the prisoner was properly convicted. I think that such a judgment is founded upon and enunciates a wrong proposition of law. But if the clerk had only a limited special authority to part with only the possession of the money entrusted to him, or a limited special authority to part with the property in a different sum from that which he delivered to the prisoner, or a limited special authority to part with a similar sum to that which he delivered to the prisoner, not to the prisoner, but to another person; then I am of opinion that the prisoner, upon the assumption that the other parts

[6] 2 C. C. Res., 64.

of the definition of larceny were proved, was properly convicted of taking the money without the consent of the Postmaster-General, and properly convicted of larceny. . . . . But he had authority to part not with any specific money, but with any of the money entrusted to him to any one of all the persons who should properly present a genuine warrant. That seems to me to be a general authority. To all such persons he had authority to give possession of the money, in order that they might keep it, that is to say, he had authority to pass to all such persons the possession of and the property in the money which he handed to them. It seems to me, therefore, that as to passing the possession of and property in the money which he should deliver, he had a general authority to deal with the money as if in the place of the owner."

In India, this question of the agent's authority to give could arise only in case of the thing given having been in the possession of the wife; clerk or servant, but on account of the different requirements of the offence of theft, the commission of that offence depends quite as much on the receiver's belief as to the authority of the person making the payment ason the existence of that authority.

Mistake as to the identity of the person.

125. There has been, indeed, an acquittal in some cases of a mistake as to the identity of the person who receives the thing or of the thing received itself, but only when the receiver of the thing had no knowledge of the mistake at the time of its receipt. The acquittal, in those cases, proceeded not on the ground that there was consent to his taking the thing, but that there was no taking or no *animus furandi* at the time of the taking. And this is the rule whatever the nature of the mistake, provided the mistake is such as to prevent the transfer of the property in the thing given and taken. To take first, the case of a mistake as to the identity of the person, because in the criminal law, unlike the law of contracts, such mistake has always a particular importance. The leading case in regard to such mistake is that of *Rex* v. *Mucklow*,[7] in which a letter containing a draft for £10 odd, meant for a certain person, was delivered by mistake to another person of the same name, who appropriated it, but was on an indictment for larceny, acquitted on the ground that he had no *animus furandi* when he received the letter. In *Reg.* v. *Davies*,[8] the facts were much the same, and Erle, J., directed the jury that if the pri-

[7] 1 Mood. C. C., 160.

[8] 7 Cox. C. C., 104.

soner, at the time of receiving the order, knew it was not his property but the property of another person of known name and address, and nevertheless determined to appropriate it wrongfully to his own use, he was guilty of larceny. He added, however, that, in his opinion, the prisoner had not received it, until he had discovered by opening and reading the letter whether it belonged to him or not, and "that the law of larceny laid down in respect of articles found, was applicable to the article here in question." The accused was thereon convicted, but the Court of Criminal Appeal quashed the conviction on the authority of *Rex.* v. *Mucklow.* So also in *The Queen* v. *Flowers*,[9] a bag of money to be given to a certain person was, by inadvertence, given to another person, who took it, knowing of the mistake, yet his conviction for larceny was quashed; though rather on the ground that the Recorder had directed the jury that if the prisoner innocently received the money and afterwards fraudulently appropriated it, he was guilty of larceny.

Similar cases have arisen in France also, and when goods were given on account of a wrong address to a wrong person who fraudulently retained and disposed of them, he was held not to have been guilty of theft, as there was no taking in such a case. The leading case on the point is that in which Balguerie was acquitted by the Court of Cassation in 1845 on the ground that the word *soustraire*, used in defining the offence of theft in Art. 379 of the Code Pénal, involved the idea of an *apprehension* (seizure) and of a *deplacement* (removal), which ought to be the act of the offender. It appears to be settled there, that Art. 379 is not applicable to him who receives the thing or to whom the thing is delivered, and who afterwards in a spirit of fraud retains and disposes of it to the prejudice of the legitimate proprietor. R. Garraud also, in his Treatise on French Penal Law,[10] after referring to that import of the word *soustraire*, says that that condition is not found when the object has been delivered to the accused on account of an error as to his identity. These grounds are specially applicable in India, as the *vol* of the *Code Pénal* is more like the theft in the Indian Penal Code, than the larceny of the English Law.

Mistake as to the thing given.

126. The same rule applies even when the mistake is as to the thing which is given, and as to the legal character of the act of taking which comes in question. There is no substan-

[9] 16 Q. B. D., 643.

[10] V. 88.

tial distinction between a mistake as to the subject-matter of a transfer, and a mistake as to the identity of the transferee. The difference in the two cases is a difference in the instance and not in a point that affects the principle. The giving and taking in each case is on account of a mistake, which relates to a matter essential to the act, and without which the act would not have taken place. The cases in which there is a mistake as to the nature of the thing given and taken are no doubt distinct from those like *Merry* v. *Green*,[11] but only so far that in the latter class of cases the question is as to the giving and taking of a thing of which the existence is unknown, and which is quite independent of the thing intentionally given. In the case cited, for instance, the bureau alone was given and intended to be given, and the purse hidden in it was a thing unknown, and separate from the bureau. In *R.* v. *Ashwell*, and *R.* v. *Hehir*, on the other hand, the external tangible thing given and taken was known and willed, though not intended to be given, and was the same external thing as was given and taken, though different in substance from what it was believed to be. In the latter case, Madden, J., comparing the facts of that case with those of *Merry* v. *Green*, observed that the delivery in that case was in ignorance of the chattel in question (the purse in the bureau sold and delivered), in this case under a mistake as to its identity (*i. e.*, of the note); and added: "This appears to me a distinction without a real difference, for in neither case was there any intelligent act. The ground upon which, in *Merry* v. *Green*, it was held there was no delivery so as to transfer legal possession, was that the vendor had no intention to deliver, nor the vendee to receive the purse and money, both being ignorant of their existence. There can be no intelligent delivery of a chattel or consent to its transfer, when both parties either believe it to be something different from what it is in fact, or, are ignorant of its existence. In either case the *dominus* remains *invitus*, for the element of intelligent volition is wanting." The other judges did not concur in this view, but the decision in the case proceeded on quite other grounds, and it has been shown above in sections 64 and 65 that consent and intelligence of the giver are not necessary for the transfer of possession.

In the French law also, the two classes of cases are treated alike on the ground that in both, *l'agent s'est bien approprié*

[11] 7 M. & W., 623.

frauduleusement des choses qui ne lui appartenaient pas, mais il ne les a pas soustraites.[12(d)]

Strictly speaking, so far as the physical act of giving and taking is concerned, it is certainly immaterial whether the thing given is a waste paper or a bill of exchange, whether it is made of clay or of gold, or has one face value or another; but the object given is a material part of the act of giving in law, and so the legal act of giving one object is different from that of giving another object. The decision in *Reg* v. *Mucklow* [13] is not against this view, as though the person who delivered the letter in that case had no knowledge of the draft contained in it; yet the draft was held to be given, as it was not a thing concealed in and independent of the letter, not intended to be given with it, but the chief part of the letter, and the important chattel which the letter only covered and conveyed.

Mistake as to motives confused with mistake as to identity.

127. Considerable difficulty has arisen in practice from the circumstance that in some of these cases a mistake as to the right of the person receiving a thing to the receipt of that thing, has been treated as if it were a mistake in regard to the identity of the person or the thing. This is due only to a confusion of ideas, because, as a general rule, a mistake as to the motive for giving a thing cannot affect the validity of the consent implied in the giving, or bar the transfer of the right intended to be transferred by it. The leading case of this sort is that of *Reg.* v. *Middleton*,[14] to which reference has already been made, and in which the depositor receiving an amount larger than that due to him was at the time of the receipt aware of the clerk's mistake in giving him that amount, and being so aware carried it away. The majority of the court held that the taking of the money was larceny. Eleven of the judges maintained the conviction; Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman, and Archibald, J. J., basing their decision on the ground that on account of the mistake as to the money delivered to Middleton, the

[1] (*d*) The doer has well appropriated fraudulently the things which do not pertain to him, but has not taken them away.

[12] V. Gir. Dr. Pen., 86.

[13] 1 Mood. C. C., 160.

[14] 2 C. C. Res., 38.

property in the said money did not vest in him, and as he received the money knowing of the mistake he had the *animus furandi* necessary to constitute larceny. In their joint decision, it was observed in one place that the "Postmaster-General intended that the property in the money should belong to the man before him, though he intended that in consequence of a mistake as to his identity." In another place, the case was likened to that "of a person handing to a cabman a sovereign by mistake for a shilling," which is a clear case of a mistake as to the identity of the thing. Kelly, C. B., also likened the case to that of a person taking one watch for another. Cleasby, B., however, pointed out the fallacy of these views, and said: "There was no mistake in the person, because the prisoner handed in his order and also his deposit book; and if the clerk had known him well it would have made no difference. He would still have paid him the wrong amount, because the same cause would have operated,—looking at the wrong order. There was no mistake in the amount. I mean it was not the case of the clerk handing him a £100 note when he intended to hand a £5 note, or, unknowingly, two notes instead of one. He intended to pay the prisoner the particular sum; and it was a deliberate act, because he took the amount from a document, and completed the transaction by debiting the prisoner with that sum in his book. So that it was not like the case of a wrong sum being put down by mistake and the prisoner snatching it up and running away with it for the purpose of preventing the mistake from being set right. The mistake was in the supposed amount of the prisoner's claim. The prisoner applied for 10 *s.*, and the clerk thought he was entitled to more and paid him accordingly, and this over-payment might have been afterwards adopted by the postmaster, so as to make the prisoner chargeable with the balance. The clerk did not the less intend to make the payment which he deliberately made, because he was at the time under the influence of a mistake; he would not have intended to make the payment but for the mistake. Mistakes are constantly occurring, and few people can say that they have not acted under their influence, but their acts remain as acts done at the time, though their effects may be afterwards corrected. No doubt there was no intention to overpay the prisoner, that is, to produce the effect of over-payment; but the intention was to do the act of paying the larger sum, because it was thought to be a proper one."

How far receiving of a thing given by mistake as to motive is larceny.

128. In *Wolfstein* v. *People*,[15] there was no confusion made as to the nature of the mistake, and yet the receiving of a sum greater than that to which a person was entitled was held to be larceny. The facts of the case were like those of *Reg.* v. *Middleton*, a draft written in the French language, having been presented for payment to a bank, the teller of which was unable to read French, and mistaking the figures $74 for $742, paid that sum to the person presenting it, who, though knowing that he was entitled to $74 only, and that the excess was paid to him by mistake, kept the same concealed, and denying the overpayment, appropriated it to his own use. The Court said: "The money in excess of that which he is entitled to receive, is taken without the owner's consent, and that which is thus taken is appropriated to the taker's use with intent, fraudulently, to deprive the owner thereof. These two elements make the crime of theft, and they are both present here." The Court did not assign any reasons for assuming it, almost without argument that there was in such a case a taking of the money without the owner's consent. That the decision is not tenable appears chiefly from the analogy on which the Court relied in support of it. The Court said: "Where money or property is obtained from the owner by another upon some false pretences, for a temporary use only, with the intent, feloniously, to appropriate it permanently, the taking, though with the owner's consent, is larceny. Wherein do the cases differ. In both there is a physical delivery by the owner, and in both the taker knows that it was given for no such purpose as he was in mind, and yet he, unlawfully and wickedly, in both cases, seeks to deprive the owner thereof. If the one case is larceny, the other is also. It has been explained above, that the absence of a person's consent is essential for a larceny of his things, and that false pretences cannot negative consent; but even if the case supposed should be one of larceny, the existence of these pretences is sufficient to distinguish it from the case actually before the Court."

In *The Queen* v. *Hollis*,[16] the Court of Queen's Bench Division, appears to have gone still further. There a person went to an inn and fraudulently got a sovereign from the barmaid, giving her by the trick of ringing the changes full change, but which consisted partly of coin given by the barmaid herself to be returned, and it was held that he was guilty of larceny.

[15] 6 Hun., 121.

[16] 12 Q. B. D., 25.

Coleridge, C. J., with whom the other Judges concurred, said: "I cannot see, if a person goes into a place and fraudulently, by a series of tricks, obtains possession of property from another which that other has no intention of parting with, how the offence can fail to be larceny." In this case, the barmaid certainly intended to part with the sovereign, though under a mistaken idea or hope, and it was contended that she had general authority to act for her master in such a matter as giving change, and that the transaction was complete before she discovered the fraud, and that therefore the property in the money had passed. The contention was overruled, however, especially as the jury found that the barmaid had no intention to part with the property in the sovereign except for full change. It may be submitted that the sovereign was given absolutely, and though it would not have been given but for the belief that full change had been given for it, yet on account of that very belief, it was given unreservedly and without any limitation or reservation. In this case, full change had also as a fact been given, though it was made up partly of the money given by the barmaid herself. This might give a cause of action for the recovery of that money, but could not affect the transfer of the property.

So far is the rule carried in France, that the Court of Cassation decided in a case in 1864,[17] that a person who refused to return a piece of money, which had been given to him just for examination did not thereby commit theft. A distinction has indeed been made there between *la remise volontaire* and *la remise nécessaire*, the former alone, when followed by a fraudulent *apprehension*, being able to result in an offence. The question has arisen there also in cases in which there appears to be thus no real authority for holding that a mistake as to the motive for giving a thing can affect the validity of the consent implied in the giving, or bar the transfer of the right intended to be transferred by it.

On the other hand, the decision in *Reg.* v. *Hehir* involves the view that a mistake in regard to the value of a note could not affect the consent to the giving of the note which was given, nor the legal consequences resulting from the delivery in pursuance of that consent. Palles, C. B., thus said: "The conviction here must therefore, if sustainable, rest upon this point—that a mistake in the mind of the donor, of a particular quality in a chattel, of the existence of which chattel

[17] V. Gar. Dr. Pen., 88 (*n*).

the giver has knowledge, and which chattel is physically handed over to another, is as regards the possession of that chattel the same, as if the donor were ignorant of its existence. Now, this was the proposition as to which the Judges in *Reg.* v. *Ashwell*[18] were equally divided, and for this neither *Cartwright* v. *Green*, nor *Merry* v. *Green*, was an authority. The actual decision, therefore, in *Reg* v. *Ashwell*, whilst it overruled three cases, has not the advantage of a single prior authority to support it, and whether right or wrong, was one of first impression." After pointing out the extremely loose and general character of Lord Coleridge's remark as to holding "that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing," the learned Judge went on: "If he intended to convey that because a man mistook the value of a coin which he knowingly handed over under a mistake as to its value, intending that the coin should cease to be in his possession, and that it should be in the possession of another, he did not in law part with the possession of that coin; he assumed, without argument, the question to be decided."

Effect of mistake as to the thing in French law of theft.

129. In France also, when a note of a higher value is given by a person as one of a lower value, the person who takes it with a knowledge of the mistake at the time of the receipt, or who takes it without such knowledge, but appropriates the same after discovery of its real value, is not considered guilty of theft; though this is rather on the ground that in such cases there is no taking as an act of the guilty party, but merely a giving; and not on the ground that the consent to the taking involved in the act of giving is a sufficient consent, notwithstanding the mistake or consequent misconception. Thus, where an individual by mistake gave to one Rabeau a bill for 500 francs in lieu of that for 100 francs, and she was convicted, the conviction was set aside on appeal in 1853, the Court of Cassation saying that there was no *soustraction* in the precise and legal sense of the word, as the delivery had been made voluntarily by the proprietor to the accused; that it mattered little that this delivery was the result of an error, and that the accused had knowingly and voluntarily profited from that error; that it mattered still less that this error had been discovered by the accused at a time more or less near that when the delivery was effected, and that it was further established that the fraud commenced from the very moment of

[18] 16 Q. B. D., 190.

the discovery; that in fact a voluntary delivery being absolutely exclusive of the very act of *soustraction*, it followed that all the ulterior circumstances, whatever might be their character, the date and the morality, could not re-act against the delivery to destroy its bearing or modify its effects.[19] And in a case, where a creditor had by mistake received a bill for fifty francs, and fraudulently appropriated the same, it was held in 1871 that that did not constitute *vol;* as there was no *soustraction* in a case in which there was a delivery, and Art. 379 was therefore quite inapplicable, the act imputed to the accused being no more than a *retention*.

The Court of Cassation has also held that a person who, having inadvertently received a piece of ten francs instead of that of fifty centimes, refuses to return the same after the discovery of the mistake, is not guilty of theft. In another case, Poupinel received a *sac* of 1,000 francs in lieu of that for twenty-five francs which the person believed he was giving, and the Court of Cassation quashed his conviction for theft on the ground, that for theft it was necessary that there should be a fraudulent *soustraction* of a thing pertaining to another person, that *soustraire c'est prendre, c'est appréhender contre le gre du proprietaire*, and that if the thing is delivered to him who appropriated it fraudulently, there could be no theft.[20] The most notable case, however, is that in which Barthelemy in payment of a bill of one hundred and thirty-four francs and five centimes payable to Perrot, paid three hundred and thirty-four francs and five centimes to him, piling them up in his temporary absence on the counter in three piles, equal and distinct, each of one hundred francs, and on his return counting in a high tone one, two, three, and asking him whether it was right, and he taking them all with one turn of the hand without making any observation. When taxed four days after, he denied having received more than the correct amount of the bill, and it was held in 1856 that there was no theft, as there was no *soustraction*, and fraud and bad faith accompanying an act other than that of *soustraction* are not sufficient to constitute theft. The Court of Cassation observed that it mattered little that the sum had not been put into the very hands of the offender, and that it had been counted at first on the counter, as the proprietor had not been dispossessed without her knowledge or against her will; and that it also was not material that the

[19] V. Adolph. and Helie, 37.

[20] V. Blanc. Etud. Prat., 630.

sum had been reckoned by small distinct and separate groups, of which two would have formed two hundred francs which were not due, as all had been given and received indistinctly by the same title of payment, and that if for the part legitimately paid, the elements of theft were completely wanting, they were incomplete for the surplus.[21] The same has been held even when the excess paid by a debtor and received by the creditor forms a distinct part of the money or the bills which represent the sum really due, if, at least, the whole has been delivered and *touché à titre de paiement*.

This has been denied, in cases in which the debtor, without intending to practice any deception as to the amount of his debt, and wishing to make payment of it, himself makes a mistake, by ignorance or inadvertence, as to the amount of the money or the bill which he hands over in payment, and the creditor, instead of removing the mistake, fraudulently pockets the sum thus delivered for another; as in such a case, the physical act of delivery is not accompanied by an intention of divesting one's self of proprietorship in what is given, and therefore there is no voluntary delivery. R. Garraud observes, in reply to this, that there can be no theft where there is no *soustraction*, the intention of the victim who delivers the object being immaterial.[22] So far is the principle of the immateriality of the intention carried, that no distinction is recognized even between *la remise volontaire*, the result of an error *fortuite or provoquée*, and *la remise involontaire*, which is the act of a madman, of an idiot or of an individual in a state of intoxication.

The contrary, however, has sometimes been held, even the Court of Cassation admitting in fact, that the delivery of an object, which has been made by the legitimate possessor or another person, either on account of error or of *machinations dolosives*, has the effect of excluding the *appréhension*, the *element constitutif* of theft. It has even been decided, that it is impossible to assimilate even to an erroneous voluntary delivery, the delivery made by an insane person, or by an idiot who has no knowledge of his act, and who bears only such a *quasi-animale* will that the person making the delivery is only a passive instrument, by the aid of which he who receives the thing, in reality, takes it fraudulently. R. Garraud,

---

[21] V. Blanch. Etud. Prat., 634.

[22] V. Gar. Dr. Pen., 88.

in his Treatise on the French Penal Law,[23] observes that he cannot concur in recognizing that distinction, as it involves a contradiction, and says: *Est-ce que celui qui remet, sans le savoir, une somme plus forte que celle qu'il veut verser, ne doit pas être regardé, quant à cette remise, comme ayant agi inconsciemment? Et, cependant, celui qui a reçu, u plus qu'il ne lui était dû et qui le retient, ne commet pas de vol. Comment et pourquoi en serait-il autrement, parce que la remise aurait été faite par un individu privé de toute raison et de toute volonte.*(c)

No larceny if person receiving shared giver's mistake at time of receipt.

130. It has sometimes even been held that the receiving of a thing given by a mistake as to its identity, is larceny, even when the receiver shared in that mistake. Thus in *State* v. *Ducker*,[24] the jury was charged that:—"If the prosecuting witness delivered to the defendant ten twenty-dollar gold pieces under the belief that he was giving him that number of silver pieces, and the defendant so took them sharing the mistake, and if, upon discovering the mistake, the defendant knew or had the means of knowing who the owner of the gold pieces was, but he thereupon, nevertheless, converted them to his own use, it was larceny." Prim, J., who tried the case, said: "The money in excess of that which the appellant was entitled to receive was taken without the owner's consent, and that which was thus taken was appropriated to the appellant's use with an intent to cheat and fraudulently to deprive the owner thereof. These two elements, being both present in this case, are sufficient to constitute the crime of larceny."

This decision was clearly wrong, in so far as it ignored the necessity of the two elements being synchronous. This was felt in *Wolfstein* v. *People*,[25] in which the Court went on to observe: "If, however, the error was not then noticed, but was afterward, and the intent of felonious appropriation was then formed and executed, the legal guilt of the prisoner was at that time incurred. As in the case of the finder of the lost article, the original taking may be lawful, but legal

(c) Is it that he who delivers, without knowing that, a sum more than that which he wishes to pay ought not to be regarded, as to that delivery, as having acted unconsciously? And, however, he who has received more than was due to him, and who retains it, does not commit theft. How and why should it be otherwise, because the delivery should have been made by an individual deprived of all reason and of all will

[23] V. 90. | [24] 8 Oreg., 394. | [25] 6 Hun., 121.

accountability as for crime begins when the owner is discovered, and the intent formed unlawfully and feloniously to deprive him of the possession thereof."

The leading decision in support of the view is that in *Reg.* v. *Ashwell*,[26] in which Keogh handed to Ashwell a sovereign, believing it was a shilling and not a sovereign, upon the terms that he should return a shilling on receipt of his wages. Ashwell also on having the sovereign handed to him honestly believed it to be a shilling, but after an hour (at 9 p. m.) discovered that it was a sovereign, and appropriated it getting change for it. At 5-20 next morning Keogh went to the house of Ashwell, who first denied having got the sovereign, and afterwards refused to return even the shillings that had remained with him, on the ground that he had asked only for a shilling. Ashwell was convicted of larceny, the majority of the judges in favor of the conviction, holding that there could be no consent to a person taking possession of a coin delivered to him without a correct knowledge of its value, and that therefore Ashwell acquired possession only when he came to know that it was a sovereign, and not merely a shilling that had been delivered, and that thus he was in the position of a finder of lost goods.[(B)] In support of that view,

(*B*) Smith, J., explained the unsoundness of the argument derived from the analogy of the finding of goods, by pointing out that it was based on the confusion of the finding out of a mistake with the finding of a chattel. He observed [27] that "the principle upon which a finder of a lost chattel has been held guilty of larceny is, that he has taken and carried away a chattel, not believing that it had been abandoned, and at the time of such taking has had the felonious intent. The proper direction to be given to a jury being, as I understand, 'Did the prisoner at the time of finding the chattel intend to appropriate it to his own use, then believing that the true owner could be found, and that the chattel had not been abandoned. If he did, he would be guilty of larceny, *aliter* he would not. Keogh intended to deliver the coin to the prisoner, and the prisoner to receive it. The chattel, namely the coin, was delivered over to the prisoner by its owner, and the prisoner received it honestly. He always knew he had the coin in his possession after it had been delivered to him. The only thing which was subsequently found was that the coin delivered was worth 240 *d.*, instead of 12 *d.*, as had been supposed. This argument, as it seems to me, confounds the finding out of a mistake with the finding of a chattel. In some cases, the finder of chattel may be guilty of larceny at Common Law: but how does that show that the finder out of a mistake may also be guilty of such a crime? A mistake is not a chattel The chattel (namely the coin) in this case never was lost; then how could it be found? In my judgment the argument upon this point for the Crown is wholly fallacious and fails. (After quoting Baron Parke's dictum in *Merry* v. *Green*[28]) I understand the learned Baron when he says 'the law applicable to all cases of finding apples,' to mean the law applicable to the cases of finding a chattel, for there are no cases extant as to finding out a mistake to which his remark could apply."

R. Garraud, in his Treatise on French Penal Law,[29] says: "No contradiction exists between the two solutions: that which does not see theft in the deed of abusing an inadvertence or error of the proprietor who delivers an object to the author of the

[26] 16 Q. B. D., 190.
[27] 16 Q. B. D., 193.
[28] 7 M. & W., 623.
[29] V. 88.

it was argued, that as the coin was given and received under the impression that it was a shilling and not a sovereign, the prosecutor could not be deemed to have consented to part with the possession of the sovereign, and consequently there was no taking by the prisoner at the time of the receiving, but at the time of the discovery of the value of the sovereign, and then also without the prosecutor's consent, so that he must be deemed to have had felonious intent at the time of taking it. Thus Lord Coleridge said: "It appears to me that the sovereign was received by the prisoner and misappropriated by him at one and the same instant of time. In good sense, it seems to me, he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it." Cave, J., also supported the conviction, and said,[30] "It is impossible to come to the conclusion that, at the time when the sovereign was handed to him, the prisoner, who was then under a *bonâ fide* mistake as to the coin, can be held to have been guilty of a trespass in taking that which the prosecutor gave him. It seems to me that it would be equally logical to say that the prisoner would have been guilty of a trespass if the prosecutor, intending to slip a shilling into the prisoner's pocket without his knowledge, had by mistake slipped a sovereign instead of a shilling . . . . In order that there may be a consent, a man must be under no mistake as to that to which he consents; and, I think, therefore, that Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign." He further supported that view by reference to the consequences of the receiver's acts in regard to the thing before the discovery of its exact nature and value, and continued: "Suppose that, while still ignorant that the coin was a sovereign, he had given it away to a third person who had misappropriated it, could he have been made responsible to the prosecutor for the return of 20 shillings. In my judgment he could not. If he had parted with it innocently, while still under the impression that it was only a shilling, I think he could have been made responsible for the return of a shilling and a shilling only, since he had consented to assume the responsibility of a possessor in respect of a shilling only.

---

fraudulent appropriation; and that which sees, on the other hand, a theft in the act of an individual who should pick up in a street an object lost and appropriates it. The delivery of the object excludes the *soustraction* in the first case; while this *soustraction* is the first act of the appropriation in the second case."

---

[30] P. P. 200 & 203.

It may be said that a carrier is responsible for the safe custody of the contents of a box delivered to him to be carried, although he may be ignorant of the nature of its contents; but in that case the carrier consents to be responsible for the safe custody of the box and its contents whatever they may happen to be; and, moreover, a carrier is not responsible for the loss of valuable articles, if he has given notice that he will not be responsible for such articles unless certain conditions are complied with, and is led by the consignor to believe that the parcel given to him to carry does not contain articles of the character specified in the notice.[31] In this case Ashwell did not hold himself out as being willing to assume the responsibilities of a possessor of the coin whatever its value might be; nor can I infer that at the time of the delivery he agreed to be responsible for the safe custody and return of the sovereign. As, therefore, he did not at the time of delivery subject himself to the liabilities of the borrower of a sovereign, so also I think that he is not entitled to the privileges attending the lawful possession of a borrowed sovereign."

This view is not correct, however, and it was not accepted by the majority of the Judges, the court being equally divided even as to the conviction. Stephen, J., referring[32] to the contention "that the delivery being made under a mistake, passed neither the property in the sovereign nor the right to a possession of it, and that the prisoner must be regarded as having taken it, not when he accepted it under a mistake as to its value, but when knowing its value he determined to appropriate it to himself, or when he did so appropriate it by getting it changed and keeping the change;" observed, that that "view is contrary to principle, because it evades by a legal fiction the principle that a fraudulent appropriation consequent upon an innocent taking is not larceny." Likewise Mathew, J., said:[33] "In my judgment, the subsequent dishonesty of the defendant is no more evidence of a felonious intent when the coin was changed in this case than it would be where the coin was received upon an express promise, which was afterwards broken, to account for the change. I think if this conviction be affirmed, any dishonest dealing with the property of another, by whatever means possession of the property may have been acquired, may be made the ground for a prosecution for larceny."

---

[31] Batson v. Donovan, 4 B. & A., 21. | [32] 16 Q. B. D., 209.
[33] 16 Q. B. D., 205.

And this latter and correct view prevailed in *The Queen* v. *Hehir*,[34] the indictment in which was for larceny of a ten pound note handed by Leach to Hehir in part payment of a debt of £2 odd due by the former to the latter, and believed by both at the time of the handing to be a £1 note. Within twenty minutes after Leach discovered his mistake, and when he found Hehir within another ten minutes, Hehir had become aware of the mistake, and with intent to appropriate the same had changed the note. Madden, Gibson, Holmes and Murphy, J. J., agreed with Lord Coleridge and the actual decision in *The Queen* v. *Ashwell*, chiefly on the ground that the common mistake was a bar to the transfer of the property in the note and therefore of its possession, which must be deemed to have been transferred at the time of the discovery of the mistake. Thus Madden, J., said[35]: "A man to whom a chattel is delivered under a mistake as to its identity, does not thereby acquire legal possession; and if he subsequently discovers the mistake, and fraudulently misappropriates it to his own use, he is guilty of larceny." The majority of the court held, however, that the offence of larceny had not been committed, as there was no felonious intent when Hehir took the note, and that he took it when it was handed to him, and that he had lawful possession of it from that time, though he then knew it to be only a £1 note. Most of the Judges discussed the question as to whether there could be a giving or taking, a transfer of possession by the delivery of a note in the circumstances, whether there could be a consent to the giving or taking in the absence of a knowledge that it was a £1 note. Andrews, J., in his judgment, said: "I think with all respect it is not only an extreme refinement but an absolute fiction to say that, although the prisoner actually took the note when it was handed to him, still he did not take it until a subsequent time when he afterwards became aware that it was a £10 note and that he then took it, when in fact he did not take it at all, for he had it then in his possession, having received it sometime previously. Such a refinement seems to me to uproot one of the fundamental and well settled principles of the Common law of larceny, that an innocent taker does not commit larceny by his subsequent fraudulent appropriation of the chattel innocently taken; and by a fiction, which should have no place in the criminal law, to ignore

[34] (1895) 2. I. R., 709.

[35] P. 721.

the actual taking, and to make, in the language of Mr. Justice Talfourd, 'a mere movement of the mind' amount to a taking. . . . What I have ventured to describe as a refinement and fiction gives to the word *take* not only a meaning which in my opinion it does not bear in larceny, but also a strained and unnatural meaning which the word, as commonly used and understood, never conveys. I think the use of the word *take* in this unreal sense is largely due to what I regard as the erroneous assumption that one man cannot intelligently give to another, and the other intelligently take, the lawful *possession* of a thing of which neither of them knows the quality or value, and which, if the giver had known the quality or value of it, he would not have given." Palles, C. B., said: "If Leach had in fact the intention expressed by his act, the prisoner would have had lawful possession of the note; and I hold that so long as the prisoner believed the note to be for £1, the prosecutor cannot be heard to say that he had not that intention; and if he cannot, neither can he say that in the interval between the note being put into the hand of the prisoner, and the discovery by the latter of the mistake, the prisoner had not its lawful possession. Thus even if on the discovery of the mistake he was bound to return the note unconditionally, the conviction would be wrong." Sir P. O'Brien, L. C. J., said:—"It is said that, though the accused in this case got the note into his hand under circumstances where *ex concessis* the relation of master and servant was not intended to be created, that though he got it into his hand—though he got the chattel, the £10 note, into his hand—he did not *receive* it. . . . Leach, intending to part with the possession of it—gave the chattel to Hehir, and, in my judgment, Hehir, to whom he gave it, in the eye of the law as well as in the eye of common sense, received it. The one gave unreservedly; the other honestly received unconditionally. True, the giver gave under a mistake as to its value, believing it to be a £1 note, whereas in fact it was a £10 note. No doubt he would not have given the particular chattel if he knew it was a £10 note; but the very fact of his mistaken belief that it was only a £1 note, made him give the note without any condition or reservation whatever. He manually transferred the chattel, to use the language of Lord Bramwell in *The Queen* v. *Middleton*,[36] not involuntarily, not accidentally, but on purpose."

[36] 2 C. C. R., 38.

131. The same principle will apply even if the person receiving the thing does not share the giver's mistake, but receives it without a knowledge of the mistake; as in such a case also, there will be no felonious intent at the time of the receipt. Thus in *Jones* v. *State*,[37] a little girl had been entrusted with a £20 gold-piece for buying a chicken, and bringing that and the change. She took the chicken for 25 cents, and believing that the gold piece was a dollar went back with 75 cents only, which were given her in change by the vendor who saw her mistake and tried against its discovery. The Supreme Court held that she parted with the gold-piece voluntarily, and he was rightly in possession of it, having obtained it without fraud or dishonesty or against the girl's consent. The acquittal on the charge of larceny proceeded on the ground, that if he handed to the girl $19·75, her ignorance of the value of the coin would be of no consequence, and his fraudulent intent was formed and his fraudulent conduct begun when he ascertained that the girl believed the coin to be a silver dollar.

No larceny if person receiving was not aware of giver's mistake at time of receipt.

132. Fraud is only a form of error, being such error as is wilfully caused, *l'erreur intentionnellement produite, produite par l'emploi de certaines manœuvres.* It has been explained above in section 38 that it does not negative the consent caused by it, or invalidate a contract induced by such consent. Its effect in criminal law is the same, it being considered insufficient to make consent altogether inoperative or immaterial. The analogy of the effect of fraud in the law of contracts is not complete, however, as a contract is made up of consent itself, while an offence is not, and consists of quite different elements. Besides, in the law of contracts fraud only makes a contract voidable, and in the law of crimes there is no such middling position for the act consented to which must, therefore, either be or be not penal. This is correct even when the crime consists of the infringement of some right or duty created by a contract.

Effect of fraud on consent in law of crimes.

This distinction, as to the effect of fraud in the law of contracts and in the law of crimes, is well brought out in some of the decisions in *Reg* v. *Clarence*.[38] Speaking of the maxim that fraud vitiates consent, Stephen, J., observed in that case: "It is commonly applied to cases of contract,

[37] 28 Tex. App., 42.

[38] 22 Q. B. D., 41.

because in all cases of contract the evidence of a consent not procured by force or fraud is essential; but even in these cases care in the application of the maxim is required, because in some instances suppression of the truth operates as fraud, whereas in others at least a suggestion of falsehood is required. The act of intercourse between a man and a woman cannot in any case be regarded as the performance of a contract. In the case of married people that act is part of a great relation based upon the greatest of all contracts, but standing on a footing peculiar to itself. In all other cases the immorality of the act is inconsistent with any contract relating to it. Thus in no case can considerations relating to contract apply to it. The effect of fraud upon a contract is to render it voidable at the option of the party defrauded. This clearly cannot apply to sexual intercourse. It is either criminal if the woman does not consent, as if her consent is obtained by certain kinds of fraud, or it is, as this was, a breach of matrimonial duty, or it is not criminal at all."

In the same case, Wills, J., observed[39]: "In respect of a contract, fraud does not destroy the consent. It only makes it revocable. Money or goods obtained by false pretences still become the property of the fraudulent obtainer unless and until the contract is revoked by the person defrauded, and it has never been held that, as far as regards the application of the criminal law, the repudiation of the contract had a retrospective effect, or there would have been no distinction between obtaining money under false pretences and theft." So also, Pollock, B., observed:[40] "To hold that an act in itself innocent becomes a criminal assault by reason of the concealment of a material fact, which, if communicated, might give rise to an objection by the person affected by the act, would, where there is disease, include a variety of cases beyond that which is now under discussion; such as a kiss given by a parent suffering from small-pox or scarlet fever to his child, or even the shaking of a friend's hand by one who is suffering from a contagious disease."

133. It is an old maxim—*voluntas vitiata per dolum vel machinationem non excludit delictum*. Notwithstanding, however, some differences of opinion, and some exceptions in practice, fraud does not negative consent in criminal law; and consent, even if

Fraud negatives offences of which absence of consent is essential constituent.

[39] P. 27. [40] P. 64.

caused by fraud, negatives an offence, of which the absence of consent is an essential constituent. There are cases which lay down the law in general terms, that wherever there is consent, even though obtained by fraud, the crime is not committed. And this is true, even though there may be some other offence committed notwithstanding such consent. Thus the taking of a thing will not be larceny, even if the consent to the taking is given on account of fraud, though in the Indian law, it may constitute cheating. So sexual intercourse with a female is not rape when her consent to it is given on account of fraud, though in some cases it has been held to be an assault.[41] To illustrate the general proposition in regard to rape, it may be looked upon as settled that, except in particular cases under special legislation sexual intercourse with a woman with her consent is not rape, even when the consent has been obtained by fraud. Thus Stephen in his Digest of the English Criminal Law lays down that if conscious permission is given by her, the intercourse does not amount to rape, although such permission may have been obtained by fraud, and although the woman may not have been aware of the nature of the act; the only exception mentioned being that specially enacted in regard to the false personation of the woman's husband.

In the United States also, it is generally held that rape is negatived by the woman's consent, even if it should have been obtained by fraud. Thus Dr. Bishop says: "Where the woman consents in fact to the connection, it is not rape in the man though he obtained her consent by persuasion or even by fraud. If a physician tells a woman that copulation is necessary in the treatment of her case, and she consents through faith in his representation, it is not rape. Though her consent was obtained by fraud, still she consented."[42] There is a general agreement that it is not rape where a medical practitioner represents to a patient that coition is necessary for the treatment of her case, and she consents to connection with him, through a belief in his representations; for there is a consent to the act, though fraudulently obtained;[43] though of course there will be no consent to the coition if she consented only to a medical examination or treatment of her, or even to a medical operation. Stowe, J., said in *Com.* v. *Childs*[44]: "No amount of persuasion or solicitation, however improper, no amount of deception or even fraud however villainous or outrageous, will make illicit

[41] Reg. *v.* Saunders, 8 C. & P., 265.
[42] II. Bish. Cr. L., 647.
[43] Walter *v.* People, 50 Barb., 144.
[44] 2 Pitts., 391.

intercourse constitute rape, where the woman, induced or persuaded, consents to the act." This has been held in some other cases also. It is a general maxim, that the employment of arts and devices, without force, is not sufficient to constitute intercourse the offence of rape.[45] It is generally held that there can be no conviction for rape where the woman's consent was obtained by stratagem or by surprise or fraud, as by a fictitious marriage; nor where her consent was obtained by fraudulent representations. In *State* v. *Murphy*,[46] Collier, C. J., in delivering the opinion of the Supreme Court of Alabama observed, "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."

Intercourse with a woman by fraud in personating her husband.

134. That consent obtained by fraud is not necessarily such as must be entirely inoperative in criminal law, is borne out also by the common law relating to what are generally called personation cases. The question of the guilt in such cases has now been settled in England, India and in the greater part of the United States, by special legislation; but the older doctrine is still of considerable value for illustrating the exact effect of fraud on consent. In England it was held in a long series of cases that if a person had connection with a woman by entering her bed and lying there with her as if he were her husband, he would not have thereby committed the offence of rape. The leading case is *R.* v. *Jackson*,[47] in which this was held by eight judges against four, Dallas, C. J., pointing out forcibly the difference between compelling a woman against her will, when the abhorrence which would naturally arise in her mind was called into action, and beguiling her into consent and co-operation. Some of the eight judges expressed a doubt, and intimated that if the case occurred again, they would advise the jury to find a special verdict. This decision was however followed in *R.* v. *Clarke*,[48] in which Jervis, C. J., in giving the opinion of the Court[49] observed that the court had conferred with several of the other judges, and that the question could not be permitted to be re-opened. In these two cases,

[45] People v. Royal, 53 Cal., 62.
[46] 6 Ala., 765.
[47] Russ & R., 487.
[48] 6 Cox. C. C., 412.
[49] Jervis, C. J., Alderson, B., Coleridge, J., Martin, B., and Crowder, P.

the accused had entered the bed with a view to pass for her husband, and to have connection with her if she did not discover the mistake, but not with the intention of forcing her in case of the discovery. They have been repeatedly followed [50] even in cases in which there was no intention to desist on discovery, but a determination to effect one's intention at all events.[1]

The same was held in *Reg.* v. *Saunders*,[2] in which the facts were the same, and rape was held not to have been committed; but under a special statute,[3] the offence was held to be an assault; Gurney, B., observing in summing up to the jury, that if they thought that "it was a fraud upon her, and that there was not consent as to this person, ... that the prosecutrix was imposed upon, and that under that imposition she consented," they must find the prisoner guilty of an assault.

In *R.* v. *Barrow*,[4] the woman fancied that the prisoner was her husband until the act had been consummated, and Bovill, C. J., Channel, B., and Byles, Blackburn, and Lush, J. J., held that there was no rape; Bovill, C. J., saying: "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 offence does not amount to rape." The correctness of this decision was doubted by all the Judges (Kelly, C. B., Mellor, J., Denman, Field, and Huddleston, J. J.,) in *The Queen* v. *Flattery*,[5] which was decided, however, on another point.

The Irish Supreme Court held the contrary, however, after a consideration of all the English cases in *Reg.* v. *Dee*,[6] in which the person having the intercourse with the woman knew that she mistook him for her husband, as when he entered the room, she considering him her husband said (in her sleep) "you came in very soon." She discovered her mistake, and withdrew her consent during the act. The decision proceeded on the general ground that she did not consent to the connection with that person, and therefore his act was a rape. May, C. J., Palles, C. B., and Lawson, J., relied chiefly on the fact that the act consented to was different

[50] R. *v.* Frances, 13 U. C. C. B., 116.
[1] R. *v.* Williams, 8 C. & P., 286.
[2] 8 C. & P., 265.
[3] 1 Vict. c. 85. S. 11.
[4] 11 Cox. C. C., 191.
[5] 2 Q. B. D., 410.
[6] 15 Cox C. C., 579.

from that done. Murphy, J., indeed appears to have thought that there was no consent, as it had been induced by fraud. He observed[7] that the question was, "whether the accused having, by fraud or device, induced the woman to believe that she was submitting her person to her husband, and having thus obtained her consent to the act of connection, committed the crime of rape;" and said, "Where the will does not accompany the act there is no consent, and every invasion of a man's person or property without consent or will is against consent and will. . . . This woman consented to intercourse with her husband, and the accused induces her to believe he is her husband and so obtains possession of her derson. She never consented to this violation of her virtue." O'Brien, J., said[8]: "We have it that the crime is capable of being committed against a person deprived of reason—that is the case of *Reg.* v. *Fletcher*—or against a person partially or temporarily deprived of reason,[9] or against a woman overpowered by fear,[10] or during sleep.[11] All these cases go upon the ground of incapacity to consent. And it occurred to me during the argument that the link between those cases and the present was capable of being completed by putting the case of a woman who was blind. For I suppose it could not be denied that a woman who was blind, and deceived into supposing another person was her husband, would be the subject of the crime in law. And what difference in reason can exist between the offence of personating the relation of a husband by means of a woman's blindness and by means of the darkness, for one is the veil of infirmity and the other the veil of nature. No doubt the question is open to the argument that the object of the law was to provide for the case of violence or inability to consent, and that, except under certain conditions, it left women to preserve their own virtue, though it has not left persons to preserve their property against aggression committed by the same means. . . . . Whether the act of consent be the result of overpowering force, or of fear, or of incapacity, or of natural condition, or of deception, it is still want of consent, and the consent must be, not consent to the act, but to the act of the particular person—not in the abstract, but in the concrete, for otherwise the consent, in principle, would be just like the act of handing money in the dark to one person

[7] P., 599.
[8] P., 597.
[9] Reg. v. Camplin, 1 Cox C. C., 220.
[10] Reg v. Jones, 4 L.T. Rep. N.S., 154.
[11] Reg. v. Mayers, 12 Cox C. C., 311.

which was received by another, who would, nevertheless, in that case be guilty of a crime."

That view was taken by some courts in the United States, but the weight of opinion there also is in favour of the view maintained by the English Courts.[12] Thus in *Wyatt* v. *State*[13] it was held that "where a woman yields to sexual intercourse with a man supposing him to be her husband, and is thus outraged in fact by fraud, she gives no intelligent assent to what is done, and she as much withholds her assent to the act done, if the case was apprehended by her, as the imbecile, and even would revolt from it, yet in such a case, under the rule laid down, there would be no rape."

The French courts also take the same view. Thus, where an individual introduced himself into the bed of a female while asleep, from where her husband had just gone out, and profiting from that surprise consummated his attempt, his conviction for rape was set aside by the chambre d' accusation of the Court of Besancon on the following grounds[14]:—*Que le viol est, de sa nature, toujours et nécessairement accompagné de violence employée sur la personne même ; que c'est la force, c'est-à-dire la violence qui constitue le viol ; que la violence n'est pas seulement une circonstance aggravante du fait, mais qu'elle en constitue à elle seule la criminalité ; qu'en admettant comme sincère et vraie la déclaration de la plaignante, il en résulte qu'il y a eu de sa part un consentement donné par erreur ; mais l'erreur ainsi que le défaut de consentement ne peuvent seuls constituer le crime de viol, dès que l'erreur ou le défaut de consentement n'a pas été accompagné de violences morales ou physiques ; qu'à la vérité ce fait est profondément immoral, mais que la loi gardant le silence sur un fait de cette nature, on ne doit point y suppléer par analogie."*(e)[15]

(e) That the rape is, from its nature, always and necessarily accompanied with violence employed over the person itself; that it is the force, that is to say, the violence which constitutes the rape; that the violence is not only an aggravating circumstance of the act, but that which alone constitutes the criminality of it; that in admitting as sincere and true the declaration of the complainant, it results from it that there has been on her part a consent given by error, but the error, like the defect of consent, cannot alone constitute the crime of rape, as the error in the defect of consent has not been accompanied with moral or physical violence; that in truth, this act is profoundly immoral, but that the law preserving silence over an act of this sort, one ought not to make it up by analogy.

[12] State v. Shephard, 7 Conn., 54. People v. Metcalfe, 1 Wheel. C. C., 379.

[13] 2 Swan., 396.

[14] IV. Adolph. & Helie, 317.

[15] 1829 Journ. Dr. Crim., 45.

Fraud is, no doubt, not an essential constituent of these offences, because, as pointed out in *The Queen* v. *Hehir* by Gibson, J., "this absence of consent does not depend on fraud. It is a conceivable case that a married woman might in the dark submit to a man whom she believed to be her husband, without guilty intent on his part, from a mistake of rooms or otherwise." He no doubt adds, that "in a civil action for assault I doubt that he could justify his possession of the woman by leave and license, though of course from absence of *mens rea* he would not be guilty of rape."

Cases against conviction for rape turn on the supposed necessity of force for that offence.

135. The opinion that consent obtained by fraud does not negative the offence of rape appears to be supported most often, as may have been noticed above, by reference to the final decision in cases relating to rape. The acquittal in such cases, it must, however, be confessed, is not always a safe guide for the formation of an opinion as to the effect of fraud on consent, because in common law consent was, as explained in S. 95, often confused with will, and the use of force generally held essential for rape.

Almost every writer on the Common law of England defines rape as the unlawful carnal knowledge of a woman by force and against her will; and the definition has been adopted even by recent writers.[16] In Scotland, Hume in his Commentaries on the Criminal Law said, that to constitute rape the knowledge must be against her will and by force; and he has been followed in that by Alison[17] and other Scotch jurists.[18] The same is still held sometimes by courts. Thus in *Reg.* v. *Sweenie*,[19] Lord Cowan observed: "It is of the essence of the crime of rape that carnal knowledge of the woman's person should be had forcibly and without her consent—in other words, by the adverse will of the woman to the act being overcome by force on the part of the ravisher. It is this that constitutes the crime accordding to all the authorities; and nothing short of it will support the charge." Lord Neaves said: "To the crime of rape by our law the element of force has always been essential."

The same is sometimes held in the United States also. It was even held in some cases that there would be no rape or attempt to commit rape, if the intention was merely to gratify

---

[16] III Russ. Cr., 223.
I Hale, 627.
East P. C., 437.

[17] Alis. Sc. Cr., 209.
[18] Macd. Sc. Cr., 166.
[19] 8 Con. C. C., 223.

one's passion, and not to do so by force in spite of the woman.[20] And in *Wyatt* v. *State*,[21] the instruction to the jury was held to be wrong, as in it "the idea of force, as one ingredient of the offence, according to all the definitions in our Acts, and in all the criminal authorities, was entirely discarded"; and it was held that the definition of rape necessarily included force as an essential element of the crime. In some of the States, as for instance, in Tennessee, rape has been even expressly enacted to be "the unlawful carnal knowledge of a woman forcibly and against her will."

Nor is the rule different on the Continent of Europe. Adolphe and Helié in their work on the Theory of Code Pénal[22] say, that violence is the characteristic element of rape, that is, violence which constitutes its criminality *tout entière*, that it is not only an aggravating circumstance, but an essential base of it; *elle ne forme donc point une question à part; elle est comprise dans le viol, qui la suppose nécessairement.*

Signification of force extended constructively.

136. As cases of intercourse without the woman's full, free and intelligent consent came before the courts, and in such form as to require punishment in the interests of the society, the scope of the offence of rape was widened by a steady extension of the word force to embrace cases not falling within its literal meaning. The extent of this extension became in time a matter rather of precedent and authority than of argument and reason, as the necessity of further extension by judicial interpretation diminished with the increased and steady activity of the Parliament which stepped in to supply the defect in the definition of the offence, and to provide for cases falling outside it and requiring punishment. In *State* v. *Lung*,[23] Bigelow, J., after referring to several cases of constructive force, said: "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. It must necessarily go thus far, or else there is no distinction between rape, where the force used is constructive, and seduction."

In *Lewis* v. *State*,[24] Stone, J., in delivering the opinion of the Supreme Court of Alabama, observed that it was settled by a chain of adjudication too long and unbroken to be shaken,

[20] Com. v. Fields, 4 Leigh., 648.
[21] 2 Swan., 394.
[22] IV. 314.
[23] 21 Nev., 209.
[24] 30 Ala., 54.

that force was a necessary ingredient in the crime of rape, and that the only relaxation of the rule was that this force might be constructive. "Under this relaxation," he continued "it has been held that where the female was an idiot, or had been rendered insensible by the use of drugs or intoxicating drinks, and in one case where she was under the age of ten years, she was incapable of consenting, and the law implied force." In *McQuirk* v. *State*,[25] Somerville, J., in delivering the opinion of the court, observed that it was an essential constituent of the crime of rape that the act should be intended to be done with force, actual or constructive, and without the woman's consent.

The Court of Cassation also has repeatedly held that surprising a female while asleep into sexual intercourse under the impression that she was having it with her husband would be a rape. Thus it convicted Lebas of rape for surprising one Laurent, while asleep in her bed, as her husband, observing "that the crime of rape not being defined by law, it pertains to the Judge to find out and establish the elements constitutive of this crime according to its special character and the gravity of the consequences which it can have for the victim and for the honor of the families, and that the crime consists in the act of abusing a person against her will, *soit que le défaut de consentement résulte de la violence physique ou morale exercée à son égard, soit qu'il résulte de tout autre moyen de contrainte, ou de surprise pour atteindre, en dehors de la volonté de la victime, le but que se propose l'auteur de l'action.*[26](*f*) Similarly in convicting Labor, who had entered Bandal's house by scaling over a wall and committing intercourse with her while she was asleep, the court observed that the character essential and constitutive of the crime of rape consisting in the deed of abusing a person against her will, it results from it that the act, thus qualified, exists with all its legal elements, when even in the absence of all physical or moral violences, *la surprise seule suffit à son auteur pour atteindre, en dehors de la volonté de sa victime, le but coupable qu'il se proposait.*[27] (*g*)

(*f*) Whether the defect of consent result from physical or moral violence exercised in regard to her, or whether it result from all other means of constraint or of surprise, to attain, in spite of the victim's will, the object which the author of the act proposes to himself.

(*g*) The surprise alone suffices to its author to attain in spite of his victim's will the guilty object which he has proposed to himself.

[25] 84 Ala., 135.

[26] V. Blanch. Etud. Prat., 109.

[27] Blanch. Etud. Prat., 111.

In the Spanish Penal Code, it is expressly enacted, that intercourse with a female will be rape, not only when it is had by force or intimidation, but also when she finds herself deprived of reason or sentiment for any cause.[28]

A project of Code Pénal provided for the punishment of kidnapping by violence or fraud, and consequently by the aid of threats, philters, intoxicating liquors, or all other means which would have deprived one of the use of his will. In the final draft the mention of violence and fraud only was retained, and Adolphe and Hélie in their work on the Theory of Code Pénal[29] observe that the other means constituted a real constraint.

Force did not include mere fraud.

137. It was unanimously held, however, that the term force even as most liberally construed, did not include fraud,[30] and that fraud could not supply the place of force in the definition of rape.[31] In *Wyatt* v. *State*,[32] it was held that fraud was not equivalent to force, and that intercourse, when consent to it was obtained by fraud, would not constitute rape. Caruthers, J., said in that case, that "fraud and stratagem, then, cannot be substituted by force, as an element of this offence according to the existing law."

This view was followed in *Bloodworth* v. *State*,[33] in which the consent to intercourse was obtained by a fictitious marriage, and the offence was held not to be rape; "for, to say that a thing is done forcibly and against the will of a party, is not sustained by showing that no force was used, but that fraud and deceit had been used instead of force." Freeman, J., in delivering the opinion of the court, observed: "In fact, the idea of attaining an end by the use of fraud necessarily excludes the idea of force, and is antagonistic to it."

In *People* v. *Barton*,[34] force was held essential to constitute rape, and the contention that fraud was to be construed to mean force was negatived. In *Lewis* v. *State*,[35] Stone, J., in delivering the opinion of the court, said: "When the cohabitation is in fact consentive, although that consent was procured by fraudulent personation of the female's husband, there is

---

[28] Art. 363.
[29] IV. 496.
[30] People v. Barton, 1 Wheel. C. C., 378.
[31] Don Moran v. People, 25 Mich., 356.
[32] 2 Swan., 394.
[33] 6 Baxt., 614.
[34] 1 Wheel. C. C., 378.
[35] 30 Ala., 54.

neither actual nor constructive force, and such act does not amount to the crime of rape." In *Pleasant* v. *State*,[36] there was an aggravated assault by a slave upon a white woman, and the Supreme Court of Arkansas said: "The better authority would seem to be, that if the man accomplish his purpose by fraud, as where the woman supposed he is her husband, or obtained possession of her person by surprise, without intending to use force, it is not rape, because one of the essential ingredients of this offence is wanting."

In *Walter* v. *People*,[37] it was held wrong to instruct the jury that, "where resistance is not made by reason of a representation leading the female to believe that sexual penetration of her body is necessary for the recovery from disease, the force used in ordinary intercourse is sufficient to constitute rape;" the correct rule being 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. In *State* v. *Brooks*,[38] the court expressly observed "that females are protected by law from violence of this kind, by the just infliction of the severest penalty on offenders, but where there is no coercion in any form, and tricks and deception are employed to accomplish the same end, there, as against these, females are protected only by such laws as protect the whole community against fraud and imposition."

In *Reg.* v. *Camplin*,[39] Patteson, J., in pronouncing sentence, observed: "The prosecutrix shewed by her words and conduct up to the very latest moment at which she had sense or power to express her will, that it was against her will that such intercourse should take place; and it was by your illegal act alone, that of administering liquor to her to excite her to consent to your unlawful desires, that she was deprived of the power of continuing to express such want of consent. . . . . Your case falls within the description of those cases in which force and violence constitute the crime, but in which fraud is held to supply the want of both." The verdict of guilty in this case was sustained by fifteen judges, but the reference to fraud was quite *ultra vires* however, as giving liquor to drink is not *per se* a fraudulent act, and there was no other fraud in the case, and the verdict of guilty did not proceed and was not based on the ground of fraud.

[36] 13 Ark., 360.
[37] 50 Barb., 144.
[38] 76 N. C., 1.
[39] 1 Cox. C. C., 220.

The same view appears to be taken on the Continent of Europe. Both French and German lawyers consider that consent obtained by fraud or machination leading to the non-resistance to an act is not equivalent to force or violence required for rape, and that sexual intercourse obtained by consent induced by fraud or machination is generally not rape. Thus Adolphe and Hélie in their work on the Theory of Code Pénal,[40] speaking of the absence of her resistance proceeding from fraud or guilty machination, refer to the question whether that fraud or that machination ought not to be considered as violence itself, and say that the negative has been decided in a personation case. In Germany, Hälschner says,[41] that *durch List keine "vis compulsiva" geübt werden könne, sei selbstverständlich.*(f) Olshausen, in his Commentary on the German Penal Code,[42] commenting on Art. 240, after observing that a person may be compelled to do an act only by violence or threats, and that if a person is induced to it by other means, it will be so not on account of compulsion but of a free determination, says: *Es gilt dieses namentlich von der Anwendung der List, insofern der Ueberlistete durch eine Täuschung zu einer Handlung, etc. veranlasst, aber nicht genöthigt wird.*(g) And *kann nach der positiven Gesetzgebung List als ein Mittel der Nöthigung überhaupt nicht angesehen werden.*(h)

In Italy, Francesco Carrara, in distinguishing fraud from constructive force said: *Qui potrà esservi inganno, potrà esservi seduzione; ma non vi è movimento alcuno di forze meccaniche costringenti il corpo; il quale concorse col seduttore all'azione, per impulso proprio, senza che questi esercitasse abuso di forza morale costringente l'animo della vittima ad un atto che le fosse repugnante.*[43] (i)

(f) Through cunning no violence can be exercised is self-evident.

(g) This holds good in the application of cunning (device), inasmuch as the (party) deceived was induced, but not compelled to the act through deception.

(h) Deceit cannot be looked upon at all as a means of compulsion according to positive law.

(i) There may be deceit, there may be seduction; but there is no movement of mechanical force constraining the body, which concurs with the seductor to the act by its own impulse, without there being exercised an abuse of moral force constraining the mind of the victim to an act which was repugnant to it.

40 IV., 317.
41 S. G., 35, 10.
42 P. 860.
43 Carr. Prog., Art. 1499.

Penality of intercourse obtained by fraud.

138. There is no doubt that sexual intercourse obtained by fraud has often been said to deserve severe punishment. Judges have often observed, that it ought to be deemed, if not rape, an offence punishable with only slightly less severe punishment; as the moral turpitude is similar, though not the same, in both the cases. Thus, in *Wyatt* v. *State*,[44] Judge Caruthers observed "that the moral turpitude of the crime (of rape) is as great when perpetrated by fraud and deception, as by force," and that the act richly deserved to be severely punished. This was approved virtually in *Bloodworth* v. *State*,[45] and the attention of the State Legislature was called to the case with a view to the enactment of a law that would meet the contingency. This was done also in *Lewis* v. *State*,[46] in which Stone, J., in delivering the opinion of the Alabama Supreme Court observed, that "under our penal laws, one who obtains the goods of another under false and fraudulent pretences, is held guilty in the same degree as if he had feloniously stolen them. He who contaminates female purity under like fraudulent pretences goes unwhipped of justice."

In *Don Moran* v. *People*,[47] Christiancy, C. J., said: "Upon abstract principles of right and wrong, a sexual connection obtained by falsely and fraudulently personating the husband of a woman, or by a physician fraudulently inducing a female patient to believe such connection essential to a course of medical treatment, must be considered nearly, if not quite, as criminal and prejudicial to society as when obtained by force or any apprehension of violence; and it might, and in my opinion would, be judicious for the Legislature to make some provision for punishment in cases of this kind."

The consequences of not treating connection with a woman with her consent obtained by fraud as rape would be almost intolerable in any condition of society, and are quite as shocking and ruinous as when the connection is had by force. A virtuous complainant can derive no consolation from the fact, that force had not been superadded to the fraud of the villain who had destroyed her. And surely, the moral guilt of the accused is magnified by the artifice under which he may expect to commit this crime with impunity.

---

[44] 2 Swan., 396.
[45] 6 Baxt., 614.
[46] 30 Ala., 54.
[47] 25 Mich., 356.

Adolphe and Hélie in their work on the Theory of Code Pénal likewise observe that it appears to them difficult to admit that a crime so grave ought to remain outside the provisions of the law, its results being the same as if physical violence had been employed.[48] They ask if the dishonour of the victim, the desolation of a family, and the means used by the actor to accomplish them are less odious, if the surprise is less infamous than force, the fraud than violence.

There is, however, a radical difference between a case of force and that of fraud. The public alarm created by the two is essentially different. The latter is not possible without some mistake of the woman herself, while in case of force, she has not to blame herself for anything. The distinction between force and fraud is maintained throughout the criminal law. Thus the taking of a property from a person by force is robbery, which is everywhere deemed to be a serious offence ; while obtaining it by fraud is only cheating, which is comparatively a minor one.

Some Italian jurists have treated fraud as *la violenza compulsiva*, which Giulio Crivellari in his *Concetti Fondamentali Di Diritto Penale*[49] says, occurs when *mediante dolosi artifizi o callide macchinazioni, si circonviene una persona in guisa da sorprendere la sua volontà a tutt'altro tendente che a consentire all'atto di cui è stata passiva.* (*j*) He admits however, that in regard to it, it is held that *il circondare con tenebrosi artifizi la mente altrui, inclinata alla credenza ed alla fiducia, onde ottenere il sacrificio del suo pudore, constati un'imputabilità minore di quella che produce la forza aperta.*(*k*)

Therefore, hardly any legislature has placed intercourse obtained by fraud on the same level with that by force. It is seldom that it has been made penal in all its generality and broadness. It is only the so-called personation cases, which have been declared rape by most legislatures. The Indian and the English criminal law punish intercourse obtained by fraud, only when fraud consists in the personation of the husband.

(*j*) By means of fraudulent artifices or artful machinations, a person is circumvented in a manner so as to take by surprise his will which was directed to something quite different from the act to which he is subjected.

(*k*) The circumventing with dark artifices the mind of another, inclined to credulity and easy of belief, with the object of obtaining the sacrifice of her modesty, constitutes an imputability less than that produced by open force.

[48] IV. 318.

[49] Art. 1140.

The California Penal Code provides for the punishment of sexual intercourse with a woman as rape, when she is unconscious of the nature of the act, or incapable of giving consent, or when she is prevented from resisting the intercourse by "threats of immediate and great bodily harm," but does not provide for any case of fraud except that involved in personating her husband.[50]

Consent obtained by fraud chiefly negatives rape, under special legislation.

139. Sometimes, it has indeed been observed, that consent procured by fraud is not consent, but the observation in most cases was a mere *obiter dictum*, and the decision did not turn on it:[1] Real authorities are not wanting, however, in favour of that view. Thus, Dr. Wharton observes,[2] that "acquiescence extorted by fear or fraud is no defence;" and that "consent obtained by fraud, as a general rule, is to be treated as a nullity."(E) Mr. Clark also observes that "if, in any case, the consent of the person injured is obtained by fraud, his consent furnishes no excuse."[4] He also does not cite any other cases or authorities in support of his view.

On grounds of public policy, it has been enacted in some States that sexual intercourse by consent obtained by fraud is rape. In Texas, for instance, carnal intercourse with a female without her consent is expressly enacted to be rape, when it is obtained by fraud or by force or threats: and it is held that carnal intercourse with a woman, obtained by means of fraud, is rape only when such intercourse is had with a married woman, and that "the fraud must consist in the use of some stratagem by which the woman is induced to believe that the offender is her husband."[5] The provision is usually not general, but applicable only to certain forms of fraud. Thus Livingston's Draft of Louisiana Penal Code laid down[6] that consent to sexual connection could not be presumed to have been given, from an acquiescence in the connection, when produced by force, menace or fraud; and Livingston

(E) In support of this statement, he says: "Consent to a sexual offence, if fraudulently obtained, does not bar a prosecution for such offence; nor does consent to entering a house, if fraudulently obtained, bar a prosecution for burglary; nor does consent, when there is any deception as to the thing to be taken, bar a prosecution for larceny."[3] In regard to all these three cases it has been, as will further be shown, that the preponderance of authority is against the view taken by Dr. Wharton.

50 S. 261.
1 Don Moran *v.* People, 25 Mich., 356.
2 1 Whart. Cr. L., 163.
3 146 P. 168.
4 Clark Cr. L., 9.
5 King *v.* State, 3 S. W. Rep. 342.
6 Art. 464.

does not treat every sort of fraud as sufficient to negative consent. He treats only two cases of it as equivalent to force for the purpose, and expressly lays down,[7] that "a carnal knowledge obtained by fraud, does not amount to the crime of rape, unless the fraud consist—

1. In causing the woman, against whom the offence is committed, to believe during its commission, that the offender is her husband.

2. In forcibly, or without her knowledge, administering to the woman who is injured, any substance that produces an unnatural sexual desire, or such stupor as to prevent or weaken resistance, and committing the crime while she is under the operation of that which is so administered.

Livingston's Code of Louisiana defines rape as the carnal knowledge of a female under the age of eleven years,[8] or of any other female obtained against her consent, by force, menace or fraud.[9] Referring to this definition, Livingston in his Introductory Report says[10] that "when the object is attained by fraud, the consent, though apparently given, is as much wanting in reality, as when violence is applied."

Consent obtained by fraud negatives assault.

140. The leading decision in support of consent not being affected by fraud is that of *Reg.* v. *Clarence*,[11] in which the fraud consisted rather in the suppression of a fact, than in its affirmance. The Court of Queen's Bench Division held that infecting one's wife with gonorrhœa by sexual intercourse with her was not an assault, as the intercourse was with the wife's consent. It was contended against that view, that the husband had not disclosed his diseased condition to her, and that it was a duty of his to do that, and the non-disclosure being a fraud, consent induced by it must be held to be vitiated by the fraud. The contention was, however, overruled.

The contrary had been held in *Reg* v. *Bennett*,[12] in which a person was indicted for indecent assault while diseased, upon his niece, she being ignorant of his disease. Willes, J., in his summing up, said: "Although the girl may have consented to sleep, and therefore to have connection,

[7] Art. 463.
[8] Art. 467.
[9] Art. 460.
[10] P. 180.
[11] 22 Q. B. D., 23.
[12] 4 F. & F., 1105.

with her uncle, yet if she did not consent to the aggravated circumstances, *i. e.*, to connection with a diseased man, and a fraud was committed on her, the prisoner's act would be an assault by reason of such fraud. An assault is within the rule that fraud vitiates consent, and therefore if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent which she may have given would be vitiated, and the prisoner would be guilty of an indecent assault."

This was followed in *Reg* v. *Sinclair*,[13] in which Shee, J., said: "If he knew that he had such a disease, and that the probable consequence would be its communication to the girl, and she in ignorance of it consented to the connection, and you are satisfied that she would not have consented if she had known the fact, then her consent is vitiated by the deceit practised upon her, and the prisoner would be guilty of an assault, and if he thus communicated the disease, of inflicting upon her actual bodily harm."

These two cases were, however, dissented from. Thus in *Hegarty* v. *Shine*,[14] in which Fitzgerald, J., speaking of the case of *Reg.* v. *Bennett*, said: "Willes, J., there assumed that the prosecutrix, being capable of consenting, had consented to sexual intercourse with the prisoner, but would not have done so if she had known he was diseased; and then applying to the case the rule that fraud vitiates consent, held that the prisoner was guilty of an assault in the act of sexual intercourse. The ruling of the judge was uncalled for by the facts. There was no consent to the prisoner's act. . . . . Assuming, however, that there was evidence of consent, and taking the proposition as stated, which the judge intended to decide, it seems to me that it was a mistake to apply the principle to such a case, and the consequence of doing so would be most serious. . . . . If the maxim should be so applied where are we to stop? We must necessarily apply the rule *suppressio veri* in favour of the common prostitute who chooses to allege that some one of the people who have used her for pay has communicated disease to her. I may point out that *R.* v. *Bennett* rests not on the vitiation of consent, but on the aggravated results. Thus the judge says that it was the

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

[14] 14 Cox C. C., 128.

fraud practised on the girl in concealing the fact of the prisoner's diseased state, which vitiated her consent to sexual intercourse, but would the indictment lie for an assault if it had not been for the subsequent result? *R.* v. *Bennett* is, in truth, a case in which a familiar maxim was strained and misapplied to reach a person who had undoubtedly been guilty of a great moral offence. . . . . If *R.* v. *Bennett* is law, the statute 12 & 13, Vict. c. 76, s. 1, re-enacted by 24 and 25 Vict. c. 100, s. 49, was not necessary. By that enactment it is provided that whoever shall by false pretences, false representation, or other fraudulent means, procure any woman or girl under the age of twenty-one years, to have illicit intercourse with any man shall be guilty of a misdemeanour. *R.* v. *Bennett* derives no weight from *R.* v. *Sinclair*, save the acquiescence of the judge in the maxim that consent will be vitiated by deceit. It was admitted in that case that there was no evidence of such an act of resistance as would justify a conviction for rape, but the girl did resist, and there was nothing from which consent could be inferred. The prisoner was convicted of an assault doing actual bodily harm, and I am not quite able to see how that verdict could be sustained in the particular case when the case failed as a rape."

And both those decisions may be taken as actually overruled by that in *Reg* v. *Clarence*, to which reference has already been made, and in which the question was to some extent complicated by the circumstance that the intercourse was by the woman's own husband, in which case the intercourse is not necessarily with her consent, but often only in discharge of the duties of her marital condition. Wills, J., in this case said: "That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. . . . . If suppression of the truth be a material element in the inquiry, actual misrepresentation on the subject of health would put an unmarried man or woman in the same position as the married man or woman who conceals that fact against which the married state ought to be a sufficient guarantee. I intentionally refer to women as well as men, for it is a great mistake to look at questions of this kind as if sexual faults and transgressions were all on the side of one sex. The unmarried

woman who solicits and tempts a perhaps reluctant man to intercourse which he would avoid like death itself if he knew the truth as to her health, must surely, under some circumstances at least, come under the same criminal liability as the man. . . . . If coition, under the circumstances in question, be an assault, and if the reason why it is an assault depends in any degree upon the fact that consent would have been withheld if the truth had been known, it cannot the less be an assault, because no mischief ensues to the woman, nor indeed, where it is merely uncertain whether the man be infected or not. For had he disclosed to the woman that there might be the peril in question, she would, in most cases other than that of mere prostitution, have refused her consent, and it is, I should hope, equally true that a married woman, no less than an unmarried woman, would be justified in such a refusal. . . . The question raised is of very wide application. It does not end with the particular contagion under consideration, but embraces contagion communicated by persons having small-pox or scarlet fever, or other like diseases quite free from the sexual element, and whilst so afflicted coming into a personal contact with others which would certainly have been against the will of those touched had they known the truth. . . . . At marriage the wife consents to the husband exercising the marital right. The consent then given is not confined to a husband when sound in body, for I suppose no one would assert that a husband was guilty of an offence because he exercised such right when afflicted with some complaint of which he was then ignorant. Until the consent given at marriage be revoked, how can it be said that the husband in exercising his marital right has assaulted his wife? In the present case, at the time the incriminated act was committed, the consent given at marriage stood unrevoked. Then how is it an assault? The utmost the Crown can say is that the wife would have withdrawn her consent if she had known what her husband knew, or, in other words, that the husband is guilty of a crime, *viz.*, an assault, because he did not inform the wife of what he then knew. In my judgment in this case, the consent given at marriage still existing and unrevoked, the prisoner has not assaulted his wife."

Similarly, Stephen, J., observing that the maxim that fraud vitiates consent was not true in regard to criminal matters if

taken to apply in the fullest sense of the word, and without qualification, said: "If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled. These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true." In another place, the learned Judge said: "To seize a man's hand without his consent is an assault; but no one would consent to such a grasp if he knew that he risked small-pox by it, and if consent in all cases is rendered void by fraud, including suppression of the truth, such a gesture would be an assault occasioning actual bodily harm as much as the conduct of the prisoner in this case."[15]

The same principles will apply to cases of ordinary assaults also. Thus, a medical man making a woman strip and pulling off her clothes under the pretence that he could not otherwise judge of her illness has been held to be guilty of an assault.[16] The Court of Cassation held in 1884 and 1885 that fraudulent *manœuvers* employed by a physician in regard to patients who should consult him, with a view to lead them, by surprise and without their consent, to submit to *attouchements et des caresses obscènes*, are such as would constitute *l'attentat à la pudeur avec violence*.[17]

Fraud vitiates consent merely as an error.

141. There are certain other matters also in which fraud, no doubt, is generally held to vitiate consent. This, however, is only on account of the element of error which is comprised in fraud, and not on account of deception or of that wilfulness which chiefly distinguishes it from error. As a result of this, the matters in which fraud has that effect are those in which a mere mistake also would have that effect. Among these, the chief about which there appears to be a general unanimity, is the nature of the act. Thus Stephen,

---

[15] 23 Q. B. D., 39.

[16] Reg. v. Rosinski, 1 Mood. C.C., 19.

[17] IV Adolph. and Hélie, 305. (n)

J., in *Reg.* v. *Clarence*,[18] speaking of the application in criminal cases of the maxim that fraud vitiates consent, observed: "I do not at all deny that in some cases it applies, though it is often used with reference to cases which do not fall within it . . . . The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done. As to fraud as to the identity of the person by whom it is done, the law is not quite clear. The judgments in the case of *Reg.* v. *Dee*, justify the observation that the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. There is abundant authority to show that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. I do not think that the maxim that fraud vitiates consent can be carried further than this in criminal matters."

In the same case,[19] Field, J., after referring to what are called personation and surgical operation cases, observed, that in them, "the fraud by which the consent was obtained was a fraud as to person and circumstances, and did not as in this case relate to the very act of connection, its physical nature and conditions, and it seems to me to follow that a consent induced by a fraud relating to the physical nature and conditions of the act itself falls still more clearly within this principle."

Consent obtained by fraud does not affect abduction.

142. Even in cases of abduction, fraud is not treated as identical with force, though, so far as the commission of the offence is concerned, the operation of the two is considered equivalent. Almost every legislature dealing with the subject, has enacted that fraud will constitute the offence of abduction quite as much as force will. The Indian Penal Code[20] thus enacts, that "whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person." In England, 24 & 25 Vict. c. 100, s. 56, provides for the punishment of

[18] 22 Q. B. D., 43. | [19] P. 61.
[20] S. 362.

any person "who shall unlawfully, either by force or fraud, lead or take away, or decoy, or entice away or detain any child under the age of fourteen years." S. 53 of the same Act provides for the punishment of any person who "shall fraudulently allure, take away or detain such woman (having interest in any estate or property), being under the age of twenty-one years." Stephen, in his Digest of the English Criminal Law, lays down broadly that "if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such person." [21]

The *Code Pénal* ignores all distinction between *le rapt de violence* and *le rapt de séduction* of the ancient French Law, and Art. 354 of the Code provides the punishment of *reclusion* for every one, who should have, *par fraud ou violence, enlevé ou fait enlever des mineurs, ou les aura entraînés, détournés ou déplacés, ou les aura fait entraîner, détourner ou déplacer des lieux ou ils étaient mis par ceux à l'autorité ou à la direction desquels ils étaient soumis ou confiés.* Even in cases under that section, fraud is held not to negative consent which actual force would in such a case do, but to negative free consent, which alone is really essential to avoid the offence of *rapt*. Thus, in a case where on an indictment of that offence, the defence was based on the consent of the parents of the girl abducted, and it had been obtained by a false assurance given to them as to the place where she would be taken, the court only said, that one could not call free assent that which had been obtained only by *fourberie* (trick).[22]

The Italian Penal Code also provides the one and the same punishment for any one who *con violenza, minaccia o inganno, sottrae o ritiene, per fine di libidine o di matrimonio.*[23] And the reason for giving the same operation to violence and fraud in cases of abduction is well explained by Giulio Crivellari in his *Concetti Fondamentali di Diritto enale.* He says [24] that they are placed alternatively *dalla dottrina e dalle legislazioni, perchè la frode come la violenza escludendo il libero consenso del soggetto passivo fanno sorgere (ciascuna di loro) la contraddizione del fatto col diritto della libertà individuale. La ragione dell'eguaglianza giuridica dei due mezzi consiste nella presunzione del dissenso della vittima, presunzione che risulta tanto dalla frode*

[21] Art. 279.
[22] IV. Adolph. & Hélie, 496.
[23] Arts. 340, 341.
[24] Art. 1199.

quanto dalla violenza. Ed è ciò così vero, che se taluno avesse fatto venire nella propria casa una donna mediante ingannevoli raggiri e poscia, trovatasi colà, avesse aderito di buona voglia ai desideri del suo rapitore, non vi sarebbero gli estremi di un reato, perchè alla violenza carnale ed al ratto violento mancherebbe l'estremo della vis ; e, malgrado la presenza di un inganno, non potrebbe sostenersi il ratto fraudolento, perchè la spontanea adesione successiva eliderebbe la presunzione del dissenso.[l] He further adds that violence and fraud are not the real essence of the offence, which consists in the *soggiogamento di una contraria volontà, del quale, d'ordinario, si ha una manifestazione nell'inganno o nella forza adoperati per ottenerlo.*[m] And the same rule applied in regard to fraud and violence, when the offence was not technically an abduction, but what in Italian Law is designated as *plagio*, and which is defined as *la violenta o fraudolenta abduzione di un uomo per causa di lucro.*[25(n)]

The German Penal Code also provides for the punishment equally of a person who removes a person from a place or withdraws a minor from the guardianship of any one, or carries away a female against her will, with certain objects whether the removal, the withdrawal, and the carrying away is by *List, Drohung* or *Gewalt.*[26]

The same appears to have been held even apart from special legislation, under the Common law. Thus in *Reg* v. *Hopkins*,[27] where a person was indicted for the abduction of an unmarried girl under sixteen years of age, "against the will" of her father, the indictment was sustained, as it appeared that the consent of the parents was induced by fraud; Gurney, J., referring to some cases, to "show that the law has long considered fraud and violence to be the same." In the United States, it

(*l*) By doctrine and by legislation, because fraud, as well as violence excluding the free consent of the passive subject, give rise (either of them) to a contradiction of the act with the right of individual liberty. The reason of this juridical equality of the two means, consists in the presumption of the dissent of the victim, a presumption which results as much from fraud as from violence. This is so true that, if anybody has caused a woman to come to his own house by means of deceitful devices, and subsequently finding herself there, she has agreed of her own good will to the desires of her abductor, there would not occur the elements of the crime, for there would be wanting for carnal violence and violent abduction the essentials of vis (force), and in spite of the presence of fraud, fraudulent abduction could not be sustained, because the free consent which followed would avoid the presumption of dissent.

(*m*) Subjection of a contrary will, which ordinarily has a manifestation in the fraud or force adopted to obtain it.

(*n*) The violent or fraudulent abduction of a man for the sake of gain.

[25] Criv. Con. Fond. Dir. Pen., 397. | [26] S. 234.
[27] C. & M., 254.

appears to be generally assumed that if the consent of a girl to her going with any person, or of her guardian from whose possession she is taken away by that person is obtained by fraud, the taking is to be deemed aginst her will or the will of the guardian. Thus in *Beyer* v. *People*,[28] the indictment was under a section of the Revised Statutes, which made it punishable for a person "to take any woman unlawfully against her will, with intent to compel her by force, menace or duress to marry him, or to marry any other person, or to be defiled, &c.;" and it was sustained, as it was by the false representation that the defendant had procured for the prosecutrix a situation as a servant in a respectable family, that he had induced her to go with him to a house of prostitution, with intent to compel her to be defiled; the inducing her to accompany him, under the circumstances, being held to be a taking "against her will," within the Statute. The decision in *People* v. *DeLeon*,[29] also proceeded on the same principle, Andrews, J., in delivering the opinion of the court, saying: "The consent of the prosecutrix having been procured by fraud was as if no consent had been given; and, the fraud being a part of the original scheme, the intent of the defendant was to cause the prosecutrix to be sent out of the State against her will." In *State* v. *George*,[30] abduction was said to be the taking and carrying of a ward or wife, &c., by fraud, persuasion, or open violence.

How far consent obtained by fraud is consent in theft.

143. The rule that fraud is equivalent to force does not apply, however, to cases of theft. In India, the obtaining of a property by fraud is dealt with not as theft but as cheating, and there is no distinction whether it is the ownership of the property that is thus obtained, or only its possession. The offence of cheating is defined[31] as "fraudulently or dishonestly inducing a person whom he has deceived to deliver any property to any person, or to consent that any person shall retain any property," and it is not necessary that the "delivery" or the "retention" should have reference to permanent ownership.

In the English law also, there is no theft if a person is induced by fraud to part with his ownership of a thing. Thus in *The Queen* v. *Prince*,[32] Blackburn, J., observed: "As the law now

[28] 86 N. Y., 369.
[29] 109 N. Y., 226.
[30] 93 N. Car., 567.
[31] I. P. C., S. 415.
[32] 1 C. C. Res., 155.

stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny." So also, in *Reg.* v. *Middleton*, [33] Bramwell, B., said: "But where the *dominus* has voluntarily parted with the possession, intending to part with the property in the chattel, it has never yet been held that larceny was committed, whatever fraud may have been used to induce him to do so, nor whatever may be the mistake he committed, because in such case the *dominus* is not *invitus*." Stephen, in his Digest of Criminal Law,[34] lays down that "it is not theft to persuade any person by fraud to transfer the property of any chattel to any person, though such an act may be an offence" of obtaining goods by false pretences or cheating.

This rule of English law does not warrant, however, a general conclusion as to the effect of fraud on consent, as it is considered theft if the inducement is not to part with the ownership of the thing, but with only its possession. Thus Stephen says, that "theft may be committed by fraudulently obtaining from the owner a tran fer of the possession of a thing, the owner intending to reserve to himself his property therein, and the offender intending, at the time when the possession is obtained, to convert the thing without the owner's consent to such conversion. The English cases on the point are collected as illustrations to the above provision in the Digest, as well as in the second volume of Russell's work on Crimes.[35]

The same rule is recognized in Scotland, where Alison in his work on Criminal Law[36] laid down, that it was theft, although the article stolen was obtained "on some false pretence, or by a trick, from the true owner, provided there was no consent obtained by false representations to the actual transfer of the property of the article in question." When possession is obtained by such false representations made to induce the owner to sell or part with the property, the crime is swindling; but where possession is obtained on some inferior title, intended only to give the right of interim custody, the offence is held there to be theft; the distinction between the two classes of cases being that in the former, the proprietor has agreed to transfer the property, therefore he has only been imposed upon in the

[33] 2 C. C. Res., 55.
[34] Art. 331.
[35] P. P., 141, 196.
[36] I. 259.

transfer; in the latter "he has never agreed to part with his property, and therefore the subsequent appropriation is theft." Thus Macdonald, in his work on the Criminal Law of Scotland,[37] says: "When it is said that if the taker believed he had the owner's concurrence, he is not guilty of theft; this does not cover the case of the concurrence being obtained by fraud. Where a person called at houses at which goods had been left, and got delivery of them by representing himself to be the messenger of the tradesman, and stating that his master had sent him for them, this was held to be theft. The same was decided where the offender pretended he had been sent to get goods on sight, and where persons stated at a luggage-room that they had been sent to get luggage, or pretended to be the owners."

The same distinction is generally recognised in the United States. Thus in *Bassett* v. *Spofford*,[38] Allen, J., with the concurrence of all the members of the court (save Grover, J., not voting), said: "Although the consent was obtained by gross fraud, there is no larceny. But the consent must be to part with the property, and not the naked possession for a special purpose;" and again, "if the owner intends to part with the property and delivers the possession, there can be no larceny, although fraudulent means have been used to induce him to part with the goods." So also one who obtains money from another on the pretence that he will bet it for him on a race, which he pretends to do, and converts the money to his own use, is guilty of larceny.[39] Sometimes, however, it is also held that there is no larceny even in case of the transfer of possession. Thus, the Supreme Court of New York held in *People* v. *Smith*,[40] that although the owner should be induced to part with his property by fraudulent means, yet if he actually intended to part with it, and delivered up possession absolutely, it would not be larceny.

It thus appears that the distinction between the offences of larceny and false pretences generally depends not so much on the means by which the consent has been induced, but on the circumstance, whether it is the ownership of the property or its possession that has been given. This is due chiefly to the historical development of the offence of larceny, which was gradually extended to the cases of taking by fraud simply to avoid their escaping from punishment altogether, as the Common law did not recognize the offence of cheating; and no general

[37] P. 21.
[38] 45 N. Y., 387.
[39] Doss v. People, 41 N. E (Ill.) Rep., 1093.
[40] 53 N. Y., 111.

inference may, therefore, be derived from such cases, as to the nature of consent.

In Europe, the separate offence of cheating is recognized in almost every country. In France *l'escroc* does not take the thing like a thief *malgré la volonté du proprietaire* (*invito domino*), but obtains it *par la ruse, la remise volontaire;* and *Betrug* in German Penal Law, and *truffa* in the law of Italy, as well as *escroquerie* in France having deception of another and unlawful gain of oneself as their essential constituents, are substantially the same as the offence of cheating in India. Francesco Carrara, in his work entitled *Programma Del Corso di Diritto Criminale* [41] expressly says that the consent of the proprietor will eliminate and make disappear the title of theft, even when it is given on account of fraud (*prestato al seguito di un inganno*).

How far consent to entrance obtained by fraud is consent in house-breaking.

144. The English law in the case of a burglary also treats consent obtained by fraud to the entrance as no consent, and the entrance obtained by such consent as sufficient for the purposes of that offence. As observed in Roscoe's Digest of the Law of Criminal Evidence : [42] "where, by means of fraud, an entrance is effected into a dwelling-house in the night-time, with a felonious intent, it is burglary." Thus, where a person informed the police that robbers were in the house, and the constable got the occupier to open the door, and thereon the person bound the constable and the occupier and carried off property from the house, he was held to be guilty of burglary.[43] And the same was held where a woman induced a boy by the promise of a pot of ale to let her into a house of which he was in charge and had the key, and then sent him to get the ale, and in his absence robbed the house and went away.[44]

On the same principle, "the getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house." [45] So also obtaining admittance into a house under pretence of having a search-warrant, or an order for the distress or attachment of property, is breaking into a house. [46] Taking

---

[41] Art. 2034.
[42] P. 345.
[43] 3 Inst., 64.
[44] R. v. Hawkins, East P. C., 485.
[45] Farre's case, Kel., 43.
[46] Gascoigne, 1 Leach, 284.

lodgings in a house with a view to rob it is also deemed breaking into it.[47] And the same was held where persons knocked at the door, and got in on pretext of business with the owner.[48] It is, in fact, quite an established principle that if one, with intent to commit a felony, applies for and obtains admission to a dwelling under a fraudulent pretence of having business with the master of the house, this is a constructive breach. It is not necessary in such a case even that there should be any express pretext, as in the absence of anything else, such pretext will be presumed from the knocking.

Thus in *Johnston* v. *Commonwealth*[49] R and J rang M's bell, with the intent of entering under the guise of friendship or the pretence of business and then robbing the bank, it was held to be a burglarious entry; a breaking within the meaning of the law. Paxson, J., in delivering the opinion of the court, said: "Nor would it matter that one of the burglars had established such social relations with M that he would have been admitted without question. It makes the fraud the greater. The dead-latch was down and the door was locked. The bolts were withdrawn upon the implied, if not express, assurance that they came there as friends for social intercourse or to transact business. This assurance in either case was a trick and deception. The law is not so impotent as to permit a burglar to enter a house under such circumstances and yet evade the responsibility of his act."

The same was held in *Ducher* v. *The State*,[50] in which B was living in a house with her son, John, and they were awakened one night by some one knocking at the door, whom John called to come in. The person outside pulled the latch-string without being able to open the door, when they said that he could not come in. John then got up and opened the door, when two men walked into the house. After they had entered, one of them nearly closed the door and stood by it; the other stated that they had a warrant for John Ondery from the prosecuting attorney of P—— county. John asked for time to put on his clothes, and after he had done so, one of the men told him that they wanted his money, and asked for his mother's money. John said it was in a chest. They told her to get the key, which she did. They tried to open the chest, where John told them the money was, and being unable

[47] Cassy, Kel., 62.
[48] Le Mott's case, Kel., 42.
[49] 85 Pa. St., 54.
[50] 18 Ohio, 317.

to do so, with threats of violence induced her to do it, and then took from the chest the money described in the indictment. It was held, that this was a constructive breaking under the Ohio statute, which provides against a forcible breaking and entering. It will be observed, in the case above cited, that the door was opened in obedience to a knock. Not a word was said by way of inducement to open it; yet it was a manifest trick and fraud. When a person rings the door-bell of a house, the owner has a right to presume that his visitor calls for the purpose of friendship or business. If, in obedience to the summons, he withdraws his bolts and bars, and the visitor enters to commit a felony, such entry is a deception and fraud upon the owner, and constitutes a constructive breaking. Livingston's Louisiana Criminal Code distinctly provided that an entry into a house obtained by fraud was to be deemed as having been made without such consent as would negative the offence of housebreaking. [1]

This view has, however, not been adopted in India, where a theft by getting an entrance into a house by fraud may be theft in a building, but not housebreaking. Thus S. 445 of the Indian Penal Code provides that a person will be guilty of housebreaking if he effects his entrance into, or departure from, the house by using criminal force, or committing an assault, or by threatening any person with assault. There is no mention here of an entrance or departure effected by fraud. If fraud could be treated as force, or consent obtained by fraud were, as such, no consent, the rule of English law would not have been departed from here. Evidently, absence of consent has not been made an essential of the offence, so that there may be no room for an argument on the ground that consent obtained by fraud is no consent.

In European countries burglary does not appear to be recognized as an independent offence, but the Code Pénal provides an increased punishment for theft when it is committed with the aid of *d'effraction* or *d'escalade* or *fausses clefs* or of *violence*, and fraud does not form a part of any of them. An entrance gained by fraud is not deemed *effraction*, even though the latter includes all *forcement*, *rupture*, *dégradation*, *démolition*, and *enlèvement* of *murs*, *toits*, *planchers*, *portes*, *fenêtres*, *serrures*, *cadenas*, *ou autres ustensiles ou in-*

[1] Arts. 605, 606.

struments servant à fermer ou a empêcher le passage.[2] So also the German Penal Code provides higher punishment for theft when it is committed from a building by means of *Einbruch* or *Einsteigen*, and neither will be satisfied by the use merely of fraud. In Italy it is the same, theft being declared punishable with *reclusion* up to six years, if the offender to commit the deed or to carry away the property stolen *distrugga, demolisca, rompa o scassi ripari de solida materia posti a tutela della persona o della proprietà, o apra serrature, valendosi di chiavi false o di altri strumenti, o anche della chiave vera perduta dal padrone, o a lui trafugata, o indebitamente avuta o ritenuta;*[3] and fraud will evidently not meet any of the above requirements.

Fraud differs from violence in never being like it, an aggravation of theft. In the Spanish Penal Code, however, for purposes of theft from sacred places or inhabited buildings, the entrance by means of a certain sort of fraud, i. e., *à la faveur de noms supposés ou en simulant l'autorite*, is placed on the same footing with the entrance by *escalade*, or *rupture de mur ou toit, ou effraction de portes ou ferrêtres*, or by use of false keys.[4] This appears to bear out clearly that fraud as such is not deemed equivalent to force or violence in that law; and it is significant that as regards theft from uninhabited places, entrance by no sort of fraud whatever is treated as an aggravation of theft.[5]

---

[2] Art. 393.
[3] Italian P. C., Art. 404.
[4] Ss. 431 & 432.
[5] S. 433.

CHAPTER VIII.

Subjective Qualifications of Consent.

Consent of incompetent person is not sufficient consent in criminal law.

145. It has been explained above in S. 14, that for actual consent it is necessary that the person consenting should have a knowledge of the act consented to. However, a knowledge of the tendencies or consequences of the act, and as pointed in SS. 20 and 21 even of its character and non-essential constituents is not necessary for the existence of the consent. This is due quite as much to the nature of consent, as to the practical necessities of society. If there could be no consent to an act without a knowledge of all its incidents, there would never be any consent at all, as every person consenting to an act might plead absence of his consent to it on the ground that he was not aware of at least some of them. At the same time, it cannot fail to be sometimes hard, that a person who is not able to understand the nature and consequences of an act should be able to give his consent to that act, and thus to bind himself to submit to and suffer all its consequences, without being able to complain of an injury to him, simply because he consented to some act which is the cause, but which could not be known by him to be the cause, of that injury.

There is a material difference between a case of mere absence of knowledge, and that of an incapacity of it, and the two cases ought to be dealt with differently in practice. In the former case a knowledge of the act and of its essential constituents, including such consequences as may be deemed a part of the act itself, is essential to and sufficient for consent. Mere ignorance of the nature of the act and its other consequences will not affect the existence of consent or even vitiate consent in any way, because if a person competent to know them gives his consent without a knowledge thereof, he has only to blame himself. It is otherwise, however, with persons incapable of knowing them, and therefore of judging the effect of the act on their own interests. It is necessary that such persons, incompetent and unable to understand the nature and consequences of their acts, and therefore unable to protect their interests, should be protected by law; and there can be no efficient protection if

they may throw it off at their pleasure by giving consent to acts prejudicial to them. If they are to be protected, protection must be given to them against their own consent, and by an absolute deprivation of the consent of all its legal efficacy and effect. This is admitted by all the jurists. Thus Breithaupt in his work on *Volenti non fit injuria*[6] says, that consent being a declaration of will, it is necessary that the person giving it *nach allgemein rechtlichen Grundsätzen fähig ist, seinen Willen rechtlich wirksam auszudrücken.*(a)

The practical difficulty in such cases is that the incompetency is not always absolute and permanent. The case of minority does not admit of much variation, but unsoundness of intellect may vary from congenital idiocy to a voluntary tipsiness of an after-dinner whisky, and to extend the same rule to both with all its intermediate stages cannot but lead to confusion and harshness in practice. It is only gradually that this truth was recognized in England in regard to minors in cases of rape against the rigidity of the common law doctrine of the full effect of consent. The consent of the insane is in England and portions of the United States, sometimes still considered even in those cases, a consent sufficient for purposes of criminal law.

In certain other portions of the United States sufficient protection is accorded to the insane, and insanity recognized as sufficient to vitiate consent. The rule has sometimes been enunciated in general terms in countries governed by the English law. A material development effected in regard to consent in the Indian Penal Code is the recognition of this principle in its broadest form, and the extension of these subjective disqualifications of consent to all offences alike. Thus S. 90 of the Code provides that if the consent is, in any case, of a person unable to understand the nature and consequences of the act consented to, it will not be consent. Some writers mention infancy and unsoundness of mind as absolute grounds of incapacity, and distinguish them from the relative grounds, as an instance of which reference is made to the absence of a free power of disposition over a property in a person who consents to an injury to that property.(b) This is,

(a) According to general legal principles is competent to express his will with legal efficacy.

(b) Thus Breithaupt, in his work on *Volenti non fit injuria*,[7] says: *Es würde also nicht nur ein absolut Willensunfähiger wie ein infans und ein furiosus, sondern auch ein relativ unfähiger, wie z. B. ein Nichteigenthümer, nicht im stande sein, seine Einwilligung in die Verletzung des betreffenden Gutes, über das ihm nicht die freie Verfügung zusteht, zu ertheilen.*

[6] P. 19.

[7] P. 19.

however, not a ground of incapacity of consent, but merely the absence of a condition necessary for the effectiveness of consent; because, as explained above in S. 107, consent to an act affecting property can receive effect only when it is given by a person who will be prejudicially affected by the act, and it is only a person having free power of disposition over the property who can be so affected.

Statutory protection of minors in regard to rape in English law.

146. Under the English common law, it was a general rule that the age of the person giving the consent was immaterial in regard to the legal effect of consent, and a consent even by a child was held sufficient to negative offences of which absence of consent was an essential constituent.

In regard to rape, however, it was recognized by an early statute (Westm. 1, c. 13), that ravishing a maiden within age was rape even when done with her consent, and a maiden up to twelve years of age was judicially held to be within age. Under the statute 18 Eliz. c. 7, a girl under ten years was conclusively presumed to be incapable of consent, and it was rape to have carnal knowledge of her even with her consent. This latter statute did not include females between ten and twelve years, and it was held not to repeal that part of the statute of Westminster which had created the offence in regard to them, and which continued to apply to the case of sexual intercourse with them. The effect of the two statutes read together was to make it an offence to have carnal knowledge of a girl under twelve years of age; a felony if she was under ten; and a misdemeanour, according to the generally accepted view, if she was over ten but under twelve. The Statute 9 George IV., c. 31, s. 17, made it a felony to have carnal knowledge of female children under twelve years of age, even with their consent. The Statute of 1861 (24 & 25 Vict., c. 100) provided separately for the punishment of persons who should unlawfully and carnally know and abuse any girl, making the offence a felony if the girl should be under the age of ten years, and a misdemeanour if the girl should be above the age of ten years and under twelve years. In 1875 the maximum age for felony was raised to twelve years, and that for misdemeanour to thirteen years[8, 9]; and

---

[8, 9] 38 & 39 Vict. c. 94, ss. 3 & 4.

they have since been raised again to 13 and 16 years respectively.[10]

All this legislation was based on the presumption, that a female of tender years was incapable of consenting to sexual intercourse, and whether the charge was the crime denounced by the statute of Elizabeth, or the offence defined by the statute of Westminster and not covered by the later statutes, or that punishable under the later statutes, the presumption was conclusive that the act was against her will. Nor was this presumption of force arbitrary. It was based upon a well-understood fact in nature, that a female at that tender age could not have a desire for such intercourse. Nature, indeed, does not definitely fix the period at which she may become capable of understanding the character of the act and assenting to it; and positive law has therefore named a certain age in most countries as the period when the conclusive presumption of the opposing will shall cease. A rape, however, is a very serious offence, and for the greater and more effective protection of young girls from the wiles of the cunning, a special and less heinous offence was created in England, which avoided altogether the difficulty and the inadvisability of treating as rape an offence which, though deserving of punishment, was not really a rape.

Substitution of minority for force in rape.

147. In this legislation for the protection of minors, the necessity of force generally recognized for rape was dispensed with in regard to girls within age; its place being supplied by the tender years of the minor against whom the offence was committed.

Thus in *Reg.* v. *Sweenie*,[11] Lord Deas, after observing that it was not necessary to allege force in every case, said: "The case of girls of tender years is an instance to the contrary, resting, however, not so much on the fact that they have neither appetite nor will in the matter (for in some cases, and to some extent they may have both), as on a presumption of law introduced and established to prevent the evils to society and the demoralization which might otherwise follow, and which presumption accordingly is not allowed to be reargued." Lord Ardmillan observed: "The element of force as applied to the overpowering of the

[10] 48 & 49 Vict. c. 69, ss. 4 & 5.

[11] 8 Cox. C. C., 227.

will is introduced by long settled legal presumption in every case of connection with a child. It is a presumption which cannot be reargued; no proof of consent can set it aside; and the act of connection with a child is, in consequence of that presumption, uniformly and necessarily the crime of rape, not in respect of any lowering or modifying of the requisites of the crime, but in respect of that legal presumption which gathers from the infancy of victim the force necessary to the definition of the crime. Except in the case of a child, actual force, or the use of means of overpowering the will equivalent to actual force, is, in my opinion, necessary to the crime of rape. In no case, that I am aware of, has there ever been a charge of rape sustained without the element of such actual force or its equivalent, except in the case of a child. In the case of a child the element of force is introduced by legal presumption, but in that case also the act amounts to rape, because in the eye of the law it is a forcible act; and thus the definition of the crime remains unimpaired."

Constructive extension of force in cases of minority.

148. In the absence of special legislation, this protection is accorded to minors by the constructive extension of force to include the advantage taken of the weakness of nonage. Constructive force is thus held to exist even where intercourse is had with a girl incompetent to give an intelligent consent. The non-resistance of a child to an act does not justify or excuse it as consent would[12]; and even when the child willingly yields to the act, the law deems the act thus done as accomplished by force.[13]

Lord Neaves in *Reg.* v. *Sweenie*,[14] after observing that "to the crime of rape, the element of violence has always been essential," said: "In the case of a child the law introduces a constructive violence. In doing so it merely expresses and recognizes a natural law. A child has no passions, no appetites. Its will is a will for purity. Nature herself cries out against connection, and any connection may rightly be presumed to be against the will. In the case of an insane woman constructive force may also be admitted, upon an extension of the same principle, the law not allowing that such a person can exercise the will."

---

[12] Coates v. State, 50 Ark., 330; Sharp v. State, 15 Tex. App., 171; Oliver v. State, 45 N. J. Law, 46.

[13] Dawson v. State, 29 Ark., 116.

[14] 8 Cox. C. C., 229.

R. Garraud, in his Treatise on French Penal Law,[15] observes that *La violence peut être présumée ou inductive quand le sujet passif de l'attentat est, par lui-même, incapable de consentir, soit à raison de son âge, soit à raison de son état physique.* (a)

Similarly Giulio Crivellari in his *Concetti Fondamentali Di Diritto Penale*[16] says: *Oltre che fisica e morale, la violenza può essere presunta o induttiva; la quale avviene quando il soggetto passivo sia di per sè stesso incapace di consenso, o par l'età in cui si trova o per un vizio di mente.* (b) He adds that all the writers are agreed in holding that *nell'imputazione della violenza carnale l'intervento della violenza presunta debba portare ad una repressione uguale a quella di cui è meritevole la vera.* (c) *Ed in ciò bene si appongono*, he continues, *poichè l'abuso di chi è privo di coscienza dei propri atti racchiude in sè stesso, oltre l'attentato alla libertà personale ed al pudore, un elemento di imputabilità altrettanto grave, consistente nello sfogo brutale e selvaggio di libidine su persóna che ispira o compassione o riverenza al candore dell' età.* (d)

Sexual intercourse with minor's consent statutorily punishable even outside England.

149. In India, apart from the general provision as to the inadequacy of a minor's consent in S. 90 of the Indian Penal Code, the Code as originally enacted provided that sexual intercourse with a woman would be rape, even when with her consent, if she were under ten years of age; and the age has since by Act X of 1891 been raised to twelve years.

Similar provisions have been made in other countries for the punishment of carnal intercourse with minor girls, without regard to their consent, either as a rape as in India or as a separate offence as in England. In Pennsylvania and California

(a) Violence can be a presumed one or inductive, when the person on whom the attempt is made, is himself incapable of consenting, either by reason of his age or by reason of his physical condition.

(b) Besides physical or moral violence, there may be presumed or inductive (violence), which takes place when the passive subject may in himself be incapable of consent, either on account of his age or unsoundness of mind.

(c) In the imputation of carnal violence, the intervention of presumed violence ought to lead to a repression equal to that which real (violence) would deserve.

(d) And this is well-founded, because the abuse of him who is deprived of the consciousness of his own acts includes in itself besides the attempt on personal liberty and modesty, an element of imputability just as grave, consisting of a brutal and savage venting of lasciviousness on the person of one who inspires compassion or respect owing to the purity of his age.

[15] IV. 465.

[16] Art. 1140.

the rule is the same as it stood in India prior to 1891. Generally the maximum age up to which the woman's consent does not avoid rape is that now recognized in India.[17] In some of the States, as in Iowa, the limit is the same as now in England. In Michigan and Missouri it is fourteen years, in Nebraska fifteen, and in Kansas even eighteen years.

The New York Penal Code [18] provides that a person who perpetrates an act of sexual intercourse with a female (not his wife) under the age of eighteen years under circumstances not amounting to rape in the first degree is guilty of rape in the second degree.

Minor's consent to sexual intercourse generally held not to be consent.

150. It is in fact now considered a general principle that when the female is of such tender years, as not to understand the nature of the act, she cannot consent to carnal intercourse. In *State* v. *Tilman*,[19] it was held that carnal intercourse with a female under twelve years of age would amount to the crime of rape; as on the basis of general principles, she must be deemed incapable of yielding consent; and the decision was followed in *State* v. *Miller*.[20] In *Coates* v. *State*,[21] Cockrill, C. J., in delivering the opinion of the Supreme Court of Arkansas, said: "If a female be an adult, but incapable of consent to carnal intercourse from idiocy, or a drug administered to her, the act is said to be forcible and against her will. The analogy of the law extends the rule to the condition of an infant whose tender years, or exceptional want of mental and physical development where her age is sufficient, renders her incapable of understanding the nature of the act."[22]

If a prosecutor is not entitled to presume a child's capacity where the child is charged with an offence, there appears to be still greater reason why a defendant should not be permitted to assume it for the purpose of justifying his own vicious act. To hold that a consent extorted from the weakness of children would justify acts perhaps destructive eventually to them, and highly prejudicial to the well-being of society, would be a doctrine of most dangerous tendency.

---

[17] Missouri Penal Code, S. 345.
[18] S. 278 (5).
[19] 30 La. Ann., 1249.
[20] 42 La. Ann., 1186.
[21] 50 Ark., 330.
[22] Dawson *v.* State, 29 Ark., 116. Anschicks *v.* State, 6 Tex. App., 524.

Minor's consent immaterial in case of attempt to have carnal knowledge of minors.

151. In England a similar provision was made by Statute 24 & 25 Vict. c. 100, in regard to the attempt of the offence of having carnal knowledge of minors. S. 52 of the Act provided for the punishment of such an attempt on a girl under twelve years of age. The Criminal Law Amendment Act, 1885, raised that age to thirteen, or, so far as attempt is concerned, to sixteen years. S. 4 of the Act,[23] after making it a felony to have unlawful carnal knowledge of any girl under the age of thirteen years, makes it a misdemeanour to attempt the same. S. 5 of the Act goes still further, and declares a person guilty of misdemeanour "who unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years."

There is no express mention in these sections, that the attempt is independent of her consent, but the general language of the section must have that effect, specially as consent is not inconsistent with unlawful carnal knowledge, and there may be an attempt to know carnally a consenting girl, though under Common law there could not be an assault on a girl who consented to the same.

In the United States, as in India, there is no special provision for a penal attempt in such cases as there is in England. There appears to be no doubt, however, that where the intercourse with a girl is rape even though the intercourse is with her consent, an attempt at such intercourse with her consent will be an attempt to commit the offence of rape. In India there can be no difficulty on account of the general provision in S. 90 of the Indian Penal Code, which provides that a consent is not such a consent as is intended by any section of that Code, if it is given, unless the contrary appears from the context, by a person who is under twelve years of age, as nothing appears to the contrary from the context in regard to an attempt to commit rape. In the United States, it has, as a fact, often been held on general principles, that as the consent of a woman under twelve years of age is immaterial for the offence of rape, there may also be an attempt to commit rape on a woman below that age even when she consent.[24]

---

[23] 48 & 49 Vict., c. 69.

[24] State v. Pickett, 11 Nev., 255. People v. McDonald, 9 Mich., 150.

Minor's consent, according to common law, avoids the criminality of an indecent assault.

152. Under the English common law, consent by a minor to an indecent assault was held sufficient to excuse its criminality; and there could be no indecent assault on a minor, when the minor consented to it. This was, of course, a natural result of the fact that the absence of consent was the very gist of all assault; and there was no restriction as to the age of the person giving the consent to negative the criminality of the assault.(a)

Thus in *Reg.* v. *Martin*,[27] a girl above ten and under twelve years of age was assaulted with intent to commit rape, and on a case reserved, fifteen judges held that the offence of assault had not been committed on account of her consent; Patteson, J., in delivering their judgment, observing that "as the child consented it was not an assault." The court directed in this case that the indictment must be for an attempt; and that was quashed,[28] but only on the ground of a verbal defect, and with an express observation that the indictment, if properly worded, would have been sustained.

This decision was followed in *Reg.* v. *Read*,[29] in which the girl, who after some expression of unwillingness, ceased to offer opposition, and apparently assented, was nine years of age, and from her tender years did not know what she was about; yet her actual consent was held to negative the offence of assault by three boys who had connection with her one after the other, even though it was admitted that she could not give legal consent. This decision was, in its turn, held conclusive in *Reg.* v. *Roadley*,[30] in which the consent of a girl of seven years was held to negative a charge of indecent assault.

In *Reg.* v. *Cockburn*,[31] the girl was under five years of age, and Patteson, J., said: "A child under ten years of age cannot give consent to any criminal intercourse, so as to

(a) In *Reg.* v. *Banks*,[25] the charge was of a felonious assault on a girl nine years old, and Patteson, J., observed that he had "great difficulty in saying that there was any assault, as there was consent." In *Reg.* v. *Meredith*,[26] a charge of an assault on a girl between the age of ten and twelve was not sustained, and Lord Abinger observed that to support it, "you must show an assault, which could not be justified if an action were brought for it, and leave and license pleaded."

[25] 8 Car. & P., 574.
[26] 8 Car. & P., 589.
[27] 9 Car. & P., 213.
[28] 9 Car. & P., 215.
[29] 3 Cox. C. C., 266.
[30] 14 Cox. C. C., 463.
[31] 3 Cox. C. C., 543.

deprive that intercourse of criminality, but she can give such consent as to render the attempt no assault. We know that a child can consent to that which, without such consent, would constitute an assault." In *Reg.* v. *Meheegan*,[32] the indictment was for assaulting and attempting to carnally know and abuse a girl of ten and a half years of age, and the conviction which was evidently for assault was quashed by the Irish Court of Criminal Appeal on the ground of her having been a consenting party. In *Reg.* v. *Johnson*,[33] a conviction for indecent assault on a girl of ten years and nine months was quashed, as it was found that she had consented to it, and an assault on a consenting person was not an offence at common law, and was not made so by any statute.(B)

The decision in *Reg.* v. *Beale*,[34] is not against this view, as the indictment in that case was for unlawfully attempting to have carnal knowledge of a girl under the age of ten years. It contained counts also for indecent assault, and the jury were directed, that "if from her tender years not knowing what was being done, she merely submitted, without the exercise of any will by her, it would be such an assault in law as would support the indictment;" yet the conviction affirmed by the Court of Criminal Appeal appears to have been for the attempt, as Pollock, C. B., in the judgment of the Court, observed, that "the charge was an attempt to commit a crime with respect to the commission of which the consent of the child is wholly unimportant," and the consent of the child was of course unimportant for the attempt.

The opposite view appears to have been held in some cases in the United States,[35] but in most of them the question was of an attempt, and not of an assault with intent to commit rape; and that view was taken on account of a confusion between such an assault, and an attempt to commit rape. Thus in *Allen* v. *State*,[36] an attempt to have carnal knowledge of a child of tender years, though with her consent, was held to constitute an assault with intent to commit rape. The ground in sup-

(B) Cockburn, C. J., in delivering the judgment of the Court of Criminal Appeal, said: "Independently of the statutes, the having carnal knowledge of a child was not an offence at law. The statutes made it an offence, saying that whether the child was an assenting party or not, it should be an offence. It follows, therefore, that the offence in this case, not being an offence within any statute, was not an offence at common law."

[32] 7 Cox. C. C., 145.
[33] 10 Cox. C. C., 114.
[34] 10 Cox. C. C., 157.
[35] Hull v. State, 22 Wis., 580.
[36] 37 S. W. R. (Tex)., 429.

port of that view is derived chiefly from the statutory legislation in regard to the immateriality of a minor's consent in cases of actual sexual intercourse. Thus Allen, J., in delivering the opinion of the Supreme Court of Massachusetts in *Com.* v. *Roosnell*,[37] observed that "if it is immaterial upon a charge of committing the completed act, which includes an assault, no reason but an extremely technical one can be urged why it should not be so upon a charge of assault with intent to commit the completed act. Indeed, to speak of an assault upon her without her consent with intent to carnally know and abuse her with her consent, seems to involve a contradiction in terms." The decision in this case was approved and followed in the case of *Com.* v. *Murphy*[37a] even though the age of consent for girls to carnal intercourse had in the interval been raised to sixteen years. The argument was pithily put in *Hays* v. *People*,[38] in which Cowen, J., delivering the opinion of the court said: "The assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender. That the infant assented to or even aided in the prisoner's attempt, cannot, therefore, as in the case of an adult, be alleged in his favour any more than if he had consummated his purpose."

The correctness of this has, however, been denied, and Peck, J., in delivering the opinion of the Supreme Court of Ohio in *Smith* v. *State*,[39] with reference to that proposition observed: "We cannot perceive that a statute punishing a man for having carnal connection with a consenting child makes the consent actually given void, or deprives her of the power to consent. The most that can be said of it is, that the statute declares that such consent, if in fact given, shall be no defence to the guilty participant. Such a statute, then, cannot make that an assault which was not one before its enactment."

The doctrine of the criminal non-liability of a person committing indecent assault on a minor with her consent has sometimes been maintained on the ground of the policy of the legislature as indicated in its criminal legislation. Thus in California, the Penal Code, before providing that sexual intercourse with a female under the age of fourteen years is rape,[40] enacts "that one who assaults another with intent to commit rape is punishable with imprisonment."[41] The latter offence is there

[37] 143 Mass., 32.
[37a] 165 Mass., 66.
[38] 1 Hill, 352. *Vide* to same effect State *v.* Johnson, 76 N. C., 209.
[39] 12 Ohio 466. *Vide* to same effect, Cliver *v.* State, 45 N. J. L., 46.
[40] S. 261.
[41] S. 220.

deemed to be included in the former; and the Supreme Court of California has repeatedly held that there may be an assault with intent to rape committed on a girl below ten years of age, even if she should consent to it. Thus in *People* v. *Gordon*,[42] the defendant was convicted of an assault with intent to rape, committed upon a girl under ten years of age, even though it was contended that she must be held to have consented because she did not resist. The court said: "It is a presumption of law that a girl under ten years of age is incapable of consenting to the offence of rape; and as such an offence includes an attempt to commit it, accompanied by such force and violence upon the person as constitutes an assault, a girl under ten years of age is incapable in law of consenting to the assault in connection with the attempt to commit the offence. Whether the girl, in fact, consented or resisted was therefore immaterial. Being incapable of consenting to an act of carnal intercourse, it was criminal for the defendant to make an assault upon her to commit such an act." And the decision in that case was approved and followed in *People* v. *Verdegreen*,[43] as being in accord with the evident purpose and intent of the California Code. Vanfleet, J., in delivering the opinion of the court, said: "It is the declared policy of our law, as expressed in the statute, that any female under the age there fixed shall be incapable of consenting to the act of sexual intercourse, and that one committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtain her actual consent. The obvious purpose of this is the protection of society by protecting from violation the virtue of young and unsophisticated girls. To hold that one of this class, although incapable of consenting to sexual commerce, could nevertheless give her assent to an assault upon her person, made for the express purpose of accomplishing the sexual act, would be to largely emasculate the statute, and defeat in great part its beneficent object. It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature. The incapacity extends to the act and all its incidents. It is true that an assault implies force by the assailant, and resistance by the one assaulted, and that one is not, in legal contemplation, injured by a consensual act. But these principles have no application to a case where, under

[42] 70 Cal., 467.

[43] 106 Cal., 211.

the law, there can be no consent. Here the law implies incapacity to give consent, and this implication is conclusive. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her." The same has been held again by the court in *People* v. *Laurintz*,[44] in which a conviction of an assault with intent to commit rape on the person of a young girl who had assented to it, was sustained.

Apart from the indications of any special legislation, however, though there may be an attempt to commit rape even as against any consenting female, there can be no assault with intent to commit rape against a female below twelve years of age. Thus Bishop in his work on Statutory Crimes,[45] says, that "by the better judicial determinations, there cannot be, under the common law rules, an assault with intent to have criminal carnal knowledge of a girl with her consent; because, by the common law, violence consented to is not an assault, and the statute which makes her consent immaterial in defence of the carnal knowledge does not extend also to the assault. Some of our American courts, without express statutory aid, have held that the girl's legal incapacity to consent to the carnal act extends also to render her incapable of consenting to the violence which, in the absence of her consent, would by all be deemed to constitute an indecent assault. So that, by these opinions, there may be a conviction for assault with intent to commit carnal abuse. Still, though, by what we have seen to be the better doctrine, the law does not term this act an assault by reason of the girl's consent . . . . . But in a State where there are no common law crimes, it is not so indictable; and, in the absence of a statute to meet the case, the offender must escape."

Special legislation to make indecent assault against minors an offence in spite of consent.

153. Special legislation was, therefore, resorted to with a view to provide punishment for the act of an indecent assault against a child incompetent to consent, the legislation being based on a presumption of law as to public policy, which was at times recognized even on general principles, and which was the basis of the extension of the doctrine of the constructive force in such cases so as to constitute intercourse with a child the offence of rape.

[44] 46 Pac. R., 613.

[45] SS. 496-499.

Thus in England, it was enacted by the Criminal Law Amendment Act, 1880,[46] that it "would be no defence to a charge or indictment for an indecent assault on a young person under the age of thirteen years to prove that he or she consented to the act of indecency." And a Bill was introduced into the House of Lords even last year to raise the limit of age for making such assaults criminal, independently of consent, up to the age of 16 years. That Act did not apply, however, to Scotland, where it is doubtful whether the consent of a minor would be able to negative the offence of indecent assault on her.[47]

Some of the States in the American Union have also enacted statutes more or less similar. Thus S. 245 of the Minnesota Penal Code declares guilty of felony "a person who takes any indecent liberties with or on the person of any female, not a public prostitute, without her consent expressly given and which acts do not in law amount to a rape, an attempt to commit a rape or an assault with intent to commit a rape, or any person who takes such indecent liberties with or on the person of any female child under the age of ten years, without regard to whether she consents to the same or not. And in *State* v. *West*,[48] Mitchell, J., said: "The taking of indecent liberties with the person of a female without her consent would at common law amount to an assault. In view of the aggravated nature of such an assault, the evident intention of the legislature was to raise it from the rank of misdemeanour to that of felony, so that it might be more severely punished. And as by another statute a female under the age of ten years was incapable of consenting to carnal intercourse, or at least her consent void, so by this section the incipient advances, in the way of indecent liberties with her person, are placed on the same footing as the principal crime. What in the case of a female over the age of ten would amount to an assault because done without her consent, would, in the case of a child under that age, in any case, be an assault, because she is deemed incapable of consent, and therefore the act must, in contemplation of law, be deemed as done without her consent. If an indictment charged a defendant with taking indecent liberties with the person of a female under ten years, with intent to carnally know and abuse her,

[46] 43 & 44 Vict. c. 45.
[47] M'Arthur Shaw, 211.
[48] 39 Minn., 321.

we think clearly this would amount to a charge of an assault with the intent alleged. If so, then it would seem to follow that, under an indictment for an assault with intent to carnally know and abuse her, the defendant might be convicted of taking indecent liberties with or on her person, if within the allegations of the indictment."

In the French law also, the Code Pénal of 1810 provided only for the punishment of the assault against the modesty when it was committed with violence, whatever might be the age of the person assaulted; so that whenever it was found that an infant had not made any resistance or had actually given consent, the act of *attentat* remained unpunished. The courts revolting at the impunity of so grave an offence, attempted in some cases, to strain the law so as to include within it such an assault, *sous prétexte qu'il avait violence morale.* The Court of Cassation held, however, that Art. 331 of the Code which dealt with the matter applied to physical violence only and not to moral violence;[49] and it was difficult to make up the gap thus created in the law by a Prætorian interpretation.[50] In 1832 a new *disposition* was therefore introduced into the Code, which, as subsequently amended in 1863, provides the punishment of reclusion for *tout attentat à la pudeur consommé ou tenté sans violence sur la personne d'un enfant de l'un ou de l'autre sexe âgé de moins de treize ans.*(c) The effect of this *disposition* is to establish an age under which violence is presumed always in case of an assault on the person of infants.[1] The same penalty was provided also for an attempt against the modesty committed by an ascendant over the person of a minor of more than thirteen years of age, but not emancipated by marriage.

Limit of the age of consent.

154. The limit of age for the nullity of consent must, of course, be arbitrary, and is, therefore, different in different countries. Nor need the age of consent for the purpose of Criminal law be the same as for civil transactions. Breithaupt in his work on *Volenti non fit injuria*,[2] thus points out that *Bestimmungen des bürgerlichen Rechtes über die Handlungs-*

(c) Every attempt against modesty, committed or attempted, without violence on the person of a child of one or the other sex, of less than thirteen years of age.

49 1830 Journ. du dr. Crim., 353.
50 IV. Gar. Dr. Pen., 474.
1 IV. Gar. Dr. Pen., 475. IV. Adolph. & Hélie, 236.
2 P. 20.

fähigkeit, die Ja allerdings mit der Grossjährigkeit in engem Zusammenhang steht, hier nicht massgebend sein können. Die gesetzliche Normirung der Grossjährigkeit ist nur etwas rein äusserliches und speziell das Gebiet des Civilrechts betreffendes; ausserdem ist sie durchaus nicht immer massgebend für die geistige Entwickelung des Menschen, auf welche es bei der Frage, ob die ertheilte Einwilligung in eine Verletzung rechtlich wirksam sein soll oder nicht, allein ankommt.[a] He further suggests that while the age of consent should never be less than seven years, *dem freien Ermessen des Richters ein möglichst weiter Spielraum gelassen werden muss, sodass er nicht sowohl die Individualität des Thäters, als auch ganz besonders alle übrigen begleitenden Umstände in Erwägung zu ziehen hat.*[3] [b] The necessary maturity of the intellect depends to a great extent upon climate, mode of life, social customs, and education; and it must be determined on those and other considerations which cannot be the same in any two cases. In *State* v. *Tilman*,[4] Eagan, J., observed that "nature does not always impart the same maturity and strength of judgment at the same age, the law determines the period at which persons are sufficiently advanced in life to be capable of contracting marriage and forming other engagements."

There is the same difficulty in fixing an absolute age of majority for other purposes, and even the age of civil responsibility is not the same in all countries. In certain system of law, no age of consent has been fixed at all for the purposes of criminal law, specially as there is not the same necessity for it as in civil law, where it is required for the certainty and the security of legal rights and legal transactions, while, as observed by Kessler in his work on Consent,[5] *bei der strafrechtlichen Einwilligungsbefugniss würde sich*

(*a*) The provisions of civil law concerning the capacity of acting, which certainly stand in close connection with the age of majority, cannot form the standard here. The legal determination of the age of majority is something purely external, and particularly applicable to the region of civil law; beyond this it does not ever furnish a standard for the mental development of a person, on which alone everything depends in the case of the question as to whether the consent given to an injury may or may not be legally effective.

(*b*) There must be left to the free discretion of the judge a field as wide as possible, so that he may take into consideration not only the doer, but also especially all the remaining attendant circumstances.

[3] P. 20.

[4] 30 La. Ann. 1249.

[5] Kess. Einw., 103.

nur das Gewaltsame, nicht das Wohlthätige einer solchen Fixirung fühlbar machen.[d]

The German Penal Code has thus not provided any general limit of the age of consent, and Kessler says [6] it is a question whether the Legislature did not do so intentionally and with good grounds. It is not seldom maintained that the question of the age of the capacity of consent is one of fact, and whether there is a valid and operative consent must be decided with reference to the *Persönlichkeit des Einwilligenden, die Art des preisgegebenen Interesses und die begleitenden Umstände.*[7][e] Nor need this limit of age be the same as that fixed for the responsibility of criminal acts, as *Die Einwilligung in eine Handlung, welche ohne sie ein Verbrechen sein würde, ist nicht ihrerseits ein Verbrechen.*[f] There are considerations for which it should be fixed higher. It is a general principle that for *Dispositionen zu Ungunsten des Disponenten das Alter der blossen Willensfähigkeit nicht genüge; und die Einwilligung ist eine Disposition dieser Art.*[g][8]

The enquiry in each case as to the necessary maturity of the intellect involves such difficulties, however, that it is generally considered as the most advantageous course to fix some age as the age of consent, as the age under which a person's consent will not be consent in law, and will not operate to prevent a criminal act done against him from being an offence. This advantage is possible only when the limit is fixed as in India, without regard to the actual development of intellect, to the actual competency in individual cases to understand the nature and consequences of the act consented to. The age thus fixed in India is that of twelve years, but the provision is not absolute in scope, and applicable only "unless the contrary appears from the context." The contrary appeared from the context of the definition of rape; but Act X of 1891 has altered the law in that respect, and made the consent of a woman below twelve years of age insufficient to avoid

(*d*) Only the violence and not the benefit of such a limit would make itself felt in the case of authority given by consent in penal law.

(*e*) Personality of the person consenting, the nature of the interest given up, and the attendant circumstances.

(*f*) The consent to an act, which (act) without it would be an offence, is in itself not an offence.

(*g*) The mere age of capacity for willing is not sufficient in the case of dispositions to the disadvantage of the person making them, and consent is a disposition of this kind.

[6] Kess. Einw., 103.
[7] III Holtz. Hdb., 417.
[8] Kess. Einw., 102.

rape. S. 87, of the Indian Penal Code for instance, contemplates a higher age of consent than the general one of twelve years, and further reference will be made to that in treating of consent as an excuse for crime.

In most systems of law the age of ten years was first fixed, and considered as safe as any that could be fixed upon. Experience, however, showed that this limit was too low, and it has generally been raised higher. That was the limit first proposed in British India, but there also it was fixed at 12 years.

In France the age of consent in regard to the offence of indecent assault was first fixed at eleven years, but has since 1863 stood at thirteen years. The attempt on both the occasions to fix it at fifteen years failed, though general opinion appears to favor a still higher minimum. R. Garraud, in his treatise on French Penal Law,[9] thus observes that it is difficult to believe that a child from thirteen to fifteen years of age can, by reason of her age, be considered as capable of avoiding seduction, and even of appreciating all the immorality of the action to which it may be proposed that she should submit or lend herself; and that the girl who is not yet ripe for a marriage ought to be regarded by the legislature as able to dispose of her person. The limit even of thirteen years is not absolute and applicable to all cases. Reference has thus already been made to its having no application as against an attempt by an ascendant, who may be deemed to possess a natural authority over a female of even a higher age, and against the abuse of whose authority there can be no certainty in the number of years, but only in the fact of her emancipation from his control by her marriage.[10]

155. The Common law doctrine, however, long retained its sway in regard to the unsoundness of mind. Even idiocy of the person giving consent was not held as such, and, as a matter of law, to be sufficient to vitiate consent. The only effect actually given to it was to take it into consideration in judging of the actual existence of consent, an absolute idiot not being capable, as a matter of fact, of giving consent.

Common law did not recognize unsoundness of mind as disqualification of consent.

[9] IV., 475.

[10] IV., Gar. Dr. Pen., 475.

Thus in *Reg.* v. *Ryan*,[11] the conviction did not proceed so much on the idiocy of the female as on her habits of decency and propriety, which warranted a presumption that she would not have consented. Platt, B., in summing up for the jury said: "It seems that she was in a condition incapable of judging, and it is important to consider whether a young person, in such a state of incapacity, was likely to consent to the embraces of this man; because if her habits, however irresponsible she might be, were loose and indecent, there might be a probability of such consent being given, and a jury might not think it safe to conclude that she was not a willing party."

In *Reg.* v. *Fletcher*[12] also, stress was laid on the actual absence of consent, and the conviction for rape was based on the ground that the woman was incapable of consent from defect of understanding, and had not given consent. The Court of Criminal Appeal maintained the conviction, as it considered that mere absence of consent was sufficient to make the intercourse amount to rape. Lord Campbell, C. J., observed that "it would be monstrous to say that these poor females are to be subjected to such violence, without the parties inflicting it being liable to be indicted. If so, every drunken woman returning from market, and happening to fall down on the roadside, may be ravished at the will of the passers by."

In *Reg.* v. *Charles Fletcher*,[13] the man had sexual connection with an idiot, and the charge of rape was left to the jury in the same terms as in *Reg.* v. *Fletcher*, viz., that they should find him guilty if she was incapable of expressing consent or dissent, and the connection was without her consent. The conviction was quashed, however, by the Court of Criminal Appeal, on the ground that there was no evidence of the absence of consent; thus showing clearly that mere idiocy was not deemed sufficient to negative the existence of consent.(*C*)

In *Reg.* v. *Barratt*,[15] Barratt was held guilty of the offence of rape for having intercourse with a woman who was evidently

(*C*) In *Reg.* v. *Pressy*,[14] it was apparent that the woman was an idiot, and a conviction for rape with her was sustained, though she stated that she knew at the time that the accused's act was wrong, and had not done or said anything to him, and did not like to hurt anybody. Stress was laid in this case, however, on the circumstance that the prisoner, when taxed with committing rape upon her against her will, had said: "Yes, I did, and I am very sorry for it." This was virtually a confession of guilt, and dispensed with the necessity of all other evidence of the absence of consent.

[11] 2 Cox. C. C., 115.
[12] 8 Cox. C. C., 131.
[13] 10 Cox. C. C., 248.
[14] 10 Cox. C. C., 635.
[15] 12 Cox. C. C., 498.

idiotic, and with whom the Judge found it impossible to communicate at the trial. She was therefore held to be incapable of giving her consent. Kelly, C. B., referring to the two cases of *Reg.* v. *Fletcher*, observed that he could not see the distinction between them in principle. Blackburn, J., after expressing himself to be of the same opinion, said: "I agree with the decision in the first case of *Reg.* v. *Fletcher*, and think that the correct rule was laid down in that case. I do not think that the Court in the second case of *Reg.* v. *Fletcher*, intended to differ from the decision in the first case. In all these cases, the question is whether the prosecutrix is an imbecile to such an extent as to render her incapable of giving consent or exercising any judgment upon the matter, or, in other words, is there sufficient evidence of such an extent of idiotcy or want of capacity. In the first case of *Reg.* v. *Fletcher*, and also in the present case, there was evidence of such an extent of idiotcy in the girl as to lead the jury to believe that she was incapable of giving assent, and that therefore the connection was without her consent . . . . . Upon the authority of the decision in the former case of *Reg.* v. *Fletcher*, it is enough to say in this case that the evidence here was that the connection was without the girl's consent." Honyman, J., said that the case seemed to him "the same as when a man has connection with a drunken woman whom he finds lying on a road, quite incapable of giving consent, in which case Lord Campbell said, it would be monstrous to say that the man would not be guilty of rape."

In *Reg.* v. *Connolly*,[16] Hagarty, J., in delivering the opinion of the court, observed "that in the case of rape of an idiot or lunatic woman, the mere proof of the act of connection will not warrant the case being left to the jury, there must be some evidence that it was without her consent—*e. g.*, that she was incapable of expressing consent or dissent, or from exercising any judgment upon the matter, from imbecility of mind or defect of understanding; and if she gave her consent from animal instinct or passion, it would not be rape." In this case, the indictment was for assault with intent to ravish. There was no evidence whatever as to the woman's general character for decency, or chastity, or anything to raise a presumption that she would not consent to the alleged outrage upon her. There was evidence, however,

[16] 26 U. C. Q. B., 317.

of insane delusion of some years' standing, unconnected with anything relating to matters of that kind. The jury were charged, that if they were satisfied that she was of unsound mind, with no moral perceptions of right and wrong, that her acts were not controlled by the will, and were, in fact, involuntary, she could not be said to be capable of consent, and from her state of mind and impotence of will, the yielding on her part to force ought not to be taken as an act done with her will. They found, however, that she was insane, but had consented to the assault. The conviction was quashed, as on a charge of an assault with intent to ravish, it would seem, on the decided cases, to be impossible to support a conviction where consent is found. "In the case of the idiot, the lunatic, the drunken, or insensible," continued Hagarty, J., "the crime can only be complete on the actual or legal deduction that the connection took place without consent."

Effect of idiocy on consent in the United States.

156. Substantially the same, but a somewhat stricter, view is taken of the effect of idiocy on consent in the United States. Thus Dr. Bishop says: "A woman with less intellect than is required to make a contract may so consent to a carnal connection that it will not be rape. But where the idiocy is so profound as absolutely to incapacitate her to consent or dissent, the man who penetrates her, not supposing he has her consent, commits this crime."[17] This was cited with approval in *McQuirk* v. *State*[18] by Somerville, J., who, in delivering the opinion of the Supreme Court of Alabama, said: "The mere fact that a woman is weak-minded does not disable or debar her from consenting to the act."[18] In *State* v. *Atherton*,[19] Adams, J., in delivering the opinion of the Supreme Court of Iowa, incidentally observed, however: "We are inclined to think that if the prosecutrix was so destitute of mind that she was incapable of consent, the defendant was guilty of rape." In *Crosswell* v. *People*,[20] the intercourse was with a woman of good size and strength, under dementia, and though not idiotic, yet approaching towards it, and there were facts from which the jury might infer that she, and not the prisoner, was the soliciting party; and it was held not to be rape, if she consented. It was urged that all intercourse with a woman in that condition must be rape, because she has no capacity to consent, and

[17] 1 Bish. Cr. L., 641.
[18] 84 Ala., 435.
[19] 50 Iowa, 189.
[20] 13 Mich., 427.

that an insane woman, or one not mentally competent to exercise an intelligent will, is in the same position as respects this crime as a child under ten years of age, and that carnal knowledge of her person would constitute the offence, notwithstanding her acquiescence. This contention was overruled however, and the decision proceeded on the ground that for rape it was necessary in the State, under a special statute, as in England, that it should be committed by force and against the woman's will, and that the same circumstances must exist to constitute rape in the case of an idiot or insane woman as where the woman was of sound mind. Cooley, J., in delivering the opinion of the Court, admitted, that "though the definition of the offence implies the existence of a will in the woman which has opposed the carnal knowledge, no violence is done to the law by holding, in any case where the woman, from absence of mental action, does not willingly acquiesce, that the physical force necessary to effectuate the purpose, however slight, is against her will." The admission could, however, not affect the decision in that case, where the will was active, though perverted, and all idea of force or want of willingness was distinctly disproved. Recently in *State* v. *Enright*,[21] it has been held by the Supreme Court of Iowa, that for a man knowingly to have criminal intercourse with a woman of intellect thus impaired is no doubt peculiarly wrongful; yet if she be capable of consenting, and does consent, it is not rape.

In *State* v. *Crow*,[22] a person was charged with the crime of rape committed upon an insane woman. It was contended that intercourse with her, even by force, could not be rape, because she had no will to oppose. The court after explaining that in idiocy and lunacy, there is no lack of will but a weakness and perversion of it, said that he had "no hesitation in holding that both idiots and insane persons are possessed of a will, so that it may be legally and metaphysically said that a carnal knowledge may be had of their persons forcibly and against their will."

Attempted extension by analogy of rules concerning minors to persons of unsound mind.

157. It has been attempted in some cases to extend the rules concerning minors by analogy to persons of unsound mind. The attempt has, however, not succeeded. The Court of Criminal Appeal in *Reg.* v.

[21] 58 N. W. Rep., 901.

[22] 10 West, L. J., 501.

Charles Fletcher,[23] in fact, argued to the contrary. Pollock, C. B., after referring to the special legislation for the protection of minors as having a tendency to throw light upon the case relating to the insane, said that, to secure conviction of a person having sexual intercourse with an insane female, "the contention on the part of the Crown must be that an idiot is incapable of consent, but it may be said in answer that the same cause which required an Act of Parliament to make the mere fact of connection a criminal offence in the case of children of tender years would require an Act of Parliament in the case also of idiots." In *Reg.* v. *Sweenie*, Lord Neaves, after observing that in the case of a child the law introduces a constructive violence, remarked that "in the case of an insane woman constructive force may also be admitted upon an extension of the same principle, the law not allowing that such a person can exercise the will." Lord Deas likewise, after referring to the principle concerning children, remarked that "it may be that idiots fall within the same principle," expressly excepting "insane persons who are not idiots, whose cases may depend on their own circumstances and on degree." These remarks were quite *ultra vires*, and were not even noticed by the other Judges. The case was concerning a sleeping woman, and it is a strong authority against the analogical extension of statutory priniciples to cases not covered by them. Even Lord Deas observed, that it did not "follow that because an exception is made of cases in which by law, or both by law and nature, the parties are totally disqualified from consenting, an exception shall equally be made of the case of a woman who might have consented if awake, although she neither did nor could consent, being asleep." Lord Cowan, after expressing his concurrence with the principles on which the ravishing of children, and of insane persons has been held equally criminal with rape committed on a grown-up person, observed that he did not "think that the principle of that class of cases can safely be extended by analogy to other and different cases."

The question has come directly before the courts in France, where also, as in English common law, the committing of an abuse on an insane female is held not to be rape on the ground that there is no violence in such a case.[24] The *Chambre du Conseil* of the tribunal of Seine held in a case that such an act should at least be held to be an assault against the modesty of the woman on

[23] 10 Cox. C. C., 248.

[24] IV Adolph. and Hélie, 319.

the analogy of that offence as against a consenting minor punishable under Art. 331 of *Code Pénal*. The Chamber of Accusation of the Court of Paris, however, on 1st August 1835 rejected that interpretation, and said, *que vouloir appliquer au cas d'imbécillité le principe qui déclare punissable l'attentat commis sans violence sur l'individu âgé de moins de onze ans, ce serait procéder par analogie d'un cas prévu à celui non prévu, ce qui est inadmissible en matière pénale; ce serait livrer l'application de la loi à une appréciation de l'état moral de la victime, ce qui conduirait à l'arbitraire; et enfin ce serait punir d'un crime que le coupable pourrait avoir commis sans le savoir, car les signes de la faiblesse d'esprit ne sont pas apparents toujours et pour tous.*[h]

Statutory legislation for protection of the insane.

158. The doctrine was carried so far, that a consent to sexual intercourse produced by mere animal instinct was sometimes considered sufficient to prevent the intercourse from being rape. This was expressly charged to the jury in *Reg.* v. *Charles Fletcher*.[25] In *Reg.* v. *Connolly*,[26] Hagarty, J., in delivering the judgment of the Court of Queen's Bench in Upper Canada, after a review of the principal cases on the point, stated it as their result, "that if she gave her consent from animal instinct, or passion, it would not be rape," and added: "In the principal offence, consent from mere animal instinct has been held to be a defence in the case of an idiot. It is impossible to say that it must not be equally so in the lesser charge of assault with intent, and equally impossible when a consent in fact is proved." With the general advance in favour of this unfortunate class of the people who have lost their intellect, this view is meeting with rather a strong disapproval in present times. Thus, in the Irish case of *Reg.* v. *Dee*,[27] Palles, C. B., observed that "consent is the act of man, in his character of a rational and intelligent being, not in that of an animal. It must proceed from the will, not when such will is acting without the control of

(*h*) That to wish to apply to the case of the imbecility (of mind), the principle on which an assault without violence against an individual of less than eleven years of age has been made punishable, would be to proceed by analogy from a case provided (by law) to that not provided, which is not allowed in penal matters; it would be to leave the application of the law to an appreciation of the moral condition of the victim, which would lead to arbitrariness; and finally it would be to punish as a crime what the offender might have committed without knowing, as the signs of the weakness of intellect are not apparent always and to all persons.

[25] 10 Cox C. C., 248.

[26] 26 U. C. Q. B., 317.

[27] 15 Cox C. C., 593.

reason, as in idiocy or drunkenness, but from the will sufficiently enlightened by the intellect to make such consent the act of a reasoning being." "Nothing is, in my opinion," he continued, "too elementary to encounter a doctrine so abhorrent to our best feelings, and so discreditable to any jurisprudence in which it may succeed in obtaining a place, as that which, more than once, was laid down in England that a consent produced in an idiot by mere animal instinct is sufficient to deprive an act of the character of rape."

The Indian law, as pointed out by Mr. Mayne in his work on the Criminal Law of India,[28] is not satisfied without "the intelligent consent of a woman who is able to understand not only the nature, but the consequences of the act. An idiot may be as capable of assenting to sexual intercourse as any other female animal. But it is evident that the nature and consequences of illicit intercourse with a woman, are very different from what they would be in the case of a cow. It is precisely this difference which the Indian law requires that she should be able to understand, and understanding it, still to consent."

Even in England and portions of the United States, special legislation has been undertaken for the protection of the insane on lines similar to that for minors. Thus S. 5 of the Criminal Law Amendment Act, 1885, providing for the punishment of carnal knowledge with minor girls, further enacts that any person who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, shall be guilty of misdemeanor. The statutes of some of the States go still further and actually lay down a rule even independent of the offender's knowledge of the condition of the female. Thus, the New York Penal Code provides that sexual intercourse with a woman is rape when, through idiocy, imbecility, or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent. The California Penal Code makes a similar provision "where she is incapable, through lunacy, or any other unsoundness of mind, whether temporary or permanent, of giving legal consent." These rules are virtually, so far as unsoundness of mind is concerned, identical with the rule enacted in the Indian Penal Code.

[28] P. 398.

159. Intoxication also, as regards the adequacy of a person's consent is often placed on the same footing with unsoundness of mind. Thus Mr. Blackburn, in an article in the "Criminal Law Magazine," after giving several definitions of rape says, that under all of them, "the act of sexual intercourse with a woman who was intoxicated to such an extent that she could not resist and could not consent, and, in fact, would not know that her person was being defiled, would be without her conscious permission, and, as a natural sequence, would be rape."[29]

Intoxication as a vitiating cause of consent.

So also in *McQuirk* v. *State*,[29a] Somerville, J., in delivering the opinion of the court, observed, that, "if the woman is mentally unconscious from drink, or sleep, or from other cause, is in a state of stupefaction, so that the act of the unlawful carnal knowledge on the part of the man was committed without her conscious and voluntary permission, the idea of force is necessarily involved in the wrongful act itself." And in the nature of things there is no difference between a person who is not able on account of intoxication to understand the nature and consequences of what he consents to, and another person unable to do so on account of the unsoundness of mind. If consent in the case of the latter is inadequate, it must be held inadequate even when given by an intoxicated person. Though intoxication is like unsoundness of mind as regards the condition of the mind at any particular time, it differs from it essentially in being a voluntary condition, which a person can assume at any time at his option for any short period, while insanity is for all practical purposes a permanent condition beyond one's control. A plea that a consent is void on account of being given by a person under intoxication will always be most easy to establish and rather difficult to rebut. A woman may even deliberately intoxicate herself to the necessary extent with a view to retain an opportunity of prosecuting in certain contingencies her successful paramour for rape. At the same time, there are, no doubt, cases in which law must extend its protection to an intoxicated person as to an insane.

---

[29] XIII, 510.

[29a] 84 Ala., 435.

160. It is settled, even in the English law, that when the intoxication is not voluntary, but has been caused by the offender himself with a view to get the consent to do the act he desires to do and which it will be criminal for him to do without it, the consent of the person intoxicated is not sufficient to negative the criminal character of the act. This was the case often in cases of indictment for rape, in which to satisfy the strict requirements of that offence, drugging to insensibility was held to amount to force. Thus in *Reg.* v. *Sweenie*,[30] Lord Ardmillan, after saying that "force, actual or constructive, is an essential element in the crime of rape," observed, "that any mode of overpowering the will without actual personal violence, such as the use of threats or drugs, is force in the estimation of law." And there was no difference of opinion in the court so far as this point is concerned. Thus Lord President Macneill also, who dissented from the final decision of the court, observed, that "if by artful means such as the administration of potions, stupefaction is produced, and the faculties are rendered dormant, and the party is for the time without will or the power of volition, it cannot, I think, be doubted, that in that state of mental inability, and especially if it has been produced with the design of taking advantage of it, the act would be held to amount to rape, although it could not be said to have been committed against the will of the sufferer, if by that is meant against an active will dissenting, or in a state of actual repugnance at the time." Similarly Lord Cowan said: "Had the sleep in which the woman was, been stated to have been induced by felonious practices, such as the use of drugs on the part of the panel, the will might then have been justly alleged to have been overcome with a view to the possession of her person without her consent; just as in the case where through fear and dread by threats of death, the woman has been thrown into a state of prostration, or as when through such threats, or through actual personal violence at the first meeting of the parties, she has been thrown into a swoon, and then her person ravished, the capital crime might be held properly charged." So also Lord Deas said: "Drugging to the extent of insensibility is even less remote from direct personal violence than presenting a pistol to the forehead, or a dagger to the breast, for such drugging overpowers the will by means of

Causing intoxication in order to get consent is equivalent to force in English law.

[30] 8 Cox. C. C., 224.

physical appliances to the body (no matter whether to the stomach internally, or by chloroform or the like externally), just as much as if the insensibility had been produced by a blow. That the woman by deception or persuasion may have been made the instrument of introducing into her own stomach the deleterious ingredient, or may have been induced to allow the man to hold chloroform to her nostrils, does not make the resulting insensibility less an act of physical violence and injury to the person than if the man had induced her to take into her own hands a machine, which immediately exploded, and left her stunned and helpless."

The same view is taken in the United States. Thus in *Don Moran* v. *People*,[31] Christiancy, C. J., said: "And when drugs are administered, or procured to be administered, by the criminal, for the purpose of taking away or lessening the power of resistance, and having that effect, there may be no ground for distinction between the force thus exerted by him through the agency of the drugs, and that directly exerted by his hand and for the same purpose." The California Penal Code similarly enacts that sexual intercourse is rape, where the female is prevented from resisting the intercourse by any intoxicating narcotic, or anæsthetic substance, administered by or with the privity of the accused.[32] The Missouri Penal Code makes it rape to have carnal knowledge of any woman above the age of fourteen years without her consent, by administering to her any substance or liquid which shall produce such stupor, or such imbecility of mind, or weakness of body, as to prevent effectual resistance.

Effect on consent of causing intoxication on the Continent.

161. The rule generally recognised in European countries is the same. Thus talking of the abuse committed on a person while intoxicated or asleep, Giulio Crivellari in his *Concetti Fondamentali di Diritto Penale*,[33] says that *in generale si conviene nel riconoscere i termini della vera violenza ove vi siano prove sicure del dissenso di lei, o mercè la prova positiva delle ripulse precedenti o mercè le sue posteriori affermazioni che se fosse stata padrona di sè nella pienezza del suo intendimento non avrebbe per alcun modo acconsentito ; o quando l'ubbriachezza od il sonno siano stati maliziosamente procurati dall'agente. Se ciò non potesse provarsi, nell'abuso dell'agente vi sarà un inganno, una seduzione, ma non vi*

[31] 25 Mich., 356.
[32] S. 261.
[33] Art. 1140.

sarebbe movimento alcuno di forze meccaniche costringenti il corpo, il quale sarebbe concorso col seduttore all'azione per impulso proprio, senza che questi abbia esercitato abuso di forza morale costringente l'animo della vittima.(i)

He adds that it is a general rule, that when such fraudulent means are employed as to leave no freedom of consent, *torni lo stesso come sia stata la vittima maliziosamente posta nell'impossibilità di resistere,*(j) which is the essence of the offence of rape, the responsibility *dell'agente dev'essere uguale a quella in cui sarebbe incorso se avesse usato una violenza vera.*[34] (k)

So also Francesco Carrara says that there is violence when an act is done to a person in sleep or intoxication, and there is sure proof of dissent, even though there is no prior express declaration of consent, observing that in the abuse of[35] *della ebra e della dormiente vi è il dissenso, vi è la forza meccanica che comprime il corpo e rende inerte la volontà; e vi è nell'uomo impudico il dolo speciale della violenza, poichè quelle forze egli pone al servigio del suo criminoso disegno.*(l)

It is on the ground of this want of dissent that he distinguishes the case of such person from that of the insane and the minor, in which case he says there is even no presumptive violence, the violence being wanting in all objectivity as there is no contrary will, and in all subjectivity, as there is *non trovandosi una forza nè meccanica nè morale adoperata a soggiogare la ipotetica avversione della paziente.*[36] (m)

(i) People in general agree in recognizing the limits of true violence, when there are sure proofs of her dissent, either owing to the positive proof of preceding repulses, or of subsequent affirmations to the effect that if she had been master of herself as regards the fulness of her intention she would not have consented in any way; or when the intoxication or stupor may have been maliciously procured by the person acting. If this cannot be proved there might be deceit—a seduction, in the abuse by the acting party, but there would be no movement of physical force constraining the body which would concur with the seducer in the act through its own impulse without his having exercised any abuse of moral force constraining the mind of the victim.

(j) the same takes place, as if the victim had been maliciously placed in a state in which resistance was impossible.

(k) of the doer ought to be that which would have been incurred if he had used real violence.

(l) the intoxicated and sleeping person, there is a dissent, there is a mechanical force which constrains the body and renders the will inert; and there is in the wanton man, the *dolus* peculiar to violence, because he places these forces at the service of his criminal design.

(m) not found a force neither mechanical nor moral, adopted to subjugate the supposed aversion of the person to whom the act is done.

---

[34] Criv. Dir. Pen., Art. 1140. | [35] Carr. Prog., Art. 1459.
[36] Carr. Prog., Art. 1515.

Adolphe and Hélie in their work on the Theory of Code Pénal, refer to the case [37] in which *l' attentat* had been committed during sleep fraudulently procured by the aid of narcotic drugs, and say *la violence n'est-elle pas dans cette machination infâme qui livre la victime sans qu'elle puisse se défendre, dans ces moyens criminels qui l'enchaînent pour la consommation de l'attentat, dans ces liens d'un sommeil léthargique qui la tiennent captive? Or, serait-il possibl d'établir une différence réelle entre ces deux hypothèses? Dans l'une et dans l'autre, la victime n'a point à s'imputer son abandon et sa crédulité; sa volonté, sa force ont été enchaînées; et qu'importe que ce soit par une machination criminellement conçue, par la violence des drogues perfidement préparées, ou par la violence physique de l'agent? L'attentat n'est-il pas même plus atroce, puisqu'il révèle une combinaison plus froide et plus calculée? Peut-on objecter que la violence ne s'exerce pas au moment même de l'attentat? Mais cette violence dure autant que l'erreur, autant que le sommeil frauduleusement procuré. Lorsque la fille enlevée s'évanouit dans les bras de son ravisseur, et qu'il profite de ce moment pour consommer le viol, pourrait-on soutenir qu'il l'a commis sans violence? Si le crime est commis sous l'impression de menaces de mort, mais sans aucune violence physique, soutiendraiton qu'il n'y a pas eu de viol parce qu'il n'y a pas eu de résistance? Si cette résistance a été rendue impossible, ne faut-il pas nécessairement remonter aux actes qui l'ont enchaînée?*[(n)]

This opinion has been confirmed by two *arrêts* which in exactly the same circumstances have decided that the act of committing abuse on a female while asleep and against her will constitutes rape.[38] The grounds of these *arrêts* are:

(*n*) Is not there violence in this base contrivance which delivers up the victim without her having the power to defend herself, in these criminal means which enchain her for the consummation of the attempt, in these bonds of a lethargic sleep which hold her captive? Now, would it be possible to establish a real difference between these two hypotheses? In one as well as in the other, the victim has not to blame herself for her confidence and her credulity; her will, her force have been enchained; and what does it matter whether this is done by a criminally conceived contrivance, by the vi lence of perfidiously prepared drugs, or by the physical violence of the doer? Is not the assault even more atrocious, since it reveals a combination more cold and more calculated? Can one object that the violence is not exercised at the moment of the assault itself? But this violence lasts as long as the error, as long as the sleep fraudulently procured. When the girl rises, she faints in the arms of her ravisher, and does it profit at that moment to consummate the rape, that one can maintain that he has committed it without violence? If the crime is committed under the impression of menaces of theft, but without any physical violence, would it be maintained that there was no rape, as there was no resistance? If this resistance has been rendered impossible, is it not necessary to trace it to acts which have prevented it?

[37] IV., 318.

[38] IV. Adolph. and Hélie, 319.

que le crime de viol n'étant pas défini par la loi, il appartient au juge de rechercher et constater les éléments constitutifs de ce crime, d'après son caractère spécial et la gravité des conséquences qu'il peut avoir pour les victimes et pour l'honneur des familles; que ce crime consiste dans le fait d'abuser d'une personne contre sa volonté, soit que le défaut de consentement résulte de la violence physique ou morale exercée à son égard, soit qu'il résulte de tout autre moyen de contrainte ou de surprise pour atteindre, en dehors de la volonté de la victime, le but que se propose l'auteur de l'action.(o)

The same view appears to be taken in Germany also. Thus Hälschner says: *Ein listiges Benehmen, durch welches jemand in den Zustand des Duldenmüssens versetzt werde, sei als eine durch "vis absoluta" verübte Nöthigung zu betrachten.*[39](p) Olshausen in his Commentary on the German Penal Code, in commenting on para. 240, and observing that fraud does not operate as compulsion, says:[40] *Die Betäubung aber ist eine Art der List und fällt nicht unter den Begriff der Gewalt.*(q) He immediately afterwards adds, however, that *das Wesen der Nöthigung an sich die Betäubung als Mittel der Nöthigung nicht ausschliesst.*(r)

Sexual intercourse with a female by drugging her is not rape, though sometimes deemed punishable as such.

162. This treatment of drugging was due, however, to the requirement of force for the offence of rape. It was mainly on account of the necessity of punishing with proper severity the act of sexual intercourse with a woman by drugging or intoxicating her, that such drugging or intoxicating was held equivalent to force. Really there is a material distinction between the two; and the offence of such intercourse is of a different gravity from

(o) That the crime of rape not being defined by law, it pertains to the judge to make a search for and establish the constituent elements of this crime, in conformity with its special character and the gravity of the consequences which it can have for the victim. and for the honour of the families; that this crime consists in the act of abusing a person against her will, whether it be that the defect of consent results from violence, physical or moral, exercised in regard to her, or that it results from other means of constraint or surprise for to attain, without the victim's will, the end which the author of the act proposes to himself.

(p) An artful conduct through which anybody is put in a state of being obliged to tolerate is to be considered as compulsion exercised through *vis absoluta*.

(q) Stupefaction, however, is a kind of cunning and does not come under the conception of violence.

(r) The nature of compulsion does not exclude stupefaction as a means of compulsion.

39 II. Hälschner, 122; 35 *Gerichtsaal*, 10.

40 P. 68.

that of rape, though it was long punished as such in England for want of a special provision for its punishment. Such provision has now been made there, as well as in some of the States of the American Union. Thus the Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), s. 3 provides that a person who applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower, so as thereby to enable any person to have unlawful carnal connection with such woman or girl shall be guilty of a misdemeanour.

In New York also, this is a separate offence provided for in S. 23 of the Penal Code. Referring to that section, Johnson, J., in *People* v. *Quin*,[41] said, that it "provides for the punishment of every person who shall have carnal knowledge of any woman above the age of ten years, without her consent, by administering to her any substance, or liquid, which shall produce such stupor, or such imbecility of mind or weakness of body, as to prevent effectual resistance. The punishment prescribed for the offence named in this section, is imprisonment in the State prison not exceeding five years. The punishment for the crime of rape is imprisonment not less than ten years. Rape, and carnal knowledge of a woman under the circumstances provided for in section twenty-three, are clearly separate and distinct offences. The latter is an offence against the person, but it is not a rape under our statute, and was designedly made a separate offence, as will appear by a note of the revisers upon this section. After copying this section, as proposed by them, they say: 'The offence committed under the preceding circumstances probably would not be rape; and yet the guilt of the offence and the injury to the sufferer are as great in this as in any other case.' The provision was borrowed by the revisers from Livingston's Louisiana Code." In *People* v. *Dohring*,[42] Folger, J., said: "In this State our statutes make a distinction between a rape and the act of carnal intercourse without her consent with a woman made insensible by the administration of that which produces stupor; and the latter is an offence against the person, but not rape." And if the result is insensibility, it is not material that it was brought on by something administered with a view not to make the woman insensible, but simply to excite her desire.

---

[41] 50 Barb., 128.

[42] 59 N. Y., 374.

163. The rule is generally considered to be the same, even when the intoxication is not caused with a view to get the consent to the criminal act, but for some other purpose ; and advantage is taken of the unconscious condition resulting from that intoxication to do the act to the person intoxicated in that condition. This was the basis of the decision in *Reg.* v. *Camplin*,[43] in which the prisoner had given liquor to the prosecutrix, and when she became quite drunk and insensible, he took advantage of it and violated her. The jury found that the prisoner gave her liquor for the purpose of exciting her, and not with the intention of rendering her insensible and thus having sexual intercourse with her, yet he was convicted, and the conviction was on a case reserved, upheld, after argument, by fifteen judges. In *R.* v. *Sweenie*,[44] Lord President MacNeill expressed it as his opinion that it was not necessary for that offence, that the inability to remonstrate or resist should have been brought about by an act of the offender, with the design of availing himself of it. "I think," said the learned judge, "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."

Criminal act done to a person after intoxicating him is not excused by that person's consent.

The same has been held in *McCue* v. *Klein*,[45] in which Willie, J., in delivering the opinion of the Supreme Court of Texas, said : "If one whose mental faculties are suspended by intoxication is induced to swallow spirituous liquors to such excess as to endanger his life, the persons taking advantage of his condition of helplessness and mental darkness, and imposing the draught upon him, must answer in damages for the injury that ensues."

Garraud, in his treatise on the French Penal Law, says[46], "that rape is committed also *en abusant d'une personne qui aurait perdu l'usage de sa volonté, soit par l'effet d'une maladie physique ou mentale, soit par l'altération de ses facul-*

[43] 1 Cox. C. C., 220.
[44] 8 Cox. C. C., 230.
[45] 60 Tex., 168.
[46] IV, 465.

tés, telle qu'une personne tombée en défaillance; soit par toute autre cause accidentelle, c'est-à-dire par une cause indépendante de la volonte de celui qui a commis l'attentat, telle que le sommeil profond, l'ivresse complète, &c.(s)

Consent by an intoxicated person does not excuse criminality of act done with knowledge of his intoxicated condition.

164. It has also been held that where the intoxication is voluntary, or, at least, not caused by the person acting on the consent given during the unconsciousness resulting from the intoxication, the act, if otherwise criminal, will not be the less so, if done by him with the knowledge of the intoxicated and unconscious condition. Stress has been laid in several English cases on this knowledge by the offender of the incompetency of the person giving the consent. Thus in *Reg.* v. *Fletcher*,[47] Lord Campbell, C. J., after observing that that case differed from the case of *Reg.* v. *Camplin*, in so far as the prosecutrix was not capable of giving consent, added: "But then the prisoner knew her condition at the time." In *Reg* v. *Barratt*,[48] Honyman, J., in charging the jury said that they might find the prisoner guilty of rape, "if the girl was in such an idiotic state that she did not know what the prisoner was doing, and the prisoner was aware of her being in that state;" but that they ought to acquit him, "if the prisoner, from the girl's state and condition, had reason to think the girl was consenting." The Court of Criminal Appeal sustained the conviction, but did not advert to the circumstance of the knowledge of her condition by the prisoner. Such knowledge has been recognized as material by the statute law of England also. Thus S. 5 of the Criminal Law Amendment Act, 1885, provides that it shall be sufficient to a charge for unlawful carnal intercourse with a girl of or above the age of thirteen years and under the age of sixteen, to make it appear that the offender had reasonable cause to believe that the girl was of or above the age of sixteen years. In regard to the unsoundness of intellect also, the section provides that the carnal knowledge would be misdemeanour, only if "the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile."

(s) In committing abuse on a person who should have lost the use of her will, either on account of the effect of a disease, physical or mental, or by injury to her faculties, so that a person falls into a swoon, or by any other cause accidental, that is to say by a cause independent of the will of him who has committed the attempt, such as profound sleep, complete intoxication.

[47] 8 Cox. C. C., 134.

[48] 12 Cox. C. C., 498.

In the United States also, Cooley, J., in delivering the leading opinion of the Court in *People* v. *Crosswell*[49] observed, that "if a man knowing a woman to be insane, should take advantage of that fact to have knowledge of her person, when her mental powers were so impaired that she was unconscious of the nature of the act, or was not a willing participator, we should have no difficulty in holding the act to be rape, notwithstanding distinct proof of opposition might be wanting." In that case, the trial judge had assumed that the naked fact of intercourse, with knowledge of the mental condition, was sufficient. But the court thought that that would be a dangerous proposition. Cooley, J., added: "As one who has knowledge of the facts which prove insanity must be supposed to know that insanity exists, it would follow that, in any case of doubt, a man's guilt or innocence would depend upon the preponderance of testimony on the question of the woman's competency. As marriage with an insane person is void, it might become a serious question whether the ceremony could protect the too partial bridegroom from prosecution for rape, where he had relied upon manifestations which, to him, appeared the evidences of genius, but which experts should convince a jury were only the vagaries of a disordered imagination."

The New York Penal Code provides that sexual intercourse with a woman is rape, when her resistance is prevented by stupor, or weakness of mind produced by an intoxicating or narcotic, or anæsthetic agent; or when she is known by the defendant to be in such state of stupor or weakness of mind from any cause.[50]

Recognition of vitiating effect of intoxication in Indian Penal Code.

165. The rule is recognized to its broadest extent in India. Thus S. 90 of the Indian Penal Code declares in the same words the inadequacy of the consent given by a person who, from unsoundness of mind or intoxication, is unable to know the nature and consequences of that to which he gives his consent. The Code ignores entirely the distinction arising from the circumstance of the intoxication being voluntary or otherwise. The abuses of which the protection of drunken persons against the consequences of their own acts and their own consent is capable, can have no place, where the protection is restricted to cases of involuntary intoxication. In regard to

[49] 13 Mich., 427.

[50] S. 278 (4).

criminal acts, the protection is restricted to those cases by SS. 85 and 86 of the Indian Penal Code. It does not appear why, in regard to consent, the protection given is general, extending, as it apparently does, even to voluntary intoxication. The Indian Penal Code appears, in fact, to go even still further, and to extend the protection to consent given by a person who is of unsound mind or intoxicated, when the said unsoundness or intoxication is not known to the person acting on the consent; an extension which does not appear to be expedient or recognized in other countries, and which is rather inconsistent even with the principle recognized in the same section of the Code in regard to the objective disqualifications of consent. In no other system of law does the protection appear to extend to cases of consent beyond those in which the intoxication is involuntary, and known to the person acting on it, and it is not seldom restricted to still narrower limits.

Effect of spiritual force on consent.

166. Even the Indian Penal Code does not refer to the effect of spiritual force on consent. This is no doubt on account of the non-recognition by the Courts and the Legislature in India of the power of spiritualism; though, according to the belief of the masses in this country, cases of the exercise of such power are not unknown here. The codes of other countries also are silent on the subject. Individual cases of the subjugation of will by magnetism have sometimes come before the Courts, and the consent extorted by magnetism has been held to be non-existent. In a case mentioned in an Italian Journal of the 13th August 1865, the Court of Assize of Var convicted of rape a person who had by acts of magnetism reduced his victim to a state of *impossibilita*, in which she remained conscious of all that was done on her, but had not force enough to oppose it. The contrary was held, however, by the Supreme Court of Vienna in 1862 in a case[1] in which the woman with whom the connection was had declared that she was not conscious even of the act of connection while it was going on, but came to know of it afterwards by finding herself *enciente*. The acquittal in this case proceeded chiefly on the ground that science was not sufficiently advanced to determine the doctrine of causation and the possible effect of magnetism in such cases. The question is discussed at length in Charpignon's *Rapports du magnetisme avec la juris prudence*, but need not be further discussed here.

[1] Carr. Prog., Art. 1515 (*n*).

CHAPTER IX.

OFFENCES INVOLVING ABSENCE OF CONSENT AS AN ESSENTIAL CONSTITUENT.

Negative operation of consent in criminal law.

167. Consent operates in criminal law as observed in Chapter I, either negatively or positively. It operates negatively by its absence being an essential constituent of an offence, either on account of the nature of the act constituting the offence, or under some provision of law. In the former case, the act constituting the offence cannot exist, unless there is an absence of consent to it. Thus there can be no wrongful confinement of a person on account of the very nature of the confinement, unless there is an absence of consent on his part to stay in the place of the confinement. *Dies ist jedoch so zu verstehen, dass hier die Straflosigkeit nicht deshalb eintritt, weil eine an und für sich durch das ius publicum für strafbar erklärte Handlung trotz ihrer Begehung auf Grund der subjektiven Willensrichtung deg Verletzten als straflos hingestellt wird, sondern weil der Eigenthümer des in Frage kommenden Rechtsgutes, dadurch, dass er einen Eingriff in diese seiner Verfügung ganz und gar unterstehende Rechtssphäre gestattet, verhindert, dass überhaupt etwas Rechtswidriges begangen wird. Es findet also hier eine Anwendung des Satzes 'volenti non fit injuria' überhaupt nicht statt, sondern die Straflosigkeit ist die Folge des Mangels eines zum Thatbestande des Verbrechens wesentlichen Merkmals, nämlich der fehlenden Einwilligung; und durch den Mangel dieses Requisits, d. h. also durch die Einwilligung, wird von der Handlung das Verbrecherische abgestreift.*[1](a)

In the latter case, the act constituting the offence may exist even when there is consent, but it will acquire its criminal character only from the fact of its being done without the consent of the person affected by it. This is the case, for instance, in regard to the offence of kidnapping,

(a) This is, however so to be understood, that the immunity from punishment does not arise, because an act in itself declared to be punishable by *jus publicum*, in spite of its commission is laid down as free from punishment on the ground of the subjective direction of the will of the injured person, but because the possessor of the good (interest) in question by the fact that he permits an attack against a legal sphere entirely subject to his disposal, altogether prevents any illegal act from being committed. An application of the maxim *volenti non fit injuria* does not at all, therefore, take place here, but the immunity from punishment is the consequence of the defect of a mark (symptom) essential for the *corpus delicti* of the offence, namely, the absence of consent; and through the defect of this requisite, that is to say, through consent, the criminality of the act is removed.

[1] Briethaupt 16.

in which case a man may carry away a minor from her guardian, but will have committed that offence, only when the carrying has not been consented to by the guardian.

The positive operation of consent consists in altogether justifying or excusing an act which would otherwise be criminal, or in legally or judicially mitigating the penalty which the act would otherwise be liable for. In this chapter mention will be made, however, of the negative operation only. It is with reference to that, that Olshausen, in his Commentary on the German Penal Code, after referring in paragraph 9 of his preliminary observations in connection with Chapter IV of Part I.[2] to several excuses of criminal acts, says: "*Während in den Fällen der N. 9 die objective Rechtswidrigkeit der Handlung ausgeschlossen ist, weil das Recht die betreffende Ausnahme von der Regel gestattet, so ist in anderen Fällen die Rechtswidrigkeit der Handlung deshalb zu verneinen, weil dieselbe nur scheinbar unter die Regel der Norm fällt, in Wahrheit aber die Handlung garnicht gegen dieselbe verstösst, so dass die Schuld-und Straffreiheit nicht erst aus einer besonders zu begründenden Ausnahme sich ergiebt.*"(b) With these he contrasts the cases of the positive operation of consent as an excuse, which the Indian Penal Code also treats as general exceptions, and goes on to say: "*Die hier in Betracht kommenden Fälle, bezülich derer im Einzelnen gleichfalls auf die Lehrbücher des Strafrechts zu verweisen ist, sind: die seitens des alleinigen Trägers eines Rechtsgutes selbst und die mit seiner Einwilligung seitens eines Anderen vorgenommene Verletzung desselben, beides vorbehaltlich der positivrechtlich getroffenen Ausnahmen.*"(c)

Determination of offences for which absence of consent is essential.

168. As to the offences in respect of which absence of consent is essential, reference has been made to them above in SS. 7 and 8. The absence of consent is expressly mentioned as an essential constituent in the case of most of them, at least as defined in the Indian Penal

(b) Whereas the objective illegality of the act is excluded in the cases of No. 9, because the law permits the exception in question to the rule, the illegality of the act in the other cases is to be denied, because it only apparently comes under the regulation of the Norm, but in truth does not at all violate it, so that the immunity from guilt and punishment is not due to an exception which must be previously established.

(c) The cases which here come into consideration, and regarding which reference may likewise be made to the various text-books of penal law, are the injury to a legal interest on the part of the sole bearer of it himself, and the injury committed to it with his consent by another, both being exceptions, exclusive of those provided for by positive law.

[2] P. 219

Code. This mention, however, is not exhaustive, and it cannot be said that the absence of consent is not essential in the case of any other offence. There is no reference, for instance, to the absence of consent in connection with wrongful restraint, and wrongful imprisonment; though the absence of it is not less essential in their case than in that of the offences of abduction and kidnapping. So also there is no reference to it in the case of the criminal breach of trust and enticing away a person's wife, though it is not less essential in them than in the case of theft or adultery. There can be no assault, criminal force, insult and some other offences unless there is an absence of consent, though this is not expressly laid down anywhere, and must be understood from the nature of the offences.

Nor is it always easy to do so, and the difficulty is particularly great in the English law, where offences are not defined with the exactness of the Indian Penal Code. So extensive is the operation of consent, that Dr. Wharton broadly observes that the consent of an owner, when malice against the owner is alleged, is always a defence.[3]

Hepp laid it down generally that the exclusion of the criminality by the consent of the injured person would depend on this,[4] *Ob die Nichteinwilligung zum Thatbestande des Verbrechens, d.h.zu der gesetzlichen Definition der strafbaren That gehört; wenn dies der Fall ist, dann ja, andernfalls nein.*(c) The Imperial Court in Germany also held;[5] *Wo das Gesetz die Einwilligung nicht ausdrücklich erwähnt; kann sie nicht berücksichtigt werden.*(d) A cursory examination of the German Penal Code cannot fail to show, however, that the mere language of the definitions of offences contained in the Code is not a certain indication of the non-necessity of the absence of consent in the case of offences, which are not defined so as to exclude consent. Similarly in the Codes of other countries in Europe and America, where offences are defined, the express mention of consent in the definitions is not frequent, though most important consequences depend on the necessity or otherwise of its absence for any particular offence.

(c) Whether non-consent pertained to the *corpus delicti* of the offence, that is, to the legal definition of the penal act; if this is the case yes, otherwise no.

(d) Where law has not mentioned consent expressly, it cannot be taken into consideration.

[3] II Whart. Cr. L., 7.

[4] XI Neues Arch-d-Crim. R., 239.

[5] II Entsch., 443.

169. In early times, the penal law was comprised mostly of offences which were unlawful acts against the rights, or prejudicial to the interests of some person, and which could not be offences, when consented to by the person affected by them. It was then usual to attempt to determine the offences in which absence of consent was essential by a consideration of the nature, constituents, and the moral character of the various offences. As observed by Kessler,[5] men were then inclined to take into consideration, *ob das Gesetz die Rechtswidrigkeit der Handlung als Voraussetzung der Strafbarkeit betone. Wo Ersteres der Fall, wie bei der Sachbeschädigung, schliesse die Einwilligung des Verletzten die Strafbarkeit aus, im anderen Falle wie bei der Körperverletzung, nicht* (e).

Moral character of an offence no criterion of the necessity of absence of consent.

No positive system of law, however, makes penal all the acts which should be punished from such a consideration. Nor does the law of any country restrict the penality to merely such acts. Thus every breach of contract is illegal as well as immoral, but it is only in very exceptional cases that it is treated as an offence. On the other hand, there is a large and growing class of statutory offences, consisting of acts which are innocent or indifferent in themselves, and which have been commanded or forbidden simply because the state considers it necessary to forbid them in the interests of the entire community or any portion of it. In these cases, the object of the State is merely to compel the adoption of a particular line of conduct, and its character from a legal or moral point of view is quite as immaterial as the presence or the absence of the consent of an individual to it.

It follows from this, as observed by Kessler,[6] that *das Verhältniss einer Handlung zu Sittlichkeit und Recht für ihre Strafbarkeit oder Straflosigkeit nach positivem Gesetze nichts beweist. Alle Erörterungen über den Einfluss, welchen in diesen Beziehungen die Einwilligung auf den Charakter*

(e) Whether the law lays stress on the unlawfulness of the act as the presupposition of its criminality, where this is the case, as in the case of mischief, the consent of the injured person excludes penality while in the other case, as in the case of hurt, it does not exclude it.

[5] Kess. Einw., 29.

[6] Kess. Einw., 30.

der Handlung habe, können höchstens als ein Räsonnement de lege ferenda in Betracht kommen. (*f*)

Necessity of absence of consent for an offence may be determined by the object of the law applicable.

170. For a determination of the necessity or the non-necessity of the absence of consent in the case of any offence, reference must be made to the object of that offence, and of the statute or law by which that offence is created, or in which it is comprised. This appears to be the only rule, which in the absence of an express declaration by the Legislature, is likely to lead to any practical result in the determination of the effect of the existence or non-existence of consent on any criminal act. This view is expressly advocated by Kessler,[7] who says, "*man muss den Zweck zu erkennen suchen, welchem die fragliche Strafbestimmung dient. Je nachdem dieser Zweck die Bestrafung auch der gegen den Einwilligenden verübten That erfordert oder nicht, wird das Eine oder das Andere als Wille des Gesetzes anzunehmen sein.*(*g*)

Consent in theft.

171. Absence of free and intelligent consent is a particular characteristic of all offences relating to property. The question has arisen most often in connection with the offence of theft; as to which it has been explained above in S. 8, that the absence of consent is quite essential. The definition of theft in the Indian Penal Code expressly mentions the absence of consent. The leading definition of larceny given in East's "Pleas of the Crown" does the same. Almost every modern writer on criminal law has mentioned it as a constituent of the offence. Thus in "Russell on Crimes," it is said that [8] "the taking of the goods should be without the consent of the owner, *invito domino*, and that this is of the very essence of the crime of larceny."

Stephen defines theft as "the act of dealing, from any motive whatever, unlawfully and without claim of right, with

(*f*) The relation of an act to morality and right does not prove its penality or non-penality according to positive law. All discussion concerning the influence, which in this connection consent may have on the character of the act, can be considered at the most as an argument *de Lege Ferenda*.

(*g*) We must try to find out the object which is served by the provision of law in question. Accordingly as this purpose requires or does not require the punishment of an act committed against a consenting person, shall either the one or the other case be looked upon as the will of the law.

[7] Kess. Einw., 32.

[8] II., 128.

anything capable of being stolen, in any of the ways in which theft can be committed, with the intention of permanently converting that thing to the use of any person other than the general or special owner thereof.[9] The ways in which theft may be committed are generally such as involve the taking or converting of property without the owner's consent.[10] There is no reference to the absence of consent in regard to theft by conversion by a bailee or by a person who knows that the property has been given to him by mistake, and of which he fraudulently takes advantage;[11] but these cases are not included in the definition of theft as understood in India or other countries.(A) In Hammon's case,[12] Grose, J., in delivering the judgment of the court, even observed, that larceny "is the felonious taking the property of another without his consent and against his will, with intent to convert it to the use of the taker."

In Scotland, Alison defined theft as consisting "in the secret and felonious abstraction of the property of another for the sake of lucre, without his consent.[13] Macdonald defines it as "the felonious taking and appropriation of property without the consent of the owner or custodier.[14]

In the United States, Dr. Wharton says, that larceny may be defined to be the fraudulent taking and carrying away of a thing without claim of right, with the view of converting it to a use other than that of the owner, without his consent."[15] Rapalje, in his work on Larceny,[16] expressly says that the taking and carrying away must, to constitute larceny, be "without the consent of the owner." Dr. Bishop says,[17] that a man may give away his property, therefore another who takes it by his permission does not commit larceny.

In *Garcia* v. *State*,[18] Moore, J., in delivering the opinion of the court said, that "the taking of the property without the consent of the owner is an essential ingredient of the offence

(A) Coke, Hawkins and Blackstone do not refer in their definitions of larceny to the absence of consent, but even they do not deny that absence of consent is essential. They require that the taking must be felonious or *animo furandi*, and generally speaking there can be no taking of a property feloniously or *animo furandi*, when it is taken with the owner's consent.

9 Art. 321.
10 Arts. 321—324.
11 Arts. 326, 325.
12 Leach. 1089.
13 I. Alison Cr. L., 250.
14 Macd. Cr. L., 18.
15 1 Whart. Cr. L., 757.
16 P. 1.
17 1 Bish. Cr. L., 140.
18 26 Tex., 209.

of theft." In *Crowell* v. *State*,[19] theft is defined as the fraudulent taking of property without the consent of the owner, with the intent to deprive the owner of the value of the property, and appropriate it to the use and benefit of the person taking it.

On the Continent of Europe, the Italian Penal Code is quite as explicit in regard to the necessity of the absence of consent, as the Indian Penal Code. The Spanish Penal Code defines theft as involving the taking of the thing without the will of the proprietor, or the denial of its receipt.[20]

The Code Pénal does not refer expressly to the absence of consent, but the absence is involved in the other requirements of the offence. Thus R. Garraud says[21] that the *soustraction* should have taken place *malgré* the proprietor, *invito domino*, as the texts of Roman law say. So also A. Blanche in his work on the Practical Studies on the Code Pénal[22] says that to constitute *soustraction* the thing should pass from the possession of the *légitime detenteur* (lawful possessor) to that of the author of the *delit*, *a l'insu et contre le gré* (unknown and against the will) of the possessor.

The same is the case in the German Penal Law. S. 242 of the Code declares a person guilty of theft, who *eine fremde bewegliche Sache einem Anderen in der Absicht wegnimmt dieselbe sich rechtswidrig zuzueignen.*(*h*) There is no mention of the absence of consent in the definition, but it appears to be quite settled that the taking to constitute theft must be against the consent of the person to whom the thing taken belongs. Almost every commentator of the Code lays down, that *Die Aufhebung des Gewahrsams des Anderen muss ohne dessen Willen geschehen.*[23] (*i*) After making that observation, Olshausen goes on to say: *demnach liegt eine Wegnahme nicht vor, wenn der Inhaber in die Aufhebung seines Gewahrsams einwilligt. Die Thatsache der Einwilligung des Inhabers und der dadurch bedingte Ausschluss einer Gewahrsamsverletztung kann auch nicht dadurch beseitigt werden, dass der Thäter schon vor Erlangung des eigenen Gewahrsams an der Sache die Absicht hegte, über dieselbe demnächst für sich zu*

(*h*) Takes another person's movable thing with the intention of appropriating it.
(*i*) The deprivation of the possession of another must take place without his will.

[19] 24 Tex. App., 404.
[20] Art. 437.
[21] V. Gar. Dr. Pen., 104.
[22] V. 626.
[23] Olshaus. Komm., 879.

verfügen.'[j] So also Rüdorff in his Commentary on the German Penal Code says : [24] *eine Wegnahme im Sinne des P.* 242 *liegt dann nicht vor, wenn dieselbe mit Einwilligung des Inhabers oder des Eigenthümers geschah.*[k] Similarly Rubo in his Commentary on the German Penal Code says : [25] *wo die Entfernung einer Sache mit Zustimmung desjenigen geschah, dem zur betreffenden Zeit die Bestimmung über den Verbleib der Sache zustand, da liegt begriffsmässig ein Wegnehmen nicht vor und fehlt es mithin an einem Erfordernisse des für den Diebstahl vorgesehenen Thatbestandes.*[l]

Consent in other offences relating to property.

172. Absence of consent is necessary, however, as observed above, in the case also of other offences relating to property. *Le défaut de consentement, chez la personne au droit de laquelle la soustraction porte atteinte, est un caractère commum au vol et aux autres délits contre la propriété.*[26][m] Binding in his work on *Die Normen* says : [27] *Jede Anerkennung des Eigentums schliesst das Verbot der Aneignung fremder Sachen ohne Einwilligung des Eigentümers, jede Anerkennung des Besitzers als eines Rechtsgutes das Verbot der Störung und der Aufhebung des Besitzes ohne Einwilligung des Besitzers in sich*[n]

There can thus be no criminal misappropriation or criminal breach of trust of a property, if the appropriation, conversion or use of the property said to constitute the offence is with the consent of the owner of the property. In *Henderson* v. *State*;[28] the owner's consent to the use of the thing entrusted

(*j*) There is accordingly no removal when the possessor consents to his being deprived of possession. The fact of the consent of the possessor and the exclusion of the violation of possession thereby conditioned, can moreover, not be removed by the circumstance that the doer, even before acquiring the possession of the thing, entertained the intention of himself making away with it.

(*k*) A removal in the sense of S. 242 is not therefore present, when it takes place with the consent of the possessor or the proprietor.

(*l*) Where the removal takes place with the consent of that person to whom at the time being, belongs the right of determining the whereabouts of the thing, a removal, as can be conceived, does not take place, and there is wanting accordingly a requirement in the component parts of theft.

(*m*) The absence of consent in the person whose right is assailed by *soustraction* is a feature common to theft and all other offences against property.

(*n*) Every recognition of proprietorship includes the prohibition of the appropriation of another's thing without the consent of the proprietor, every recognition of possession as a legal interest includes the prohibition of the destruction and of the deprivation of the possession, without the consent of the possessor himself.

[24] P. 521.
[25] P. 812.
[26] V. Gar. Dr. Pen., 104.
[27] II. 539.
[28] 1 Tex. App , 432.

as it was used, was held to be a good defence to the charge of criminal breach of trust in respect of that thing. In the Indian Law, that offence is committed, even if the property entrusted to a person is dealt with "in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which he has made touching the discharge of such trust." It is clear that the consent of the real beneficiary will vary the trust or the contract itself, and any use of the property in accordance with his consent, can never be in violation of the legal mode of discharging the trust or of any contract entered into for that purpose.

Nor can there be cheating, unless consent is obtained by wilful deception, in which case there can be no such consent as is recognized by Criminal law. Olshausen, in his Commentary on the German Penal Code, says :[29] *Aus der Nothwendigkeit des Kausalzusammenhanges zwischen der Täuschung und der Vermögensbeschädigung ergiebt sich, dass falls jemand Vermögensrechte aufgiebt oder auf einen sicheren Gewinn verzichtet, ohne dafür irgend ein Aequivalent zu wollen, von dem Vorliegen des hier in Rede stehenden Thatbestandsmerkmales des Betrugs keine Rede sein kann, wenn auch eine Täuschung des Gebenden durch den Empfangenden mit unterlief.... den nicht dadurch wurde der Vermögensschaden zugefügt, sondern durch den eigenen Willen des Beschädigten.*(o) In another place, the same Commentator says : [30] *Da der Begriff des Betrugs durch die Zustimmung des am Vermögen Beschädigten in die Beschädigung aufgehoben wird, so muss folgeweise die, wenn auch unrichtige, Annahme einer solchen Zustimmung das Bewusstsein der Rechtswidrigkeit bzw. den Dolus beseitigen.* (p)

(o) From the necessity of the causal connection between deception and injury to a pecuniary interest, there arises the fact that if anybody renounces his pecuniary rights or foregoes a certain gain, without willing any equivalent for it, there can be no question of the essentials of the offence of cheating, as here in question, being present, even if a deception of the person giving has taken place by the person receiving; ..... for the injury to the pecuniary interest was not caused thereby, but by the will of the injured person himself.

(p) As the conception of fraud is removed by the consent to the injury, of the person injured in his pecuniary right, so must consequently the supposition of such consent even if incorrect, remove the consciousness of the illegality or respectively of the *dolus*.

[29] P. 1011.

[30] P. 1023.

Nor can there be a trespass on a person's property, when that person consents to it. Thus in *Haley v. State*,[31] Smith, J., in delivering the opinion of the court, said, "Consent, no matter how fraudulently obtained, if there be no mistake as to the taker or the thing taken, excludes the idea of trespass, and consequently the idea of larceny."

Nor will there be mischief, if the destruction or change in a person's property is with his consent, because with a consent of the person affected there can be no wrongful loss or damage to him, which is the essence of that offence. In the French law, R. Garraud speaks of it as a rule applicable to all the crimes and *delits* against property, that they lose their delictuous character when the diminution of the value has taken place with the consent of the proprietor; and that it is for this category of *delits* that it is true to say,[32] *volenti non fit injuria.*

Consent in rape.

173. In the case of offences against person, the question of the absence of consent has arisen most frequently in cases of rape and assault. As to the former, it has been observed above, that originally in almost every system of law, the use of force or violence on the woman's person was considered essential for rape. So strict was the rule, that even the force involved in the act of sexual intercourse was not deemed sufficient to satisfy the requirements of the definition of the offence. In *Bailey* v. *Com.*,[33] Lacy, J., observed that "wherever there is a carnal connection and no consent in fact, fraudulently obtained or otherwise; there is evidently in the wrongful act itself, all the force which the law demands as an element of the crime." This view was, however, not generally adopted by the courts. Thus in *R.* v. *Sweenie*,[34] it was contended that the mere bodily contact necessarily implied in the act of connection was force sufficient to constitute rape, but the contention was negatived. Lord Ardmillan observed that there was no authority for such a proposition, and on principle it did not commend itself to him. Lord Deas in speaking of the force required for rape, said: "I mean force different from that which is necessarily implied in the act of sexual intercourse, for there is a plain fallacy in confounding what is essential to the act, even when consented to, with the force necessary to obtain opportunity to perform the act."

[31] 49 Ark., 147.
[32] V Gar. Dr. Pen., 104.
[33] 82 Va., 107.
[34] 8 Cox. C. C., 227.

So also in *Reg* v. *Dee*,[35] May, C. J., after observing, that rape may be defined as sexual connection with a woman forcibly and without her will, said : " It is plain, however, 'forcibly' does not mean violently, but with that description of force which must be exercised in order to accomplish the act, for there is no doubt that unlawful connection with a woman in a state of unconsciousness, produced by profound sleep, stupor, or otherwise, if the man knows that the woman is in such a state, amounts to a rape." The observation was, however, *ultra vires*, as the case was merely of the personation of a husband, and the other Judges did not even refer to it.

In the United States also, it was held in *Com.* v. *Fields*,[3] that the force involved in the act of a man getting in bed with a woman, and of stripping up her night garment in which she was sleeping, was not such force as was required for the offence of rape. In *People* v. *Quin*,[37] Johnson, J., in delivering the opinion of the Court, said : "It has never yet been held that merely having carnal knowledge of a woman while deprived by voluntary intoxication or otherwise of all reason, and violation without her consent, and by such force only, as was necessary to accomplish the act under such circumstances, was a rape."

It was a logical deduction, however, from the constructive extension of the word force to which reference has been made in S. 136, that absence of consent came gradually to supplant it in the definition of rape, so that sexual intercourse even unaccompanied by force or violence is generally held to be rape, if obtained without her consent. This development, has, however, not received proper recognition in the English law even up to this time.(*F*)

(*F*) Thus in R. v. *Sweenie*,[38] Lord President Macneill, after observing that the writers on criminal law describe the crime of rape as consisting in having carnal knowledge of a woman's person forcibly and against her will, and that these or similar words are generally used by the text-writers to describe that crime, said "That description, if the words be taken in what is perhaps the most strictly literal meaning of them, may be understood to imply the positive presence in every case of rape of two elements, *viz.*, physical force or violence applied to the person, so as to overpower resistance, and coercion of the will while it is in a state of dissent or opposition. Certainly, in most cases of rape these two elements do concur ; the crime is accomplished by the application of physical force overpowering resistance, and against the remonstrances of the sufferer. But I am not prepared to hold that these two elements, understood in that sense are essential to the crime of rape. That the knowledge of the woman's person should be obtained against her remonstrance or against her will actively dissenting, or in a state of known antagonism is certainly not necessary in all cases. It is not necessary that the act should be in that sense 'against her will.' It is

[35] 15 Cox. C. C., 585.
[36] 4 Leigh, 648.
[37] 50 Barb., 128.
[38] 8 Cox. C. C., 229.

Outside England, it has received greater recognition. The Code Pénal does not define rape, and does not restrict it to cases in which the offender has used violence, and R. Garraud in his treatise on the French Penal Law says,[40] *il semble, par suite, qu'on puisse décider, sans se mettre en désaccord avec la loi, qu'il y aura bien viol toutes les fois que la femme n'aura pas consenti à l'acte dont elle a été la victime. Ce que la loi réprime, en effet, c'est non seulement le fait d'avoir abusé d'une femme contre sa volonté, mais encore le fait d'en avoir abusé sans sa volonté.*(q)

---

not necessary that she should have a will or mind dissenting, or capable of indicating dissent. That is settled in the case of infants under puberty, who, in the estimation of the law, have no will ; and some of your lordships have already observed that the same would hold in the case of an insane woman of mature years." After referring to cases of intercourse with the woman while unconscious, the learned Judge added : " But in such a case the connection has been had without her consent, and when she had not mental power to consent. In such cases the expression 'against her will,' used by the writers can mean nothing else than without her consent, and must be so understood, unless they are to be regarded as imperfect or rejected as erroneous. . . Such forcible invasion of the woman's person is an assault; the connection is without her consent ; and I think, that the forcibly invading a woman's person and having carnal knowledge of her, without her consent, through the instrumentality of assault, is nothing less than rape. 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, such as some of the cases put in illustration by Lord Ivory, as for instance, the case of a woman abused in a state of syncope, or in a state of insensibility from intoxication. In all these cases, the knowledge of the woman's person has been had without her consent, which as regards the will of the sufferer, is all the law desiderates when the mind and its faculties are in abeyance, and it has been accomplished by means of assault, which necessarily implies violence—all the violence that was necessary for the accomplishment of the criminal purpose in the circumstances, and therefore, all the violence that the law desiderates in rape. I own that I cannot distinguish the present case from the cases to which I have been alluding. The woman is stated to have been asleep ; her mind and its faculties were dormant—in abeyance. The accused is stated to have entered the bed by stealth, wickedly and feloniously—that is, with a criminal intent, the criminal intent being to have carnal knowledge of her person without her consent. He is said to have accomplished this criminal purpose, by means of assault or forcible invasion of her person, for we are all agreed that the act charged against him is assault, at the very least, whatever more it may be, and assault necessarily implies violence—in this case all the violence that was necessary to accomplish his criminal purpose, having regard to the physical condition of the sufferer at the time. It appears to me that an assault feloniously committed on a woman for the criminal purpose, and effectuating the criminal result of having carnal knowledge of her person without her consent is rape. I know no more accurate description of that crime." Lord Ivory also after expressing his approval of Lord Cockburn's definition of rape as " having intercourse without the woman's consent," observed that it was the absence of consent that constituted the essential element in rape, and that it was on that ground that connection with children and insane persons was deemed to be rape, because in these cases consent could not be obtained, and the law did not pay much regard to the employment of force.[38] This view was not adopted, however, by the majority of the judges.

(q) It appears, therefore, that one can decide, without setting himself in disagreement with law that there is rape always whenever the female shall not have consented to the act of which she has been the victim. That what the law represses is not only the act of having committed abuse on a female against her will, but even the act of having committed abuse on her without her will.

---

[40] IV, 465.

A. Blanche also takes the same view, and defines rape as consisting in *le fait d'abuser d'une femme sans la participation de sa volonte*[41] (*r*) Referring to the language of Art. 331 under which the offence of rape has been made punishable by the Code Pénal, he says that the generality of the terms of that disposition permits the belief that according to it there is rape always whenever the female has not consented to the brutal act of which she is the victim. The woman who is assailed only by physical or moral violence can still defend herself. She who is surprised while asleep or stupified by narcotic draughts cannot do so. She has only law for her safeguard, and the affront to which she submits is not less a rape than that which results from violence.

The same view has been adopted in some countries even by the Legislature. The Indian Penal Code has, for instance, enacted that sexual intercourse will be rape not only when it is against the will of the female, but also when it is without her consent, or even with her consent when she is below twelve years of age.

Nowhere, however, does absence of consent appear to be absolutely necessary for rape. In almost every system of law, sexual intercourse with a woman may often be rape, even when it is with her consent. Most of such cases are those in which consent is inadequate, and has, for instance, been obtained by a particular sort of fraud, or from a girl who, on account of her tender years, is incapable of giving a proper consent. Even in the case of full and intelligent consent, the intercourse will be rape, if it is against the woman's will.

Consent in assault.

174. As to assault, it has been explained above in Section 7, how absence of consent is the essence of assault in the Indian and to some extent even in the English Law. Mr. Mayne in his work on the Criminal Law of India, says,[42] " where the force used to a person is an essential element in the offence intended to be committed, if the latter offence is only an offence by reason of the want of consent, the whole charge will fail, unless want of consent is proved." Stephen in his Digest of

(*r*) The act of abusing a woman without the participation of her will.

[41] V. Blanche. Etud. Prat., 108.

[42] P. 582.

[39] P. 225.

Criminal Law, after recounting various acts which may constitute an assault in the English Law, says that they will be so only if done without the consent of the person assaulted.

In *Whitcher* v. *State*,[43] Hoyt, J., observed, that "we are unable to conceive of a person being assaulted who consents to the acts which without such consent would constitute an assault." The courts, both in England and the United States appear to be agreed that "to an assault as such, consent is apart from special statutory legislation, always a complete defence."

On the same principle, Livingston's Louisiana Criminal Code provided in Art. 442 that "where two persons agree to fight, unless it be with deadly weapons, no prosecution shall be commenced for assault and battery committed in consequence of such agreement, on the complaint of either of the parties, or any other person, unless the assault and battery took place in public, in a dwelling-house, shop or store;" in which cases there may be a prosecution.

So far is the rule carried, that in *The Queen* v. *Bruce*,[44] a person entering into a shop pulled a young lad employed at the shop by the hair off a cask where he was sitting, shoved him to the door and from the door back to the counter, and then put an arm round his neck and spun him round, and continued to do that, till he broke away from the person, and in consequence at the moment of his doing so reeled out into the road, and knocked against a woman who was passing, and knocked her down causing her death. The person was indicted for her death, but acquitted on the ground that he had not assaulted the lad, as the latter did not resist him in the transaction, and thought the person was only playing with him and was sure that it was intended merely as a joke. Erle, J., observed, speaking of the prisoner: "Had his treatment of the boy been against the will of the latter the prisoner would have been committing an assault, . . . but as everything that was done was with the witness's consent, there was no assault."

Consent in assault in disturbance of public peace.

175. The cases in which an assault is notwithstanding consent, punishable, as being in disturbance of the public peace, are not against this view, and do not show that the absence of consent is not an essential

[43] 2 Wash., 286.

[44] 2 Cox. C. C., 262.

constituent of assault. They proceed on altogether a different principle, a principle that where considerations of public peace are concerned, law "no more regards an agreement by which one man may have assented to be beaten, than it does an agreement to part with his liberty and become the slave of another." In *The Queen* v. *Coney*,[45] Stephen, J., speaking of prize fights, observed that "the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults." So also, Cave, J., after explaining that "a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault," said[46] that, "an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial."

Similar language is used by text-writers. Harris, in his work on Criminal law, for instance, observes that "as a rule, consent on the part of the complainant deprives the act of the character of an assault, unless, indeed, non-resistance has been brought about by fraud. But the fact of consent will in general be immaterial where the alleged assault is of such a nature that its infliction is injurious to the public as well as to the person injured, and involves an actual breach of the peace."[47] Similarly, W. Jones in his article on assault in the English and American Encyclopædia of law[48] says that, "in cases where life and limb are exposed to no serious danger in the common course of things, consent is a good defence to the charge of assault, provided there is no breach of the peace, and consent is not obtained by fraud, or through ignorance or incapacity."

Such observations and language may appear to show that consent is only a defence as regards assault, and its absence not an essential constituent of it. Really, however, they only show that acts of the nature of those constituting an assault, when done so as to disturb the public peace are an offence, even though done with the consent of the parties. In case of prize fights there is no consent to the blow received, but at the best a taking of their risk, a consent to the fight which involves a risk of them; as the parties so far from consenting to them use their best efforts to avoid them.

---

[45] 8 Q. B. D., 534.
[46] 8 Q. B. D. 539.
[47] P. 176.
[48] II. 986.

Nor is an assault necessarily a breach of the peace, as there may be an assault in private as well as in public. The confusion in the language of Cave, J.,[49] is evident from what he added to the observation cited above; "If this view is correct a blow struck in a prize-fight is clearly an assault; but playing with single sticks or wrestling do not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in *Reg.* v. *Orton*." [50] It is clear, however, that in playing with single sticks or wrestling, a blow may be, and in fact usually is, struck in anger or with an intention or knowledge of the likelihood of its causing bodily hurt; and that in a prize-fight a blow may be struck without that knowledge. Thus in *Camphor* v. *State*,[1] an indictment against A for an assault and battery on B, was not sustained by evidence that A assaulted and beat B in a fight at fisticuffs by agreement between them.

Consent in cases of aggravated assault.

176. The same rule applies to aggravated assaults also. It has thus been held that even when the indictment is for the offence of assault with intent to commit rape on, or to outrage the modesty of, a woman, the consent of the woman will negative all notion of assault.[2] The Texas Supreme Court has held, that there can be no assault with intent to commit rape on a woman unless there is an intention to have intercourse with her in spite of her resistance[3] and by force.[4] As observed by Mr. Roscoe,[5] "In consequence of the natural desire not to permit a flagrant act of immorality to go unpunished, an attempt has frequently been made to treat that as an assault which is consented to on the part of the person who is the subject of the act. But on examination it will be found that there is no authority for such a position."

In France, violence is considered a constitutive element of the assault (*attentat*) against modesty, though the consent of a person under thirteen years is held to be non-existent and therefore insufficient to avoid the offence. The present doctrine appears to be, as observed by R. Garraud, that "*l'attentat à la pudeur existe toutes les fois que l'acte a été commis malgré*

[49] 8 Q. B. D., 539.
[50] 39 L. T., 293.
[1] 14 Ohio, 437.
[2] Hull v. State, 22 Wis., 580. II Encyc. Law., 987.
[3] Dockery v. State, 34 S. W. R., 281.
[4] Ellenburg v. State, 35 S. W. R., 989.
[5] Ros. Cr. Ev., 286.

la volonté ou meme sans le consentemente de la victime.[6] (s) It has even been argued that a simple *défaut* of will or consent is not such violence as will constitute *l'attentat* against modesty,[7] but it has never been considered that there may be *l'attentat* when there is consent. Similarly Adolphe and Hélie in their work on the Theory of Code Penal say[8] that *L'attentat à la pudeur, des qu'il est consenti par la personne sur laquelle il est commis, est dépouillé de toute criminalite légale.* (t) The absence of consent is not necessary only when the assault is on a person who by reason of a subjective disqualification is incapable of giving consent,[9] or when the assault is in public,[10] in which case the offence being an essentially public one, the existence of consent is immaterial on the same principle on which an assault in disturbance of the public peace is an offence without regard to the consent of the person assaulted.

In India there are, unlike England, no special provisions relating to any particular classes of assaults, and to the ineffectiveness of consent in regard to them. Whether the criminal act constituting an assault is done with intent to dishonor of rob a man, or to punish or deter a public servant as such, the consent of the man or the public servant respectively shall be sufficient to prevent the act being an assault. This will be, *a fortiori*, so in case of the offence of an assault or use of criminal force to a woman with intent to outrage, or with knowledge of the likelihood of outraging, her modesty, as there can be no such intention or knowledge in respect of a woman who consents to the act, and the very consent will leave no modesty to be outraged.

Consent in wrongful confinement.

177. Consent is an essential constituent of offences against personal freedom. Such offences in which the question generally arises are wrongful restraint and wrongful confinement. The essence of these offences is obstruction and prevention, which involve a notion of the contrariety to *will*. A person cannot be said to be restrained or obstructed in a

(s) There is an assault against the modesty always whenever the act has been committed against the will or even without the consent of the victim.

(t) The assault against the modesty, from the time it is consented to by the person, is deprived of all criminality.

[6] IV. Gar. Dr. Pen., 482. [145.
[7] 1885 Journal du Ministere public,
[8] IV. 304.
[9] S. 331 Code Pénal.
[10] V Blanch. Etud. Porat., 70.

place where he consents to stay, and from which he has no will to go. To constitute wrongful restraint or confinement of a person in a place, it is absolutely necessary that he should not be willing to stay where he is. If he consents to that, he cannot be said to be obstructed in proceeding in any direction or beyond certain circumscribing limits, which is essential to those offences as defined in the Indian Penal Code.[11] A continuous application of superior physical force is not necessary to constitute those offences, [12] but it is necessary that there should be in some way an overpowering or suppressing of one's voluntary action.[13] Where there is no voluntary action to be overpowered or suppressed, there can be no wrongful restraint or confinement.

Para. 239 of the German Penal Code defines the offence by providing punishment for every person who *vorsätzlich und widerrechtlich einen Menschen einsperrt oder auf andere Weise des Gebrauches der persönlichen Freiheit beraubt.*(u) Rüdorff in commenting on the para. observes that *dieselbe eine Beugung des Willens unter den Willen eines Andern zur Voraussetzung hat.*[14] (v) Rubo also says that *Widerrechtlich handelt derjenige der Befugniss zu dem, was er thut, nicht hat.*[15] (w) Olshausen, in commenting on that para., observes that the *Widerrechtlichkeit* (illegality) may be excluded also by the consent of the person in question, though only as long as the consent, which can be withdrawn at any moment, lasts. Similarly Hälschner says :[16] that *eine Freiheitsbeschränkung überhaupt nicht vorliege, wenn der Betreffende in die Vornahme einer die Beschränkung seiner Freiheit bezweckenden Handlung im Augenblicke ihrer Verübung einwillige, ohne in der freien Bestimmung der Dauer ihrer Wirksamkeit gehindert zu werden.*[17] (x)

The same rule will apply to aggravated forms of wrongful confinement. The ordinary forms of aggravation provided for

(u) Intentionally and unlawfully shuts up a man or in some other way deprives him of the use of his personal freedom.

(v) Subjugation of one will under the will of another is a necessary requirement of it.

(w) He acts illegally who has no authority (permission) to do that which he does.

(x) A deprivation of freedom does not at all exist when the person in question consents at the moment of the execution to the undertaking of an act directed to the limitation of his freedom, without however being prevented in the free limitation of the period of its efficacy.

11 SS. 339, 340.
12 Bird *v.* Jones, 7 Ad. & El. N. S., 742.
13 Parankusam *v.* Stuart, II Mad. H., C. Rep., 396.
14 Rüd. Komm., 510.
15 Rubo Komm., 804.
16 Olshaus. Komm., 858.
17 I Gem. D. Strap., 471.

in the Indian Penal Code are those on account of an increase in the duration,[18] or of any speciality in the mode [19] or in the object[20] of confinement, or on account of the peculiar condition of the person confined.[21] Mere concealing a woman, however, need not necessarily be against her consent; and though the offence of keeping a kidnapped person in confinement,[22] and even of detaining a married woman enticed from her husband,[23] will involve an absence of consent, yet concealing such persons may be an offence even when it is with their consent. On this very account, these offences are not classed by the Indian Penal Code under the head of wrongful confinement.

Consent in offences relating to compulsory labour.

178. A person may not simply be restrained or confined, but compelled to labor or do any work. The absence of consent is an essential constituent also of the offences involving compulsion to labor. S. 374 of the Indian Penal Code makes it an offence to unlawfully compel any person to labor against his will. If he himself consented to labor, there would be no compulsion, and no unlawfulness of compulsion.

Mr. Mayne conceives "that the compulsion employed must be such as amounts in law to duress, and must at least be as great as would vitiate a contract." [24] Duress operates in law only by affecting and vitiating consent, and there can be no duress in regard to an act which is fully and freely consented to. In *Madan Mohun* v. *Reg.*,[25] a creditor induced certain debtors of his to live in his house, where they were compelled to work, and even beaten when they did not work. He was charged with the offence of unlawfully compelling them to labour, but acquitted, as, Sir Comer Petheram, C. J., did "not think that a person who insists that another who has consented to serve him shall perform his work, unlawfully compels such person to labour, because it is the thing which he or she has agreed to do." Norris, J., dissented from the judgment of the court, but not on the ground that the absence of consent was not necessary for the offence, but because he considered that the persons complaining of having been compelled "never did give their full and fair consent to work and labour for the accused."

---

[18] SS. 343., 344.
[19] S. 346.
[20] SS. 347, 348.
[21] S. 345.
[22] S. 363.
[23] S. 498.
[24] Mayne Cr. L., 649.
[25] I. L. R. XIX Cal., 572.

A continued and therefore severer form of the offence of unlawful compulsion to labour is that of slavery. S. 370 of the Indian Penal Code provides a punishment for every person who "imports, exports, removes, buys, sells, or disposes of any person as a slave, or accepts, receives, or detains against his will any person as a slave. The essence of slavery is the unlawful assertion by one person of an absolute right to restrain the personal liberty of another, and to dispose of his labour against his will; [26] and the provisions in the Indian Penal Code " were enacted for the suppression of slavery, not only in its strict and proper sense, *viz.*, that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another." [27]

Consent of the person dealt with as a slave will evidently not avoid the criminality of the dealing. This might be justified on the ground that slavery was an offence on account of its inherent general evil, and independent of the consent of any person. The absence of consent is, however, not the less an essential constituent of slavery. If a person is willing to obey and work for another even without receiving any consideration, there will be no slavery. For this, consent must exist at the time of every act, as initial consent can operate only as a binding contract, and a contract for future irrevocable loss of freedom is not recognized by law. Such a contract was not invalid however while slavery was recognized as a lawful institution, and then consent entirely avoided the criminality of making a person a slave with his consent. Thus Breithaupt quoting from Ulpian observes that *in Rom auch derjenige* (war) *dem unmittelbar Verletzten gegenüber straflos, der einen Freien mit seiner Einwilligung in die Sklaverei verkaufte.* (y) [29] The Lex Fabia threatened with punishment only persons who concealed or bound an *ingenuus* or *libertinus*, and Breithaupt in his work on *Volenti non fit injuria* [30] argues from it that this sort of *Freiheitsberaubung erlaubt war, falls sie mit Einwilligung des Verletzten geschah.* (z)

(y) He who sold into slavery a free person with his consent, was free from punishment as regarded the person directly injured.

(z) Deprivation of freedom was permitted, in case it took place with the consent of the injured person.

[26] Queen v Sikundur, III N.-W. P. ; H. C. R., 146.

[27] Empress of India v. Ramkuar, I. L. R. II. All., 731.

Amina v. Queen-Empress, I. L. R. VII Mad., 279.

[28] Rubo Komm., 804.

[29] Breithaupt, 6.

[30] P. 10.

It has been explained above that the existence of consent negatives the offence of wrongful imprisonment, but subject to the condition that the imprisonment lasts as long as the consent is continued, and that the consent may be revoked at any time, and thus put an end to the lawfulness of the imprisonment. This is what Rubo refers to when he says: *Das Recht zur Beraubung des Gebrauches der persönlichen Freiheit wird dadurch nicht erworben, dass der zu Beraubende in die Beraubung willigt.* [28] (a)

In Italy, *plagio* is as much a reduction of a free person to slavery, as mere abduction, and Giulio Crivellari in his *Concetti Fondamentalli di Diritto Penale*[31] after observing that violence and fraud are the essentials of *plagio*, as consent naturally destroys even the possibility of conceiving an injury to personal liberty, says *e se codesto consenso fosse dato pazzamente con destinazione di irrevocabilità nell'avvenire, la nullità intrinseca del patto basterebbe a guarentire il diritto da ogni possibile lesione. Il fatto non delittuoso in principio per il libero consentimento prestato a servire altri, diverrebbe reato non appena revocato tale consenso il soggetto passivo rivendicasse la sua libertà naturale, e il soggetto attivo malgrado cio persistesse a volerla comprimere.* (b)

Consent in other offences affecting personal freedom.

179. Personal freedom may be interfered with not only in regard to the going to or from a particular place, or to the working for another person, but also as to the doing or not doing of other acts. Criminal intimidation is the chief offence of this sort. Its chief constituent is a threat of injury to a person with intent to cause alarm or to cause an act to be done or omitted, as a means of avoiding the execution of such threat.[32] If the fear caused is such as to make him deliver some property, it is designated extortion in the Indian Law. The offence assumes a still more serious form and becomes robbery, if the fear caused is of instant death, of instant hurt, or of

(a) The right to deprive one of the use of personal freedom, shall not be acquired by the circumstance that the person to be deprived consents to the deprivation.

(b) And if this consent was given foolishly with the intention of its being irrevocable in the future, the intrinsic nullity of the pact would be enough to preserve the right from every possible injury. The act, not criminal in the beginning on account of the consent freely given to serve another, would become an offence as soon as such consent being revoked, the passive subject should reclaim his natural liberty, and the active subject should, notwithstanding that, persist in wishing to constrain it.

31 Art. 481.

32 S. 503, I. P. C.

instant wrongful restraint; and the person causing the fear is sufficiently near the person to whom fear is caused to cause that fear to him.[33] This fear can necessarily not be caused to a person consenting to the doing of the act or to the delivery of the thing to induce the doing or the delivery of which the fear must be caused to constitute the offence. It has been repeatedly held, that the delivery of a property by a person with his consent is not theft, even though a threat of such fear has been held out to him, as will otherwise be sufficient to constitute robbery.[34]

Consent in abduction.

180. Abduction is also an offence essentially against personal freedom. Its essential constituent also is the absence of the consent of the person abducted. A person who consents to go from or to any place cannot be said to be abducted by any person who takes him from or to that place. The offence has been classified sometimes not with reference to its nature or constituents, but with reference to the usual purpose or object of its commission, as an offence against morality.

The Indian Penal Code places it among offences against person, but under a sub-head separate from that of confinement, as it involves the additional element of carrying away the person in respect of whom the offence is committed.

The offence is, no doubt, usually committed on children, whose consent even when given is immaterial. There has thus grown up another offence, which the Italian jurists call an "imperfect abduction," and which in the English and the Indian law is called kidnapping. This offence is independent of the consent of the person kidnapped, but not of all consent. It requires as an essential constituent the absence of the consent of his guardian, which in regard to the offence of kidnapping takes the place of the consent of the kidnapped person himself.

The Code Pénal thus provides the punishment of *seclusion* for any one who should have by fraud or violence, *enlevé ou fait enlever des mineurs, ou les aura entraînés, détournés ou déplacés, ou les aura fait entraîner, détourner ou déplacer des lieux où ils étaient mis par ceux à l'autorité ou à la direction desquels ils étaient soumis ou confiés.*[35] The Code does not

[33] I. P. C., S. 390.
[34] *Vide* Supra S. 110.
[35] Art. 354.

say anything expressly as to the rights or consent of the guardian, but the guardian's consent would evidently avoid the offence, as placing a minor anywhere with it would be practically the guardian's own act, and therefore not an offence. Like the Indian Penal Code, the Code Pénal does not in such cases allow any legal operation to the consent of a girl under sixteen years of age. It, therefore, specially provides for the punishment of a person who should take her away with her consent, if she should have consented to her *enlevement* or followed voluntarily the *ravisseur*. This is quite as much on account of the inadequacy of the consent of a young girl who, because of the immaturity of her intellect, may easily be cajoled or frightened into giving the consent,[36] as on account of the rights of her guardian to her custody, and therefore to the offence being primarily against him. This is pointed out clearly by Fournel, who, in his treatise on Seduction, says:[37] *L'enlèvement d'une mineure, quoique revêtu de son consentement, conserve sa qualification de rapt par deux raisons*: 1° *parce que ce consentement est présumé surpris à son inexpérience et à sa faiblesse, et l'effet d'une captation criminelle;* 2° *parce que la personne ravie étant sous la puissance de ses père et mère, tuteur ou curateur, c'est contre eux que le rapt est commis. C'est sur eux que retombe principalement l'injure d'une pareille entreprise, puisqu'on leur enlève un dépôt précieux dont ils sont les gardiens, et dont la soustraction alarme tout à la fois leur honneur et leur tendresse.*" [(a)] No special provision has been made for the taking away of young boys and persons of unsound mind, as their consent will, on general principles, be held non-existent.

The Italian Penal Code also, after providing punishment for abduction, lays down that if a minor female may be *sottratta o ritenuta senza violenza, minaccia o inganno, ma col suo consenso*,[38] [(b)] he may be punished with reclusion for a period from six months to three years. This is so on the ground that the offence is really not against the person kidnapped. Thus

(a) The taking away of a minor, even though it be done with her consent, preserves its designation of abduction for two reasons; 1st, because this consent is presumed to be surprised on account of her inexperience and her weakness, and as the effect of a criminal undue influence; 2nd, because the person ravished being under the power of her father and mother, tutor or curator, it is against them that abduction is committed. It is chiefly on them that the injury of such an undertaking chiefly falls, since one carries away from them a precious deposit of which they are the guardians, and the *soustraction* of whom alarms at once their honour and their affection.

(b) Taken away or detained without violence, menace or fraud, but without her consent.

[36] Art. 356. | [37] P. 331. | [38] Art. 341.

Giulio Crivellari in his *Concetti Fondamentali Di Diritto Penale* [39] observes that the writers are agreed in affirming that the son of the family and he who is subject to the tutorial power cannot free themselves from it, without the assent of the parent or the tutor, and says: *Chi s'impadronisce di costoro senza consultare le persone che sono investite di tale podestà o che ne sono contrarie, fà onta all'autorità di esse, e sopendo che il consenso degli ablati è nullo di fronte alla legge, dev'essere tenuto di plagio come si fosse impossessato del figlio di famiglia o del pupillo renuenti.* [(c)] The same view is taken in Germany, and Breithaupt in his work on *Volenti non fit injuria* says: [40] *Das Objekt der Verletzung bildet hier der Eingriff in die den Eltern resp. dem Vormund behufs Ausübung der Erziehungsgewalt u. s. w. gesetzlich gegebene Autorität.* [(d)]

The Spanish Penal Code contemplates the abduction only of a female, providing a punishment for it when executed against her will and with a dishonest purpose, or in respect of a girl below twelve years of age.[41] A lighter punishment is provided also for carrying away a girl with her consent when she is below twenty-three years of age.[42] This, however, does not show that the absence of consent is not necessary for the offence, but that for a serious act like that, a female below twenty-three years of age is not considered qualified enough to give an intelligent consent. As regards males, the act is punishable only as an offence against the parental control, in which case the consent of the person taken away will of course be immaterial. S. 410 of the Code provides punishment for persuading a legal minor above seven years of age to abandon the house of her parents, tutor, or other persons to whom the care of their person may have been committed. There is no mention in this case of the absence of the consent of the parents, tutor or other such persons, but on general principles it is evident that there will be no offence in case of their consent.

Consent in adultery.

181. The absence of the husband's consent appears to be treated in some countries as an essential constituent of the offence of adultery also. This can, of

(c) He who gets them into his power without consulting the persons who are invested with such power, resists their authority, and knowing that the consent of the person carried away is null in the eye of the law, ought to be liable for *plagio*, as if he possessed himself of a son under parental control or of a ward without their consent.

(d) The object of the injury in this case is the attack on the authority, legally given to the parents or respectively to the guardian for the purpose of the exercise of their powers to train, &c.

39 Art. 482.
40 P. 78.
41 Art. 368.
42 Art. 369.

course, be so only where the adultery is viewed merely as an offence against the rights of the husband. This is the case specially in British India, and the Indian Penal Code therefore defines adultery as sexual intercourse with the wife of another man, without the consent or connivance of that man.

In the English law, adultery is only an ecclesiastical offence, and as such, not affected of course by the consent of the woman's husband. His consent or even connivance is there also deemed insufficient to disentitle him to an action for divorce or damages. Thus S. 31 of the Matrimonial Causes Act, 1857, provides that a decree for the dissolution of the marriage may be given only if it is not found that "the applicant has been in any manner accessory to or conniving at the adultery of the other party to the marriage." It has been repeatedly held that the husband can recover damages only, if he has not in any way, been a party to his own dishonor, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with the person from whom the damages are claimed.[43] To have this effect, however, mere negligence, inattention or indifference will not be sufficient, but there must be an intention that the wife should commit adultery, or at least a willing consent.[44]

In the United States also, the consent of the husband, whether to the specific act, or to the general immorality of the wife, is deemed to be a bar to his right to recovery.[45] But there, adultery has generally been made a criminal offence also, though rather as an offence against the marriage vow, than as an attack against the husband's rights. Thus, in some of the States, it extends even to the intercourse of a married man with an unmarried girl, and Dr. Bishop considers it as the correct and best established doctrine, that "in all cases where one of the parties to an act of criminal intercourse is married and the other is not, it is adultery in the married party and fornication in the unmarried."[46]

This was the doctrine of the canon law, which also punished it as a violation of the marriage vow, without recognizing any

[43] Winter *v.* Henn, 4 Car. & P., 494.
[44] Marris *v.* Marris, 2 Sw. & Tr., 530; Ellyatt *v.* Ellyatt, 3 Sw. & Tr., 504; Adams *v.* Adams, 1 P. & D., 333.
[45] Bonas *v.* Steffens, 62 Hun., 619; Schorn *v.* Berry 63 Hun., 110; Fry *v.* Derstler, 2 Yeates, 278., Cook *v.* Wood, 30 Ga., 891; Sanborn *v.* Neilson, 4 N. H., 501.
[46] Bishop, St. Cr., 413.

difference as to which of the parties was married. The Scotch law followed the canon law, and punished sexual intercourse even when one of the parties was married, as a heinous, and sometimes even as a capital, offence. In these circumstances, the husband's consent could naturally have no effect on the criminality of the adultery, and of those who took part in it. Under the Mahomedan law also, adultery was treated as an offence against God, and the husband's consent could not justify the act of unlawful intercourse constituting it. Before Christianity and Mahomedanism, the offence of adultery was among Jews and Romans restricted to the married woman, but it was treated as criminal only as an offence against the family order. In the Roman law, *De crimine adulterii pacisci non licet*, was an ordinary maxim. It was laid down, *quod si patiatur uxorem delinquere, non ob quæstum, sed negligentiam, vel culpam, vel quamdam patientiam, vel nimiam credulitatem, extra legem positus videtur.* It has been held that under that law, the husband of the woman with whom the adultery was committed was obliged on discovery to prosecute on pain of being himself convicted as an accomplice. *Qui quæstum ex adulterio uxoris suæ fecerit, plectitur, nec enim mediocriter delinquit qui lenocinium in uxore exercuit.*

The ancient law in France was the same. If the husband connived at the guilt, *le scandale et l'honnêteté publique*, as observed by Jousse, required that the public minister should interpose his authority to punish both the woman and the husband who favoured her *desordres.*[47] This was proposed to be enacted in the Code Pénal, but the provision was omitted for fear of scandalous discussions which a proof of the husband's complicity would lead to. The Code Pénal,[48] therefore, broadly provided that *l'adultère de la femme ne pourra être dénoncé que par le mari.* The law has not reserved public action any longer, and it has been argued from that that even the husband's connivance will not be a plea in bar to a prosecution by him, though an action for damages may be barred by such connivance; as *les peines ne sont point prononcées à son profit, elles sont prononcées dans un intérêt général, et la société seule en reçoit le bénéfice.*[49] Society also is interested more in the reunion of the spouses than in the punishment of an offence which leaves no such traces as render it certain and manifest for the public; and it concerns good manners them-

[47] III., 236. [48] Art. 336.
[49] IV. Adolph. & Hèlie, 386.

selves that an act wounding the sanctity of marriage does not become a public scandal by proceedings before tribunals, and does not acquire a judicial certainty by judgment.[50]

The husband is therefore allowed to pardon the wife, even after commencing proceedings against her, or to compound the offence with her in any way. Even Fournel in his "Treatise on Adultery"[1] says that it was permitted to a husband to compound the offence of adultery with his wife, and *de remettre le crime soit avant, soit après l'accusation intentée*, and a transaction of that sort would operate against the husband and his heirs as an unsurmountable plea in bar. The Court of Cassation has repeatedly held that the act of the public minister for adultery ceases to have a legal character, when, during the prosecution, the husband withdraws the information of adultery by a formal declaration.[2]

The entire law relating to the matter was well enunciated by the Court of Cassation in an *arrêt*, dated the 17th June 1850.[3] The court said: *que de la combinaison des art.* 336, 337 *et* 338 *du Code Pénal, il résulte que l'adultère de la femme ne peut être poursuivi que sur la dénonciation du mari; qu'il peut faire cesser la poursuite en se réconciliant avec sa femme; qu'il peut même, en consentant à la reprendre, arrêter l'effet des condamnations qui seraient intervenues; que ce sont là des exceptions aux règles qui assurent le libre exercice de l'action publique et la stricte exécution des jugements; que, comme toutes les exceptions, celles-ci doivent être renfermées dans les limites que la loi leur a fixées; qu'il suffit que le mari ait dénoncé l'adultère de sa femme pour que le ministère public ait le droit de rechercher et de poursuivre son complice, quand même il ne lui aurait pas été désigné par la plainte; que si, par la puissance domestique dont est investi le mari, il est le maître d'arrêter la condamnation prononcée contre son épouse, cette faculté ne lui appartient point à l'égard du complice; que s'il importe à l'intérêt des bonnes mœurs que le fait de l'adultère n'acquière pas, par un jugement, une certitude judiciaire, que si le désistement du mari, pendant le cours des poursuites, doit être accueilli comme une preuve légale de l'innocence de son épouse, que si, conséquemment, ce désistement doit profiter au complice, ces considérations sont sans force et sans autorité, lorsque le désistement n'intervient qu'après un jugement définitif qui a condamné la femme, et après qu'il a été jugé souveraine-*

[50] IV. Adolph. & Hèlie, 360.
[1] P. 74.
[2] 7th August 1823; 30th July 1885.
[3] IV. Adolph. & Hèlie, 363.

ment qu'elle s'est rendue coupable d'adultère ; que, dans ce cas, le mari ne peut pas plus, en pardonnant à la femme, arrêter les poursuites à l'égard du complice, qu'il ne pourrait arrêter les effets de la condamnation qui serait intervenue contre lui." (d)

M. Rogron, in commenting on Art. 336, says that the husband's connivance to the adultery will disqualify him from complaining of it. He cites in support of this an *arret*, dated the 1st February 1855, of the Court of Caen.(C) He himself, however, refers to a later *arret* of the same court, dated the 29th November 1855 in support of the contrary view.

The Spanish Penal Code provides that a husband cannot complain of the adultery if he has consented to it.[4]

The Italian Penal Code not only provides that no proceedings can be taken for adultery except on the complaint of the husband, or, in case of adultery by the husband, except on the complaint of the wife,[5] and that even after the conviction of one party there may be a remission by the other, which will put an end to the execution of the sentence, and its penal effects ;[6] but it also lays down that in the case of the complaint by the husband there will be no punishment for the wife or the

(C) It is said in this arret: "*Considérant que si la loi pénale doit protection au mari trompé, outragé, qui alors peut réclamer l'application et même l'aggravation de la peine devant tous les degrés de la hiérarchie judiciaire, quoique le ministère public ait négligé ou refusé de concourir aux mesures propres à conserver le droit d'aggravation, cette loi cesse d'être applicable dès qu'il n'y a plus ni tromperie ni véritable offense:* **nullum potest videri injuriam accipere qui semel voluit** ; *que le mari qui aurait reçu le prix d'indieuses complaisances ne saurait trouver dans la loi les moyens de spéculer de nouveau et de faire encore acheter son silence ; que l'intérêt de la famille, conséquemment l'intérêt social, demande qu'un voile soit jeté sur une faute commune aux deux époux, que la nécessité d'étouffer le scandale, en pareil cas, a été reconnue et notablement indiquée par le législateur moderne lorsqu'il a supprimé le droit consacré par le temps de flétrir par un juste châtiment l'infâme conduite du mari; considérant que la connivence du mari l'ayant rendu indigne de se plaindre, l'action du ministère public ne saurait être accueillie, puisqu'elle ne procède bien qu'autant qu'elle a pour base une plainte ou une dénonciation recevable de la part du mari ; etc.*" (d)

(d) That it results from the combination of Arts. 336, 337 and 338 of the Code Pénal that the adultery by the female can be prosecuted only over the denunciation of the husband ; that he can stay the prosecution by reconciling himself with her ; that he can even, by consenting to take her back, stop the effect of the sentence ; that these are the exceptions to the rules which assure the free exercise of the public action and the strict execution of judgments ; that like all exceptions, these ought to be restricted to the limits which the law has ordained for them ; that it is sufficient that the husband has filed a complaint of his wife's adultery to enable the public minister to make a search for and prosecute her accomplice, even when he should not have been designated in the complaint ; that though by the domestic power with which the husband is invested, he has the power of stopping the sentence pronounced against his wife, that power does not pertain to him in regard to the accomplice ; that if it is material in the interest of public manners that the deed of adultery should not acquire by judgment, a judicial certainty ; that if the desisting of the husband during the course of the prosecution proceedings ought to be received as a legal proof of the innocence of his wife ; that consequently this desisting should be to the profit of the accomplice. These considerations are without force

[4] Art. 359. | [5] Art. 356. | [6] Art. 358.

adulterer, if it is proved *l'abbia costretta o indotta a prostituirsi ovvero ne abbia eccitata o favorita la prostituzione.*[7] (e)

The German Penal Code goes still further; and expressly enacts that adultery may be punished only after the marriage has been dissolved,[8] for which evidently a complaint and proceedings by the innocent party will be necessary. Thus Olshausen in his Commentary on the Code[9] observes that adultery being punished not so much as an attack against the institution of marriage as a material injury to the rights of the spouses arising from marital faith, the consent of the husband as held by Binding, Kessler and others must exclude the penality of adultery, and that a person who panders his wife, cannot, as observed by Schwarze, Liszt, Meyer, and Rubo, complain of her adultery.

Mere consent does not avoid criminality of an act which must be done with particular evidence of it.

182. Mere evidence of consent will not avoid the criminality of an act, when it is criminal without regard to the consent of any person, even when the act is criminal not because done without consent of a person, but done without certain particular evidence of his consent. This principle is limited, however, to the cases in which consent will, as a matter of law, neutralize the otherwise criminal quality of the act; and where a prosecution was founded on a statute imposing a penalty on any one dealing or trafficking with a slave without a written ticket or permit from the owner, it was held that the offence would be consummated, although the trading was done by the slave in pursuance of the instructions of the owner, and in his presence.[10]

---

and without authority, when the desisting comes only after a definitive judgment by which the female has been sentenced, and after it has been established by sovereign authority that she has become guilty of adultery; that in this case, the husband can no more by pardoning the wife stop the prosecution in regard to the accomplice; that he could not stop the effects of the sentence which should have come against him.

(e) Had constrained or induced her to prostitute herself or had instigated or favoured the prostitution.

---

7 Art. 357.
8 Para. 172
9 P.P. 643, 644.
10 United States v. Withier, 5 Dill., 35.

CHAPTER X.

Consent as a Justification.

Consent as a ground of exemption from criminal liability.

183. Consent has its positive operation in cases in which there is no room for a negative operation. Thus, in the case of offences, of which the absence of consent is not an essential component, consent often operates as a ground of non-liability. This effect of it is not restricted to any particular class of offences. The Indian Penal Code recognizes it to its fullest extent, and broadly provides as a general rule that nothing is an offence by reason of any harm which it may cause to a person who has given consent to suffer that harm or to take the risk of that harm. The word harm is used in the Indian Penal Code in a most comprehensive sense, and therefore the exemption from criminal liability on the ground of consent will not be restricted to acts causing physical injury, but extend to all private criminal acts, whether they affect body, mind, reputation or property. To illustrate the rule, the authors of the first draft of the Indian Penal Code say:[1] "If Z, a grown man, in possession of all his faculties, directs that his valuable furniture shall be burned, that his pictures shall be cut to rags, that his fine house shall be pulled down, that the best horses in his stable shall be shot, that his plate shall be thrown into the sea, those who obey his orders, however capricious those orders may be, however deeply Z may afterwards regret that he gave them, ought not, as it seems to us, to be punished for injuring his property. Again, if Z chooses to sell his teeth to a dentist, and permits the dentist to pull them out, the dentist ought not to be punished for injuring Z's person. So if Z embraces the Mahomedan religion, and consents to undergo the painful rite which is the initiation into that religion, those who perform the rite ought not to be punished for injuring Z's person."

Most Legislatures ignore this effect of consent altogether, and some jurists even deny it in express words. Thus Breithaupt in his work on *Volenti non fit injuria*, comes to the conclusion that *Die Verletzung des Einwilligenden im Allgemeinen, vom rein*

[1] Note B annexed to the draft.

wissenschaftlichen Standpunkt aus behandelt, in allen den Fällen, wo das "invito laeso" nicht das einzige ausschliessliche Deliktsmerkmal bildet, wo also nicht auf Grund der ertheilten Einwilligung überhaupt das Zustandekommen eines Verbrechens verhindert wird, der betreffenden Handlung nicht den Charakter der Rechtswidrigkeit nimmt und somit die Strafbarkeit des Verletzenden nicht ausschliesst.[2] [(a)]

Practically, however, effect is given to consent as a ground of non-liability in every system of law, and the practical conclusions even of Breithaupt are much the same as those of the Indian Legislature. Thus he also holds surgical operations to be free from criminal liabilty, though on the ground, that the act causing the injury in such cases is done without any criminal or other inimical intent, and directly for the benefit of the person injured,[3] a ground that will justify an operation on a person even against his consent. In the case of slight bodily injuries also, he admits their non-penality, though in an indirect way, and as a result of a rule of procedure. Thus speaking of the question of the effect of consent on the act of causing them, he says that it is settled *weil diese ein Antragsdelikt ist, und man sicherlich annehmen muss, dass die ertheilte Einwilligung einen Verzicht auf die Ausübung des Antragsrechts enthält. Ein gegentheiliges Resultat würde allerdings in diesem Falle sehr merkwürdig sein. Welcher Richter würde wohl denjenigen bestrafen, der einem Anderen mit dessen ausdrücklicher Einwilligung eine kräftige Ohrfeige gegeben hat, nachträglich aber von diesem hierfür gerichtlich belangt wird. Wenn der Gesetzgeber bestimmt, dass die Verfolgung einer wider Willen zugefügten Körperverletzung nicht eintreten darf, auf deren Bestrafung Jemand nach der Verletzung Verzicht geleistet hat, so ist umsoweniger nach der 'ratio legis' eine strafrechtliche Ahndung denkbar, wenn der Betreffende vor der Verletzung durch Ertheilung der Einwilligung seinen Verzicht auf Bestrafung erklärt hat. Hier ist also die Straflosigkeit nicht in Anwendung der Regel volenti non fit iniuria eine Folge der*

(a) The injury to a consenting person in general, if dealt with from a purely scientific point of view, does not remove from the act in question its character of illegality, and accordingly does not exclude the punishment of the injuring person in all those cases where the "*invito laeso*" does not form the one exclusive symptom of the delict, that is to say where on the ground of the consent which has been given, the very existence of the offence is not altogether prevented.

[2] P. 36.

[3] P. 63.

Einwilligung, sondern des in letzterer liegenden Verzichtes auf Ausübung des Antragsrechtes.(b)

Principle of the exemption from liability.

184. Nor is it difficult to explain the principle underlying the exemption from liability on the ground of the positive operation of consent. In explaining that principle, the authors of the Indian Penal Code in the Note B annexed to their draft of the Code say: "It is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions. It is by no means true that men always judge rightly of their own interest. But it is true that, in the vast majority of cases, they judge better of their own interest than any lawgiver, or any tribunal, which must necessarily proceed on general principles, and which cannot have within its contemplation the circumstances of particular cases and the tempers of particular individuals, can judge for them. It is difficult to conceive any law which should be effectual to prevent men from wasting their substance on the most chimerical speculations, and yet which should not prevent the construction of such works as the Duke of Bridgewater's canals. It is difficult to conceive any law which should prevent a man from capriciously destroying his property, and yet which should not prevent a philosopher, in a course of chemical experiments, from dissolving a diamond, or an artist from taking ancient pictures to pieces, as Sir Joshua Reynolds did, in order to learn the secret of the colouring. It is difficult to conceive any law which should prevent a man from capriciously injuring his own health, and yet which should not prevent an artisan from employing himself in callings which are useful and indeed necessary to society, but which tend to impair the constitutions of those who follow them, or a public-spirited physician from inoculating himself with the *virus* of a dangerous disease. It is chiefly, we conceive, for this reason, that almost

(b) On the ground that this is an offence punishable only on a charge, and we must certainly suppose, that the consent which has been given, contains a renunciation of the exercise of the right. An opposite result in this case would certainly be very remarkable. What Judge would punish a man who had given another a sound box on the ear with his consent, but who was subsequently charged by that other for it. If the legislator ordains that there may not take place the prosecution of a bodily injury committed against the will of a person, the punishment of which has, however, been renounced by the injured after the injury, then a penal prosecution according to the *ratio legis* is still less conceivable, when the person in question has declared a renunciation of the punishment by giving consent already before the injury. The immunity from punishment is here accordingly not on account of the rule *volenti non fit injuria*, and therefore a consequence of consent, but on account of the renunciation of the exercise of the right of bringing a charge which is involved in the latter.

all Governments have thought it sufficient to restrain men from harming others, and have left them at liberty to harm themselves."

Restriction of the rule as to non-liability on the ground of consent.

185. The rule, though of a wide application, is subject to several restrictions and exceptions, specially in regard to offences against person. For consent to justify or excuse the commission of an offence affecting one's person, it must of course be such as is recognized to be adequate for the purposes of the criminal law generally, thus having all those objective and subjective qualifications which are referred to in S. 90 of the Indian Penal Code, and have been explained above in Chapters VII and VIII, without which it must be deemed non-existent, and which render it quite inoperative in cases in which the absence of consent is the gist of the offence. That, however, is not enough, and to render it a ground of non-liability for other offences, it should fulfil such other requirements also as may be determined with a view to secure that consent is given after full deliberation, and to minimize the chances of the abuse of the liberty allowed to individuals of suffering harm. It must be given, generally speaking, either by a person of more than the ordinary maturity of age required for valid consent, or for the benefit of the individual affected. These restrictions are in the Indian Penal Code laid down in SS. 87, 88 and 89, which deal with the cases in which consent is held to justify or excuse acts that would otherwise be criminal, on account of the harm caused, or intended or known as likely, to be caused by them. S. 87 refers to general cases of harm, while S. 88 deals with acts done for a person's benefit, and S. 89 with cases in which the person to whom the harm is caused or contemplated to be caused is unable to give consent on account of the immaturity of intellect or the unsoundness of mind.

Restriction of the exemption from liability in regard to the age.

186. One of the conditions usually imposed is that the consent to the act should be given by a person thoroughly able to understand the harm likely to result from it. This ability is not the same in every case. Where the act causing harm is intended to do good to, and done for some benefit of, the person consenting to it, any unusual caution in respect to his capacity is not necessary. However, where the harm consented to is gratuitous, and not intended or known by the doer to be likely to be counterbalanced by any good or benefit,

a higher degree of capacity is required ; and this is particularly so in cases where the harm is not slight, but serious and such as no reasonable person ought or is likely to consent to. It is on this principle, that S. 87 of the Indian Penal Code, which contemplates the case of harm without any intention of doing good or causing benefit, expressly provides a higher age than usual for the giving of consent. The original draft of that section did not contain any such special provision, but provided for the consent being given by a person of twelve years of age. The Committee appointed in 1854 for the consideration of the draft of the Code, which recommended the enactment of that draft, considered that a person of that age, though competent to give consent in ordinary cases, should not be competent to consent to suffer or to take the risk of harm which is caused, or intended to be caused, or known to be likely to be caused, by an act done otherwise than for the benefit of the person consenting. To give such consent, they proposed that the person should be above eighteen years of age, which was the limit adopted in the final draft as enacted.

Consent will therefore not justify an act causing harm under that section, when the person consenting to the harm is below eighteen years of age. Thus even a private boxing match between two schoolboys under that age will be criminal, The consent of the master of the school, or even of the boy's parents or guardians shall not excuse the match, as their consent can have any operation under Sec. 89, only when the boy to whom the harm is caused is below twelve years of age, and the harm is for his benefit, which cannot always be said of a boxing match.

Restriction of the exemption from liability in regard to the nature of the harm caused.

187. No consent can, however, affect certain rights of individuals. What these rights are has not been definitely determined, but it is a general characteristic of theirs, that they cannot be affected without affecting the interests of the society. They are ordinarily called inalienable, as they cannot be parted with or thrown away by the individual to whom they pertain, though correctly speaking, consent does not involve the alienation or a transfer of any right.

Dr. Wharton enumerates among such rights, those to one's life, liberty, and the pursuit of happiness. It has been explained above in S. 5 that the interests of the society are affected by the harm to the individual generally in a manner only too remote for its recognition by law. And whatever difference of

opinion there may be in regard to the doctrine of the inalienability of rights to one's life or limb, it does not appear to have been seriously advocated by any jurists of eminence, that the inalienability can extend to liberty or pursuit of happiness.[3] (A) The doctrine has, however, been maintained with the greatest persistency in regard to life. It is not seldom extended to serious injuries to one's person on the ground that society has quite as much interest in the bodily health and integrity of its members as in their lives.

Some jurists deny the doctrine of the inalienability of rights in regard even to one's life or body. Thus Kessler is an eminent advocate of this denial. Certain German jurists having maintained that doctrine on the ground that such rights being *Wesensbestimmtheiten* (the essential elements) of *der sittlichen Persönlichkeit* (moral personality), he combats it, asking whether, the *sittliche Persönlichkeit mehr dadurch einbüsste, wenn sie auf den Besitz eines Zahnes, als wenn sie auf den ihres Vermögens verzichtet.*[4(c)] In another place in the same work[5] Kessler, in speaking of the observation that the *volenti non fit injuria* is not applicable in the case of bodily injuries, terms it as an *irrige Voraussetzung* (wrong supposition).

The question has been considerably discussed by other jurists also. Stübel, for instance, maintained the non-imputability of

(A) Dr. Wharton exemplifies the inalienability of the right of liberty by a reference to the invalidity of the agreements by a person for absolutely giving up the exercise of his business capacity. This invalidity is, however, not on the ground that liberty is an inalienable right to the injury of which one's consent is ineffective, because an agreement not to do business in particular localities will also be liable to the same objection, and Dr. Wharton himself admits that an agreement of that sort will be sustainable. It is even doubtful whether an agreement to give up a certain right can be considered an injury, and no question as to the alleged injury can arise while the person making the agreement is willing to abide by it. There can be a question of the violation of liberty only when the person making the agreement wants to act in contravention of his agreement, and at that time there will be no consent of his to any injury to be done to him; unless of course consent is treated as such only when it is given irrevocably. There is no ground, however, for such a restriction of the term consent, and the invalidity of the agreement in cases in which it is invalid is due not to the fact of the consent to an injury affecting the liberty of the person consenting being inoperative, but to the requirements of the public policy which does not approve of an absolute restriction of liberty in such cases, though it allows of a partial restriction thereof.

As an instance of his views, Dr. Wharton observes: "Should it appear that incarcerations are effected, even by consent, by ecclesiastical or medical authority, of persons whose liberty is thus wrongfully destroyed, the fact of consent could not, if the doctrine here advanced be correct, be used as a defence, when such party seeks release."[6] He does not cite any authority however for this proposition, and it appears that the absence of consent is the very essence of incarceration, and that there can be no incarceration of a person who gives his consent to be so incarcerated. If the consent is not to incarceration, there can of course be no question as to the ineffectiveness of consent on the ground of the inalienablity of the right of liberty.

(c) Loses more in giving up the possession of a tooth than in renouncing that of wealth.

[3] I Whart. Cr. L., 160.
[4] Kess. Einw., 4.
[5] P. 95.
[6] I Whart. Cr. L., 162.

suicide on the general principle of *volenti non fit injuria*. Hepp argued against it. There was a difference of opinion even as to whether the doctrine of the inalienability was based on the duties which a man owed to himself, or on those which he owed to others. The latter view was generally approved, but even the soundness of that was assailed on the ground principally, that if it were established that society had a right to the preservation of ones' life in spite of himself, it must follow as an inevitable consequence that society has a right of punishing intemperance and even emigration; and it was chiefly that ground that weighed with Boehmert in his decision against the penality of suicide and homicide by consent.

Harm to one's life among ancients.

188. In early times, indeed, a person could consent to any harm to himself. His life and liberty like his money and his clothes were all his own. Murder was only a tort which could be expiated for by a pecuniary compensation to the heirs of the deceased; and according to the Mahomeden law, the consent of the heirs can even now excuse the extreme penalty in spite of the state. In some nations and in some cases, suicide was even honored; while in others though not punished, it was condemned. Thus in Greece, it was not made a punishable offence, but declared to be a bad act. Plato and Pythagoras pronounced against it, and Calcante opposed the cremation of the body of Ajax to save the holy fire being profaned by the remains of a suicide; burial being assigned to such persons as a dishonorable mode of disposing of the dead.[7] In the early days of Roman and German civilization also, a person could consent to the infliction of death on himself, and killing a person at his request was no offence.

It was not punished even during the time of the Republic among Romans. Montesquieu in his Spirit of Laws says[8] *il n'y avait pas de loi qui punit ceux qui se tuaient eux-mêmes. Cette, chez les historiens, est toujours prise en bonne part et on ne voit jamais de punition pour ceux qui l'ont faite.*[(d)] The Roman law, reflecting the principles of Stoic philosophy considered suicide as an act of strength and virtue, *si in impatientiâ doloris, aut tædio vitæ, aut morbo, aut furore, aut pudore, mori maluit.*

(*d*) There was no law among them for the punishment of those who killed themselves. This act was always taken in good part by historians, and one never sees those who have done it punished.

[7] Carr. Prog., Art. S. 1152 (n).

[8] Book xxix, Ch., 9.

It is sometimes considered that suicide was an offence under the Emperors, being punished with forfeiture of goods; but it appears that even then forfeiture was allowed only in cases in which a person being charged with some offence punishable with forfeiture of goods attempted to avoid the forfeiture by suicide.[9] It was in such a case not the suicide that was punished, as the offence which preceded it. It was on this very ground that the heirs of the person committing suicide were allowed to avoid the forfeiture by showing that he was innocent of the preceding offence he was charged with. It may thus be affirmed that the suicide *quantunque appositamente commesso per nuocere ad altri, non punivasi neppure dai Romani; poichè altro essi non facevano se non impedire che il danno agognato dal suicida si consumasse.*[10] (e)

Influence of Church and State on harm to one's life.

189. The influence of the Christian and the Mahomedan religions encouraged the notion of the sanctity of the human life. They both taught that a man's life was out of his control, and, as it were, exclusively of and for God. The church resuming the Jewish traditions which deprived of sepulture the remains of those who committed suicide, forbade the celebration of mass over them, and their burial with a religious pomp. The Christian religion made its effect felt not only in the manners of the people, but also in their laws. Under its influence, secular legislation added temporal penalties to the religious, the forfeiture of the property left by the suicide to the denial of burial to his remains. These penalties applied to all, excepting only those who laid hand on themselves while mad or even *sujets á des égarements d'esprit;* and forfeiture was sometimes restricted to those who did that to avoid the shame of a condemnation. The Canonical law considered suicide not only as a crime but as a homicide, *est verè homicida et reus homicidii cùm se interficiendo innocentem hominem interfecerit.*

This attitude of the Church materially restricted the power and the practice of consenting to one's death. The increasing importance of the State and its public character helped to strengthen the same conclusion, by subordinating human life

(e) though committed with the object of injuring another, was not punished even among the Romans, because they did nothing but prevent the consummation of the loss aimed at by suicide.

[9] Carr. Prog., Art. 1407 (n).

[10] Hommel., 127.

to the State. Stoics argued against that view, but it was accepted even in the Justinian Code. "It is," says Locke in his Essay on Civil Government,[11] "out of a man's power so to submit himself to another as to give him a liberty to destroy him; God and Nature never allowing a man so to abandon himself as to neglect his own preservation, and since he cannot take away his own life, neither can he give power to another to take it."[12] "Nobody," he says in another place, "can give more power than he has himself, and he that cannot take away his own life, cannot give another power over it."

A person's life is thus now generally regarded as belonging to the State, and even those who deny the doctrine of the inalienability of rights altogether, admit that a person's life ought to be preserved in spite of the person himself. It is repeatedly laid down by judges[13] as well as text-writers that a man cannot consent to the taking away of his own life. His life is not his to take or give away. It would be criminal in him to take it, and equally criminal in any one else who should deprive him of it with his consent. Cooley in his work on Torts, after observing that, says:[14] "The person who, in a duel, kills another, is not suffered to plead the previous arrangements and the voluntary exposure to death by agreement, as any excuse whatever. The life of an individual is guarded in the interest of the State and not in the interest of the individual alone."

Immunity of suicide from punishment.

190. Suicide was punished in France before the Revolution in 1789, which, however, abolished it entirely, and proclaimed the principle of absolute human liberty, and of the indifference of suicide before justice and society. The present French, Austrian, German, and Italian Penal Codes are all silent as to the punishment of suicide; and it is urged in favour of the immunity from punishment of suicide, that the injury resulting from it to the person killed can neither be estimated nor taken into account; that the injury to the survivor is generally small; that it produces no alarm; and that it cannot be repeated.

Francesco Carrara maintains that the *imputabilità politica* of suicide as a special *delit* should not only be admitted but

[11] P. 347.
[12] Ch. IV, S. 23.
[13] McCue *v.* Klein, 60 Tex., 168. Willey *v.* Carpenter, 15 L. R. A., 856.
[14] P. 187.

maintained ; as no one can deny that homicide, even though committed by oneself, is a thing fruitful of *danno politico, sì per la perdita che incontra la società di quel cittadino, sì per il mal esempio che induce ; onde è a temersi per la natura imitatrice dell'uomo, che il propricidio si ripeta e si renda frequente, con grave sospetto e dolore delle famiglie e detrimento della prosperità nazionale.*[15] (f)

There are other jurists and lawyers also, who see in the suicide an act socially and morally punishable, *qui prive la collectivité d'un de ses membres, et, par la contagion de l'example, se répercute dans tout le milieu social.*[16] Gray, C. J., in delivering the opinion of the Supreme Court of Massachusetts in *Com.* v. *Mink*,[17] even said that " self-destruction is doubtless a crime of awful turpitude ; it is considered in the eye of the law of equal heinousness with the murder of one by another." The weight of opinion is, however, in favour of the immunity of suicide from punishment.

Suicide not an offence, as it does not contemplate injury to any rights.

191. The immunity of suicide from punishment has sometimes been based on the ground that there can be no crime unless there is an injury to a right, and a person has no rights over himself, and therefore killing oneself does not violate any right. Thus R. Garraud observes that the man who commits suicide does not violate *aucun rapport juridique, ni avec lui-même puisque tout rapport suppose deux termes, ni avec la société vis-à-vis de laquelle il n'a pas l'obligation de vivre.*[18]

If this were correct, however, a person committing suicide with a view to avoid military service would certainly be punishable, at least in systems of law in which a person causing hurt to oneself with that object is punished, as in such a case there is clearly found *la lesione del diritto della patria, e delle successive reclute.*(g)

(f) Political damage, as well through the loss of that citizen, encountered by society, as through the bad example set by it ; whence it is to be feared owing to the imitative nature of man that suicide may repeat and render itself frequent, causing grave suspicion and grief to the families and detriment to national prosperity.

(g) the injury to the right of the country, and of the recruits who are taken as the next in order.

---

[15] Carr. Prog., Art. 1152.
[16] IV Gar. Dr. Pen., 313.
[17] 123 Mass, 422.
[18] IV Gar. Dr. Pen., 313.

Francesco Carrara considers that the impunity of suicide is not sufficiently accounted for by the theory of the non-violation of rights, specially as all good legislations do not admit the penality of suicide even where it tends to injure any rights ; that the soldier who tired of fighting in lieu of mutilating attempts to kill himself, is not punished for the attempted suicide .... though he thereby offends precisely against the same rights as he would have injured by mutilating himself; and the modern schools and legislations are generally agreed on the absolute immunity from punishment of suicide even when it appears to be committed with a view to injure the rights of third persons, or in those special conditions in which bodily injury to oneself is undoubtedly punishable.[20] The basis of exemption, according to him, is rather the absence of an intention to injure any rights, the absence of a criminal intention or what is known as *dolus*. He thus observes that it can be said that he who kills himself *non ha l'animo di nuocere ad altri, od eludere un diritto altrui: il fallito non si uccide per defraudare i creditori, ma per sottrarsi al disonore che lo minaccia. Laddove il soldato che si mutila, evidentemente intende a defraudare la legge, e nuocere così alla patria che ha diritto al suo servigio militare, ed alla successiva recluta costretta a servire in sua vece ; mirando così procacciarsi un vivere ozioso ed inerte a dispetto della legge.*[21] (h)

Suicide not punishable as indicative of unsoundness of mind at the time of its commission.

192. The immunity of suicide from punishment is sometimes based on the presumption of its author committing the act in a state of madness (*furore*). Suicide is generally held to argue either insanity, or a mind so distracted by misfortune, disease, or unhappiness, as to make the offender an object rather of pity than of punishment. R. Garraud, for instance, says:[22] *l'extrême difficulté de savoir si la résolution du suicidé a été ou non exécutée dans la plénitude de ses facultés mentales nous paraît concluante dans le sens de l'impossibilité d'établir une répression du suicide. Celui qui attente à sa vie n'a pas, en effet, le plus souvent, cette liberté d'esprit et cette maîtrise de soi-*

(h) Has not the intention of injuring another, or evading the right of another: the bankrupt does not kill himself to defraud the creditors, but to save himself from the dishonor which threatens him. Whereas the soldier who mutilates himself, evidently intends to defraud the law, and so to injure the country, which has a right to his military service, and the successive recruit forced to serve in his place, intending thus to procure for himself an idle and inert life in spite of the law.

[20] Carr. Prog., Art. 1407.

[21] Carr. Prog., Art. 1407.

[22] IV. Gar. Dr. Pen., 314.

même qui sont les conditions de l'imputabilité pénale. Quel que soit le motif qui l'a déterminé au suicide, s'il se tue, c'est toujours parce que sa raison a été plus faible que son mal moral ou physique.(i)

Francesco Carrara[23], however, dissents from this view. Ferräo, the great Portuguese Jurist, has argued strongly against it in his work on the theory of Penal Law,[24] pointing out that the instinct of self-preservation is to be found even in animals, that brutes do not commit suicide, that among savage tribes suicide is unknown, that statistics show that suicide is most rare among minors and old men, and that, therefore, suicide is not a consequence of the defect of reason, but, on the other hand, an effect of reason which grows and progresses with it ; that the life of a brute is constituted only of a physical force, and it is not possible that a force should act against itself ; that the life of man is constituted of two distinct forces, namely, the spiritual and the physical, which usually act, helping each other, but that in certain contingencies there grows up an antagonism between them, when the spiritual force acts to the destruction of the corporal force, and the greater the power acquired by spiritual force, the more frequent is the suicide.

Inadvisability of punishing suicide.

193. A more real ground for the immunity from punishment of suicide is that a dead person cannot be adequately punished with advantage. The suicide itself, which the law would otherwise punish with its utmost rigour, puts the offender beyond the reach of the infliction of all punishment. M. Bertauld in his *Cours de Code Penal*[25] observes that the man who disposes of his life *se derobe a la répression*. R. Garraud in his treatise on French Penal Law observes that the cause of the impunity of the suicide is suicide itself. *La mort empêche tout procès.*[26]

Livingston excluded suicide altogether from his Code, and in defence of that in his Introductory report said: "Suicide can never

(i) The extreme difficulty of knowing if the resolution of the person committing the suicide has been executed in the fulness of his mental faculties or not, appears to us to be conclusive in the sense of impunity of establishing a repression of suicide. He who injures his own life has not, in fact, most often that liberty of spirit and that mastery over himself which are the conditions of penal imputability. Whatever may be the motive which has determined him to suicide, if he kills himself, it is always because his reason has been more weak than his morals or his body bad.

[23] Car. Prog., Art. 1407.
[24] VII. 44.
[25] P. 370.
[26] IV. 314.

be punished but by making the penalty (whether it be forfeiture or disgrace) fall exclusively upon the innocent. The English mangle the remains of the dead. The inanimate body feels neither the ignominy nor pain. As a natural result, the mind of the innocent survivor alone is lacerated by useless and savage butchery, and the disgrace of the execution is felt exclusively by him. The father, by a rash act of self-destruction, deprives his family of the support he ought to afford them ; and the law completes the work of ruin, by harrowing up their feelings ; covering them with disgrace ; and depriving them by forfeiture of their means of subsistence. Vengeance is unknown to our law ; it cannot, therefore, pursue the living offender, much less, with impotent rage should it pounce, like a vulture, on the body of the dead, to avenge a crime which the offender can never repeat, and which certainly holds out no lure for imitation ; the innocent, we have assumed, should never be involved in the punishment inflicted on the guilty. But here, not only the innocent, but those most injured by the crime, are exclusively the sufferers by the punishment. We have established as a maxim, that the sole end of punishment is to prevent the commisson of crimes; the only means of effecting this in the present case, must be by the force of example; but what punishment can be devised to deter him, whose very crime consists in the infliction upon himself of the greatest penalty your law can denounce ? Unless, therefore, you use the hold which natural affection gives you on his feelings, and restrain him by the fear of the disgrace and ruin with which you threaten his family, your law has no effective sanction; but humanity forbids this." Most of the modern laws have generally repudiated confiscation which to reach the guilty punishes his family. Nor do present manners tolerate penalties which unable to reach the guilty were inflicted only on dead bodies. *La punition ne pourrait donc être, en définitive, qu'une flétrissure publique ; mais quel serait l'effet de ce blâme dépourvu de sanction, de cette infliction morale prononcée sur une tombe.*[27 (j)]

Ferräo observing that this is not consistent with the principle on which rewards are given for the dead, says that you decree glory for a soldier who encounters death assailing

(j) The punishment could be definitely only a public stigma ; but what will be the effect of this blame deprived of sanction, of this moral infliction pronounced over a tomb.

[27] III Adoph. and Hélie, 477.

the trenches of the enemy, and if you decree that glory and grant medals to his corpse to encourage others to imitate him, you ought also to decree infamy against the suicide to prevent others from following his example and causing such damage to the society.[28] R. Garraud,[29] "on the other hand, observes that even if this may stop a few suicides, how many others would be provoked by *des recherches indiscretes*, by the publication of enquiries which necessarily must result from it, on account of the force of imitation or the contagion of example. In expressing his doubts about the efficacy of the punishment of suicide, he says: *Celui que ne peuvent arrêter ni l'horreur de la mort, ni les liens les plus chers de la nature, ni les craintes d'une éternité malheureuse ne saurait être retenu par des lois qui n'atteindront que son cadavre ou sa mémoire. Dira-t-on que s'il méprisait ces lois pour lui-même, il les redouterait, du moins, pour sa famille, sur laquelle rejaillirait l'ignominie de la condamnation?*[(k)]

Mellio in his 'Institutions of the Criminal Law of Lusitania' says:[30] *Hoc delictum impune est, vel quia auctor potestati humanae jam non subditur, vel quia quem propriae vitae, uxoris et cognatorum amor ab eo parando non deterret, minus deterrere potest pœna post mortem inflicta.* Francesco Carrara also observing that the sole consideration of political convenience is a sufficient consideration for excluding suicide from the category of offences, says:[31] *La impotenza di irrogare contro il cadavere una pena che non abbia del barbaro o dell'ingiusto: la commiserazione verso la famiglia già troppo afflitta e avvilita: la inutilità di rafforzare con la esemplarità di una pena l'amore della propria vita bastantemente radicato in noi dalla natura; sono considerazioni che a tutta ragione persuasero molti legislatori contemporanei a passare sotto silenzio cotesto fatto; e conseguentemente a non elevarlo alla condizione di delitto.*[(l)]

(*k*) He whom neither the horror of death, nor the dearest ties of nature, not the fear of an unhappy eternity could not prevent, would not be restrained by the laws which reach only his corpse or his memory. One will say, that if he scorns the laws for himself he would fear them at least for his family, over which the ignominy of the condemnation would reflect itself.

(*l*) The inability of inflicting on a dead body a penalty which would not be barbarous or unjust; the sympathy with the family already too much afflicted or humbled; the uselessness of enforcing the love of one's life by means of penalty as an example, sufficiently implanted in us by nature; are considerations which in all reason have persuaded several contemporary legislators to pass over this act under silence; and consequently not to elevate it to the condition of a delict.

---

[28] VII. Theory Penal Law, 46.
[29] IV. Gar. Dr. Pen., 314.
[30] Tit I., S. 23.
[31] Carr. Prog., Art. 1155.

Suicide in English law.

194. By the common law of England, suicide was considered a crime against the laws of God and man, for which the lands and chattels of the person committing it were forfeited to the king; his body was denied all Christian rites, and allowed only an ignominious burial in the highway with a stake driven through; and he was deemed a murderer of himself, and a felon, *felo de se*. The forfeiture was abolished along with that for other felonies by the Forfeiture Act, 1870; section I of which provided, that "no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat." In regard to the burial also, the Interments (*felo de se*) Act, 1882, provides, that "it shall not be lawful for any coroner or other officer having authority to hold inquests to issue any warrant or other process directing the interment of the remains of persons against whom a finding of *felo de se* shall be had in any public highway, or with any stake being driven through the body of such person," but that he would be interred where he would have been interred if the verdict of *felo de se* had not been found against him. That Act did not, however, authorize the performing of any of the rites of Christian burial on the interment of the remains of any such person, and is not to be taken to alter the law or usage relating to the burial of such persons. The only penalty now attending the offence of *felo de se* is thus a denial of the right of Christian burial. Forfeiture of goods not being allowed in the United States, suicide is practically not punishable there, yet its criminality is recognized whenever the question has a bearing collaterally; as, for example, when one who in attempting to kill himself, accidentally kills another, is held guilty of criminal homicide.

Penality of attempt of suicide.

195. While suicide was deemed a heinous offence, an attempt to commit it was sometimes punished even as voluntary homicide; *punitur tamen perindè ac si delictum consummasset*. With a change in the views about suicide, its attempt also ceased to be punishable. As a general principle, an attempt to do what is not an offence cannot be deemed an offence. It is thus no longer punishable in France, Germany, Italy and some other countries.

The chief objection against its penality is that a threat of it

si aggiungeva un nuovo motivo di uccidersi a colui che già tanti ne aveva da aver tentato la propria strage.[32] (m)

It is sometimes attempted to punish an attempt to commit suicide as that to commit homicide, suicide being deemed a species of homicide. Pessina went even to the length of requiring that the attempt at suicide should be punished with the same severity also. Boehmert, Francesco Carrara and others consider that view as fundamentally wrong, on the ground that suicide is not comprised in the genus homicide. Besides in countries where, as in France, an attempt is generally liable to the same punishment as is fixed for the principal offence, the result of treating an attempt at suicide as an attempt of murder may be to condemn to death the person who had in vain attempted to kill himself; and thus the executioner would in compliance with law do the act which he had attempted against law unsuccessfully.[33]

In England, an attempt to commit suicide is not deemed an attempt to commit murder, but only a misdemeanor triable at Quarter sessions.[34] In *Reg. v. Doody*,[35] the prisoner was indicted for unlawfully attempting to commit suicide, and Wightman, J., told the jury that "the offence charged constituted, beyond all doubt, a misdemeanor at common law." The rule appears to be the same generally in the United States. Thus Dr. Bishop says:[36] "If one attempts to commit self-murder and fails, is he indictable for misdemeanor as though the attempt were on a third person? There would seem to be no ground for distinguishing the two cases, or distinguishing the common law of England and of our States on this question. And by the common law as administered in England, this is an indictable misdemeanor."

The New York Penal Code provides[37] that a person who with intent to take his own life, commits upon himself any act which is dangerous to human life, or which, if committed upon or towards another person and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide; which will be a felony punish-

(m) Would add a new motive to kill oneself for him who had already had so many as to have attempted his own destruction.

[32] Carr. Prog., Art. 1155.
[33] Carr. Prog., Art. 1155 (n).
[34] Reg. v. Burgess, 9 Cox C. C., 247.
[35] 6 Cox C. C., 463.
[36] II Bish. Cr. L., 683.
[37] S.S. 174, 178.

able by imprisonment for two years, or by a fine not exceeding one thousand dollars, or both. It has generally been held that in the absence of a special statutory provision, where suicide is not a crime, an attempt to commit suicide cannot be a crime; and that a provision for the punishment of an attempt, does not make suicide itself a criminal offence.[38] But in some of the States, it has been held to be punishable even in the absence of a statutory provision. Thus in Massachusetts,[39] it was held to be an offence, on the ground that suicide though not technically a felony, "being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal."

Penality of abetment of suicide.

196. As a rule, suicide not being punishable, its abetment also is not punishable on mere general principles. Nor is there any special provision for the punishment of the abetment in the German, French, and Austrian Penal Codes. As a result of this, those who have instigated one to the suicide, those who have aided or assisted him in the acts of preparation for it, those who have given instructions to commit it or furnished means for its execution, for example, the arms, the poison, are all free from punishment. This immunity is, however, generally disapproved. The abetment, in this case, is worse than the principal offence, and has none of its excuse. R. Garraud in his *Traite Du Droit Penal Francais*[40] observes that this participation is an act socially and morally reprehensible, *qui ne peut s'expliquer, comme l'acte du suicidé, par un égarement d'esprit, un trouble de l'intelligence.* So that the legislature, continues R. Garraud, even if unwilling to make suicide an offence, has the right and the duty of punishing under the special designation of "participation in the suicide of another" those who should provoke any one to commit suicide or co-operate in it. In the Hungarian Penal Code, and in the Penal Code of the Pays Bas, there are special provisions for the punishment of an abetment of suicide. The Spanish Penal Code [41] expressly provides for the punishment of a person helping an individual to commit suicide.

The Italian Penal Code[42] specially provides for the punishment of a person who should have persuaded (*determina*) another to commit suicide, or given him assistance in commit-

38 *Vide* Darrow *v.* Family Fund Soc., 116 N. Y., 537.
Meacham *v.* New York Benevolent Assoc., 120 N. Y., 237.

39 Com. *v.* Dennis, 105 Mass., 162.
Com. *v.* Mink, 123 Mass., 422.

40 IV. 315.

41 S. 335.

42 S. 370.

ting it, provided, of course, that the suicide is committed. Francesco Carrara in justifying the punishment of the abetment of suicide by participation says: *E ciò perchè sebbene io non abbia diritti sopra me stesso, e nel fatto di uccidermi non si possa ravvisare, quanto a me, la violazione di un diritto, pure bisogna bene in me riconoscere un diritto sopra gli altri, per il quale essi sono tenuti a rispettare la mia vita, ed a non procacciare che la medesima sia violentemente troncata, fosse anche per la stessa mia mano. Chi volontariamente coopera per qualsivoglia modo alla morte di un uomo, viola senza dubbio il dovere giuridico che egli ha di rispettare la vita altrui, e di astenersi da qualunque atto che possa menomarla. Nè da cotesto dovere giuridico lo scioglie il consenso della vittima; perchè è inattendibile, cadendo sovra cosa della quale essa non è libera dispositrice. Nè vi è ragione giuridica per dirlo sciolto da tale dovere per la mera accidentalità materiale che lo strumento del quale egli si valse a procacciare la morte altrui fosse piuttosto la mano della stessa vittima anzichè la propria, o quella di un terzo. La imputabilitá dello strumento non è condizione necessaria alla imputabilità del motore detto strumento. Che io per uccidere altri mi valga di scellerato sicario, o di un pazzo, o di un fanciullo, o di un animale, o di un ordigno meccanico, o della mano del mio stesso nemico, torna all' istesso. Io ho voluto, l'altrui morte; l' ho voluta cagionare con un atto esterno da me diretto a quel fine: la ho effettivamente cagionata con tale atto. Sono dunque responsabile di una volontaria violazione di diritto. Per eliminare da me codesta responsabilità (sia nella uccisione, sia nel danneggiamento del corpo altrui) non vi è che una formula possibile: voglio dire quella che renda giuridicamente operativo di cessazione di diritto il consenso del paziente. Ma cotesta formula è inaccettabile in faccia ai principii fondamentali del diritto naturale* (l) [43]

(l) This is because though I have no rights over myself, and in the act of killing myself there cannot be found, in regard to myself, the violation of a right, yet it is very necessary to recognize in me a right over others, by which they are bound to respect my life, and not to procure that the same may be cut off violently, even though it may be by my own hand. He who co-operates in whatever manner in the death of a man, without doubt violates the juridical duty which he has to respect the life of another, and to abstain from every act which can diminish it. Nor does the consent of the victim absolve him from that juridical duty, because it is immaterial, bearing as it does on a thing which he is not free to dispose of. Nor is there a juridical reason for saying that he is absolved from such duty by the mere material accident that the instrument of which he wants to make use in procuring the death of another is rather the hand of the victim himself, than his own or that of a third person. The imputability of the instrument is not a necessary condition of the imputability of the person using the instrument. That to kill another I make use of a scoundrel, assassin, or of a madman, or of a

[43] Carr. Prog., Art. 1408.

Abetment of suicide in English law.

197. In the English law, the common law rule that an accessory before the fact could not be punished unless the principal was first tried and convicted, stood often in the way of the punishment of an abettor of suicide, except when he could be treated as a principal in the second degree. Thus in *Reg.* v. *Russell*,[44] and in *Reg.* v. *Leddington*,[45] the abetment by procuring the poison and by instigation was respectively held not to be cognizable by the courts as the principal was not triable, and an acquittal was recorded. Generally it was held, however, that if one persuaded another to kill himself, the adviser would be guilty of murder; and if a person took poison himself by the persuasion of another, though in the absence of the persuader, yet it would be a killing by the persuader; and he a principal in it, though absent at the taking of the poison.[46] The common law rule has, however, now been generally repealed, and an abettor of suicide will not escape punishment on account of it. It has been said: "If the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder of A by B, and I apprehend that if a man murders himself, and one stands by, aiding in and abetting the death, he is as guilty as if he had conducted himself in the same manner where A murders B."

In the United States, Dr. Bishop says:[47] "though a dead man cannot practically be punished, there may be collateral consequences, whether the murder is of one's self or another. If, under the common law as it was administered in England when this country was settled, one advises another to kill himself, and he does it in the presence of the adviser, the latter becomes guilty of murder, probably as principal of the second degree, but at all events as principal. And it is the same in our States. As suicide is felony, not misdemeanor, if it is committed in the adviser's absence, the latter at the common law goes free of punishment; because the principal, being dead, cannot be first convicted. In reason, on a question probably

child, or of an animal, or of a mechanica contrivance, or of the hand of my own enemy, comes all to the same. I have wished the death of another; I have caused it by an external act directed by me to that end: I have effectively caused such act. I am, therefore, responsible for the voluntary violation of a right. For to eliminate the said responsibility from me (whether of homicide or of bodily injury to another), there is no possible formula—I wish to say—one, which renders the consent of the passive subject juridically operative of the cessation of the right. Such a formula cannot be acceptable, however, in the face of the fundamental principles of natural law.

[44] 9 C. & P., 80 (n).
[45] 9 C. & P., 79.
[46] III Russ. Cr., 5.
[47] II Bish. Cr. L., 682.

not decided, the statutes which widely prevail among us, making the accessory before the fact in felony a principal felon, should, in the States wherein they have been enacted, be held to work a reversal of this doctrine, subjecting the instigator in these cases to punishment." The New York Penal Code thus provides, that a person who wilfully, in any manner advises, encourages, abets, or assists another person in taking the latter's life is guilty of manslaughter in the first degree, and if only in attempting to take the latter's life, he is guilty of a felony.[48]

And so far is the principle carried, that in *Com.* v. *Bowen*,[49] the abetment of suicide, committed even by advising a felon already condemned to death was held to be an offence. Parker, C. J., in charging the jury on that point, said: "The community have an interest in the public execution of criminals; and to take such an one out of the reach of the law is no trivial offence. Further, there is no period of human life which is not precious as a season of repentance. The culprit, though under sentence of death, is cheered by hope to the last moment of his existence. And you are not to consider the atrocity of this offence in the least degree diminished by the consideration that justice was thirsting for its sacrifice, and that but a small portion of Jewett's earthly existence could in any event remain to him."

It has been attempted to treat suicide as homicide in a few other cases also, as in the case of an attempt, but suicide though wicked and injurious to society is not to be compared with or deemed to fall within it, though the attempt to commit suicide may be punished as an offence *sui generis*.

Attempt and abetment of suicide in India.

198. The Indian Penal Code provides expressly for the punishment of an attempt to commit suicide, as well as for an abetment of it. The authors of the first draft of the Indian Penal Code proposed even to make it a culpable homicide by consent to voluntarily induce a person to put himself to death, and the provision was omitted finally, only because it was considered as likely to lead to difficulties by affording pretext for false charges.(B) The Code, however,

(B) Campbell, in commenting on the provision observed,[50] "that nothing was more common than for native women of all ages to throw themselves into wells on the merest momentary impulse of passion, excited generally by the most trifling causes, such as

[48] SS. 175 & 176.
[49] 13 Mass., 356.
[50] Indian Law Commissioners' First Report, Para. 260.

does not justify the voluntary causing of death in any case on the ground of consent.

Confusion of abetment of suicide with homicide of consenting person.

199. The abetment of suicide is sometimes confounded with homicide by consent. This is often due to the fact that it is frequently difficult to determine in individual cases whether there is only an abetment of suicide, or homicide by consent; and in some cases, the two acts are so close to each other that it is indeed impossible to determine the exact line between them with certainty. This difficulty however is not a sufficient reason for confounding acts essentially and juridically different from each other.[1]

In France, Adolphe and Hélie in their work on the theory of Code Pénal[2] say: *Est-il vrai, en premier lieu, qu'il n'y ait de suicide proprement dit que lorsqu'une personne se donne elle-même la mort? Est-il vrai que cet acte doive perdre cette qualification aussitôt que la mort part d'une autre main que la sienne? Cette assertion, qui repose uniquement sur l'étymologie du mot, ne paraît pas exacte: c'est la volonté qui fait le suicide, et non pas l'acte matériel de se donner la mort. L'homme qui de son propre mouvement se précipite à la bouche d'un canon, ou qui sans nécessité court au-devant des balles ennemies, cet homme ne sera-t-il pas suicide? Qu' importe que vous teniez vous-même l'arme qui va vous détruire, ou que cette arme parte par l'effet d'une machine que vous aurez préparée? Aura-t-elle un caractère différent parce que vous aurez déposé l'arme entre les mains*

an unexpected reprimand, a thwarted wish, the colic, &c., and those who are afflicted by such female folly, are as its alleged instigators, too often harassed most unjustly by the police, for fatal consequences produced by the deceased alone." And referring to that, the Commissioners observed, "We are inclined to think that the explanation by which inducing a person voluntarily to put himself to death is declared to be voluntary culpable homicide by consent, would give an opening to a great deal of vexation and oppression in the manner suggested by Mr. Campbell. The word 'inducing' is so comprehensive that it would afford ample verge and scope to malice and corruption to work safely in getting up pretended charges against innocent persons founded on circumstances in their domestic history which may be plausibly distorted, and in causing distressing inquiries thereupon into family matters. We are led to conclude that it will be better to omit the explanation. Cognizance would then be taken only of such cases of proposed inducement to suicide as clearly amount to murder. There may, indeed, arise cases in which it would be improper to treat the person who had induced another to commit suicide as guilty of murder, although the circumstances of the case might be clearly within the definition, and the purpose might be evident; as, for example, where the high-born native of India induces the females of his family to take poison in order to save themselves from pollution in an expected assault of a licentious soldiery, but such are cases to which—we agree with Sir J. Awdry—the prerogative of mercy would properly apply."

[1] Breithaupt, 44.

[2] III, 482.

d'une personne ignorante, aussi aveugle et dévouée que cette machine? N'est-ce pas votre volonté, sinon votre main, qui en pressera la détente? Eh quoi! un homme aura armé le bras d'un serviteur dévoué, il aura impérieusement exigé d'une aveugle amitié la préparation d'un poison, lui seul enfin aura médité sa propre mort et en aura fait les apprêts, ses instances n'auront vaincu qu'avec peine la résistance qu'on lui opposait, et l'on voudrait, pour apprécier cette action, faire abstraction et de son concours et de ses efforts, et ne voir que le fait d'un autre dans l'acte dont il a lui-même ordonné la perpétration! Non, la main étrangère dont il s'est servi, quelque criminelle qu'ait été son aide, n'a plus été qu'un instrument, une arme dont il a dirigé les coups; l'attentat ne peut changer de nature, parce qu'il a changé de mode d'exécution; son caractère n'est pas dans la forme extérieure de la mort, mais dans la volonté qui l'impose; dès qu'elle est le résultat de l'ordre de la personne homicidée, elle constitue un véritable suicide. [m] The fallacy underlying this is explained by Breithaupt who points out that there can be no will to cause the death in an engine used as a means of causing it, while it must necessarily exist in him who kills one with his consent; and that the hand of the person who kills another with his consent must be more than a tool directed by that other, being directed rather by the will of the former, and that therefore the act causing the death must be ascribed rather to him than to the person killed.[3]

(*m*) Is it true that there is suicide, in the proper sense of the word, only when a person has caused his own death? Is it true that this act ought to lose that designation, directly the death proceeds from a hand other than his own? This assertion, which rests only on the etymology of the word, does not appear exact: it is the will which makes the suicide, and not the physical act of causing death to oneself. The man who of his own accord precipitates himself before the cannon's mouth, or who without necessity runs in front of the enemy's balls, will he not be a suicide? What does it matter that you yourself held the weapon which was going to destroy you, or that that weapon was directed by the force of a machine which you had prepared? Will it have a different character, because you have placed the weapon in the hands of an ignorant person, as blind and devoted as that machine? Is it not your will, if not your hand, which will press the trigger of it? Eh what, a man should have armed the hand of a devoted servant, he should have imperiously required of a blind friendship the preparation of a poison, he alone should have finally meditated his own death, and should have made the preparations for it, his entreaties having with difficulty overcome the resistance which one opposed to him, and one would wish to appreciate this action, to make abstraction of his agreement and of his efforts, and see only the act of another in the action of which he has himself ordered the perpetration. No, the hand of the other, by which he is served, though it has been criminal in aiding him, has been no more than an instrument, an arm of which he has directed the blows; the assault cannot change the nature, because it has changed the mode, of execution; its character is not in the exterior form of the death, but in the will which imposes it; and as it is the result of the order of the person killed, it constitutes a veritable suicide.

---

[3] Breithaupt, 44.

So far is the confusion carried in England, that if two persons agree to commit suicide together, and only one dies, the survivor is held guilty of murder. In *Rex* v. *Dyson*,[4] the prisoner had cohabited with the deceased for several months previous to her death, and she was with child by him. Being penniless and in a state of extreme distress, they both went into a boat to drown themselves. There was some doubt as to whether he fell into the water intentionally or accidentally; but he struggled back to the boat, when he found that she had gone into water, and in spite of his efforts to save her, she was drowned; and the judges, on reference, observed that "if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example, in pursuance of their previous agreement, he was a principal in the second degree, and was guilty of murder." This observation was followed in *Reg.* v. *Alison*,[5] in which also the prisoner and the deceased had been living as man and wife, and being in great distress, agreed to poison themselves, and took laudanum, and she alone died. Patteson, J., held, "that if two persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will, in point of law, be guilty of the murder of the one who died." In *Reg.* v. *Jessop*,[6] the prisoner and the deceased purchased laudanum separately, but took it jointly, the prisoner having taken it first. Field, J., said: "It is contrary to the law of the land to commit suicide, and if two persons meet together and agree so to do, and one of them dies, it is murder in the other."

Abetment of suicide is really distinct from homicide by consent.

200. This confusion of abetment of suicide with homicide by consent appears to be clearly an error. All the English cases referred to in the preceding section fell clearly within the category of the former, as the act causing the death in them was the act of the deceased himself and not of his associate in crime. In European countries, and especially in France, they are usually treated as constituting abetment; and homicide by consent is restricted to cases in which the act of the associate causes the death. R. Garraud, for instance, observes that if two persons wishing to die together have sought for death in a double suicide, there are in reality two suicides and not two homicides. If then *le projet de s'enlever la vie venait à n'être exécuté que quant à l'une des personnes qui*

[4] Russ. & R., 523.
[5] 8 C. & P., 418.
[6] 16 Cox C. C., 204.

avaient formé ce projet, l'autre ayant manqué son coup, on ne pourrait poursuivre celle-ci, puisqu'elle n'aurait commis qu'une tentative de suicide. [7]

In Italy, Francesco Carrara refers to the case of two lovers who determine to kill themselves by means of poison or asphyxia caused by carbon, and jointly prepare the poisonous cup or the fatal room. Both voluntarily drink the contents of the cup or shut themselves up in the mephitic atmosphere, but the woman alone dies, and the man is saved. *Voi potrete obiettare a questo uomo la partecipazione all'altrui suicidio, ma non potrete mai obiettargli di essere autore di omicidio. La donna volontariamente prese il nappo di sua mano e trangugiò la pozione micidiale: la donna volontariamente si coricò nell' atmosfera mefitica. L'uno o l' altro atto essa fece, consapevole dell' effetto a cui correva incontro, e per fine di tôrre la vita al suo corpo. Tutta intera la sua personalità concorse all' atto: l'anima che deliberò e volle; il corpo che eseguì l'atto consumativo della strage. Essa è l'autrice della propria uccisione, l'amante non è che un partecipe o per preparazione o per consiglio.* [8] (*n*)

In Germany Wächter says[9] that *Der einen Einwilligenden Tödtende nicht blos Gehilfe bei einer That des Einwilligenden, sondern Urheber der Tödtung eines Dritten ist.*(*o*) Breithaupt in his work on *Volenti non fit injuria*[10] explains very clearly the distinction between abetment of suicide and homicide by consent. He says: *Derjenige, welcher einen Selbstmord begeht, ist selbstständig bei der Vernichtung seines Daseins thätig. Diese selbstständige Thätigkeit wird auch in dem Falle nicht aufgehoben, wo ein Anderer dem Selbstmörder zu seiner That Beihilfe leistet. Es wird also dadurch dass der Getödtete einen Anderen seine Selbsttodtung vorbereiten, sich bei ihrer Ausführung unterstützen, etc. lässt, an dem Kriterium des Selbstmordes nichts geändert. Der eingentliche Thäter ist und bleibt hier der Verletzte, der Getödtete;*

(*n*) You can charge this man with participating in another's suicide, but you can never charge him with being the author of a homicide. The woman voluntarily took the cup in her hand, and swallowed the deadly drink. The woman voluntarily shut herself up in the mephitic atmosphere. She did both the acts, conscious of the effects she pursued, and in order to set free the life from her body. All throughout, her own personality concurred in the act: the mind which deliberated and wished: the body which executed the act consummative of death. She is the author of her own death, the lover is only a participator either by preparation or by advice.

(*o*) he who kills a consenting person is not merely an abettor in the act of the consenting person, but the cause of the killing of a third party.

7 IV Gar. Dr. Pen., 320.
8 Carr. Prog. 1157 (n).
9 Lehrbuch, 186, (Ed, 1881.)
10 P, 43,

er liefert blos, wie Mittermaier [11] *zutreffend ausführt, den Beweis dafür, dass sein Wille, sich das Leben zu nehmen bis zum letzten Augenblick beharrlich blieb. Bei der Tödtung mit Einwilligung dagegen will der Getödtete allerdings gleichfalls die Herbeiführung des vrletzenden Erfolges, dieser Wille aber bethätigt sich nicht durch Selbsthandlung; er würde nimmermehr die Katastrophe herbeiführen konnen, wenn nicht ein zweiter Wille vorhanden gewesen wäre, welcher selbstständig verletzend gewirkt hätte; einzig und allein der Wille des Tödtenden hat thatsächlich den Tod bewirkt.*(o o)

Homicide by consent is real homicide.

201. Homicide by consent, on the other hand, is a real homicide. The person killed by it indeed solicits his death, but he takes a purely passive part; the author of the act, the principal doer being only he who causes the death. His act falls clearly within the definition of murder, and consent does not appear to be recognized as a complete justification of it in any system of law. Dr. Wharton, in his work on Criminal Law, observes,[12] that consent in such cases is no bar to punishment, is an axiom acknowledged by all schools of jurisprudence, and rests on the maxim, *jus publicum privatorum voluntate mutari nequit.*(C)

It is a general principle of the English law, that he who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he did it merely of his own head.[14] The English Criminal Code Bill of 1879 thus proposed to enact broadly, and the Canada Criminal Code

(o o) He who commits suicide is personally active in the destruction of his existence. This personal activity is not removed even in the case where another helps the person committing suicide in the act. Nothing is, therefore, changed in the criterion of suicide by the fact, that the killed person allows another to prepare or assist him in the execution of the act. The actual doer is and remains here the injured or killed person; he merely gives a proof, as Mittermaier correctly remarks, that his will to take his life has remained persistent till the end. On the other hand in the case of homicide by consent, the killed person certainly likewise (wills) the causing of the injurious effect; this will does not, however, realise itself by an act of his own; he would never have been able to cause the catastrophe, if a second will had not been present, which has independently acted in an injurious manner; the will of the killing person alone has here actually caused the death.

(C) In illustration of this, reference is often made to the case of *Smith* v. *Com.*[13], in which a person had agreed not to bring a writ of error in a criminal case of high degree, and Tilghman, C. J., said: "what consideration can a man have received, adequate to imprisonment at hard labour for life. It is but going one step further to make an agreement to be hanged. I presume no one would be hardy enough to ask the court to enforce such an agreement, yet the principle is, in both cases the same."

[11] IX G. A; 438.
[12] I. 428.
[13] 14 S. & R., 69.
[14] I Hawk. P. C., Ch. 27, S. 6. III Russ. Cr., 5.

has actually enacted, that no one has a right to consent to the infliction of death upon himself; and if such consent is given, it shall have no effect upon the criminal responsibility of any person by whom the death of the consenting person is caused.

In Germany, the abetment of suicide is not punishable, but the Penal Code expressly provides a lower punishment for homicide on request,[15] which may substantially be considered as homicide by consent. There is no special provision for such homicide in the French and the Italian Penal codes, but, notwithstanding some difference of opinion, it may now be considered as settled that homicide by consent is punishable there as murder.

The Court of Cassation in France has repeatedly judged in favor of the penality of homicide by consent on the double ground that consent is not mentioned among the excuses of homicide, and homicide is a delict of public action in which the remission by the injured person does not help the offender.[16] It observed in its *arret* dated the 16th November 1827, that *l'action pour la quelle une personne donne volontairement la mort à autrui, constitue un homicide volontaire un meurtre, et non un suicide, ou un acte de complicité de suicide.*(p)

R. Garraud says:[17] *la différence entre la culpabilité sociale de celui qui participe à un suicide et de celui qui commet un homicide pour rendre service à un ami, est évidente, parce que'lle résulte de la nature même des choses. Ce n'est pas la volonté seule qui fait le suicide, pas plus que ce n'est la volonté seule qui fait le meurtre. Le crime se constitue, ici comme ailleurs, de la volonté et du fait ; et si, aux yeux de la loi morale, l'homme qui se tue est aussi coupable que celui qui se fait tuer par un autre, il n'en est pas moins vrai que le tiers qui a donné la mort n'est pas le complice d'un suicide, mais l'auteur d'un homicide volontaire, puisqu'il a réalisé en lui-même et par lui-même les deux éléments qui constituent le crime, le fait de l'homicide et la volonté de tuer.*(pp)

(*p*) The act by which a person voluntarily causes death to another constitutes voluntary homicide—murder, and not suicide or an act of complicity in suicide.

(*pp*) The difference between the social culpability of him who participates in suicide and of him who commits homicide in order to render a service to a friend is evident, because it results from the very nature of the thing. It is not the will alone which constitutes suicide, no more than it is the will alone which constitutes murder. The crime consists in this case as in other cases of the will and of the act; and if in the eyes of the moral law, the man who kills himself is as guilty as he who gets himself

---

[15] S. 216.

[16] Carr. Prog., Art. 1155. (n).

[17] IV Gar. Dr. Pen., 317.

Francesco Carrara speaking of homicide by consent says,[18] it is true homicide, and legitimately punished as such, *non già (come erroneamente disse il Frühwald) perchè cada sotto il titolo di correità in omicidio: ma perchè direttamente cade sotto il titolo di omicidio, come esattamente avvertirono Herbst ed Geffter. Lo uccisore del consenziente è il vero e proprio autore della uccisione, ed autore volontario, a differenza di chi aiuta al suicidio altrui; il quale non fa che degli atti preparatorii. Nel primo caso lo estinto era nel fatto criminoso un mero soggetto passivo: nel secondo caso era un vero soggetto attivo primario dell' azione micidiale.* (q)

Objections to the treatment of homicide by consent as murder.

202. So far is the principle carried, that even a person who killed another in an affair, in which he contemplated and attempted his own death, was held to be guilty of murder. The Court of Cassation in its *arret*, dated the 16th November 1887, in support of the conviction said: *que l'action par laquelle une personne donne volontairement la mort à autrui constitue un homicide ou un meurtre, et non un suicide ou un acte de complicité de suicide; que le meurtre n'est excusable que dans les cas prévus par les art.* 321 *et* 322 *du Code Pénal; que l'homicide ne cesse d'être considéré comme un crime ou un délit que lorsqu'il a été le résultat du commandement de la loi et de l'autorité légitime, ou de la nécessité actuelle de la légitime défense de soi-même ou d'autrui; qu'il importe peu que la mort ait été donnée du consentement, par provocation, ou par l'ordre de la personne homicidée, puisque ce consentement, cette provocation ou cet ordre ne constituent ni un fait d'excuse aux termes des articles précités, ni une circonstance exclusive de la criminalité de l'action aux termes des articles* 321 *et* 327 *du Code Pénal; que les lois qui protégent la vie des hommes sont d'ordre public; que les crimes et délits contre les personnes ne blessent pas moins l'intérêt*

killed by another, it is not less true of him who causes the death of another that he is not accessory to suicide, but the author of voluntary homicide, since he has realised in himself and through himself the two elements which constitute the crime, the act of homicide and the will of killing.

(*q*) Not indeed, as Frühwald erroneously says, because it falls under the title of complicity in homicide, but because it falls directly under the title of homicide, as stated exactly by Herbst and Geffter. The person killing a consenting person is the true and personal author of the homicide, and a voluntary author, different from him who has helped in the suicide of another and who only does preparatory acts. In the first case the deceased was a mere passive subject in the criminal act, in the second case he was a real active primary subject of the murderous act.

[18] Carr. Prog Art., 1157., (u).

général de la société que la sûreté individuelle des citoyens, et qu'aucune volonté particulière ne saurait absoudre et rendre licite le fait que les lois ont déclaré punissable, sans autres conditions ni réserves que celles qu'elles ont expressément établies [19(r)]

The effect of this is that consent is quite ignored as it is not statutorily recognized as an excuse, on the ground that an agreement embodying it must be considered as tainted with immorality. This view, however, has been objected to, Adolphe and Hélie being strong advocates against it. In their work on the theory of Code Pénal,[20] they point out that the consent of the person killed is not claimed to be an excuse of homicide, but to be an essential condition affecting that offence, an essential constituent of homicide, and say: *Vous voulez effacer, pour ainsi dire, et réputer non écrite, comme vous le feriez d'une clause illégale, l'une des circonstances essentielles de cette action! Mais comment apprécier la moralité d'un fait si vous le divisez? comment le juger, si vous refusez de prendre en considération l'un ou l'autre de ces éléments, ici l'action matérielle tout entière, la les causes qui l'ont provoquée? L'acte que vous jugerez ne sera plus qu'une fiction; vous aurez les apparences d'un crime, mais ces apparences seront mensongères.*(s)

As to the taint of immorality, the learned authors further observe that consent is not ignored on account of immorality in cases of indecent assault, that the immorality of an act ought not to be confounded with the criminal will of its doer, and

(r) That the act by which a person voluntarily causes the death of another constitutes homicide or murder, and not suicide or an act of complicity in suicide; that murder is excusable only in the cases provided for by Arts. 321 and 322 of the Code Pénal, that homicide ceases to be considered as a crime or a *delit* only when it has been the result of a command of law and of legitimate authority, or of the actual necessity of the legitimate defence of oneself or another; that it matters little that death has been caused by consent, by provocation, or by the order of the person killed, since this consent, this provocation or this order does not constitute an act of excuse in the terms of the Articles quoted above, not as a circumstance exclusive of the criminality of the act in the terms of Articles 321 and 327 of the Code Pénal; that the laws which protect the life of men are of a public order; that the crimes and *delits* against individuals no less injure the general interest of society than the individual security of the citizens; and that no particular wish would absolve and render lawful the act which laws have declared punishable, without other conditions or reserves than those which they have expressly established.

(s) You wish to efface, as it were, and hold as not written, as you would an illegal clause, one of the essential circumstances of this act. But how appreciate the morality of an act if you divide it? How judge of it, if you refuse to take into consideration one or the other of these elements, here the act physical all entire, there the causes which have provoked it? The act you will judge of will be no more than a fiction; you will have the appearances of a crime, but these appearances will be false.

19 III. Adolph. & Hélie., 479. | 20 III. 487.

that a fact which destroys the criminality of an act cannot be ignored from consideration in determining its penality. *L'accusé*, they observe in another place, *de viol qui s'excuse en disant qu'il avait séduit la victime, doit-il moins être entendu ? Le faussaire qui excipe de la nullité qui, à son insu, entache l'acte falsifié n'est-il pas admis à prouver cette nullité qui, en rendant le préjudice impossible, ôte au crime l'un de ses éléments ?* [21] (t)

One ground urged against the conviction for murder in these cases was that there would not have been any crime if the survivor had succeeded in killing himself as he had proposed, and a crime could not result from the chance which had spared his life. The Court of Cassation overruled that contention on the ground that in case of the offender's own death, justice would remain inactive only as his dead body could not be punished ; but *le fait n'en reste pas moins avec la qualification qui lui appartient, et, s'il a survécu, la justice est saisie.* (u) In an *arret*, dated the 23rd June 1838, the court, with reference to that contention, further said : *que la criminalité de l'acte résultait, indépendamment de toute circonstance postérieure à sa perpétration, du concours de la volonté homicide et du fait qui en a été la conséquence; que la mort de l'inculpé n'aurait eu d'autre effet que de prévenir ou d'arrêter la poursuite de cet acte, sans le dépouiller de son caractère criminel; qu'on n'est pas mieux fondé à prétendre qu'un attentat sur une tierce personne, suivi d'une tentative de suicide, l'un consent, et même provoqué par la victime, l'autre effectué par le meurtrier, ne présente d'autre caractère que celui d'un double suicide ; qu'il n'y a de suicide que dans le sacrifice qu'on fait de sa propre vie et que ce sacrifice ne donne pas le droit de disposer de la vie d'autrui.* [22] (v)

(t) Should the person accused of rape be heard less if he excuses himself by saying that he had seduced the victim ? Is a forger who pleads the nullity, which unknown to him taints the forged deed, not allowed to prove this nullity, which by rendering the harm impossible, takes away from the crime one of its elements ?

(u) The act does not remain less under the designation which appertains to it, and if he survives, justice takes hold of him.

(v) That the criminality of the act resulting independently of every circumstance subsequent to its perpetration, from the co operation of the homicidal will and of the act which has been the consequence of it, that the death of the accused could have no effect other than that of preventing or stopping the prosecution of this action, without depriving it of its criminal character ; that there is no more ground for contending that an assault on a third person, followed by an attempt of suicide, the one consented to and even provoked by the victim, the other effected by the murderer, do not present any character other than that of a double murder ; that there is no suicide except in the sacrifice which one makes of his own life, and that this sacrifice does not give him the right of disposing of the life of another.

[21] III Adolph. & Hélie. 524.

[22] III Adolph. & Hélie., 481.

It is generally urged, however, that whatever might be the gravity of the act, it was committed without violence and without wickedness, that the doer of the act had in causing death not wished to injure any one, that he had believed himself to be rendering service, and had acted only on the solicitations and entreaties of the deceased; that for murder it was necessary that there should be a criminal intention and a criminal will, that the intention or will to kill was not necessarily always criminal, that there were several cases in which the intention or will to kill was not criminal, and that for the criminality of the intention or will it was necessary that it should be to injure some one by causing his death.

In support of this view it is said that the soldier who fires and kills a person under the order of a proper authority, and the citizen who kills an assailant in self-defence, have the intention and the will to kill, and yet the homicide in both cases is held to be free of all criminality. This will *revêt ensuite des nuances différentes qui impriment aux faits qu'elle commet des degrés divers dans l'échelle de la criminalité. Ainsi celui qui a longtemps préparé l'homicide qu'il consomme, celui qui ne l'accomplit que dans l'inspiration d'une passion perverse mais instantanée, celui qui n'en a puisé la pensée que dans les coups ou les blessures graves qui ont provoqué sa colère, ces trois agents ont également eu la volonté de tuer, et cependant cette volonté diffère de l'un à l'autre. Combien les circonstances où elle s'est produite lui impriment un caractère distinct ! Quelle barrière infranchissable sépare les actes qui l'ont manifestée !* [27] (*w*)

Adolphe and Hélie in another place in their work on the theory of Code Pénal observe that it is not sufficient for the crime of murder or of assassination, that the will of killing has been in the contemplation of the doer, for this will is not essentially criminal; but that it is necessary that it should have been born of wickedness and the desire of causing injury, and that the commission of a crime should have been contemplated. They go on to say: *or cette volonté criminelle*

(*w*) Finally assumes different shades which imprint on acts committed by it different degrees of the scale of criminality. Thus, he who has for a long time prepared for the homicide which he consummates, he who accomplishes it only on the inspiration of a perverse but instantaneous passion, he who has taken the idea of it only from the blows or serious wounds which have excited his anger, these three agents have equally had the will of killing, though this will differs in each case from the other. How much do these circumstances whence it is produced impress it with a distinct character ! What an insurmountable barrier separates the acts by which it has been manifested.

[27] III. Adolph. & Hélie 521.

existe-t-elle quand une convention lie l'agent et la victime? quand celui-là n'agit que sur l'ordre de celle-ci? quand les deux volontés se réunissent et concourent dans la perpétration de l'homicide? Il est évident que ce fait modifie entiérement la criminalité de l'action: elle ne prend plus sa source dans la violence, dans la cupidité, dans les plus odieuses passions; c'est une fausse pitié, c'est un dévouement mal entendu qui l'inspire. L'agent puise son intérêt non plus dans la satisfaction de ses désirs personnels, mais dans l'intérêt de la satisfaction de la victime: il est visible que son action diffère de l'assassinat comme la faute lourde du dol, comme le préjugé du crime, comme l'ignorance grossière d'une volonté coupable. Il a voulu la mort de la victime parce qu'elle la voulait elle-même il a prêté son bras à l'exécution de l'homicide parce qu'elle implorait son aide; mais il n'en avait pas conçu la pensée avant son impulsion, il ne l'avait point méditée en secret; aucun intérêt, aucune passion ne l'animait; la résolution était immorale sans doute, mais elle n'était pas criminelle dans le sens de la loi pénale; il avait la volonté de tuer, mais il n'avait pas la pensée qu'il pût nuire en ôtant la vie à celui qui voulait mourir; son action est coupable, la conscience la réprouve, la société peut la punir, mais c'est avec une autre qualification que celle du meurtre ou de l'assassinat.[28] (x)

Speaking of a person committing homicide by consent, they observe: *Faut-il, dans l'horreur que son acte nous inspire, l'isoler du concours qui lui a été donné, pour en faire un crime à part? Faut-il faire abstraction de cette volonté dont elle s'est faite l'instrument, de cette influence qu'elle subissait, pour n'apercevoir que sa seule action, distincte et séparée des causes qui l'ont produite? En un mot, cet acte n'est-il à son égard qu'un acte de complicité de suicide; et, s'il faut le punir, est-ce seulement comme*

(x) Now does this criminal will exist when a convention binds the doer and the victim? When does the former act only on the order of the latter? When do the two wills unite and co-operate in the perpetration of the homicide? It is evident that this act modifies entirely the criminality of the action: it does not any more have its source in violence, in cupidity, in the most odious passions; it is a false pity, it is a misunderstood devotedness which inspires it. The doer does not derive his interest any more from the satisfaction of his personal desire, but from the interest of the victim's satisfaction: it is clear that his action differs from assassination as a gross blunder from malice, as prejudice from crime, as gross ignorance from a guilty will. He has wished the death of the victim because the victim himself wished it, he has lent his hand to the execution of the homicide, because the victim implored his aid; but he had not conceived the idea of it before its being suggested by the victim, he had not meditated it in secret; no interest, no passion, no animation; the resolution was immoral without doubt, but it was not criminal in the sense of the penal law; he had the will to kill, but he had not the will to do an injury in taking away the life of him who wished to die; his action is guilty, conscience reproves him, society can punish him, but under a designation other than that of murder or assassination.

[28] III Adolph. & Hélie, 486.

une faute grave, une haute imprudence, une impéritie grossière? Ou bien doit-on, en effaçant les circonstances qui l'entourent et le modifient, le considérer comme un crime complet par lui-même, comme un homicide volontaire et délibéré? [29] (y)

R. Garraud says [30] that it is sufficient to constitute murder that *l'agent ait eu la volonté de tuer;* but there is a distinction between an intention of killing and a motive of homicide, and the French penal law does not take motives into account. It considers him as a murderer, as he had the homicidal will, without pre-occupying itself with knowing *quel but il a cherché et dans quelle intention il a agi.* (z)

General consensus as to penality of homicide by consent.

203. Even those who maintain, that suicide is not murder, do not deny the penality of homicide by consent. Thus Adolphe and Hélie expressly disclaim all intention of mitigating the penality of homicide committed on the demand of a person, and say: *Loin de là, notre pensée est que ces deux actes révèlent une honteuse immoralité, que non-seulement ils outragent la morale, mais menacent la société elle-même, et que la société peut les punir, car elle a la mission de veiller à la securité individuelle des citoyens et de protéger leur viemême contre leur propre volonté.*[31] (a)

In discussing the question of the penality of homicide by consent, Francesco Carrara in his *Programma Del Corso di Diritto Criminale*, says[32] *Pretendere che la uccisione del consenziente non possa incriminarsi perchè chi lo uccise credette di fargli un benefizio, innanzi tutto converte una iperbole fantastica in una realtà. Ed oltre a ciò partirebbe da un principio che non può senza pericolo ammettersi come precedente nella materia penale. Colui*

(y) Is it necessary in the horror with which his act inspires us, to separate it from the co operation which has been given to it, in order to make a crime of it in itself? To separate it from this will of which it has made itself the instrument, from this influence to which it has submitted, in order to perceive only his act, distinct and separate from causes which have produced it? In a word, is not this act in regard to him only an act of complicity in suicide; and if it is necessary to punish it, is it only as a grave fault, a great imprudence, a gross unskilfulness? Or else one ought, effacing the circumstan which surround and modify, to consider it as a crime complete in itself, as a voluntary and deliberate homicide.

(z) What end he has had in view, and with what intention he has acted.

(a) Far from that, our thought is that these two acts reveal a shameful immorality, that they not only outrage morals, but menace society itself, and that society can punish them, for it has the mission of watching over the individual security of citizens and of protecting their lives even against their will.

[29] III Adolp. & Hélie 483.
[30] IV Gar. Dr. Pen. 318.
[31] III Adolph. & Hélie, 481.
[32] S. 1408 (n).

che ha rubato al vicino la carne in un venerdi, può dire io lo feci per impedirgli di peccare. Colui che ha adulterato con la donna del vicino inutilmente desideroso di prole, può dire io lo feci per procacciargli la consolazione di un figlio. Sotto cento facce potrebbe riprodursi cotesta fallace dottrina se si ammettesse come ragione d'impunità il pretesto di aver voluto recare un bene all'altr'uomo mediante la lesione dei suoi diritti. (*aa*)

German Jurists have advocated the penality of homicide by consent on the ground, that it is an offence against the public, as well as against the private individual, and consent cannot affect it in its former aspect. Lion thus observes:—*Da die Tötung mit in der Verletzung des Privatwillens, zugleich aber in der des allgemeinen Willens sich als Verbrechen darstellt, ist bei der Tödtung mit Einwilligung nur jenes konkrete Verbrechen nicht vorhanden.* [33] (a) Breithaupt in expressing his approval of that observation, remarks that the word concrete can refer only to the violation of the subjective will. In his work on *Volenti non fit injuria*,[34] he explains the grounds of the penality of homicide by consent, and says:—"He who kills another with his consent undeniably violates the order of law. There is certainly no offence in this case so far as the private will of the killed person is considered; and the maxim *Volenti non fit injuria* is therefore applicable to that extent; but it must not be interpreted so as to signify that the killing of a consenting person contains no violation whatever of a right, and signifies only that so far as the consenting person is concerned there is no injury, or the act of homicide is not illegal. The state has in regard to public offences (*Rechtsverbrechen*), and especially in the case of homicide, an absolute right to place its will above the private will. It has the right to declare itself injured or endangered even when the individual consenting (*Rechtssubjekt*), who is directly deprived of an interest

(*aa*) To claim that the killing of a consenting person cannot be charged with criminality as he who kills him believes to have done good to him, is rather to convert a fantastic hyperbole into a reality. Moreover, it would be starting from a principle, which cannot be admitted in penal matters without danger. He who has stolen meat from a neighbour on a Friday can say "I did it to prevent him from committing a sin." He who commits adultery with the wife of a neighbour who has desired in vain to have issue, can say "I did it to procure for him the consolation of having a child." This fallacious doctrine can reproduce itself in a hundred forms, if the pretext of having worked to do good to another person by means of an injury to his rights is admitted as a reason for impunity.

(*b*) As homicide appears as an offence, both in the injury to the private, as well as at the same time to the public will, so is there wanting in homicide by consent only the former concrete offence.

[33] I Lion, G. A., 462.

[34] P. 42.

(*Rechtsgut*), has declared himself to be agreeable to it. The law of a country cannot permit to its citizens, that they should, by mutual consent, take each other's lives, quite according to their own free will, and thereby endanger the integrity of the State. It, therefore, justly threatens homicide by consent with punishment. For, if there were absolute immunity from punishment for that offence, there might finally take place such a diminution of useful citizens, that a favourable development of the State would be impossible. It follows, therefore, that the will of the killed person alone cannot be decisive with regard to the criminality of the act, as we have at the same time to deal with interests which are removed from his one-sided and exclusive power of disposal (*Verfügungsgewalt*), and that as the will of the killed person can give no absolute authority to kill, so the act can in no case remain entirely free from punishment."

How far homicide in a duel is murder.

204. The question of the penality of homicide by consent has arisen sometimes in cases of duelling also. In the English law, deliberate duelling, if death ensues, is, like all homicide by consent, deemed murder. It has been alleged, on the one hand, that there ought to be much less objection to treat such duels as murder than the cases of killing a person at his request, as the former are generally founded in deep revenge. "And though a person should be drawn into a duel, not on a motive so cruel, but merely upon the *punctilio* of what the swordsmen falsely call honour, that will not excuse him. For he who deliberately seeks the blood of another in a private quarrel, acts in defiance of all laws, human and divine, whatever his motive may be." [35] And in any case in a duel the will of the offender is a guilty will, it *foule aux pieds la justice dont elle dédaigne les reparations, la société dont elle trouble l'ordre et la paix, la vie humaine qu'elle sacrifis avec légèreté à ses passions.*

It may however be contended, on the other hand, that in a duel there is usually no intent to actually kill the adversary, but only to do an act which may lead to the death of the other party as well as of oneself. And though it is an evil of duelling, that it "entrusts the punishment of injuries to the chance of combat, or the coolness of premeditation, and exposes the person who has suffered an injury to the additional and greater evil of becoming a murderer, or being murdered;" and a point of the duellist's offence is

[35] Ros Cr. Evid., 740.

that he takes up justice in his own hands, that he attempts to place individual justice over public justice, and private vengeance in lieu of punishment by constituted authority. This will though guilty, this culpability though grave, does not amount to murder. Both the parties take an equal risk, and though the motive may not be sufficient to justify homicide, yet it may well mitigate that offence. Indeed, the criminality of the duellist appears to be essentially distinct from that of an assassin, both in regard to the moral gravity of the act and its material consequences. There is no general alarm created by the death, which, so far as that goes, may be deemed as a sort of suicide ; as no one need be afraid of it unless he agree to fight.

These considerations, however, are not considered sufficient in England to exclude homicide in a duel from the category of murder. So far is the rule carried, that in *Reg.* v. *Cuddy*,[36] it was held by Williams, J., that where two persons went out to fight a duel, and death ensued, all persons who were present encouraging and promoting the death were guilty of murder. So also in *Reg.* v. *Young*,[37] the indictment was for murder, and Vaughan, B., said: "When upon a previous arrangement, and after there had been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder, and the seconds also are equally guilty." After observing that neither of the prisoners had acted as a second, he continued; "if, however, either of them sustained the principal by his advice or presence; or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not say or do any thing, yet if he was present and was assisting, and encouraging at the moment when the pistol was fired, he would be guilty of the offence charged in the indictment."

The provision of the Canada Criminal Code, declaring that consent will not excuse homicide, adds an illustration to the effect that if A and B agree to fight a duel together with deadly weapons, and either is killed in the duel, his consent will make no difference as to the criminal responsibility of the other.

---

[36] 1 C. & K., 210.

[37] 8 C. & P., 644.

The Code Pénal being silent as to duels, the Court of Cassation in France now takes the same view as is taken by courts in England. In an *arret* dated the 22nd December 1887, it even held that the homicide committed and the wounds inflicted in a duel could be imputed not only to the combatants themselves as principal authors, but also to the witnesses of the duel as accomplices.

It was sometimes contended, and in prior cases even held, that homicide in a duel was not punishable in France, but this was only on the ground that the Code Pénal did not contemplate such homicide, and rightly so as the punishment provided for assassination or even murder in the Code was too heavy for a duel. This is chiefly on the ground of the character of the will inducing to a duel, and the mutual convention which takes place between the parties before the homicide is committed. The will is no doubt generally of killing, but not with any evil motive, not necessarily even for gain, cupidity or revenge. *Chez le duelliste, la volonté de tuer n'est qu'accidentelle et secondaire, souvent même elle n'existe pas; ce qu'il demande, ce qu'il veut, c'est de laver son honneur souillé ou de le maintenir intact.*[38] (c)

The convention is not claimed to operate as a general excuse, but merely to negative that absence of the consent of the person killed which is an essential part of the criminal intention which alone can constitute the offence of homicide. Adolphe and Hélie in their work on the theory of Code Pénal say:[39] *Cette convention n'est ni une excuse, ni un contrat ; elle n'est qu'une circonstance intrinsèque du fait ; elle en fait partie, elle le modifie, elle le caractérise. Il est impossible d'en faire abstraction dans l'appréciation du duel, car on prononcerait alors, non plus sur le fait lui-même, mais sur une fiction, non plus sur la criminalité réelle de l'agent, mais sur sa criminalité supposée. La convention doit être appréciée, non comme une obligation qui lie les parties, sous ce rapport elle est illicite et nulle ; non comme une excuse qui atténue le crime, car l'excuse le modifie et le laisse subsister ; mais comme une circonstance substantielle du fait, circonstance*

(c) With the duellist, the will of killing is only accidental and secondary, often it does not even exist; what he asks, what he wishes is to wash his soiled honour, or to maintain it intact.

[38] III Adolph. and Hélie, 522.

[39] III. 525.

qui en change radicalement la nature, et qui suppose nécessairement l'absence du dol et de la perfidie qui le constituent.(d)

The treatment of homicide in a duel as an assassination is justified in two *arrets* dated the 22nd June 1837 and the 15th December 1857 respectively, mainly on the ground that the convention to fight is, like the consent on which it is based, contrary to good manners and public order, and therefore null, and what is null cannot produce any effect. Those who advocate the contrary, argue, however, that *il ne s'agit pas d'apprécier le caractère moral de la convention, mais de décider s'il faut faire abstraction de ce fait, effacer cette circonstance et punir l'acte du duel après l'avoir ainsi modifié.*(e)

Homicide by consent punishable in India.

205. Homicide by consent has been made expressly punishable in India as ordinary culpable homicide.[40] The authors of the first draft of the Indian Penal Code assigned quite a new reason for the ineffectiveness of consent in regard to the criminal liability resulting from an intentional causing of death. They say: "The thing prohibited is not, like the destruction of property, or like the mutilation of the person, a thing which is sometimes pernicious, sometimes innocent, sometimes highly useful. It is always, and under all circumstances, a thing which a wise lawgiver would desire to prevent, if it were only for the purpose of making human life more sacred to the multitude. We cannot prohibit men from destroying the most valuable effects, or from disfiguring the person of one who has given his unextorted and intelligent consent to such destruction or such disfiguration, without prohibiting at the same time gainful speculations, innocent luxuries, manly exercises, healing operations. But by prohibiting a man from intentionally causing the death of

(d) This convention is neither an excuse for it, nor a contract; it is only an intrinsic circumstance of the act; it makes a part of the act, it modifies it, it characterises it. It is impossible to make a separation of it in the appreciation of the duel, for one would then pronounce, no more on the act itself, but on a fiction, no more on the real criminality of the doer, but on his supposed criminality. The convention ought to be appreciated, not as an obligation which binds the parties, in which relation it is illicit and null; not as an excuse which mitigates the crime, for the excuse modifies it and allows it to exist; but as a substantial circumstance of the act, a circumstance which changes radically the nature of it, and which supposes necessarily the absence of *dol* and perfidy which constitute it.

(e) It is not a question of appreciating the moral character of the convention, but of deciding if it is necessary to make abstraction of that act, to efface that circumstance and to punish the act of dueling after having thus modified it.

[40] I. P. C., S. 300, Excep. 5.

another, we prohibit nothing which we think it desirable to tolerate."[41]

The general theory at present is, that an act causing or likely to cause serious harm may be justified by consent, only if the act is known or believed to be for the benefit of the person consenting to the harm. Under no circumstances, therefore, can consent be allowed to excuse the commission of any act intended to cause death, the harm of the highest description, as no good to a person can *ex hypothesi* weigh against such harm. No consent can, therefore, excuse an act intended to cause death even to the person consenting.

Effect of consent on acts merely known to be likely to cause one's death.

206. It is different, however, with acts which are not intended to cause one's death. Even if known to be likely to cause death, they may be lawful when done for the benefit of the person consenting. S. 88 of the Indian Penal Code thus broadly lays down, that nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent to suffer that harm, or to take the risk of that harm.

The harm contemplated by this section may be death, and the section thus includes acts known to be likely to cause death, and such acts will not be penal if done for the benefit of the consenting person. This is rendered still clearer by the illustration attached to the section, which provides directly for an act, known, but not intended, to cause death. It runs, that "A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs the operation on Z, with Z's consent. A has committed no offence." There is no restriction here even as to the nature or extent of the benefit for which an act known to be likely to cause death may be done, except that the benefit must not be a merely pecuniary one.[42] If the benefit is a physical one, the law will not measure and contrast the extent of it with that of the harm involved in the likelihood of the death.

[41] Note B annexed to the first draft of the Indian Penal Code.

[42] I. P. C., Expl. S. 92.

It will leave that to the discretion of the person affected himself, because, as a general rule, he will be able to judge better of it than any legislature, which can necessarily proceed only on general principles. Consent to an act even known to be likely to cause death will, however, not be a justification for the act, if it is not for the benefit of the person who consents to it and whose death it is known to be likely to cause.[43]

This principle is recognised outside India also. In *McCue* v. *Klein*,[44] Willie, C. J., in delivering the opinion of the court said: "Admitting that the allegations show that deceased had, at the time he consented to drink such an excessive quantity of spirits, sufficient consciousness to know the injury it was likely to cause him, still the act of the defendants cannot be excused because he consented to an experiment which might end in his death, or at least in doing him great bodily harm. . . The deceased gave assent to an assault to be effected by taking into his stomach poison in such a quantity as would probably deprive him of life. It was administered to him perhaps in sport, but no one has a right to trifle with human life in such a manner; as well might they have wagered that they could fire a pistol at his person and not injure him. His consent to such a trial would not have excused the battery or murder that might have followed."

Knowledge of likelihood of an effect distinguished from intention to cause that effect.

207. In general a distinction is not made in the English criminal law between the cases in which a man causes an effect designedly, and the cases in which he causes it merely with a knowledge that he is likely to cause it. If, for example, he sets fire to a house in a town at night, with no other object than that of facilitating a theft, but being perfectly aware that he is likely to cause people to be burned in their beds, and thus causes the loss of life, they propose to punish him as a murderer. The authors of the Indian Penal Code also have generally followed that principle. But it appeared to them that there were cases in which it was absolutely necessary to make a distinction, and that the case of justification by consent was one of them. In support of their view, they said in their note B: "It is often the wisest thing that a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labour

[43] I. P. C., S. 87.

[44] 60 Tex., 168.

under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health and vigour. We do not conceive that it would be expedient to punish the surgeon who should perform the operation, though by performing it he might cause death, not intending to cause death, but knowing himself to be likely to cause it. Again ; if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though when they fired they knew themselves to be likely to cause his death."

Penality of causing hurt to oneself.

208. Causing hurt to oneself is, as a general rule, not punishable. In some cases, it is specially made punishable, but this is only when it involves an injury to the rights of some other person. Thus, the New York Penal Code provides, that "a person who, with design to disable himself from performing a legal duty, existing or anticipated, inflicts upon himself an injury, whereby he is so disabled is guilty of a felony ;" [45] and that "a person who inflicts upon himself an injury such as if inflicted upon another would constitute maiming, with intent to avail himself of such injury, in order to excite sympathy, or to obtain alms, or any charitable relief, is guilty of a felony." [46]

R. Garraud says that like suicide, mutilation exercised over oneself is not punishable ; and that it ought to be punished only when it has been practised as a means of withdrawing oneself from public service. It is on this very ground, that in the laws relating to the recruitment of the army, there is generally a special provision made for the punishment of young soldiers who mutilate themselves so as to become unfit for military service. Thus Francesco Carrara in his *Programma del Corso di Diritto Criminale* says : [47] *La lesione di se stesso non è di regola punibile tranne quando la medesima si rivolga a ledere i diritti altrui, e sia per cotesto punto di vista specialmente*

[45] S. 207. | [46] S. 208. | [47] Art. 1408 (n).

contemplata come delitto sui generis dalla legge vegliante. (*f*) Similarly, § 142 of the German Penal Code provides punishment for every person *Wer sich vorsätzlich durch Selbstverstümmelung oder auf andere Weise zur Erfüllung der Wehrpflicht untauglich macht oder durch einen Anderen untauglich machen lässt.* (*g*) And in cases in which the injury to oneself is not an offence, an abetment of that injury by another is also not an offence. [48]

Voluntary causing of hurt to another as affected by his consent.

209. There is a greater conflict of opinion as to the effect of consent on the voluntary causing of hurt to another. It is sometimes considered to be generally punishable. In *Willey* v. *Carpenter*, [49] Thompson, J., in delivering the opinion of the Supreme Court of Vermont even said, that "if the consent of a person to a moderate assault and battery upon him were a justification, we see no reason why consent to one so great as to take his life would not also be a justification."

This is the view generally taken in France and Italy. Thus R. Garraud says that the mutilation practised on a person with his consent is included in the provisions for the punishment of injuries to persons, and that this is in accordance with the general principles of law, as the consent of the person to whom hurt is caused does not avoid the intrinsic criminality of the delict of causing hurt; and the person causing it would in vain invoke in his defence the maxim *volenti non fit injuria. Ce n'est pas dans l'intérêt seul des particuliers que la société punit; elle réprime les attentats contre les personnes, parce que ces attentats atteignent la collectivité elle-même, et nul ne peut autoriser à violer en sa personne les lois qui intéressent l'ordre public.* He continues that if the consent of the injured party does not destroy the criminality of the act, it no more effaces the culpability of the doer, for the culpability results only from the will of committing an action of which one knows or can know the criminal character. [50] Similarly Francesco Carrara observes that *La lesione del consenziente è sempre una lesione personale, la quale*

(*f*) The injury to oneself is, as a rule, not punishable, except when it is directed to injure the rights of others, and if it be from that point of view specially contemplated as an independent delict by the law in force.

(*g*) Who intentionally by self-mutilation or in some other way, makes himself unfit fo the fulfilment of conscriptional duty, or allows another to make him so.

[48] Carr. Prog., 1408 (n).

[49] 15 L. A., 853.

[50] IV. Gar. Dr. Pen., 357.

di regola deve punirsi ; tranne che, per le regole generali della imputazione, possa questa eliminarsi per vera mancanza di dolo. [1] (*h*)

In Germany, Hälschner, Liszt, Oppenhof, Hepp, Geyer, Rüdorf, and Breithaupt maintain that consent does not operate to remove the criminality of acts causing bodily injuries, and that such acts are criminal, even when done with the consent of the injured person. Breithaupt, in his work on *Volenti non fit injuria*,[1 a] thus says : "(Homicide) if viewed externally, *i.e.*, according to its effect, is nothing but an intensified bodily injury. If the State has the right to punish the former, we must admit its right to punish the latter which is merely to be looked upon as a stage (*Stadium*) of the former. Even if viewed from the same economical point of view, which we have laid stress on in the case of homicide by consent, the State cannot permit that its citizens should mutually deprive each other of their bodily integrity according to their own free will. If the state requires for its existence the lives of its citizens, so must it also consider it necessary that they should live in such a manner that their bodily health may permit them to go about their business, to fulfil their duties towards their fellow-creatures and the State, in order thereby to remain useful members of society. For just as it is impossible for the State to exist without citizens, so is this existence equally impossible if the citizens indeed live, but for example only do so in a crippled or impotent manner ; and therefore the legislator cannot in an unlimited fashion permit bodily injury with consent If this were the case there might arise a want of people suitable for military service, which would be highly important, and a great deal of mischief might also be caused by the free practice of quacks. The State therefore justly wishes to prevent the appearance of such a state of affairs endangering the public safety ; and it cannot therefore take into consideration whether this appearance is due to the consent of the directly injured party in such a case, or not. The generally injurious effect is the same in both the cases, and in both cases the State has the right to look upon it as an infringement of the law." He makes no distinction between severe and slight bodily injuries, and goes on to observe:

(*h*) The injury to a consenting person is always a personal injury, which, as a rule ought to be punished ; except when the general rule of imputability can exclude the punishment on account of the real want of *dolus*.

[1] Carr. Prog., Art. 1408 (n). | [1 *a*] P. 88.

"According to these points which have been generally developed, the State cannot on principle make any difference whether there is a severe bodily injury or a slight one. For first of all, in many cases it is difficult to decide at the very outset, whether an injury which has just taken place is slight or severe, as a decision on the point can frequently be given only after the completion of the healing process; and secondly it is possible that a person to whom a slight bodily injury has been caused may be just as incapable under certain circumstances of fulfilling his civic or State duties respectively as one who has suffered a severe bodily injury."

The *Reichsgericht* also takes the same view, and in its judgment dated the 15th November 1880 held that *die Körperverletzung mit Einwilligung prinzipaliter zu strafen sei, und zwar ohne Unterschied, ob sie leicht oder schwer ist, und dass die entgegengesetzte Ansicht unrichtig ist.* (*a*)

Apart even from the doctrine of the inalienability of rights, it appears, however, to be clear that the effects of slight or ordinary hurt can hardly go beyond the person injured, while grievous hurt may often prevent him from working for and discharging his duties to society. As a general rule, a person is therefore held incompetent to consent to such injury as will directly interfere with his discharge of his duties to the State, or as is so severe that it must interfere with them. Thus Stephen in his Digest of Criminal Law [2] lays down that one has a right to consent to the infliction upon himself of bodily harm not amounting to a "maim," which for the purposes of this rule is "bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened."

This distinction was recognized even in the English Common Law, in which mayhem was always considered an indictable offence. Thus Lord Coke, observing that the life and members of every subject are under the safeguard and protection of the King, referred to a case, in which "one Wright, a young, strong, and lustic rogue, to make himself

(*i*) Bodily injury with consent is to be punished on principle, and indeed without any difference as to whether it be slight or severe, and that the opposite view is incorrect.

[2] Art., 227.

impotent, thereby to have the more colour to begge, or to be relieved without putting himself to any labour, caused his companion to strike off his left hand, and both of them were indicted, fined and ransomed therefor." [3] So East in his Treatise on the Pleas of the Crown, says [4]: "The statutes of H. 4. H. 8, and Car. 2 are evidently directed to the maiming of others; but a person who even maims himself, or procures another to maim him, that he may have more colour to beg; or disables himself to prevent being pressed for a soldier; is subject to fine and imprisonment at common law; and so is the party by whom it was effected at the other's desire." So also Dr. Bishop says [5]: "It being the gist of the crime in mayhem that the injured person is rendered less able in fighting, one may not innocently maim himself; therefore, if at his request another maims him, both are guilty."

On the other hand, Binding, Wächter, Schwartze, Ortmann, Zimmermann consider that even the severest bodily injuries will be excused if caused with the consent of the injured person. Olshausen has also taken that view in his Commentary on the German Penal Code. Commenting on § 223 dealing with the offence of causing hurt, he says [6] that the force of the maxim *volenti non fit injuria* is indeed *gerade bei Körperverletzgen sehr bestritten, allein während die Natur gewisser Delikte der Anwendung iener Regel geradezu widerstrebt, lässt solches von der Körperver letzung sich nicht sagen; im Gegentheil ist die völlige Versagung ihrer Anwendbarkeit auf alle Körperverletzgen entschieden dem allgemeinen Rechtsbewusstsein zuwider, so wenig dieses freilich billigt, dass auch schwere Körperverletzgen* (§§ 224—225) *in Folge ertheilter Einwilligung des Verletzten straflos bleiben. Zunächst ist hervorzuheben, dass die Bestimmungen der* §§ 223*ff. nur im Interesse des unmittelbar betroffenen Individuums gegeben sind, wie daraus hervorgeht, dass nur die Körperverletzung eines Anderen bestraft wird; die Vorschrift des* (§ 142) *wonach ausnahmsweise die Selbstverstümmelung strafbar ist, bestätigt lediglich die Regel. Bei dieser Sachlage kann bei dem Schweigen des Gesetzes über die Strafbarkeit einer mit Einwilligung des Verletzten erfolgenden Körperverletzung konsequenter Weise nur angenommen werden, dass Dasselbe bei vorliegender Einwilligung die Rechtswidrigkeit für ausgeschlossen erachte. Dazu*

---

[3] 3 Co. Litt., 127a
[4] 4 P. 396.
[5] I. 140.
[6] P. 804.

treten einige Spezialbestimmungen des StGB., vor allen der bereits cit. § 142, *Nach dessen Abs.* 2 *die Körperverletzung eines Anderen sogar bei vorliegendem Verlangen desselben bestraft wird, aber unter Umständen, die solches im staatlichen Interesse ausnahmsweise erfordern; es wird hier aber nicht, wie im* § 216 *bei der Tödtung auf Verlangen, der mildeste Fall der Tödtung eines Einwilligenden unter eine privilegirte Strafandrohung gestellt, sondern offenbar der—nach Ansicht des Gesetzgebers—allein eine Bestrafung erheischende Fall überhaupt kriminalisirt. Wenn ferner* § 216 *bei den Tödtungsverbrechen in dem Verlangen des Getödteten den Grund für eine bedeutende Strafmilderung sieht, so würde die völlige Ignorirung des Verlangens bei der Körperverletzung damit wenig harmoniren, endlich würde bei der entgegenstehenden Ansicht die schwere Körperverletzung eines Einwilligenden nach den* §§ 224*f. bedeutend härter zu bestrafen sein als der—die schwersten, in Tödtungsabsicht vorgenommenen, Fälle der Körperverletzung einschliessende—Versuch der Tötung aus* § 216, *falls der Versuch dieses Vergehens überhaupt strafbar wäre. Man hat deshalb durch die Einwilligung des Verletzten den Ausschluss der Rechtswidrigkeit in allen Fällen der Körperverletzgen des Abschn.* 17 *anzunehmen und sind daher bei vorliegender Einwilligung auch die gefährliche und die schwere Körperverletzungen für straflos zu erachten.*(*j*) The correctness of this construction of the German Code is denied by a number of jurists.

(*j*) very much disputed in the case of bodily injuries, but whereas the nature of certain crimes is directly opposed to the application of this rule, the cases of bodily injury do not allow the same to be said of them. It would, on the contrary, be directly opposed to the general spirit of law, if we wished to completely deny its applicability in cases of bodily injury, although the law does not allow that severe bodily injuries should remain unpunished even after consent has been given by the injured party. We must first of all lay stress on the fact that the provisions of § 223 have been promulgated in the direct interest of the immediately concerned individual, as will also be seen from the fact that only the bodily injury to another is punishable; the provisions of § 142 which exceptionally make self-mutilation punishable merely go to prove the rule Owing to this state of affairs, we may consequently infer that in case of the law being silent concerning the penality of an act committed with the consent of the injured party, the law will consider the illegality of the act as excluded if consent be really present. There are, besides a few special provisions in the Penal Code: first of all § 142 already mentioned, according to which bodily injury to another even at his request shall be punishable, but under circumstances which are exceptionally required in the interest of the State. In this connection however, the only case which requires punishment has been made criminal, and not as in § 216 in the case of killing on request, where the mildest form of the killing of a consenting party has been made liable to a special punishment. When furthermore § 216 finds in the request of the killed person a ground for a material mitigation of punishment, it would but little harmonize with this, if we wished to entirely ignore the force of the request in the case of bodily injuries. Finally in the case of an opposite opinion, the bodily injury to a consenting person according to § 224, would have to be punished much more severely than the attempt in §216, including the severest cases of bodily injury committed with an intention to kill, in case the attempt of this offence were punishable at all. The exclusion of illegality is, therefore, to be inferred in all the cases of bodily injury under P art 17 (dealing with offences

Breithaupt in his work on *Volenti non fit injuria* thus says;[7] "*dass die Körperverletzung mit Einwilligung auf Grund der §§ 223 fg. ebenso zu bestrafen ist, als wenn die Einwilligung nicht ertheilt wäre. Es ist daher unzulässig, von § 216 auf § 225 zu schliessen, wie es Binding, Zimmermann, Ortmann, Kronecker u. A. thun. Auch der Vergleich mit § 142 berechtigt in keiner Weise zu einer der unsrigen entgegengesetzten Auffassung. Dadurch, dass der Gesetzgeber im § 142 ausdrücklich die Körperverletzung mit Einwilligung unter Strafe stellt, will er nicht, wie Zimmermann, Ortmann, Binding u. A. mehr, die Körperverletzung mit Einwilligung ausnahmsweise bestrafen, während er sie sonst straflos wissen will* (*a*) Referring to a speech of Herr Laskar in a debate in the Reichstag in its sitting of the 4th April 1870, Breithaupt infers that[8] *der Gesetzgeber zwischen Körperverletzung im Allegemeinen und Körperverletzung mit Einwilligung nicht nur nicht unterschieden hat, sondern dass er auch diese Unterscheidung nicht machen wollte; es muss demnach, da ferner die Einwilligung in unserem St. G. B. kein allgemeiner Milderungsgrund ist, die Körperverletzung mit der poena ordinaria ganz nach den Bestimmungen des XVII. Abschnitts bestraft werden; denn es kommt nur darauf an, dass der im Gesetz als nothwendig bezeichnete Thatbestand vorhanden ist, und dieses ist der Fall, da Körperverletzung Körperverletzung bleibt, auch wenn der Verletzte seine Einwilligung dazu gegeben hat.*" (*b*)

In Italy also Giulio Crivellari in his *Concetti Fondamentali Di Diritto Penale*, speaking of the criminality of grave injuries caused to a person with his consent, says[9]: *Si risponde che questi*

causing bodily injury) if there be consent, and dangerous and severe bodily injuries are also to be considered free from punishment in the case of its presence.

(*a*) That bodily injury withconsent is to be punished on the ground of 223 and the following paras, just as if consent had not been given. It is therefore incorrect to draw any conclusion from § 216 regarding the construction of § 225, as Binding, Zimmermann, Ortmann, Kronecker and others have done. Nor does a comparison with § 142 in any way justify us in taking the opposite view. The legislator by providing expressly for the punishment of bodily injury with consent in § 142 does not wish to punish it in this case exceptionally, and to leave it free in other cases as Zimmermann, Ortmann, Binding and others argue.

(*b*) That the legislator has not only not distinguished between bodily injury in general and bodily injury with consent, but that he did not wish to do so. Now as consent is no general ground of mitigation according to our Penal Code, bodily injury with consent must therefore be punished with the ordinary punishment according to the provisions of Part XVII, for the question is whether there exists the *corpus delicti* described as necessary by the law, and this is the case, for bodily injury remains bodily injury even when the injured person has consented to it.

[7] P. 46 | [8] P. 5. | [9] Art. 1423

atti debbono andare impuniti per l'innocenza del fine che esclude il dolo; onde bisogna eliminare ogni idea di criminosità da un atto posto in essere allo scopo legittimo di liberare una creatura umana da un' affezione morbosa o da una deformità o da un pericolo nella salute. E tanto è ciò vero (si soggiunge), che ogni qualvolta si configura nella lesione consentita un fine doloso si procede senz'esitazione a riconoscerne la politica imputabilità. Parmi siano più nel vero i sostenitori dell'imputabilità di codeste lesioni, perchè non troverebbesi una ragione per non imputarle, quando è imputabile l'omicidio del consenziente. In tema di lesioni personali il dolo può dirsi insito "in re ipsa". Allorchè si mutila, si deturpa nella faccia una donzella col consenso di lei che vuole in tal guisa soddisfare alle gelose esigenze del suo amante, o quando si evira, sia pure col consenso della vittima, sia pure per recare un vantaggio economico al paziente, per questo fatto il paziente rimane imperfetto, la donzella diventa deforme, e tutto ciò l'agente lo sa, lo conosce, lo vede. Il legislatore nè può nè deve tollerare lo sconcio gravissimo, che, specie nell'evirazione, è contrario ad un precetto naturale d'ordine supremo. ([k])

In Germany also, Merkel, Schaper and some other jurists hold a middle opinion, namely, that consent excludes penality, but only in the case of slight injuries.

In Indian Criminal law, consent justifies every hurt other than grievous.

210. The same view has been adopted in India also, and appears to be sound, at least from a practical point of view. All harm is *a priori* an evil, and a wise legislature cannot allow any person to inflict it on any other, or even to suffer or take the risk of it himself, except when it is only slight, and is not intended or known to be likely to result in a permanent injury.

([k]) It is said that such acts ought not to be punished owing to the innocence of the aim which excludes *dolus*; wherefore it is necessary to remove every idea of criminality from an act done for the legitimate aim of freeing a human being from a morbid affection or from a deformity or from a danger to his health. And so far, and this with right, (it is added) that every time that we imagine to ourselves a criminal intention in the injury consented to, we proceed without hesitation in recognizing its political imputability. It appears to me that the supporters of the imputability of such injuries are more in the right; for no reason could be found for not imputing it to them, when the killing of a consenting person is imputable. As regards personal injuries, the *dolus* can be said to be innate in the offence itself. When we mutilate or disfigure the face of a girl with her consent in order that she may thus satisfy the jealous demands of her lover, or when emasculation takes place, whether it be with the consent of the victim, or in order to procure economical advantage to the patient, by this act the patient remains imperfect, the girl becomes deformed, the doer knowing, recognizing, and foreseeing all this. The legislator neither can nor ought to tolerate such a grave misdemeanour which, particularly in emasculation, is contrary to a natural precept of supreme order.

This is provided for by S. 87 of the Indian Penal Code, which lays down that "nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm." The section, as originally drafted, contained an exception only in favor of the harm intended or known by the doer to be likely to cause death. R. Comyn objected that "the public are surely interested in the preservation of the limbs as well as the lives of the Queen's subjects; and if such a state of society can be imagined as that in which one may allow another to inflict upon him any bodily injury short of death, it would well become the legislator to step in and save persons from the consequences of their own free and intelligent consent. In a country thoroughly civilized, a law such as is indicated by clause 69 (now S. 87) would in all probability be a dead letter; but in India, where so much self-infliction and voluntary torture are resorted to, it seems necessary to protect men from themselves, rather than offer impunity to those who are assisting in their sufferings." The words referring to grievous hurt appear to have been added with reference to that objection, though the Commissioners did not consider it of much weight.

Even grievous hurt justified in certain cases by consent.

211. Consent may, however, under section 87, justify acts which cause grievous hurt, provided they are not intended or known by the doer to be likely to cause death or grievous hurt, even though the doer may have had reason to believe, or actually believed that death or grievous hurt would be caused by them.

The section is not restricted, however, to acts which actually cause harm to the consenting person, but extends to all acts, which, though not actually causing harm, are intended to cause the same. This will be the case mostly with acts which may be an offence without causing harm, simply because of the intention to cause harm with which they are accompanied, as well as with acts which on that account are of the nature of the attempt of acts which can be offences by reason of the harm caused by them. Thus assault, mischief, criminal trespass, and defamation may be mentioned as

instances of offences in which the acts constituting them will be criminal without causing harm to a person, if done with the intention of causing harm to him.

Taking risk of harm contrasted with consent to suffer harm.

212. The exemption created by the section further refers not only to acts that cause harm or are intended to cause harm which a person has consented to suffer, but also to acts that may be known by the doer to be likely to cause harm to a person who has consented to take the risk of it. In the case of such latter acts, no harm is intended and therefore contemplated, which could be consented to, but there is only a risk of some harm, and therefore the consent can be only to take that risk. Considerable difficulty has arisen sometimes from not making a sufficient distinction between consenting to a harm and taking the risk of that harm. Strictly speaking, as pointed out above in S. 93, a man can be said to consent only to the act causing the harm. It is only in popular language, that a person can be said to consent to certain harm, and he is said to do so when he knows that the harm must accrue to him from some act he has consented to, and does nothing to avoid or avert it. He is, on the other hand, said to take the risk of that harm, only when he does or consents to another person doing some act he knows to be likely to result in the harm which, however, he not only does not consent to suffer, but wishes, hopes or even tries to avoid or avert.

Nor is this confusion restricted to India. It is noticeable even in the writings of jurists in other countries. Thus Kessler in his work on Consent[10] refers to an American case in which a publicly appearing marksman in the case of a Tell-shot penetrated the skull of his assistant instead of the apple on his head, and was acquitted. I have not been able to trace the case in the American reports, but he adds that a German judge would have to do the same, and in support of his view, says: *Man könnte sich versucht fühlen, in dem Falle des Kunstschützen ähnlich zu argumentiren: die Einwilligung bezog sich nur auf das Schiessen bei genauer Richtung der Pistole auf den Apfel, nicht bei ihrer Richtung auf den Schädel. Dabei würde man jedoch übersehen, worin die Fahrlässigkeit des Schützen bestand. Nicht dass er losdrückte, als das Korn um ein Minimum zu tief in der Kimme des Visirs stand, war fahrlässig; denn was dem Geschicktesten bei Anspannung*

10 P. 98.

aller Aufmerksamkeit passiren kann, ist keine Fahrlässigkeit. Dass er es überhaupt unternahm, so hart an einem lebenden Menschen vorbeizuschiessen, dadurch handelte er, und zwar im höchsten Grade, fahrlässig. In diese Handlung aber hatte der Verletzte eingewilligt. (*l*) Breithaupt in his work on *Volenti non fit injuria*[11] denies, however, the correctness of this, and observes that in such a case there could be no consent. He says *Der Kunstschütze, welcher einem Andern einen Apfel vom Kopf schiessen will, hat sich von vornherein ganz genau über die konkrete Handlung, nämlich über das Herabschiessen des Apfels, erklärt, und nur in diese Handlung ist eingewilligt worden. Da weder der Schütze noch der Getroffene vorher wissen konnten, ob überhaupt eine Verletzung eintreten würde, konnte von einer vorher ertheilten Einwilligung garnicht die Rede sein resp. musste eine trotzdem ertheilte Einwilligung einer nachher thatsächlich eingetretenen Verletzung gegenüber, von welcher vorher gar keine Rede war, gänzlich wirkungslos sein, weil diese Einwilligung nur zu einer ganz andern konkret bestimmten Handlung: nämlich dem Herabschiessen des Apfels ertheilt worden war.*(*a*)

He in fact maintains that there can be no question of consent in the case of offences committed by negligence, as consent can be given only to a definite act; and clearly lays down:[12] *Derjenige, welcher sich der Gefahr einer Verletzung aussetzt, d.h. sich darauf gefasst macht, verletzt zu werden, keineswegs als ein in die Verletzung Einwilligender juristisch zu behandeln ist.*(*b*) Meyer says the same. Hälschner also dissenting from Wächter as to the application of the principle *volenti non fit injuria*,

(*l*) We may feel inclined to argue, that the consent referred sonly to shooting in a straight direction with the apple and not in a line with the skull. We would thereby, however, overlook what the carelessness of the marksman consisted in. It was not carelessness that he fired when the aim was just a little below the mark; for that is not carelessness which may happen to the most skilful person in the exercise of his greatest attention. He acted carelessly, however, and in the highest degree so, in the fact that he at all undertook to shoot so hard by a living person. To this act, however, the injured party had consented.

(*a*) The marksman who wishes to shoot an apple off another's head, has from the very outset declared himself regarding the concrete act, *i. e.*, the shooting down of the apple, and only to this act consent has been given. As now neither the marksman nor the person struck could know beforehand, whether an injury would take place, there can be no question of a consent previously granted, or rather consent even if given could have no effect as regards an injury which actually took place afterwards, and of which of course there could have been no question, because consent had been given to quite another concrete and definite act, namely, the shooting down of the apple.

(*b*) He who exposes himself to the danger of an injury, *i. e*, is prepared to be injured, is by no means to be dealt with juridically, as one who consents to an injury.

[11] P 28. | [12] P. 29. | [13] Lehrbuch, 318.

says that he who with full consciousness exposes himself to a danger to his life does not yet intend to lose it.[14]

The question often arises when the harm in question is death. Mr. Mayne in his work on the Criminal Law of India,[15] in distinguishing between "consenting to death" and "taking the risk of death," says: "A man consents to death when the infliction of it is a friendly proceeding, which he authorises. He takes the risk of death when it is a hostile proceeding, which he neither consents to nor authorizes, but which he foresees as the possible termination of a conflict on which he is determined to enter." It does not appear, however, that the friendliness or the hostility of the proceeding is material to the distinction, which really turns only on the act contemplated, and on the character of the relation of the resulting harm to that act. An act directly contemplated, and the harm resulting from it as a certain consequence, is said to be consented to. A harm only known as likely to result from a contemplated act cannot be said to be consented to, but a person doing that act or allowing that act to be done, with a knowledge of the harm, may be said to take the risk of that harm.

In *Samshere Khan v. The Empress*,[16] it was argued against the applicability of the 5th exception of S. 300 to a case of a faction-fight that the party killed did not intend to get himself killed if he could help it. White, J., pointed out, however, that the language of the exception was not confined to the cases where a man consented to suffer death, but extended also to those where he consented to take the risk of death, and said: "Although it was Khoaz's intention to escape death if he could, yet he not the less ran the risk of death, when an armed man he joined in encountering armed men, and he did this voluntarily, and therefore with his own consent."

In *Queen-Empress* v. *Nayamuddin*,[17] Ghose, J., observing that there was an obvious distinction between suffering death and taking the risk of death with one's own consent, said: "In the case of a person who is said to have suffered death with his own consent, some definite circumstances both as to time and the mode of inflicting death, consented to—as in the case of a *suttee*—should, no doubt, as has been observed by

[14] XXXIV. G. S., 7.
[15] P. 615.
[16] I. L. R., VI Cal., 154.
[17] I. L. R., XVIII Cal., 494.

Pigot, J., be proved. But I am disposed to think that this rule cannot always apply in the same way in the other case."

A duel is often talked of as a case of consent to death, but the consent in that case is only to the act of fighting, and not to the causing of death, though there is a taking of the risk of death. Thus in the very case of *Queen-Empress* v. *Nayamuddin*[18] Ghose, J., went on to observe, that "in the case of a person entering into a duel with another person, both being armed, neither of the combatants specially consents to being killed: each of them hopes to come out victorious, but knows fully well at the same time that he incurs the risk of being killed—so in other cases of the kind where two persons in concert with each other deliberately fight with deadly weapons."

The same view is taken in Germany. Thus Breithaupt, in his work on *Volenti non fit injuria*,[19] *says*: "*Einwilligung beim Duell bezieht sich nämlich nicht eigentlich auf die Tödtung oder Verletzung, vielmehr ist ein jeder Duellant hier bemüht, diese von sich abzuwenden und seinem Gegner die Gefahr zu bereiten. Beide kämpfen zugleich zur Abwendung der Gefahr von sich selbst; sie haben sich Beide nur in den selbstgewollten Zustand der Nothwehr versetzt, und von dem, der sich wissentlich in die Gefahr begiebt, kann man nur uneigentlich sagen, dass er den eingetroffenen schlimmen Erfolg gewollt und zuvor genehmigt hat. Es liegt also hier nur eine Einwilligung in die allgemeine Angriffshandlung, nicht in die durch dieselbe bewirkte Verletzung* vor." [(a)] Kessler also in his work on Einwilligung[20] says "*die ächte Einwilligung allemal in nichts Anderem als im Wollen der Handlung, insbesondere nicht im Wollen des Erfolges besteht, so ist es klar, dass das Einlassen auf einen Zweikampf die beiderseitige Einwilligung in die aggressive Thätigkeit des Anderen enthält.*"

In the corresponding section of the original draft of the Code, the clause "or be known by the doer to be likely to

(*a*) Consent in the case of a duel does not refer actually to the killing or injury; either duelist endeavours rather to ward off the danger from himself and to expose his opponent to it. Both fight at the same time trying to save themselves from danger; they have both only placed themselves in a self-imposed state of self-defence, and it could only be said of one who knowingly exposes himself to a danger that he had willed it or approved of it. There is therefore consent in this case only to the general mode of attack, and not to the injury caused by it. Real consent consists only in the willing of the act, and especially not in the willing of the effect. It is therefore clear that in entering into a duel the mutual consent refers only to the aggressive acts.

[18] I. L. R., XVIII Cal., 494. | [19] P. 31. | [20] P. 90.

cause" was placed immediately after the clause "or be intended by the doer to cause;" and the clause "or to take the risk of that harm" after the clause "to suffer that harm." The section was thus evidently very broad, and would include even cases in which, though the harm was caused or intended to be caused, and, therefore, known definitely to the person doing the act, yet might not be known definitely to the person to whom it was caused or intended to be caused, and who, therefore, could not consent to suffer it, but could only take its risk. The Committee of 1854 in their draft submitted in 1856, changed the phraseology of the section, making it as it now stands. They, however, left the same phraseology in the next section intact, and actually introduced it in the section after that, so that the alteration in section 87 must have been deliberate, and could not have been made except for some reason. No reason, however, is reported as having been given; and the effect of the alteration can be only to narrow the signification of the section, and to restrict the clause as to the consent to suffer harm to the cases in which the harm is caused or intended to be caused, and the clause about "consent" to take the risk to the cases in which the doer of the act may only know that he is likely to do harm.

The section would thus exclude cases like that given above, and yet this could not have been intended; as of the four illustrations given by the framers of the draft Code, the Committee retained only one, and in that, while the harm caused may have been intended by the person whose act caused it, the person to whom the harm was caused could not have known it exactly, and could, therefore, only take the risk of it. This illustration provides that if A and Z agree to fence with each other for amusement, the agreement implies the consent of each to suffer any harm which in the course of such fencing may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence. In this case A intends to cause the hurt caused, but its nature was not known to the person to whom it was caused, and he therefore could not consent to that harm or take the risk of it.

Manly exercises with arms how far allowed.

213. The section, even as it now stands, will cover all those "manly sports and exercises which tend to give strength, activity, and skill in the use of arms, and are entered into merely as private recreations among friends." Thus persons

playing by consent at cudgels, or foils, or wrestling, will be excusable, even if death ensue. For, though doubtless it cannot be said that such exercises are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard.[21] East further observes in his Pleas of the Crown, that "the reason given by Mr. Justice Foster, for considering such sports as lawful, seems a good one; because, says he, bodily harm is not the motive on either side; upon the supposition of which motive, Lord Hale had grounded his opinion to the contrary. To which it may be added, that the weapons ordinarily made use of upon such occasions are not deadly in their nature, unless urged by a malicious and vindictive spirit." He concludes "that where the sport itself is innocent which occasions the death, the possibility of danger arising from it will not vary the case, and convert that which is a misfortune into an offence: yet that where danger may arise, due and ordinary caution, such as is usual under similar cases, ought to be used. That where the sport itself is unlawful, or the motive improper, the offence will be thereby enhanced more or less according to the probability and greatness of the danger."

In India the fixing of the age of consent for the purposes of section 87 at eighteen years will, however, prevent ordinary schoolboys from joining in any sports which are likely to cause any harm.

Greater effect of consent on acts done for benefit of person consenting.

214. The other sections in the Indian Penal Code, dealing with the exemption from criminal liability for harm caused to any person on the ground of that person's consent, have reference to acts done in good faith for the benefit of the person to whom harm is caused by them. In case of such acts, consent is naturally considered an excuse to an extent much greater than in the case of those which are at the best gratuitous and sometimes professedly mischievous, or calculated, and sometimes even intended to do harm. The benefit for the purpose of the rules contained in these sections, and of the general principle on which they are based, should not consist simply of money. Mere pecuniary benefit must usually be quite an inadequate compensation for actual injury to a person, and impunity should not be given to a person causing injury

[21] East P. C., 268.

to a person's life or body, simply because he intends to do him such good, to get him a few rupees, or a piece of furniture, or even to make him richer in money or master of more acres. Such benefit does not appear to be held sufficient to excuse criminal acts in any system of jurisprudence. The contrary doctrine would justify even slavery, rape, or abduction of a woman for forcible marriage, on the ground that those acts would get her money or even make her the master of a large fortune. The Select Committee appointed in 1854 to consider the draft of the Indian Penal Code, apparently influenced by these considerations, added an explanation to S. 92, which expressly provides that mere pecuniary benefit is not benefit within the meaning of SS. 88, 89 and 92 of the Code.

Such acts to be justified must be done in good faith.

215. Nor is the restriction of good faith less important for the purpose with which these acts are grouped together separately. Bethune's draft did not exempt from criminal liability any acts other than those done in good faith for the lawful benefit of the person harmed, but extended the exemption equally to all such acts excepting those meant to cause death, whether the consent was given by the person harmed, or, if he was under 12 years of age or of unsound mind, by his lawful guardian. Within the meaning of the Indian Penal Code, nothing is said to be done or believed in good faith which is done or believed without due care and caution. This qualification of good faith will, therefore, exclude from excuse on the ground of consent, all dangerous operations performed by unqualified persons. "We apprehend," said the Indian Law Commissioners in their first Report on the original Draft of the Code, "that an unqualified and ignorant quack could hardly be excused, for it is not to be conceived that such a one could obtain the free and intelligent consent of any person to his performing upon him an operation dangerous to life, but by misrepresentation; and such a one could hardly satisfy a court of justice that he had undertaken the operation in good faith, for good faith must surely be construed here to mean a conscientious belief that he had skill to perform the operation and by it to benefit the party, while the supposition is that he was unskilled and ignorant."[22]

A Kobiraj, who had previously cut out internal piles successfully, performed the same operation on a man who died

[22] P. 123.

from the loss of blood, and the Calcutta High Court held that it was impossible to say that the prisoner, in experimenting in the way he did, without any knowledge of the subject, was acting in good faith. The decision proceeded on the ground that the Kobiraj was uneducated in matters of surgery and had no regular education in those of medicine, and it was proved by expert medical evidence produced on behalf of the prosecution that the operation performed was one so imminently dangerous that educated surgeons scarcely ever attempted it, and treated the complaint of internal piles in a totally different way.[23] In *Reg.* v. *Long*,[24] Bayley, J., said: "It matters not whether a man has received a medical education or not. The thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution."

Extent of justification by consent in case of acts for benefit of person consenting.

216. S. 88 of the Indian Penal Code deals with such acts, when the consent to them is given by the person to whom the harm is caused or contemplated to be caused. It thus provides that "nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm." It has been explained above in S. 206, that under section 88 of the Code consent may justify any act other than that intended to cause death, and that even acts known to be likely to cause death and actually causing death may be justified by the consent of the person dying. The section was, however, held not to exempt from culpability certain persons who performed emasculation on a person at his request, but neither by a skilful hand nor in the least dangerous way, and therefore so as to cause death, but without knowing on account of their ignorance that the operation was likely to cause death.[25]

And an examination of the section shows that except in regard to death, there will be no criminal liability whether the harm is caused by the act, or intended to be caused by it by

[23] Sukaroo v. Empress, I. L. R., XIV Cal., 566.

[24] 4 C. & P. 423.

[25] Queen v. Baboolun, V W. R. Cr., 7.

the doer of the act, or known by the doer to be likely to be caused by it; and whether the person to whom the harm is caused consent to suffer that harm or to take the risk of it. Nor is there any restriction in the section as to the competency or age of the person consenting, so that consent given by any person will justify the act consented to, if it fulfil the subjective qualifications which have been explained in Chapter VII.

Acts for a person's benefit not justified if not consented to by him.

217. There may be cases in which a person may be deemed justified in causing harm to another for his benefit, even against his desire. A surgeon may thus sometimes consider it absolutely necessary for a person's recovery from a dangerous disease or for saving his life to operate upon him, even though that person's nervousness and ignorance may lead him to withhold or deny his consent to the operation. The English Criminal Code Bill of 1879 proposed to enact in its section 67, and the Canada Criminal Code has actually enacted in section 57, that "every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit, provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case." The protection thus proposed to be given in England and actually given in Canada would not be dependent on the consent of the person upon whom the operation was performed, and, therefore, would be absolute. In fact, Stephen, one of the framers of the Bill, in his Digest of Criminal Law, submits it as the correct rule that "if a person is in such circumstances as to be incapable of giving consent to a surgical operation, or to the infliction of other bodily harm of a similar nature and for similar objects, it is not a crime to perform such operation or to inflict such bodily harm upon him without his consent or in spite of his resistance."

The Indian Penal Code does not, however, recognize non-liability in such a case; and the surgeon will, under the Code, be liable criminally for the effects of any such operation he may perform, however necessary or advantageous the operation may have appeared, and however well intentioned it may have been. Nor is this, as a general rule, to be deprecated. The contrary would be to give to a person's friends or physicians the right to force an operation which he declines.

"This," as Bentham observes, "would be to substitute a certain evil for a danger almost imaginary. Distrust and terror would watch by the sickman's bed. If a physician, through humanity, goes beyond his right, and the experiment turns out unfavourably, he ought to be exposed to the rigour of the law, and his intention, at most, should only serve as an extenuation of his offence."

Guardian's consent generally deemed equivalent to one's own consent.

218. It may be otherwise when the person on whom the operation is performed is incapable of giving consent, in which case the absence or even denial of his consent may be treated as null; and the act treated as if consent had been given by that person. This is the case when the incapacity to give consent arises from a want of the subjective qualifications of an adequate consent, which have been laid down above in Chapter VIII.

Thus when a person is under 12 years of age, or of unsound mind, and has a guardian or is in lawful charge of some other person, the consent of the guardian or the said other person may legally be treated as the consent of the person himself. "A lunatic may be in a state which makes it proper that he should be put into a strait waist-coat. A child may meet with an accident which may render the amputation of a limb necessary. But to put a strait waist-coat on a man without his consent is, under our definition, to commit an assault. To amputate a limb is, by our definition, voluntarily to cause grievous hurt."[26] It is, therefore, desirable "that the consent of the guardian of a sufferer who is an infant or who is of unsound mind shall, to a great extent, have the effect which the consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind." Section 89 accordingly provides as a general rule that nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to that person.

---

[26] Note B annexed to the first draft of the Code.

219. The guardian's power of consent is not co-extensive, however, with a person's own. The authors of the first draft of the Indian Penal Code in justifying the difference said:[27] "There is a considerable danger in allowing people to assume the office of judging for others in such case. Every man always intends in good faith his own benefit, and has a deeper interest in knowing what is for his own benefit than any body else can have. That he gives a free and intelligent consent to suffer pain or loss, creates a strong presumption that it is good for him on the whole to suffer that pain or loss. But we cannot safely confide to him the interest of his neighbours in the same unreserved manner in which we confide to him his own, even when he sincerely intends to benefit his neighbours. Even parents have been known to deliver their children up to slavery in a foreign country, to inflict the most cruel mutilations on their male children, to sacrifice the chastity of their female children, and to do all this declaring, and perhaps with truth, that their object was something which they considered as advantageous to the children. We have, therefore, not thought it sufficient to require that on such occasions the guardian should act in good faith for the benefit of the ward. It has been considered desirable to impose several additional restrictions which, we conceive, carry their defence with them."

Guardian's power of consent is not co-extensive with one's own.

220. These restrictions are that the guardian's consent "shall not extend to the doing of anything which the person doing it knows to be likely to cause death, or to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity."[28] In the original draft there was another proviso to the effect, that the exception would not extend to rape, or to the gratification of unnatural lust, or to the attempting to commit rape, or to gratify unnatural lust. Objections were made against the allusion to such acts, "as within a rule respecting acts done in good faith for the benefit of a child or lunatic." The Commissioners considered it proper to retain the clause with a view to guard the exception from abuse, as in the then state of moral feeling among large classes of the

Restrictions on guardian's power of consent.

[27] *Vide* note B annexed to the first draft of the Code.

[28] S. 89, I. P. C.

people of India, they did not regard that as a case out of all probability. The provision was finally omitted however.

To help in the interpretation and application of the provisoes introduced into the section, a number of illustrations were given. Illustration (*c*) was a case of intentionally causing death of one's daughter to prevent her from falling into the hands of Pindarees, which of course did not come within the exception, and was omitted evidently, as not necessary. The illustration (*d*) was a case of voluntary, but not intentional, causing of death; which fell within the exception, and even now finds a place in the Code. It provides that "A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child."

What is chiefly noticeable in the provisoes to S. 89 is that they extend also to the attempt of all acts the doing of which is within their scope, and the fourth proviso expressly extends it to the abetment of all acts intentional or voluntary within the scope of the first three provisoes. This appears to have been necessitated by the changed phraseology of the rule of the exception, in which reference has been made to the consent to the act done, and not to the harm resulting from it, as in SS. 87 and 88 of the Code. This change in the phraseology is due evidently to the circumstance that a person may consent to a harm to oneself, but cannot well be said to consent to a harm done to another, though he may well consent to an act done to another person and causing harm to him. Besides when the question is of consent to the acts causing harm to another person, the acts must be restricted to a much greater extent, and only those exempted from criminal liability which do not involve an intention carried out by oneself or by another, and in either case entirely or only to a certain extent. Bearing this in mind, the "grievous disease or infirmity, for the curing of which consent may be given to the voluntary causing of grievous hurt or even death," must be taken in a strict sense.

What acts causing harm justified when done without consent.

221. There are cases in which acts causing harm are necessary for one's benefit, and not only the person to whom the harm is caused is incapable of giving consent, but has no guardian or other person in lawful charge of him,

who may be appealed to for it. There can be no real consent in such cases, though it may be said that there is a presumed or even constructive consent, which, of course, is no consent at all. The authors of the first draft of the Indian Penal Code, speaking of such a case in their note B, said: "For example, a person falls down in an apoplectic fit. Bleeding alone can save him, and he is unable to signify his consent to be bled. The surgeon who bleeds him commits an act falling under the definition of an offence. The surgeon is not the patient's guardian, and has no authority from any such guardian; yet it is evident that the surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings it from the house-top, with a faint hope that it may be caught in a blanket below, but with the knowledge that it is highly probable that it will be dashed to pieces. Here, though the child may be killed by the fall, though the person who threw it down knew that it would very probably be killed, and though he was not the child's parent or guardian, he ought not to be punished. In these examples there is what may be called a temporary guardianship justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy with which the law invests every person who is present when a great crime is committed, or when the public peace is concerned." To acts done in the exercise of this temporary guardianship, the authors of the Code extended by S. 92 a protection very similar to that which they had given to the acts of regular guardians by S. 89. Bethune's draft proposed to enact briefly the following: "Nothing is an offence which is harm not meant to cause death, and which is done in good faith for the lawful benefit of the person harmed, in any emergency in which free consent cannot be sought or given." Such latitude was not considered advisable by the Committee of 1854, which adopted with some modification, the detailed and more stringent provisions proposed by the authors of the first draft, which were substantially adopted in the end by the Legislature, and enacted as a general rule in S. 92 of the Indian Penal Code. This section provides, that "nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is

possible to obtain consent in time for the thing to be done with benefit."

Restrictions on the power of causing harm without consent.

222. As in such cases there is no consent, the rule containing the exemption from criminality is still more circumscribed, and does not extend even to the voluntary causing of hurt except for preventing death or hurt, the other restrictions being the same as in the case of consent by a guardian. [D]

To further explain these restrictions, the authors of the original draft added the following four illustrations, all of which have been retained in the Code, as finally passed:—

(*a*) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(*b*) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence.

(*c*) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(D) The provisoes containing these restrictions are—

First.—That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly.—That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly.—That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly—That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

(*d*) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, A has committed no offence.

Consent does not justify acts constituting public offences.

223. Reference has been made above to cases in which consent to a criminal act by or on behalf of a person deprives that act of its criminal character. It was observed there that consent could have this operation, only as regards the injury caused by that act to the person by whom or on whose behalf the consent was given, only so far as that act was an offence on account of the injury caused to that person. Acts which are offences quite apart from the injury to that person are not excused by the consent given to them by any individual. This is provided for directly by S. 91 of the Indian Penal Code, which enacts that the general exceptions made on the ground of consent, and enacted in SS. 87, 88, and 89 of the Code, do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Criminal acts directed against society, and not intended to affect individuals as such did not require this special provision for their exemption from the effect of individual consent. Thus not only all the so-called offences against the State or its various departments, or its currency or revenues, but also all acts intended to produce public commotion or disturbance, to interfere with public convenience, or to corrupt public morals, are punishable quite regardless of the consent of any person, who may be incidentally affected by them. Consent of an individual to public nuisances, obscene publications and indecent exhibitions, has no effect on the criminal liability of the persons guilty of them. The law with regard to riots and affrays is the same, determined altogether by the interests of the public, and without the least regard to the injury caused to any persons by them in their mind, body or property. Whatever may be the effect of consent in a suit between party and party, it is not in the power of any man to give an effectual consent

to that which amounts to, or has a direct tendency to create, a breach of the peace, so as to bar a criminal prosecution.[29]

Consent does not justify acts constituting other offences, irrespective of harm caused by them to person consenting.

224. Section 91 appears to refer chiefly to criminal acts which are offences against individuals, regardless of the harm to the individual directly injured by them. Thus acts prejudicially affecting society through an injury to individuals are also punishable as offences, notwithstanding consent given to them by any individual. As instances of such acts reference may be made to those causing miscarriage, and to duels and prize-fights. The first mentioned offence is given as an illustration in the Code, which provides that "causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore it is not an offence 'by reason of such harm;' and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act."

It is sometimes contended with regard to this offence, that the mother's consent to the act of causing miscarriage cannot purge the act of its criminal character, as the act is an offence on account of the injury done by the act to the child. It is said, on the other hand, that the child was not *in esse*, and so no injury could be done to it. The approved theory appears to be that it is an offence directly against society as affecting the increase of population.[30] It is an unlawful act, dangerous to life, and, as observed by Shaw, C. J., in *Commonwealth* v. *Parker*,[31] "the consent of the woman cannot take away the imputation of malice, any more than in case of a duel, where in like manner there is consent of the parties."

That prize-fights are illegal, and the parties thereto may be prosecuted for assault upon each other is quite evident and may be taken as settled. In *Rex* v. *Billingham*[32] two persons agreed to fight a pitched battle, and about 1,000 persons assembled to witness it. A scuffle ensued, which ended in a general tumult, and Burrough, J., said that all these fights were illegal and no consent could make them legal. In *Rex* v. *Perkins*,[33] Patteson, J., said: "There is no

[29] The Queen v. Coney, 8 Q. B. D., 553. Per Hawkins, J.
[30] State v. Cooper, 22 N. J. (L)., 52.
[31] 9 Met., 263.
[32] 2 C. & P., 234.
[33] 4 C. & P., 537.

doubt that prize-fights are altogether illegal; indeed just as much so as that persons should go out to fight with deadly weapons." Similarly in *Queen* v. *Coney*,[34] Hawkins, J., said: "Nothing can be clearer to my mind than that every fight in which the object and intent of each of the combatants is to subdue the other by violent blows, is, or has a direct tendency to, a breach of the peace, and it matters not, in my opinion, whether such fight be a hostile fight begun and continued in anger, or a prize-fight for money or other advantage. In each case the object is the same, and in each case some amount of personal injury to one or both of the combatants is a probable consequence, and, although a prize-fight may not commence in anger, it is unquestionably calculated to rouse the angry feelings of both before its conclusion." In the same case, Lord Coleridge conceived,[35] "it to be established, beyond power of any argument however ingenious to raise a doubt, that as the combatants in a duel cannot give consent to one another to take away life, so neither can the combatants in a prize-fight give consent to one another to commit that which the law has repeatedly held to be a breach of the peace."

The latitude given to manly sports and exercises, calculated to give bodily strength, skill, and activity, and to fit people for defence, public as well as personal, in time of need, when conducted merely as diversions among friends, "must not be extended to legalize prize-fightings, public boxing, matches, and the like, which are calculated to draw together a number of idle, disorderly people; . . . . such meetings have a strong tendency in their nature to a breach of the peace;"[36] for they "serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement, and without anger or mutual ill-will."[37] Stephen in his Digest of Criminal Law[38] lays down that "no one has a right to consent to the infliction of bodily harm upon himself in such a manner as to amount to a breach of the peace, or in a prize-fight or other exhibition calculated to collect together disorderly persons."

---

[34] VIII Q. B. D., 553.
[35] P. 567.
[36] East. P. C., 270.
[37] Com. *v.* Colberg, 119 Mass., 351.
[38] Art. 229.

CHAPTER XI.

Consent as a Ground of Mitigation.

Consent a ground for mitigation of liability.

225. Consent when not sufficient even as a ground for avoidance of criminal liability, or for justification of a criminal act, is generally deemed to be a cause for mitigation, or, as French jurists would say, an *excuse*. Thus Sutherland, in his treatise on Damages[1] says: "The previous consent of the plaintiff to the act which he complains of, though not given in a form to bar him or support a plea of justification, may yet be proved in mitigation of damages. Thus in trespass for an alleged injury to the plaintiff's wall by inserting joists in it, evidence that the wall was so used by the defendant in the erection of an adjoining building under an express parol agreement with the plaintiff is admissible under the general issue in mitigation." In *Adams* v. *Waggoner*,[2] it was said that consent might be shown in mitigation of damages for an assault, even when it would not bar an action for it. In *Gosha* v. *State*,[3] the court observed that though the consent of a minor girl to sexual intercourse with her was not justification, yet it should so mitigate the crime as to make the punishment lighter.

Breithaupt in his work on *Volenti non fit injuria*[4] explains very clearly the ground of this mitigating operation of consent in criminal law. He says that every offence contains two essential factors (*momente*); first, an objective one consisting in this, that the acting person violates the positive law, *i. e.*, the will of the State or the interests of the public welfare; and secondly, a subjective one through which the acting person illegally opposes the will of the injured (person); and therefore in the cases in which the latter has given consent, the subjective factor is removed, and the doer offends only against the *jus publicum*, in as much as the existence of the offence is not altogether prevented by consent. *Nun wäre es doch entschieden eine grosse Ungerechtigkeit, wenn man Denjenigen, der durch seine Handlungen nur Missachtung gegen einen Willen, nämlich den des Staates, an den Tag legt, mit derselben Strafe bedrohte, wie Denjenigen, der noch die Subjektivität des Verletzten speziell angreift, indem er zugleich auch gegen den Willen desselben*

[1] I. 218.
[2] 33 Ind., 531.
[3] 56 Ga., 36.
[4] P. 35.

handelt. Es ist also bei dem mit Einwilligung des Verletzten Handeln den die Widerrechtlichkeit eine abgeschwächte.(a) He comes to the conclusion that *dass bei der Verletzung mit Einwilligung einerseits der Verstoss gegen das positive Recht gerügt werden muss, und dass andererseits nicht die volle Strafe verhängt werden darf, welche auf das ohne Einwilligung des Verletzten begangene Delikt gesetzt ist.* (b)

Consent is ground of mitigation in case of homicide.

226. It has been explained in the previous chapter that consent to another person causing the death of the person consenting does not affect the criminal character of the act causing death; and that the act remains penal notwithstanding the consent. This has been determined in deference to the importance of the state and to abstract conceptions of morality, but is quite as opposed to popular ideas, as to the notion of the individual's own rights. As a compromise between the conflicting rights of society and of the individual, it generally came to be recognized that the causing of death in such a case, even if otherwise murder, would be a mitigated form of it, consent thus having the effect of reducing, if not removing, the criminality of the act.

There appears to be no provision in any European Code expressly making consent a ground for the mitigation of the offence, but at the same time there appears to be no doubt that consent is everywhere recognized as a ground for the mitigation of its punishment. In France, R. Garraud admits[5] that the consent of the person killed certainly modifies the criminality of the murderer to a material extent. He says, however, that the circumstances bearing on consent, and the motives of the person acting on it, are so varied, that it will not be convenient to make consent an excuse, a mitigation of an offence as distinct from a mitigation of punishment; and that there will be more inconveniences than advantages in a *disposition* which would by law reduce the punishment of

(a) It would certainly be a great injustice if we threatened him with the same punishment, who had by his acts shown a disregard merely for the wish of the State, as him who had especially operated against the subjectivity of the injured person, in as much as he had at the same time acted also against this will of the injured one.

(b) That on the one hand, in the case of an injury with consent the violation of positive law must be punished, and that, on the other hand, there may not be awarded the full punishment which is laid down for the offence if committed without consent.

[5] IV Gar. Dr. Pen., 319.

assassination or murder, because the crime was committed with the consent or on the demand of the victim. He says: *Comment ce consentement a-t-il été obtenu? L'idée première du suicide et la volonté de l'accomplir viennent-elles de la victime? Quel a été le mobile de la personne trop complaisante qui a exécuté l'homicide? A-t-elle voulu obéir à un faux sentiment d' amitié? Au contraire, n'a-t-elle eu d'autre but que de satisfaire sa haine ou sa jalousie contre la victime, ou même sa cupidité? On voit combien de circonstances diverses peuvent modifier la situation. La loi piurrait-elle les prévoir? Qu'arriverait-il si elle en omettait quelques-unes? et n'est-il pas préférable de laisser au Juge, mieux placé que le législateur pour apprécier toutes ces circonstances, le soin de modérer la peine, s'il convient de le faire?* [a]

In some Codes also, consent is thus expressly treated as a mitigation of punishment in case of homicide by consent. The Spanish[6] and the Danish[7] Penal Codes provide a light punishment for homicide by consent. The Codes Penal of Holland[8] and Hungary[9] provide a special punishment for taking a person's life at his express and earnest desire. The German Penal Code, in § 216, provides a greatly reduced maximum of punishment for killing a person when one should have been determined to it by *das ausdrückliche und ernstliche Verlangen* (the express and earnest request) of the person killed. But *Verlangen* is, as observed by Oppenhoff, more like instigation than mere consent (*Einwilligung*), which latter is not sufficient to bring the killing within § 216. *Verlangen*, as pointed out by Dr. Rüdorff in his Commentary on the German Penal Code, cannot be identified with *Zustimmung* or *Einwilligung*, as for *Verlangen* it is necessary that the initiative should come from the person killed, while for the latter, *i. e.*, *Zustimmung* or *Einwilligung*, it may and usually would come from the person killing. The authors of the German Penal Code, in giving their grounds for the provision contained in the section, observed that it was in accordance with the feeling of individual right (*Rechtsgefühl*)

(a) How has this consent been obtained? Did the first idea of the suicide and the will of accomplishing it arise from the victim? What has been the motive of the too complaisant person who has committed the homicide? Has he wished to yield obedience to a false sentiment of friendship? On the contrary, had he no object other than that of satisfying his hatred or his jealousy against the victim or even his own cupidity? One sees how many different circumstances can modify the situation. Can law foresee them? How would it happen if one omitted some of them? And is it not preferable to leave to the Judge, who is in a better position than the legislator to appreciate all these circumstances, the task of moderating the penalty if it should appear proper to do that.

[6] S. 421.
[7] S 196.
[8] S. 293.
[9] S. 282.

that the killing of a consenting person was not to be punished as that which had taken place against the will of the killed person; however, the undisputed moral law that *das Leben ein nicht veräusserliches Gut ist, lässt weder Straflosigkeit, noch eine niedrig bemessene Strafe zu.*[10] (b) Breithaupt in his work on *Volenti non fit injuria*[11] observes, that moral considerations play so subordinate a part in positive law, that they ought to be placed entirely in the background, and that the mitigation of punishment in case of homicide by consent is due to the general principle that through the existence of consent there is no injury to the individual right, but a violation only of the rights of the State. In support of this view, he refers to the observations of Herr Abg. Evelt, who observed in the Reichstag: *Was strafen Sie denn, meine Herren, wenn Sie die Tödtung des Einwilligenden strafen? Sie strafen ja nicht die That, dass der Betreffende dem Mann auf seinen Wunsch und Verlangen das Leben genommen hat, Sie strafen nicht den Umstand, dass das Leben des Einzelnen gekürzt ist, sondern vielmehr das Faktum, dass das öffentliche Interesse in der Vernichtung des Lebens des Einzelnen einen tiefen Schaden erleidet, Sie strafen nur lediglich wegen des verletzten Interesses der Allgemeinheit, nicht wegen des verletzten Rechtes des Einzelnen zum Leben.*(c)

Under the English common law the criminality of the act of murder is deemed such, that the consent of the party murdered is held not to lower the degree of the offence in law. And this rule exists not only in cases where there is malice, but even where no malice exists, as in case of an agreement for concurrent suicides. While, however, there is no particular name for murder committed by consent, and consent on that ground is not an excuse or mitigation of the offence; there is nothing to indicate that the offence of murder when committed by the consent of the person murdered is not considered less heinous than that of violent murder, and consent in the case of murder is not a ground for mitigation of punishment, what French lawyers would call a *circonstance attenuante*. And cases may readily be conceived

(b) Life is an inalienable commodity, and neither allows immunity from punishment nor a lower degree of punishment.

(c) What is it that you punish gentlemen, when you punish homicide by consent. You do not punish the fact that the person in question has taken the life of an individual with his consent, you do not punish the circumstance that the life of the individual has been shortened, but rather more the fact that the public interest has suffered a deep loss in the destruction of the life of the individual, you punish only on account of the injured interest of the general public and not on account of the injured right of the individual to his life.

[10] Rüdorff. Comm., S. G. B., 474. | [11] P. 36.

where the degree of guilt would indeed be greatly reduced. A physician, at the request of a dying man suffering intolerable agonies, may, from humane motives, precipitate death; or a soldier on the battle-field, after urgent appeals, may, with intense agony on his own part, yet from the same humane motives, take the same course as to a dying comrade. Yet even here the maxim *Volenti non fit injuria* cannot receive full operation, as there will be nothing in the consent to bar a verdict of guilty. That verdict, however, would be for the lowest form of voluntary manslaughter, and might well be followed by executive pardon.

Consent is a mitigation of offence of homicide in India.

227. In India, consent is statutorily recognized even as a ground of the mitigation of the offence. The fifth exception of S. 300 of the Indian Penal Code, thus provides, that culpable homicide is not murder, when the person, whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death with his own consent. The authors of the first draft of the Code, in making the provision, pointed out that the distinction between murder and voluntary culpable homicide by consent had never, as far as they were aware, been recognized by any Code in the distinct manner in which they proposed to recognize it; but that it might be traced in the laws of many countries, and often, when neglected by those who had framed the laws, it had had a great effect on the decisions of the tribunals, and particularly on the decisions of tribunals popularly composed.

In giving their reasons for not punishing such culpable homicide with the severity of the offence of murder, the authors of the draft in their note M, said: "Our reasons for not punishing it so severely as murder are these: in the first place, the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honour, not unfrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain, the friend who supplies laudanum to a person suffering the torment of a lingering disease, the freedman who in ancient times held out the sword that his master might fall on it, the high-born native of India who stabs the females of his family at their own entreaty in order to save them from the licentiousness of a band of marau-

ders, would, except in Christian societies, scarcely be thought culpable, and even in Christain societies would not be regarded by the public, and ought not to be treated by the law, as assassins. Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society. When we punish murder with such signal severity, we have two ends in view ; one end is, that people may not be murdered ; another end is, that people may not live in constant dread of being murdered. This second end is perhaps the more important of the two. For if assassination were left unpunished, the number of persons assassinated would probably bear a very small proportion to the whole population ; but the life of every human being would be passed in constant anxiety and alarm. This property of the offence of murder is not found in the offence of voluntary culpable homicide by consent. Every man who has not given his consent to be put to death is perfectly certain that this latter offence cannot be committed on him at present, and that it will never be committed unless he shall first be convinced that it is his interest to consent to it. We know that two or three midnight assassinations are sufficient to keep a city of a million of inhabitants in a state of consternation for several weeks, and to cause every private family to lay in arms and watchmen's rattles. No number of suicides, or of homicides committed with the unextorted consent of the person killed, could possibly produce such alarm among the survivors."

Objections were raised against this provision in regard to the effect of consent. It was broadly observed, that it was no alleviation of homicide that the murderer had the person's consent to kill him.[12] It was said that apart from "all religious considerations of a future state, and merely adverting to man's strong natural love of life, even in the most desperate circumstances, the mere fact of a person consenting to be killed would indicate a morbid state of mind sufficient to raise a doubt of his sanity;" [13] That the principle of the sanctity of life should not be departed from, and that the " prerogative of mercy would much better be allowed to apply when necessary to such cases, than a rule be laid

[12] Indian Law Commissioner's first Report, para. 286.

[13] Indian Law Commissioner's first Report, para. 284.

down that a man has to some extent a right to authorize its destruction." [14]

S. 316 of Bethune's draft of the Code thus provided, that "whoever maliciously abets another person in committing self-murder, or in doing anything which the latter knows to be likely to cause death, and thereby causes the death of such other person commits murder, and is liable to death;" and S. 317 still more broadly laid down that "in any case of murder or man-slaughter, the free consent of the person killed does not change the offence." The Indian Law Commissioners agreed, however, with the authors of the Code, and the provision as proposed by them was enacted without the limitations which, in view of the general provisions as to consent, were not considered necessary.

Limitation of the age of consent for homicide in India.

228. The authors of the Code codsidered, however, that with a view to the great importance of life, and the inherent improbability of a person consenting freely to its extinction, a higher degree of the maturity of intellect, and special safe-guards for its freedom should be required in such a case. They first proposed to fix the age for this purpose at 12 years, and to enact the following provisoes to qualify the general proposition as to homicide by consent. "First.—That the offender does not induce the person whose death is caused to make that choice by directly or indirectly putting that person in fear of any injury. Secondly.—That the person whose death has been caused is not, from youth, mental imbecility, derangement, intoxication or passion, unable to understand the nature and consequences of his choice. Thirdly.—That the offender does not know that the person whose death is caused was induced to make the choice by any deception or concealment. Fourthly.—That the offender does not conceal from the person whose death is caused anything which the offender knew to be likely to cause that person to change his mind."[15] The Indian Law Commissioners in their first Report, proposed to exclude the express reference to age, and to substitute for it the words "being capable of making an intelligent choice," observing that they could hardly imagine, that "it was advisedly intended to make the difference between murder and culpable homicide by consent depend upon the circumstance of the widow at whose *satee* a person may have assisted,

[14] Indian Law Commissioners' first Report, para. 285.

[15] S. 298 of the first draft of the Code.

having been under or above 12 years of age, if she was ripe in both body and mind; supposing, for example, that she cohabited with her husband, and performed the ordinary duties of a wife with judgment and intelligence, and was one of whom there could be no doubt that she was able to understand the nature and consequences of that to which she gave her consent."[16] The Committee of 1854 decided to retain the reference to a fixed age, but raised it first to 21 years, and on reconsideration to 18, and this view was adopted by the Legislature.

Finally, the provisoes also were omitted, as it was not considered necessary to retain them, specially after the general safeguards prescribed for that purpose in S. 90 of the Code.

Proposed English legislation in regard to homicide by consent.

229. The weight of the observations made and of the arguments urged by the authors of the first draft of the Indian Penal Code was felt in England also. The drafts of the Code relating to the law of homicide accompanying the fourth and the seventh Reports of Her Majesty's Commissioners on Criminal law presented in the years 1839 and 1843, in accordance with the English Common law, provided as a general principle, that "homicide is neither justified nor extenuated by reason of any consent given by the party killed." The English Criminal Law Commissioners appointed in 1845 were impressed, however, with the weight of those observations and arguments as to the desirability of providing a lower punishment for murder by consent, and came to a different conclusion; and in Art. 14 of the draft of the Criminal Code Bill presented with their second Report, they proposed to enact that "homicide is extenuated whensoever the killing is wilful and not justifiable, but the act from which death results was done or the act from the omission of which death results was omitted at the request, or with the consent, of the party killed." To secure the reality of consent, Art. 15 of the Bill provided that, "homicide shall not be extenuated within the meaning of the last preceding Article, where the party killed is in a state of idiotcy, or is by reason of unripeness or weakness of mind, or of any unsoundness, disease or delusion of mind, or of passion

[16] Para. 294

incapable of discerning the nature and consequences of his consent; or where such consent is extorted by the party killing; or where the party killing has reasonable cause for believing that such consent is given, in consequence of some false impression in respect of facts on the part of the person killed at the time of his giving such consent."

Thomas Starkie differed from the other Commissioners, and with reference to these provisions recorded: "I cannot concur in recommending the above article which constitutes the consent, on the part of the party killed, an extenuation of the offence. I conceive, that in point of religion and morals, the crime of murder comprehends the wilful destruction of a human being, whether it be with or without his consent. If according to the moral law, a party has no power to consent that another shall destroy him, it must be a grievous moral wrong that any other person should destroy the consenting party, or even that his offence should be extenuated by such consent given. Such destruction is not, however, merely a sin but a crime against society of the most dangerous character to life. Insecurity to life is admitted to be an evil calling for the greatest severity of punishment against offenders; and I cannot but think that were the question to be examined even on this ground alone, the result would be against the proposed alteration. The law could not be relaxed, even where consent was given, without considerably diminishing the general efficacy of the law as a moral as well as merely penal protection; and it is very questionable whether the change would not be attended with very serious diminution of protection to life, and increased apprehensions of danger. The plea of consent would probably be not an infrequent, and certainly a dangerous one; so difficult would it be to ascertain the real circumstances under which consent had been given, and to discover the arts really used for procuring consent, or rebutting slight evidence of consent, where the sufferings of a party from bodily disease or mental distress might render consent not improbable. The provisions contained in Article 15, with which it has been deemed necessary to guard the proposed alteration, sufficiently attest the questionable nature of such a defence, and not only show with what jealousy it would require to be constantly guarded, but also prove the difficulty of guarding effectually against most atrocious practices against human life which might be practised under colour of such a consent."

Burning the *Satee* is only culpable homicide.

230. The express provision in the Indian Penal Code appears to have been necessitated chiefly by the frequent cases of *Satee*, which were, under the Regulations of every Presidency, punished as an offence, but in no Presidency as the offence of murder. The original draft of the Code provided also an illustration to the following effect:—"Z, a Hindoo widow, consents to be burned with the corpse of her husband. A kindles the pile. Here A has committed voluntary culpable homicide by consent." The illustration was omitted, however, only as it might lead to the inference that the legislature had in some measure justified the rite of *Satee*.

The Indian Law Commissioners in their Report on that Draft said[17]: "It is probable that the authors of the Code were led to distinguish this form of voluntary culpable homicide, by the consideration of the case stated in the first illustration of a Hindoo widow who with her own consent has been burned with the corpse of her husband. They were obliged to provide for this case which was already the subject of penal enactments in the Regulations for the Company's Courts. They found that 'the burning of a Hindoo widow by her own consent, though it is now, as it ought to be, an offence by the Regulations of every Presidency, is in no Presidency punished as murder.' By Regulation XVII of 1829 of the Bengal Code, copied exactly in Regulation I of 1830 of Madras, and followed substantially in Regulation XVI of 1830 of Bombay, the offence is declared to be 'culpable homicide,' punishable in the Presidencies of Bengal and Madras with fine, or with imprisonment, or with both fine and imprisonment at the discretion of the Court, and in the same manner, except with a maximum limitation of imprisonment to 10 years in the Presidency of Bombay. This is not a case of 'extraordinary local superstition' as Mr. Norton suggests, but a matter of national concern affecting a whole people, for which the Penal Code for India must legislate. The Commissioners had to consider whether they would rank this offence as murder, as falling within the definition thereof, or reduce it by a special exception to a lower grade of culpable homicide, following the existing law which had been enacted upon the most careful and solemn deliberation. They concluded that it ought not to be treated as murder. They had then to frame an exceptive definition, and the question would

[17] Para. 291.

naturally arise whether the terms of the definition should be limited specifically to cases of *Satee*, or be made general enough to comprehend other cases depending upon the same principle."

Homicide in a duel is culpable homicide in India.

231. The clause in the Indian Penal Code as to homicide by consent is applicable to duels also. It is in fact merely a reproduction of S. 298 of the first draft of the Code without its limitations and illustrations, and operates to reduce the offence of killing an antagonist in a fair and open duel from murder to culpable homicide. In the draft of the Code first printed, a duel was given as an illustration of voluntary culpable homicide by consent. The Commissioners considered that notwithstanding the slight alteration made in the definition since the omission of that illustration, the clause even as it stood in the final draft of the authors included the case of a person killed in a duel as one in which he "suffers death or takes the risk of death by his own choice." There can hardly be any doubt that a man who deliberately stands to be shot at twelve paces must be deemed, even if not to consent to death, at least to take its risk with his own consent. The Commissioners in their report on the authors' draft of the Indian Penal Code, said: "If the clause be retained, if voluntary culpable homicide by consent be recognized as a distinct offence, we know not but it may be the best way of dealing with a species of crime which it has hitherto been found impossible to deter men from by the dread of capital punishment. It is in vain to denounce a penalty which is so contrary to the general sentiment, that except in cases marked by extreme malignity, or some special aggravation rousing indignation against the offender, it could not be executed without shocking the public sense. Yet this is just what must be said of the penalty of death threatened by the existing law to the person who kills another in what is called a fair duel—threatened but so rarely enforced, that it carries no terror with it, no terror at least of that which it threatens. It might be well worth a trial whether the certain expectation of punishment for culpable homicide by consent, the enforcement of which would surely be approved by the public mind, would not be more efficacious in preventing duels in which life is risked, than the present empty denunciation of the law."

232. This appears to be the correct view also, as in England and the United States, it is the treatment of homicide by duel as murder, and the consequent extreme severity of the punishment for it, which has stood in the way of the repression of that offence, by enlisting the sympathy of the public and juries in favor of duellists. Thus Alison, in his Principles of the Criminal Law of Scotland,[18] observes, that "such has been the natural and human sympathy both of courts and juries, with the alternative to which the best men are often reduced, of fighting a duel, or losing their place in society, that there is hardly an instance, for a long period, on our records, of a capital sentence being pronounced on such a charge, if there was nothing unusually savage or dishonourable in the conduct of the accused." And after mentioning by name a variety of cases in which fatal duels had been fought, and in which the judges had laid down the law, that death by duelling was no other than murder, he says, that nevertheless "successive verdicts of not guilty were delivered by juries." In Eden's Principles of Criminal Law, it is stated:—"I have not found any case of an actual execution in England in consequence of a duel fairly fought."

Unsatisfactory effects of treating homicide in a duel as murder.

This is due chiefly to the treatment of homicide in a duel as murder. However imperative a law may be, it loses its force when it includes in the same prohibition, by the same name, and under the same penalty, acts different in their motives, circumstances and effects. As observed by Livingston, in the introductory report accompanying his draft of the Criminal Code of Louisiana we may, in our statutes, give the name of murder to death occasioned by a duel; but the world will not adopt the appellation; and a combat, sanctioned by the irresistible command of public opinion, and marked by no circumstances of peculiar malignity, will never be considered, prosecuted or punished, as an assassination.(A)

(A) Livingston observes in his report as to the punishment of duelling:—"That practice, in modern times, seems to have proved how inefficient are all laws when opposed to public opinion, and to what degree the fear of shame will prevail over that of punishment. Severe penalties have been denounced against it in vain; and it is the more difficult to be eradicated, because it prevails most where courage, a fear of disgrace, and a sense of personal dignity are most perfect." And again, "the same false sentiment of honour which leads to a breach of the laws in committing this offence, renders its punishment more difficult. Witnesses avail themselves of the principle, that they cannot be compelled to justify anything that may inculpate themselves; and, therefore, neither seconds, nor surgeons, nor any others, who were voluntarily present, can be induced

18 P. 54.

233. Attempts have sometimes been made even in England to reduce the offence of such homicide from murder to manslaughter. The drafts of the Code, relating to the law of homicide, presented with the fourth and the seventh Reports of Her Majesty's Commissioners in the years 1839 and 1843, provided that, "if two persons deliberately agree to fight with deadly weapons, and one be killed, the offence of the other is not extenuated." With a change in the view as to the effect of consent on the culpability of homicide, the draft presented with the second report of the English Commissioners presented in 1845, provided expressly that "homicide is extenuated where, if two persons deliberately agree to fight, a contest ensues, and one of them is killed: provided that if such contest be with deadly weapons, the party killing shall incur the penalties of the second class;" and also that "homicide is not extenuated in the case of any such contest as in the last preceding article is mentioned where the death of the person killed is caused in consequence of any unfair advantage taken, or any unfair means used, by the party killing."[19] The majority of the Commissioners in their notes on these provisions said:[20] "An evil ingredient in the crime of murder of great importance is wanting to the offence of duelling: death by duelling does not, like murder, spread alarm through all ranks of society, from the highest to the lowest. The grounds on which the extreme measure of capital punishment, in cases of murder, seems justifiable, are, first, to prevent the severest of personal injuries, and secondly, to prevent people from living in constant dread of being murdered. It is obvious that, in the case of duels, the danger is confined only to the higher class of society; and what is of more consequence, no one need be in dread of dying by such means, unless he chooses to enter into a voluntary compact to violate the law. As the punishment for murder is not grounded on the Jewish law, nor on our moral or religious horror at the act, but on its prejudice to society, and chiefly on the insecurity and alarm it occasions, it appears to us that there is not an adequate cause to justify the taking away of life, where death occurs in the instance of two persons voluntarily agree-

Attempts in English law against the treatment of homicide in a duel as murder.

to testify; so that facts notorious to the world, published in every newspaper, which must be known and understood in order to exonerate the parties from the foul crime of assassination, and which, therefore, they cannot wish to keep secret, can rarely be proved before a court of justice."

[19] *Vide* SS. 16 & 17.

[20] Second Report, 30.

ing, according to certain stipulated or implied rules, to give each other an opportunity of killing his antagonist. It seems to us that the present law is shown to be ineffectual in repressing the practice, and that its effect is to afford immunity to duellists."[B]

The Commissioners further said: "The case of treacherously killing in a duel, where the party killed cannot be deemed concurrent in producing his own death, unless indirectly and remotely, we propose to leave under the present provisions of the law. By the present law, cases of homicide which would otherwise have been manslaughter only, amount, where undue advantage is taken or unfair means are used, to murder. As for instance, where parties fight upon a sudden quarrel, and one of them is killed, this is murder, if the party killing sought or took any undue advantage, otherwise it is manslaughter only (Foster, Disc. II., c. 5, S. 3). In the same section also, Mr. Justice Foster, speaking of a fight upon a sudden quarrel, where one of the combatants is killed, says: 'This is holden to be manslaughter, for it was a sudden affray and they fought upon equal terms.' In Whiteley's case (1 Lew., 173), where a party was killed in a sudden affray, Mr. Justice Bayley told the jury, 'If a party enters a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder.' And although even this case may not appear to be attended with alarming circumstances to the same extent as other murders, yet it is apprehended that the punishment of death in such cases would not be followed by the stifling of prosecutions, or the acquittals of juries by any means to the like extent, as is the case, according to the experience of the criminal annals of this country, and (as appears from the opinions we have cited) according to the experience of the Scotch and

---

(B) The Commissioners continued: "The reluctance of witnesses and juries to take any part in the capital conviction of a person who has been engaged in a fair duel, especially if he may have received grievous provocation, or been the party challenged, must have been manifest to persons who have been present at trials of this description. And there have not been wanting examples of persons of high rank and character tending to diminish the public odium of the offence of duelling. We are, for these reasons, of opinion that, by abolishing the capital punishment in cases of duelling, not only will a just objection be removed from the law of punishing the offence with death, without due discrimination between that offence and other cases of murder, but a great stigma in our criminal jurisprudence will be taken away, that of leaving a very serious injury to society unrepressed, by reason of affixing a punishment for it which it is found generally impracticable to put into execution."

American tribunals, with the punishing with death duellists under all circumstances." (C)

General consensus against treating homicide in a duel as murder.

234. There is a strong concensus of opinion against treating a killing in a duel as murder, and in favour of the view taken by the Royal Commissioners and the Indian Commissioners. Thus Livingston in an introductory report on his Draft of the Louisiana Criminal Code said: "If you wish to have it punished at all, it must be by its own name, and a proportionate punishment, nor must that be an infamous one. Put what is called a fair duellist on a footing

(C) Thomas Starkie dissented from the majority of the Commissioners, and in his dissenting Note said: "If the objection already urged against the plea of extenuation where a party is killed by his own consent be just, it is decisive also on the present question. A duel is but a compact by which each party gives leave to the other to kill if he can. Looking to the motives by which duellists and the juries who try them are usually actuated, and the probable moral result of the proposed alteration, its adoption appears to me to be inexpedient. Experience leads to the conclusion that the practice is not controlable by mere penal laws. A party in a duel is usually influenced by one or other of two motives: he acts in a spirit of resentment arising from unredressed injury, or in deference to the law of public opinion. Where the law gives no redress for a severe injury to the feelings, as, for instance, a sister's dishonour by deliberate seduction, the brother, to satisfy his own revenge, or it may be in expectation of effacing the stigma on his family, has recourse to arms, and should he kill the seducer, although the criminal law may denounce him as a murderer, the law of public opinion views the offence very differently. Juries, in such cases, are influenced by considerations which the law cannot possibly estimate or recognize, and it is impossible that they should not be sensible that, however deplorable the appeal to arms may be, the practice is not without some degree of salutary effect in restraining men from the infliction of severe wrongs and intolerable insults, against which the law can afford no adequate protection. Hence arises a wide and necessary difference between the penal law and the laws of honour and of public opinion—a difference which can never be wholly reconciled, although some approach to it may be made by extending the sphere of legal protection against injuries to the feelings, and which difference, when it prevails to a great extent, greatly weakens the effect of the penal law. The impossibility of preventing the practice of duelling by subjecting offenders to even the severest measure of punishment does not, however, by any means warrant any legislative extenuation, except it can be founded on circumstances which the law can recognise, as in the case of grave provocation; the law cannot be moulded for this purpose to agree with the laws of honour or of public opinion, and where this cannot be done, the case must stand as though no ground for extenuation existed. It is urged as an argument for extenuation that the punishment for a very serious injury to society (by killing a man in a duel) is now impracticable, and it is assumed that the offence will be repressed by making the proposed alteration. I cannot accede to this opinion. I believe that duels arise from motives (to which I have already alluded) which are beyond the control of mere penal laws; and it seems to me to be probable that where juries would, under the influence of considerations such as have been suggested, evade if possible the conviction of a party for a duel fairly fought where the offence was capital, they would give the same verdict although the offence were punishable only with transportation. To inflict a slighter punishment by fine, or even a term of imprisonment, would be to trifle with so grave a crime. Whilst, as it seems to me, little good could be expected from the proposed alteration, it might, I think, be productive of much harm in a moral point of view. It would be understood to manifest an alteration in the opinion of the Legislature, as to the heinousness of the crime of homicide, and of course, tend to diminish the efficacy of the law against it. I am induced briefly to express my opinion on the subject of the particular alteration of the general law concerning homicide which has been proposed, but with considerable reluctance, not, indeed, because I doubt as to the inexpediency of the change, but because it is a question of moral and public policy which is scarcely a fit subject for discussion in a mere note to a proposed article."

with a thief or a murderer, and you assure his impunity. . . . Let the severe punishment, then, be reserved for treachery and ferocity; inflict a mild penalty on duels fairly conducted, punish the insults which lead to them, and you will insure the execution of the law." Acting on this view, he provided in S. 555 a maximum punishment of only four years for a person killing one's adversary in a duel, except when death should be caused by treachery, in which case that person was to be deemed guilty of murder by assassination.

The Codes of most of the European countries also provide only a light punishment for ordinary homicide in a duel. Thus the Belgic Penal Code provides that homicide in a duel shall be punished with imprisonment from one to five years.[21] The Spanish Penal Code provides for its punishment only with *prison majeure*.[22] § 206 of the German Penal Code provides that any one who kills his opponent in a duel shall be punished by confinement in a fortress for not less than two years, and if the duel is of such a nature that it must bring about the death of one of the two, by confinement in a fortress for not less than three years. This is qualified, however, by § 207, which provides that if the homicide has been brought about by means of a deliberate transgression of the agreed or traditional rules of duelling, the transgressor is to be punished according to the general regulations relating to the offence of homicide.

The Italian Penal Code similarly provides in S. 239 the punishment of detention for a period which may not be less than six months and not more than five years for a person who in a duel kills his adversary, or makes a wound that causes the adversary's death; S. 243 providing that there would be no mitigation of punishment for homicide or hurt on account of their having been caused in a duel: 1. if the conditions of the combat have not been settled beforehand by the seconds or witnesses; 2. if the combat did not take place with equal arms, or with any arms other than swords, sabres, or pistols of equal charge, or with arms of precision, or with several cuts; 3. if in the choice of arms or in the course of the combat there was fraud or violation of the settled conditions; or 4. if it should have been expressly agreed that the duel would cease only with the death of one of the combatants, or if that condition resulted from the nature of the duel,

[21] Art. 430.

[22] Art. 350.

from the distance between the duellists, or from other settled conditions.

Homicide in a premeditated fight between armed factions is murder.

235. The Exception 5 of S. 300 of the Indian Penal Code, though applicable to duels, does not apply to premeditated faction fights between armed persons known to each other to be armed. The contrary was held by a Division Bench of Calcutta High Court in *The Queen* v. *Kukier Mather*,[23] decided on the 13th November 1877, in which White, J., in his decision said : "A man who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life; and as he voluntarily puts himself in that position, he must be taken to consent to incur the risk. If this reasoning is correct as regards a pair of combatants fighting by premeditation, it equally applies to the members of two riots or assemblies who agree to fight together, and of whom some on each side are, to the knowledge of all the members, armed with deadly weapons."

In *Empress* v. *Rohimuddin*,[24] Ainslie and Broughton, J. J., held, however, that the exception did not apply to such fights between armed assemblies, chiefly on the ground that if it, applied to them, the exception 4 of the same section 300 would be superfluous. Ainslie, J., said : "If culpable homicide in a premeditated fight with deadly weapons is not murder, *a fortiori* unpremeditated culpable homicide in a sudden fight in the heat of passion upon a sudden quarrel would not be murder. It seems to me that the 4th exception clearly indicates that culpable homicide in a fight is murder unless the fight is unpremeditated, and is such as is therein described, sudden in the heat of passion and on a sudden quarrel; a fight is not *per se* a palliating circumstance, only an unpremeditated fight can be such. Where persons engage in a fight under circumstances which warrant the inference that culpable homicide is premeditated, they are responsible for the consequences to their full extent."

The question came next before White and Field, J. J., who dissented from that decision. Referring to the chief ground

[23] Unreported.

[24] I. L. R., V. Cal., 31.

of that decision, White, J., said,[25] "If, as I think, according to the common and natural meaning of the words, an armed man, who deliberately fights with another man whom he knows also to be armed, consents thereby to take the risk of death, why is the adversary who kills him to be excluded from the benefit of the 5th exception, because by another exception the case of a man who kills his adversary in the course of sudden fight is specially provided for. The circumstances under which a man slays his opponent in sudden fight are different from those where he slays him in premeditated fight, and if the Legislature intended that the offence of both should be only culpable homicide, the intention would naturally be shown by the enactment of two distinct exceptions. Again, sudden fight is a distinction recognised by the English law of homicide, and the framers of the Code may easily be supposed to have for that occasion alone made sudden fight the subject of a distinct exception, without imputing to them the intention thereby implied, by excluding from the 5th exception a case of premeditated fight, if it actually falls within the meaning of the exception. The sound construction to my mind is, that the 5th exception extends to all cases of death occasioned by, or resulting from, premeditated acts, where the party killed takes the risk of the death with his own consent; and that the 4th exception is an independent exception, applying to all cases of death occurring in the course of sudden and unpremeditated fight, and does not in any way bind the natural operation of the 5th exception." Field J., concurred with the judgment of White, J., and observing that both parties were armed and prepared to fight, said: "I think it is reasonable to say that, in entering upon that conflict, each party had for its object to fight for victory, and in doing so, knowingly and deliberately took upon itself the risks of the encounter; to this state of facts I agree that the 5th exception is applicable .... When a man, being one of an armed band, and being himself armed with a deadly weapon, takes part in a fight, and uses that deadly weapon against his opponents, I think it is reasonable to say that he was, within the 4th clause of S. 300, committing an act which he knew to be so imminently dangerous, that it must, in all probability, cause death or such bodily injury as is likely to cause death. . . . When he and his party are opposed by a number of persons similarly armed, and using their arms in a similar way, I think it is reasonable to say

[25] Samshere Khan v. The Empress, I. L. R., VI Cal., 159.

that such person, within the meaning of exception 5, takes the risk of death with his own consent."

The most important case on the subject is the Full Bench decision in *Queen Empress* v. *Nayamuddin*[26] in which Pigot, J., delivered the leading decision, and Sir Comer Petheram, C.J., and Macpherson, J., concurred with it. In that decision, he observed that before the exception 5 could apply, there must appear some degree of particularity at least both as to the act consented to or authorized, and the person or persons authorized, and said: "I cannot read it as referring to anything short of suffering the infliction of death, or running the risk of having death inflicted, under some definite circumstances not merely of time, but of mode of inflicting it, specifically consented to, as for instance in the case of *Suttee*, or of duelling, which were, no doubt, chiefly in the minds of the framers of the Code. Nor can I understand that it contemplates a consent to the acts of persons not known or ascertained at the time of the consent being given." With reference to the analogy of a fight between two armed individuals on which White, J., relied in *the Queen* v. *Kukier Mather* and in *Samshere Khan* v. *Empress*, Pigot, J., pointed out, that "in such a case the circumstances do show a distinct act of the mind of each combatant with respect to the other and in concert with him of willingness to encounter and suffer such known and anticipated acts of violence from that other as he cannot defend himself from. But I think there is a distinction between such a case and that referred to in the following passage, at page 158 of the report of *Samshere Khan* v. *Empress*, of the members of two riotous assemblies who 'agree to fight together,' and of whom some on each side are, to the knowledge of all the members, armed with deadly weapons. I do not think that from such a mere agreement to fight, such a consent as is contemplated by the section can be imputed to each member of each mob, to suffer death or take the risk of death at the hands of any one of the armed members of the other mob, by means of whichever of such deadly weapons, used in whatever way that person may please, and be able, to inflict it."

In the particular circumstances of the case, O'Kinealy and Ghose, J.J., also agreed in thinking that the exception did not apply, but they considered that the question of its applicability was not one of law, as to which any

[26] I. L. R., XVIII Cal., 484.

general rule could be laid down, but one of fact to be decided with reference to the circumstances of each case. Ghose, J., relied upon the analogy, referred to by White, J., in *Samshere Khan* v. *Empress*,[27] of a fight between two armed persons, and said : " In such cases, I think, it can hardly be questioned that the exception would apply. If so, I do not see why, when the fight is between a person and two or more persons, or between two or more persons on either side, it cannot apply. There is nothing in the exception itself to indicate such a distinction. Take this case: Two men, on each side, are determined and agree to fight each other until some one of them is killed or wounded. They use different weapons ; the two on one side use a gun and a club, respectively, and the other side a sword and spear. The fight is begun, and nothing is shown indicating that any one of the combatants resiled from that determination and agreement; and in this fight one of them is killed. Here there was no consent given by the deceased to any particular person killing or wounding him, or as to the particular weapon that might be used for the purpose. Instances of this kind might be multiplied to show that a band of persons varying in number, and armed with different kinds of weapons, may fight another band of persons similarly situate, both bands agreeing to fight each other until one is killed. In these cases, the person killing, the person to be killed, the mode and the instrument by which death might be inflicted, would be uncertain ; and yet, each one of the combatants might expressly consent to suffer death, or take the risk of death. Can it be said that in these cases the exception does not apply ? In a case where there is no *express* consent, the difficulty of bringing the offence within the exception is indeed great ; but there may be facts and circumstances proved, which necessarily lead to an inference of consent, and from which the jury may find that the deceased took the risk of death with his own consent."

O'Kinealy, J., also said: " Consent under the Code is not valid if obtained by either misrepresentation or concealment, and implies not only a knowledge of the risk but a judgment in regard to it, a deliberate free act of the mind. In other words, before this section can be applied, it must be found that the person killed, with a full knowledge of the facts, determined to suffer death or take the risk of death, and this determination

[27] I. L. R., VI Cal., 154.

continued up to, and existed at, the moment of his death. It appears to me difficult to assert that when two parties armed with *lathies* and spears go out to fight, the members of each party consent to suffer death ; nor can it, I think, be predicated, as a general rule, that they consent to take the risk of death. . . . If two men went out armed with rifles and fired at each other from a distance of 10 yards, and one of them was shot, then looking at the nature of the weapons and the short distance which separated them, I think, looking at the illustration to section 87, that a Jury would be entitled to hold that they took the risk of suffering death. But as the existence of the consent at the moment the deceased received the fatal shot would be necessary in order that the accused should obtain the benefit of the exception, he could not succeed if the evidence pointed the other way. Thus, if the deceased declined to continue the fight, or ran away, or showed in any other open manner a desire to avoid his previous consent, the accused could not successfully appeal to this exception. On the other hand, if they were armed only with ordinary walking sticks, I think it would be extremely difficult for a Jury to hold that the parties had fully before them the idea that they were running any risk of death, or ever consented to suffer death. Between these two extremes there are numerous cases different in degree, in which it would be extremely difficult to state what was the mental attitude of the person whose death was caused when he was killed. If, as I have said before, the parties were armed with guns and were placed near each other, a Jury might well find that they had undertaken the risk of death. If, on the other hand, there was only one or two guns amongst a great number of people, there would be much less room for the conclusion that the deceased considered there was any risk of death or consented to take it. So far as I can see, the nature of the weapons with which the parties were armed in this case is only one out of many facts from which the consent of the deceased should be inferred : and I myself would not come to the conclusion that any individual of either of the two parties consented to take the risk of death, when the evidence in support of that conclusion is simply that some of the men on both sides were armed with *lathies* and spears."

Ghose and O'Kinealy, with White, J., in the case of *Samshere khan*,[28] do not appear to make a sufficient distinction

[28] I. L. R., VI Cal., 154.

between a knowledge of the likelihood of death, and taking the risk of death with his consent. Mr. Mayne, in the last edition of his Commentaries on the Indian Penal Code,[29] observed that it seemed to him certain that the exception was "directly intended to abrogate the rule of English law that a combatant in a fair duel who kills his opponent is guilty of murder. If so, the rule must equally apply, however numerous the combatants may be, provided they have voluntarily sought the contest, with a knowledge that its result may probably be fatal." This observation has not been repeated in his work on Indian Criminal Law, which supersedes the Commentaries. There also, he refers, however, to the confusion in the full bench judgment from a want of distinction between consenting to death and taking the risk of death, and says :[30] "In a formal duel each combatant takes the risk of a contest, strictly limited by rules as to weapons, duration of the combat, &c. But in the case of two bodies of armed men there is no consent to death, and no authority to inflict it. Each takes the chance of whatever may happen. The only question will be, What does he take the chance of? If a party go out with their fists, or with ordinary sticks, they do not expect to take the risk of being attacked with guns or spears. But if a party armed with guns, spears, and *lathies* goes out to meet another party similarly armed, each member of the party takes the risk of the general result of the fight. It is impossible to distinguish between one member and another, and to require proof that a man who was only armed with a *lathi* took the risk of being speared or shot. It is necessary to show that the deceased was a member of a party which went out to seek a contest which might end fatally, and expecting to meet a party similarly prepared. It is also necessary to show that he shared in the common purpose of his party. It is difficult to see what further evidence could be given. It could hardly be alleged on behalf of such an individual who met with his death, that he took the risk of killing, but did not take the risk of being killed."

Mr. Collett also took[31] the view that the exception contained in clause 5 applied where death was caused in a fair fight with deadly weapons, and no undue advantage was taken, and that thus death caused in a fair fight by several on each side, was not

---

[29] P. 288. | [30] P. 615. | [31] Comm. P. C., 244.

murder, but only culpable homicide not amounting to murder. He had not the advantage, however, of considering the grounds urged by the majority of the Full Bench of the Calcutta High Court. It certainly appears that in the case of a faction fight, the likelihood of the death of any particular individual is too remote for the cognizance of law. There is a certain risk of death in almost every act, even in the act of an evening ride or drive, or of going under a roof which may fall, or of eating one's meal which may contain poison. But no one thinks that a person by doing any of these acts takes the risk of death. The danger of death in a faction fight is more than in these acts, but generally not sufficient to justify the fight being deemed a consent to take the risk of death.

Objection has also been taken to the particularity insisted upon by Pigot, J. It has been asked: "Suppose a person consents with a number of persons that any one of them may kill him or employ any person to kill him, will not this case fall within the exception?"[32] There is no doubt, however, that as a general rule, for a valid consent, the particularity of the act consented to as well as of the person doing it is necessary. In regard to the former, Breithaupt in his work on *Volenti non fit injuria*,[33] says: *Die Einwilligung muss sich auf eine konkrete ganz bestimmt bezeichnete verletzende Handlung beziehen, welche der Thäter vorzunehmen beabsichtigt und der sich der Einwilligende unterwerfen wollte. So würde also noch keine Berechtigung zur Wegnahme eines beliebigen Gegenstandes vorhanden sein, wenn Jemand ganz allgemein darin gewilligt hat, sich bestehlen zu lassen.* (*a*)

As to the person, Breithaupt, after observing that as a general rule he who consents to an injury not only has a certain person in view, but that he also especially gives him his consent, says that cases may be imagined in which an exception may be made, as for instance when consent is not given to an individually definite subject but to a smaller or larger circle, and every one belonging to that circle can consider himself justified in causing the injury in question. He adds:[34] *Unter*

(*a*) Consent must refer to a quite definitely described injurious act, which the doer intends to undertake and to which the consenting person wishes to subject himself. There would therefore be no right to the removal of any article at one's option, if anybody had quite generally consented to allow himself to be robbed.

[32] I Mad. L. J., 691. | [33] P. 26. | [34] P. 33.

Umständen ist sogar noch nicht einmal ein certus circulus nothwendig. Man denke an einen zum Tode verwundeten Krieger, welcher von den grässlichsten Schmerzen gepeinigt, ganz allgemein darum bittet, dass sich doch Jemand finden möchte, welcher ihm den Todesstoss giebt. In diesem Fall ist Jeder, der die dringende Bitte hört, ob Freund ob Feind, berechtigt, die Verletzung auszuführen. Ist dagegen die Einwilligung einer bestimmten Person ertheilt, so ist auch nur diese allein berechtigt die Handlung vorzunehmen, da derjenige, welcher in seine Verletzung willigt, naturgemäss freie Selbstbestimmung bezüglich des Mittels oder Werkzeuges haben muss, dessen er sich dazu bedienen will, um sich die Verletzung zufügen zu lassen.(b)

Consent is a ground for mitigation of punishment in case of bodily injuries.

236. Similarly, in cases in which the consent of the person hurt does not operate to altogether avoid the criminality of the voluntary causing of hurt, it is a ground for the mitigation of the punishment, and this for a similar reason. The fact that the injuries were received in a combat in which the parties engaged by mutual agreement may be shown in mitigation of damages.[35]

Generally it is not a ground for the mitigation of the offence, as the varied character of the mitigation is not such as to enable the Legislature to give a separate name or to provide a separate maximum of punishment for the mitigated offence. In some countries, however, even a separate maximum or minimum is provided. *Ferlangen* is indeed something more than consent, but § 142 of the German Penal Code provides the minimum of only one year's *Gefängniss* for any one *welcher einen Anderen auf dessen Verlangen zur Erfüllung der Wehrpflicht untauglich macht.*(c) The ordinary minimum for the voluntary causing of grievous hurt is *Zuchthaus* for two years,

(b) Under circumstances even a defined circle is not necessary. Let us imagine a soldier mortally wounded who, tortured by the most frightful pains, begs generally that somebody may be found who will give him the deathblow. Every one in this case, whether friend or foe, who hears the urgent request is entitled to cause the injury. If, on the other hand, consent has been given to a definite person, then only that person is justified in carrying out the act, as he who consents to an injury naturally must have the free determination regarding the means or tool of which he wishes to avail himself in order to allow the injury to be caused to his person.

(c) Who at another's request makes him unfit for the fulfilment of the duty to serve in the Militia.

[35] Barholt *v.* Wright, 45 Ohio, 177.

from which it may be gathered how material the mitigation is; and the punishment for the mitigated offence would have been still less, if at all, if it were not that the offence of causing grievous hurt in such a case is not so much against the person hurt as against the State and the Society, of which that person is a subject or citizen.

Absence of consent is aggravation.

237. In case of offences independent of the consent of the person injured, in case of acts consented to by him which are an offence notwithstanding his consent the absence of consent is, on the same principles, an aggravation of the offence or of the penalty. Thus in India, the maximum period of imprisonment which may be ordered for causing miscarriage is three years, and if the woman should have been quick with child, seven years;[36] yet when the miscarriage is caused without the consent of the woman, the offender may be punished even with transportation for life.[37] So causing her death by an act done with intent to cause her miscarriage is punishable with imprisonment only up to ten years, while, if the act is done without the woman's consent, the punishment may be transportation for life.

With the exception of France, where the existence of consent will in such a case be deemed only as a *circonstance attenuantè*, the absence of consent is in almost every country deemed an aggravation of the offence. Thus in the Belgic Penal Code, which is to a great extent based on the Code Pénal, the causing of abortion is, when with the woman's consent, punishable only with imprisonment from two to five years; and when without her consent with the penalty of *reclusion*.[38] So in Spain, it is, when with her consent, punishable with *prison mineur*, and when without her consent with *prison majeure*.

The aggravation is in some cases recognized not by the provision of a higher maximum of punishment, but by that of a minimum or a higher minimum. Thus the German Penal Code provides the punishment of penal servitude up to five years for anyone who, with the consent of a female with child, has applied or administered to her the means to procure abortion or slay the child in the womb.[39] Anyone, however, who wilfully slays or procures the abortion without her knowledge

[36] S. 312, I P. C.
[37] S. 313, I. P. C.
[38] S.S. 350 & 348.
[39] S. 218.

or consent is to be punished with penal servitude for not less than two years ; and if her own death be caused by the act, with penal servitude for life or for a term of not less than ten years.[40]

In the Italian law, the aggravation is provided for by the raising of both the maximum and the minimum punishments provided for the offence. Thus the Italian Penal Code enacts that a person procuring abortion with the consent of the woman is punishable only with reclusion for a term of not less than three months and not more than five years ; and if her death should have been caused thereby, for a term of not less than four and not more than seven years. On the other hand, the mere employment of means to procure abortion without her consent or against her will, is punishable with *reclusion* for a term of not less than three months and not more than six years ; and if abortion should take place, the term may extend to twelve years, and shall not be less than seven years; and if the woman should die, it may extend even to twenty years and shall not be less than fifteen years.[41]

Even approval, not amounting to consent, causes a mitigation of punishment.

238. It is almost a universal principle that even an approval not amounting to consent is a cause of, and leads to, a mitigation of punishment. This is generally the case with the subsequent approval of the act constituting the offence in the absence of consent. The Spanish Penal Code thus provides the punishment of *prison correctionnelle* for a minor contracting marriage without her father's or mother's consent ; and even a subsequent approval of the marriage is held to mitigate the offence, and render it punishable with only the penalty of *arrêt majeure*.[42]

---

[40] S. 220. | [41] S.S. 383 & 384. | [42] Art. 399.

CHAPTER XII.

Consent in Procedure.

Quilibet potest renunciare juri pro se introducto.

Consent cannot give jurisdiction.

239. This principle is of a general application, applicable to criminal as well as civil proceedings. It is, however, essentially restricted to legal provisions intended for the benefit of individuals, and does not apply to the rules based on public policy and general considerations. It naturally has not much application to questions of essential jurisdiction, which, speaking generally, comes from law and not from the consent of litigants.[1] Thus consent cannot authorize a court to act in a cause outside the sphere which the law has ordered for it. In *Bhoopendro Nath* v. *Kalee Prosunno*,[2] the defect of jurisdiction was not of a subjective character, but there was an application for taking out the execution of an agreement which was not of the character of a decree. The conduct of the judgment-debtors, in so far as it could operate in that way, had been such as to induce the new decree-holders to believe that they could obtain by execution all that they were seeking for, and yet execution was not allowed, as the consent of the parties could not give jurisdiction.

Some enactments expressly provide that a particular class of courts may, on parties' consent, try and dispose of certain cases ordinarily beyond their jurisdiction. The Presidency Small Cause Courts Act[3] thus provides that when the parties to a suit, which, if the amount or value of the subject-matter thereof did not exceed two thousand rupees, would be cognizable by the Small Cause Court, have entered into an agreement in writing that the Small Cause Court shall have jurisdiction to try such suit, the Court shall have jurisdiction to try the same, although the amount or value of the subject-matter thereof may exceed two thousand rupees. Similarly, the County Courts Act, 1888, in England provides[4] with respect to all actions assigned to the Queen's Bench Division of the High Court, that if both parties shall agree by a memorandum signed by them or their respective solicitors

---

[1] Dicks *v.* Hatch, 10 Iowa, 380.
[2] XXV W. R., 205.
[3] S 20.
[4] S. 64.

that the judge of any Court named in such memorandum shall have power to try such action, such judge shall have jurisdiction to try the same. So also, S. 61 of the same Act provides that in any action in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise, shall incidentally come in question, the judge shall have power to decide the claim which it is the immediate object of the action to enforce, if both parties at the hearing shall consent in any writing to the Judge having such power. These cases do not constitute an exception from the rule that the courts acquire their jurisdiction from law, as mere consent could give no jurisdiction in the absence of the special provisions which empower the court or the judge to act in case of the parties' consent, on the same principle on which it authorizes them to act in other contingencies.

Nor can consent oust the jurisdiction of any court. Thus in *Crawley* v. *Luchmee Ram*,[5] the Principal Sudder Ameen dismissed the suit on the ground that the bills of lading provided that a claim under them should come before the High Court of Calcutta; but the dismissal was set aside by the Agra High Court, as it did "not consider that any clause which ousts the jurisdiction of the Civil Courts of these Provinces in cases of dispute between the parties in favour of the High Court of Calcutta, which in such a matter has no jurisdiction, could have any legal effect or could be pleaded in bar of a suit brought into a competent Civil Court having jurisdiction, by either of the parties."

It is on this principle, that a person who is not a judge cannot act as a Judge.—The Supreme Court of Illinois has repeatedly held both in civil and criminal cases, that a member of the Bar, even with the consent of the parties, cannot exercise judicial powers, and any judgment passed in their exercise will be void.[6] So far is the rule carried, that if a Magistrate goes outside the local limits of his jurisdiction, he has no jurisdiction whatever, and no waiver or agreement made before him by the claimant of the property attached by him can give him jurisdiction.[7]

---

[5] 1 Agra, 129.

[6] Hoagland *v.* Creed, 81 Ill., 506. | Bishop *v.* Nelson, 83 Ill., 495. | Cobb *v.* People, 84 Ill., 511.

[7] Block *v.* Henderson, 82 Ga., 23.

240. The inefficacy of consent in regard to jurisdiction applies specially to jurisdiction over the subject-matter, which cannot be given or enlarged by consent even in civil cases.[8] Mr. Hawes, in his work on the Jurisdiction of Courts, says: "Defects in the jurisdiction of a court over the subject-matter of a cause are fatal and cannot be waived. No act or consent of parties in such a case can confer jurisdiction.[9] . . . When a tribunal has not jurisdiction over the subject-matter, no averment can supply the defect; no amount of proof can alter the case. Neither the acquiescence of the parties, nor their solicitations, can authorize any court to determine any matter over which the law has not authorized it to act."[10]

Consent cannot give jurisdiction over subject-matter.

In *Jackson* v. *Ashton*,[11] the bill was dismissed for want of jurisdiction, even though the opposite party not only did not raise any objection to the jurisdiction, but "was anxious that the court should hear and determine the cause," and the defect in the jurisdiction arose merely from a non-description of the circumstance which could give jurisdiction to the court.

So far is the rule carried, that, as observed by Mr. Hawes,[12] "when jurisdiction is by law conferred upon a court, only upon the existence of certain conditions, parties may not waive the conditions and thus confer jurisdiction."

In India also, it is quite settled, that even express consent of the parties cannot confer on a court such jurisdiction as it does not possess,[13] and that it will not give power to a court to pass a decree which it is otherwise not competent to pass.[14]

In *The Government of Bombay* v. *Ranmalsingji*[15] the suit was for immoveable property in foreign territory, and both the parties were willing that the case should be decided on the merits, yet the lower court's decree was set aside by the High Court "as having been made without jurisdiction;" Sargent, C. J., observing in the judgment of the court that "no consent of parties can give to the court a jurisdiction which it does not possess over the subject-matter of the suit."

---

[8] Doctor *v.* Hartman, 24 Ind., 221. Damp *v.* Town of Dane, 29 Wis., 419. Fleischman *v.* Walker, 91 Ill., 318.

[9] P. 13.

[10] Wansley *v.* Robinson, 28 La. Ann., 793; St. Louis and S. Co. *v.* Sandoval C. Co., 111 Ill., 32.

[11] 8 Pet., 148.

[12] Hawes Juris., 16.

[13] Kadambinee Dossee *v.* Doorga Churn Dutt, Marsh., 4.

[14] Ramrao Tatyaji *v.* Babaji Dhonji, I. L. R., XX Bom., 632.

[15] IX B. H. C. R., 242.

This was expressly recognized by the Judicial Committee of the Privy Council in *Ledgard* v. *Bull*;[16] in which Lord Watson, in delivering their Lordships' judgment, observed that "when the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter and be bound by his decision on the merits when these are submitted to him." The observation was *ultra vires*, but it has been repeatedly followed in the Indian courts. Thus in *Ladli Begam* v. *Raje Rabia*[17] the defendant objected to the jurisdiction of the Original Court, but on appeal by the plaintiff from the decision which was in his favour, he did not take that objection in the lower Appellate Court, where the decision was against him. On appeal to the High Court, the decree was set aside for want of jurisdiction, it being held that the failure to take the objection in the lower court, "would not clothe the District Court with a jurisdiction not given it by law."

Consent cannot give jurisdiction over appeals.

241. The same rule applies to appeals also. Thus in *Aukhil Chunder Sen* v. *Mohiny Mohun Dass*,[18] Morris, J., observed that "the preponderance of authority favors the view that where a Court has no jurisdiction to entertain an appeal, no consent of parties can give it a jurisdiction which it does not by law possess." In *Minakshi* v. *Subramanya*[19] there was no subjective defect of jurisdiction, and the defect arose only from the circumstance that the appeal was not allowed by law. No objection was taken while the appeal was pending before the High Court, and it was contended before the Judicial Committee of the Privy Council that the right to object to the jurisdiction must be considered to have been waived. The contention was overruled, however, and Sir Richard Baggallay, in delivering their Lordships' decision, observed, that "no amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. . . There was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed."

In the United States, Mr. Hawes observes that neither consent nor long acquiescence of parties will give an appellate

[16] L. R., XIII I. A., 134.
[17] I. L. R., XIII Bom., 650.
[18] I. L. R., V Cal., 489.
[19] L. R., XIV I. A., 160.

court jurisdiction over an appeal.[20] It has been repeatedly held, that a criminal case not ripe for appeal, cannot be carried into the Appellate Court by agreement.[21] In *Perkins* v. *Perkins*[22] it was said that the appearance of the plaintiff after the appeal, and submitting to the jurisdiction of the court by proceeding to trial on the merits, were equivalent to a waiver of all exceptions to the appeal and to the jurisdiction of the court. This was also admitted to be the law, "when the want of jurisdiction arises from the want of legal notice." The court after observing that, pointed out that "when the want of jurisdiction appears of record, the defect cannot be supplied by the submission of the party; for the agreement of the parties cannot alter the law, nor make that good which the law makes void." In some cases, the objection to the jurisdiction is allowed to be taken even by the appellant.[22a]

Objection to jurisdiction may be taken at any stage of proceedings.

242. It is on this very ground, that it is considered a general maxim, that the plea of jurisdiction, when apparent on the record, may be taken at any stage of the proceedings;[23] and cannot be considered waived by the parties.[24] Thus in *Wahid Ali* v. *Inayet Ali*,[25] even a plea as to the execution not being barred by limitation law was treated as one of jurisdiction, and allowed to be raised for the first time after remand on special appeal. In *Ganpatrao* v. *Bai Suraj*,[26] the defect of jurisdiction consisted only of the circumstance that the court was not of the lowest grade competent to try the suit, and an objection to it was allowed to be raised for the first time on special appeal from the final decision, even though the first order of remand by the lower Appellate Court was not appealed against. In *Naunhoo Singh* v. *Tofan Singh*,[27] the objection to the Moonsiff's jurisdiction was allowed to be taken, for the first time, when the case went to the High Court a second time on special appeal, though the parties had allowed five adjudications in the courts below without raising any objection as to that point. In *Macdonald* v. *Riddell*,[28] the plea to the jurisdiction was allowed to be taken for the first time on

[20] Hawes Juris., 15.
[21] Rutter *v.* State, 1 Iowa, 99. People *v.* Myers, 1 Colo., 508.
[22] 7 Conn., 558.
[22a] Plano Manu'fing Co. *v.* Rasey, 69 Wis., 246.
[23] Nobeen Kishen Mookerjee *v.* Shib Pershad, VII W. R., 490. Nidhi Lal *v.* Mazhar Hussain, I.L.R. VII All., 230.
[24] Lalmoney Dassee *v.* Jaddoonath Shaw, I. In. Jur., N. S., 319.
[25] VI B. L. R., 52.
[26] VII B. H. C. R. A. C., 79.
[27] XIV W. R., 229.
[28] XVI W. R. Cr., 69.

special appeal, and Ainslie, J., in delivering the judgment of the court, observed that "neither the ignorance and consequent silence of the parties, nor their consent, can vest a magistrate with powers which the law does not give him." In *Trimbakji* v. *Tomu*,[29] the Bombay High Court even allowed a plaintiff who had instituted the suit in a court to object for the first time to the jurisdiction of that court on special appeal. It was contended that the plaintiff having himself selected the *forum* could not take that objection, but the contention was overruled on the ground "that if express consent could not give jurisdiction, much less could a mistake in the selection of a court to bring a suit in."

It is sometimes indeed held that the objection to jurisdiction may not be taken for the first time on the second appeal, and the prohibition is not seldom extended even to the first appeal.[30] So far is the rule carried, that in *Mohammed Hossein* v. *Akhaya Narayan*,[31] the objection was taken in the first court, but still held to be waived, as it was not taken in the lower Appellate Court. This is, however, usually in cases in which the facts giving rise to the objection are not patent on the record; as it is presumed that if there were an irregularity, the objection would have been raised at an earlier stage of the proceedings, when its correctness could easily be tested. Most of the decisions against taking the objection at a later stage are expressly coupled with the proviso that the objection, when apparent on the face of the record, may be taken at any stage.[32] In *Bapuji Auditram* v. *Umedbhai*[33] the objection to the jurisdiction was not allowed to be raised for the first time on special appeal, as it was not patent on the face of the record that the court of the first instance had no jurisdiction. The general rule thus is, that if the original court find a jurisdictional fact so as to retain the jurisdiction, and the finding is not appealed against, objection to the jurisdiction may not be taken on the second appeal.[34]

In *Koylash Chunder* v. *Ashruf Ali*,[35] a suit was remanded for trial on the merits by the lower appellate court, which held

---

[29] II B. H. C. R., 192.
[30] Naimudda *v.* Scott, III B. L. R., 283.
[31] II B. L. R. App., 42.
[32] Gooroo Persad Roy *v.* Juggobundoo Mozoomdar, W. R. F. B., 15.
[33] VIII B. H. C. R., A., C., 245.
[34] Raj Narain *v.* Rowshun Mull, XXII W. R., 124.
[35] XXII W. R., 101.

it to be within the jurisdiction of the original court; and on second appeal from the decision on the merits, the objection to the jurisdiction was not allowed to be raised, as it had not been raised at the proper time on appeal from the order of remand. This decision does not, however, appear to be tenable, as merely not appealing from an order at once does not necessarily estop a party from objecting to it on appeal from the final decision in the proceedings. Thus in *Goodall* v. *Mussoorie Bank*,[36] an assignee from a judgment-debtor who was not a party to a suit was made a party to the execution-proceedings, and the order making him a party was not appealed against. He appealed, however, against a subsequent order asking him to produce the shares which had been assigned to him, and directing that in case of default, his property was to be sold. It was contended that objection could not then be taken to the jurisdiction to pass the first order making him a party; but the contention was overruled, Straight, J., observing that he had "no hesitation in holding that in an appeal of the kind before me, where the objection goes to the very root of the matter and to the authority of the Court to make the order in the sense that it had no jurisdiction at all, I am entitled to entertain it, and if it has force, to give effect to it."

Estoppel from plea of jurisdiction.

243. However though express consent or waiver will not give jurisdiction to a court over a suit or appeal which it does not possess by law, a party may well be estopped from pleading the absence of jurisdiction by failure to take objection to it at the proper time. This is specially the case in India, where unlike England there is a system of courts organized in a regular gradation of dependence on the High Courts, and where an error as to jurisdiction may always be corrected on appeal or review.

In England, this was not practicable, and unless a prohibition were granted, or the proceedings quashed on a *certiorari*, there was no other way to try the jurisdiction than by an action against those who made or acted on the order. Thus an action of trespass was suggested by Martin, B., in *Denton* v. *Marshall*[37] as the proper way of trying the validity of an order of a County Court. Naturally absence of jurisdiction was held

[36] I. L. R., X All. 97.

[37] 32 L. J. Ex., 89.

there to make the proceedings absolutely null, as if they had not taken place at all. Even there, however, a change is being made. Thus in *Steed* v. *Preece*,[38] the Master of Rolls considered it a good answer to an application founded on the court having sold property without jurisdiction, that there was a decree standing unreversed, and directing the sale. S. 114 of the County Courts Act directly contemplates that whenever an action or matter is commenced over which the Court has no jurisdiction, it shall be struck out, only "unless the parties consent to the court having jurisdiction." The rough method of treating the order of a Court as no order at all, or of seeking by a suit to expel a person whom that order has definitely placed in possession, has no proper application where provision is made for such a proceeding, and where the order itself may be brought under review by precisely the same authorities, who will have to dispose of the suit brought to test its validity.

West, J., in delivering the judgment of a Division Bench of the Bombay High Court in *Naro Hari* v. *Anpurnabai*,[39] said: "By providing the one method of redress, the Legislature has tacitly excluded the other. . . . There seems to be no reason, on principle, why, in India and for a Court having general jurisdiction, a question of jurisdiction arising on this point (subject-matter) should not, at least as regards the party on whom the jurisdiction immediately bears, be concluded by submission or by failure to take the steps, which the law prescribes for getting rid of an erroneous order just as much as a question of personal jurisdiction. Every decree is a command to a person, and whether his possible ground of objection is that the Court has no jurisdiction to command him at all, or none to command him in the particular case and as to the particular subject-matter, seems to make no differenee in principle. . . . It is commonly said that a question of jurisdiction may be raised at any time; where proceedings are laid down for determining the question, it should be 'any time in the course of those proceedings.' He, who, having an appeal and a special appeal on a question of jurisdiction, has not availed himself of those remedies, *renunciavit juri pro se introducto*. The public interest is not concerned when the matter has once been placed before a Court having full jurisdiction over the person and the cause, and an omission to urge objections there is to be treated when the proceedings have been completed as conclusive."

[38] 18 Eq., 193.

[39] I. L. R., XI Bom. 160 (n).

The Calcutta High Court also has taken the same view. Thus in *Teckum Lall Dass* v. *Peter MacArthur*,[40] a decree for rent obtained from a civil court was sustained on the ground of the defendant's acquiescence in the court's jurisdiction over the suit. Markby, J., in delivering the judgment of that court in *Drobo Moyee* v. *Bipin Mundul*[41] observed, that "the applicant took his chance of a decision in his favour in the Court of the Collector, without in any way protesting against the jurisdiction. And though his conduct in this respect will not give that court jurisdiction, still, it is, in our opinion, sufficient to prevent him coming before this Court, and asking it to exercise its extraordinary powers of relief in his favour, by setting aside proceedings of which he was willing enough to avail himself so long as there was a chance of their turning out to his own advantage." In *Ooma Sunduree* v. *Bepin Beharee*[42] a suit was brought to set aside, on the ground of fraud, a sale made in execution of a decree of a Revenue Court, and the sale was not allowed to be impeached for want of jurisdiction, as that objection had not been taken in the prior proceedings and not even in the plaint in that suit. In *Radha Gobind Gossami* v. *Ooma Sunduree Dossia*, [43] a decree of a Burdwan Court was transmitted for execution to Beerbhoom District, and in the course of execution-proceedings there, some property was attached, and the judgment-debtor prayed for a month's time, alleging that if the debt was not satisfied in that period, the property attached might be sold without further notice ; and after that a plea to the jurisdiction of the court passing the decree was not allowed to be taken by him.

In *Nehora Roy* v. *Radha Pershad Singh*,[44] an objection as to the jurisdiction of a court executing a decree was not allowed to be taken after the proceedings had been carried on for ten years in that court, without any objection to the jurisdiction and with full acquiescence in it. In *Gopi Nath* v. *Bhugwat Pershad*,[45] Mitter, J., in delivering the judgment of the court observed, that "in the suit of 1860, there was no objection taken that the Munsif had no jurisdiction to entertain it, and, therefore, the parties being the same, it may be taken as conclusively decided by that suit as between them that the Munsif in that suit had jurisdiction to entertain it."

---

[40] 1 W. R., 279.
[41] X W. R., 6.
[42] XIII W. R., 292.
[43] XXIV W. R., 363.
[44] IV C. L. R., 353.
[45] I. L. R. X Cal., 707.

The Indian legislature also has adopted the same view. Thus it has been enacted in the Suits Valuation Act, 1887, that an objection that, by reason of the over-valuation or under-valuation of a suit or appeal, a court of first instance or lower appellate Court, which had not jurisdiction with respect to the suit or appeal, exercised jurisdiction with respect thereto, shall not be entertained by an appellate Court unless:—(*a*) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the Lower Appellate Court in the memorandum of appeal to that Court, or (*b*) the Appellate Court is satisfied, that the suit or appeal was over-valued or under-valued, and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits. Even in cases, in which an objection is allowed to be taken, the proceedings shall not be deemed void on account of it, but the Appellate Court, unless satisfied that the mistake prejudicially affected the disposal, shall proceed to dispose of the appeal as if there had been no defect of jurisdiction; and when it is satisfied of the prejudice, and not having the materials necessary for the determination of the other grounds of the appeal to itself, remands the suit or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a court competent to entertain the suit or appeal. It is further declared in the Act, that the same provisions shall apply so far as may be, to a Court exercising revisional jurisdiction. These provisions are of a very comprehensive character, and apply not only where the over-valuation or under-valuation is due merely to a mistake in estimating the value of the subject-matter, but also where there has been a mistake in principle,[46] or even an intentional over-valuation with a view to exclude the jurisdiction of a court of exclusive jurisdiction.[46a] Similar provisions have been enacted in regard to some other cases also for avoiding the ordinary consequences of an absence of jurisdiction, but further reference need not be made to them here.[47]

A similar view appears to have been taken in some cases in the United States also. Thus in *Hays* v. *Fritton*,[48] the objection was that the State Court had no jurisdiction over the proceedings, and Hunt, J., in delivering the opinion of the Court,

[46] Krishnasami v. Kanakasabai, I. L. R. XIV Mad., 183.

[46a] Hamidunessa v. Gopal Chandra, 1 Cal. W. N., 556.

[47] Chand's Res. Jud., 422.

[48] 20 Wall., 414.

said:—"To be available here an objection must have been taken in the Court below. Unless so taken it will not be heard here. It is not competent to a party to assent to a proceeding in the Court below, take his chances of success and, upon failure, come here and object that the Court below had no authority to take the proceeding. This point comes before us at every term and is always decided the same way."

In *Ponder* v. *Moselley*,[49] Lancaster, J., in delivering the opinion of the Court observed that "the defendants having appeared in Court, and pleaded to the action, thereby admitted legal notice of the institution of the suit, as well also as the jurisdiction of the Court, not only of the parties to the action, but also of the subject-matter of the suit." This can of course apply to the facts on which the jurisdiction over subject-matter depends, but will not affect a case in which the defect of jurisdiction is apparent on the record.

Waiver of defect of certain other sorts of jurisdiction.

244. There is a greater unanimity of opinion as to the waiver of the defect of jurisdiction other than that over subject-matter. Thus it is generally considered that the non-existence of other facts necessary for the jurisdiction may be waived. For instance, where it depends on the residence of the parties or other similar facts, consent will, in the absence of special circumstances, be deemed to establish those facts, and an objection to their existence may be waived.[50] Thus Mr. Black[1] observes: "We are told that it is only when a judge or court has no jurisdiction of the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction. In all other cases the objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed."[2]

As an instance, reference may be made to the effect of consent on the courts' power to give a decree in regard to

---

[49] 2 Flo., 207.

[50] Lucking *v.* Denning, 1 Salk., 200.
Bureau *v.* Thompson, 39 Ill., 566.
State *v.* Harper, 28 La. Ann., 35.
Brady *v.* Richardson, 18 Ind., 1.
State *v.* Regan, 67 Mo., 380.
Mininger *v.* Carver Commissioners, 10 Minn., 133.

[1] 1 Black Jud., 264.

[2] Hobart *v.* Frost., 5 Duer, 672.

matters connected with a claim. Thus it is a general rule that a court has jurisdiction only to decide the issues raised by the pleadings, and if it goes beyond them, all the provisions relating to the matters outside the pleadings are deemed void.[3] This rule does not apply, however, to a consent decree which is not invalid, if its provisions do not go beyond the general scope of the case made by the pleadings. Thus in *Fletcher* v. *Holmes*,[4] a suit was brought to foreclose a mortgage, and a personal decree given against the defendant by consent. Referring to the decree, the Court said: "It cannot be doubted that without May's consent such a judgment against him, upon that complaint, would not have been warranted. But he consented to it. Was it then void as against May, because the complaint did not allege sufficient facts to justify it without such consent? We can conceive of no reason why a judgment entered by agreement, by a Court of general jurisdiction, having power in a proper case to render such a judgment, and having the parties before it, should not bind those by whose agreement it is entered, notwithstanding the pleadings would not, in a contested case authorise such a judgment. The object of a complaint is to inform the defendant of the nature of the plaintiff's case. It is for his protection that it is required. If he wishes to waive it, or agrees to the granting of greater relief than could otherwise be given under its averments, without amendment, and such relief is given by his consent, we think that the judgment is not even erroneous, and much less void as to him." And this was cited with approval in *Schmidt* v. *Oregon Gold Mining Co.*,[5] in which case certain costs of a referee and stenographer were allowed with consent, even though they had not been claimed.

The waiver will, of course, not affect the rights of any person other than the parties to the suit. Thus a judgment obtained in a district other than that of the defendant's residence, on an agreement between the parties to acknowledge the jurisdiction, was held to be void as against subsequent judgment-creditors who obtained their judgments in the proper district.[6] In *Sankumani* v. *Ikoran*,[7] a person objected to the attachment of his property in execution of a decree on the ground that the court passing the decree had no jurisdiction to pass the same, as the suit in which the decree

[3] *Vide* Chand's Res. Jud., 451-453.
[4] 25 Ind., 458.
[5] 23 Oreg., 9.
[6] Georgia Rail. & Bank Co. *v.* Harris, 5 Ga., 527.
[7] I. L. R., XIII Mad., 211.

was passed had been transferred to that court without notice to the defendant in that suit; and the objection was disallowed on the ground that the defendant had waived the same by not raising it at the proper time. It is, however, to be borne in mind, that this objection was in regard merely to a matter of procedure, and the court had jurisdiction over the proceedings as between the decree-holder and the objecting party. The court thus said: "Nor do we think that the present defendants, who were no parties to the decree in original suit No. 25 of 1883, and as between whom and the plaintiff the execution-creditor in the Cochin Subordinate Court, the Calicut Subordinate Court has jurisdiction, are entitled to rely on the provisions of section 25, of which the defendants in original suit No. 25 of 1883 did not avail themselves and thereby call in question the jurisdiction of the Cochin Subordinate Court."

Nor do the courts recognize collusive agreements entered into simply with a view to give jurisdiction to a court. Thus in *Cameron* v. *Hodges*,[8] Miller, J., in delivering the opinion of the United States Supreme Court, said: "This court has uniformly acted upon the principle that, in order to protect itself from collusive agreements between parties who wish to litigate their controversies in the Federal Courts, it would, on its own motion, take the objection of the want of jurisdiction in the Circuit Court especially as regards citizenship."[9] This appears to be due chiefly to the circumstance that in cases before Federal Courts, the citizenship of the parties is often an essential constituent of jurisdiction. It has thus been repeatedly held by the Supreme Court of United States, that the question of jurisdiction in such cases when dependent on the citizenship of the parties must be determined by the court, even if the parties do not raise it, or expressly aver that the case be considered upon its merits.[10]

Thus in *Hartog* v. *Memory*,[11] the Court said: "If, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary enquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding,

---

[8] 20 Davis, 322.
[9] 19 Wall., 81; 1 Davis, 65.
[10] Mansfield *v.* Swan, 4 Davis, 379.
King Bridge Co. *v.* Otoe, 13 Davis, 225.
Blacklock *v.* Small, 20 Davis, 96.
Metcalfe *v.* Watertown, 21 Davis, 586.
Morris *v.* Gilmer, 22 Davis, 315.
[11] 9 Davis, 568.

and act as justice may require, for its own protection against fraud or imposition.

Waiver of defect of local jurisdiction.

245. In India, it appears to be generally held that the defect of local jurisdiction also may not be waived. Thus in *Babaji* v. *Lakshimibai*,[12] the Original Court asserted its jurisdiction on the ground that the bond sued upon was executed within the local limits of its jurisdiction. Two of the defendants had not objected to the jurisdiction, and it was contended before the High Court, that the lower Appellate Court could not set aside the decree at least as against those two. The contention was, however, overruled, and West, J., in delivering the judgment of the High Court, observed, "that consent or appearance does not give jurisdiction to a court of limited jurisdiction, though the waiver may be sufficient in a court of superior jurisdiction. . . . The consent which waives an irregularity or allows the court to exercise a power vested in it on a wrong reason instead of the right one, on which it might have rested, cannot give the authority itself as an attribute of the Court which must directly or indirectly emanate from the sovereign." The observation as to the waiver in a court of superior jurisdiction was made with reference to the decision in *Oulton* v. *Radcliffe*,[13] in which that doctrine was based on the ground that the Palatinate Court in that case was a superior court, having "jurisdiction over matters arising elsewhere than within the county." It is clear that in the case of such courts, the question of the absence of local jurisdiction could not arise. Brett, J., expressly pointed out, however, that "if its jurisdiction had been confined to the limits of the county, I should have thought that that would have made it a court of inferior jurisdiction." In this sense, all the courts in British India would be inferior courts, in connection with which the absence of local jurisdiction may not be waived.

In *Narain Das* v. *Kotu Mal*,[14] the defect was of local jurisdiction, as the defendants resided outside the local limits of the Court's jurisdiction, and jurisdiction was claimed only on the ground that the defendants' agent executed the hundis sued upon inside those limits, which was finally held not to constitute a cause of action. On first appeal, the counsel for the

[12] I. L. R., IX Bom., 266.
[13] 9 C. & P., 189.
[14] 1883 P. R., No. 132.

defendants expressly stated before the lower Appellate Court that he had no objection on the ground of jurisdiction; but on a subsequent appeal to that same court he raised that objection, and the court disallowed it on the ground of the prior consent. The Punjab Chief Court, however, held that the objection could be raised at that stage, Rattigan, J., in delivering the judgment of the court, observing that, "if, as is settled law, the express consent of parties cannot confer jurisdiction on a court which does not otherwise possess it; the omission or refusal on the part of the defendant to raise the objection of want of jurisdiction cannot relieve the court which is trying the suit, of the duty of determining whether it has or has not jurisdiction to hear it."

Section 20 of the Civil Procedure Code, however, directly contemplates cases in which a suit may be brought against a person in a court simply because another defendant resides or carries on business or works for gain inside the local area of its jurisdiction;[15] and under that section, the objection by the person outside the jurisdiction must be made at the earliest opportunity, and in all cases before the issues are settled; and any defendant not so applying is deemed to have acquiesced in the institution of the suit in that court.

In some such cases, proceedings can be commenced only after special leave has been obtained. Thus the Charters of the Presidency High Courts provide, that, in suits other than those for land or other immovable property, if the cause shall have arisen only in part within the local limits of their respective ordinary original jurisdictions, a suit may be brought in them, "in case the leave of the court shall have been first obtained." Similarly, the English County Courts Act, 1888,[16] provides that every action or matter may be commenced by leave of the judge or registrar, in the court within the district of which the defendant, or one of the defendants, dwelt, or carried on business, at any time within six calendar months next before the time of the commencement, or, with the like leave, in the court, in the local limits of whose jurisdiction the cause of action or claim wholly, or in part, arose.

---

[15] Viraragav v. Krishnasami, I. L. R., VI Mad., 344.

[16] 51 & 52 Vict., C. 43, S. 74.

In these cases, the plaintiff's consent is the very origin of the jurisdiction of the Court. The defendant's consent is not directly material, and the objection to the non-existence of jurisdiction is, in all such cases, deemed to be waived, if the defendant proceeds without making the objection. Thus, in *Jones* v. *James*[17] the defendant who had, for five years, resided out of the jurisdiction of the County court, in which the cause of action arose, was served with a summons issued out of that court, and was, at the time, served with an order of the judge of that court, more than two years before, granting leave to the plaintiff to issue a summons against the defendants. The defendant gave notice to the clerk of his intention to rely upon the defence of the Statute of Limitations, and afterwards moved for a prohibition; and it was held, that this notice was equivalent to pleading, and "by thus coming in and pleading, the defendant deprived himself of the power of examining minutely into the regularity of that process by which he was called upon to appear, and that, as against him, it must be considered as perfectly valid." Erle, J., in the course of the argument pointed out, that "where an inferior Court has no jurisdiction from the beginning, a party by taking a step in a cause before it does not waive his right to object to the want of jurisdiction; but jurisdiction is sometimes contingent; in such case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards."

In *Moore* v. *Ganjee*,[18] leave had not been obtained and the case was heard and partly decided before the objection was taken, and it was, therefore, held to have been waived. Cave, J., with whom Smith, J., concurred, observed, that "the objection to the jurisdiction of the Court may be waived by taking any step in the proceedings before applying to dismiss the action."

In the United States also, it is held that where the place of trial is changed by consent, no order for such change is necessary, and the consent of the parties, and the filing of the papers in the court to which the cause is transferred, is all that is required to give jurisdiction to that court.[19]

In regard to criminal proceedings, the law is quite settled in British India, as S. 531 of the Criminal Procedure Code

[17] 10 L. J. (Q. B.), 257. | [18] 25 Q. B. D., 244.
[19] Woodward v. Hanchett, 52 Wis., 982.

provides that no finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at, or passed, took place in a wrong Sessions Division, District, Sub-division, or other local area, unless it appears that such error occasioned a failure of justice.[20]

Waiver of defect of jurisdiction over person.

246. In ordinary cases, it appears to be settled law, that the defect of jurisdiction over a person may be waived by him.[21] If a Court has jurisdiction of the subject-matter, a party may voluntarily submit himself to such jurisdiction, or may, by failing to object thereto at the proper time, waive his right to contest it.

In *Kenney* v. *Greer*,[22] the question arose under a statute which prohibited the suing of a defendant out of the country where he resides or may be found, except in certain cases. It had been passed subsequently to the Acts conferring upon the Circuit Courts general jurisdiction of all actions arising in the country, and for the benefit of defendants, and not to limit the jurisdiction of the Circuit Courts, and it was held that the right of not being sued in certain cases being a privilege of the defendant, he had the right to waive it, and must be deemed to have waived it, unless he made his objection to the writ served upon him in due time.

Waiver of personal exemption from jurisdiction.

247. When the limitation of jurisdiction is in regard to a certain person or class of persons, he or they may, of course, waive the privilege, and thus give jurisdiction to the court.[23] In *Manohar* v. *Bhivrav*,[24] the defendant objected to the execution of a decree on the ground that he as a *Sirdar*, was not subject to the jurisdiction of the court passing it. A Full Bench of Bombay High Court disallowed the objection, and Westropp, J., in the judgment of the Court, said: "Before the *Munsif* the applicant either did, or did not, raise the objection of want of jurisdiction. If he raised it, and the Munsif wrongly disallowed it, he ought to have appealed to the Judge; and there would have been a

---

[20] XXI W. R. Cr., 66 & 88.

[21] Aurora Fire Ins. Co. v. Johnson, 46 Ind., 315.
McCauley v. Murdock, 97 Ind., 219.
Dampr v. Town of Dane, 29 Wis., 419.
Montgomery v. Town of Scott, 32 Wis., 252.

[22] 13 Ill., 432.

[23] Gray v. Hawes, 8 Cal., 568.

[24] II B. H. C. R., A. C., 374.

special appeal to this Court. But if he did not raise it, he must be taken to have waived it; and it is certainly too late for him to raise it now, when the Munsiff's decree is sought to be executed." Independent Princes[25] and foreign ambassadors[26] are often held to be able to waive their privilege of exemption, and to elect to submit to the jurisdiction of any court. The Maharaja of Tipperah often waived his personal exemption from the jurisdiction of the civil courts in British India, though a waiver in one suit will not operate as such in other suits.[27] The Criminal Procedure Code expressly provides that a European British subject may waive his right of trial as such.[28]

Speaking of the rule, Mr. Hawes observes, that "if a court has jurisdiction of the subject-matter and over the person, and a defendant has some privilege, which exempts him from the jurisdiction, he may waive it, if he chooses to do so."[29] Mr. Herman also lays down that "a privilege defeating jurisdiction may be waived, if the court has jurisdiction over the subject-matter."[30] Thus, in *McCormick* v. *Pennsylvania Central Railroad Co.*,[31] it was held, that "where the court has the jurisdiction of the subject-matter or cause of action, consent may confer jurisdiction of the person; and that such consent may be expressed by a foreign corporation by appearing by attorney and answering generally in the action."

It is somewhat on a similar principle, that, as observed by Dr. Bishop,[32] "with the defendant's consent, the venue may be changed back to the original county; for, in the words of Stone, J., it is a matter of 'privilege secured to the prisoner, which he may waive, either before or after the order changing the venue has been entered.'[33]"

Disqualification of a Judge at common law may be waived.

248. Judges are in some cases disqualified from trying particular causes, as for instance, on account of a direct interest in their result, or of a relationship with the parties to them. The disqualification in English

---

[25] Ladkuvarbai *v.* Ghoel Sarsangji, VII B. H. C. R., 160. Mighell *v.* Sultan of Johore, [1894] I Q. B., 149.
[26] Taylor *v.* Best, 14 C. B., 487.
[27] Beer Chunder Manikkya *v.* Nobodeep Chunder, I. L. R., IX Cal., 535.
[28] S. 454, Act X of 1882.
[29] Hawes Juris., 16.
[30] Herm. Comm., 67.
[31] 49 N. Y., 303.
[32] 1 Bish. Cr. Proc., 44.
[33] Paris *v.* State, 36 Ala., 232.

law is the result generally of common law principles. It is sometimes considered that the disqualification does not affect essential jurisdiction, and does not make the proceedings of the judge void.[34] It is held in some of the States of the American Union also, that the recusation of a judge does not affect jurisdiction, but is merely a ground to set aside the judgment on error or appeal.[35]

The weight of opinion, however, is in favor of the view, that the disqualification affects jurisdiction, but where it results only from common law, jurisdiction may be restored by consent, or by waiver express or implied, as by failing to raise the objection at the trial.[36] Thus in *The Queen* v. *The Cheltenham Commissioners*,[37] Lord Denman, C. J., observed, that "if all parties know that he (magistrate) is interested, and make no objection, at any rate if there be any thing like a consent, or if he take a part upon being desired to do so by all parties, it would be monstrous to say that the presence of the magistrate vitiated the proceedings." In *Denning* v. *Norris*[38] the court held that, since the defendant had admitted the person presiding to be a judge by a plea to the action, he was estopped afterwards to say that he was not a judge.[39]

In the United States also, it is held, that in such cases the parties by a joint application to the judge, suggesting the ground of recusation, expressly waiving all objection on that account, and requesting him to proceed with the trial or hearing, may give him full power to proceed as if no objection existed.[40] A tacit waiver is inferred against a plaintiff who brings his cause before a judge who is known to him to be disqualified to try it; and against a defendant, who knowing the existence of just grounds of recusation, appears, and without objecting offers defences in the cause, either dilatory or peremptory.[41] In *Posey* v. *Eaton*,[42] an order for sale of land was given by a judge related to one of the parties, and the Tennessee Supreme Court said:—"If the parties submit to the action of the judge at the time, the incompetency is considered waived,

---

34 Hesketh *v.* Braddock, 3 Burr., 1847.
35 Gorril *v.* Whittier, 3 N. H., 268.
Stearns *v.* Wright, 51 N. H., 609.
Heydenfeldt *v.* Towns, 27 Ala., 423.
Gregory *v.* Cleveland, 4 Ohio, 675.
McMillan *v.* Nicholls, 62 Ga., 36.
36 Wroe *v.* Greer, 2 Swan, 172.
Sweepster *v.* Gaines, 19 Ark., 96.
37 1 Ad. & El. N. S., 475.
38 2 Lev., 243.
39 Andrews *v.* Linton, Ld. Raym., 884.
40 Paddock *v.* Wells, 2 Barb. Ch., 333.
41 Ellsworth *v.* Moore, 5 Iowa, 486.
Platt *v.* N. Y. & Boston R. R. Co., 26 Conn., 544.
Groton *v.* Hurlbert, 22 Conn., 178.
42 9 Lea., 500.

and not available on a collateral attack on the judgment." As a general rule, waiver is inferred if objection is not taken before issue is joined and trial commenced, except when the party was not aware of the objection, and was in no fault for not knowing it.[43] A party, however, who has once declined the jurisdiction of a judge will not be deemed to waive it by any subsequent defence.[44]

And while the principle of disqualification extends even to persons associated with a judge, as, for example, to assessors appointed by the parties themselves under the Land Acquisition Acts,[45] yet a waiver by a minor's guardian will not be sufficient, and an objection may be raised against it for the first time in appeal from the award; and this on the ground that a waiver is a matter beyond the ordinary conduct of the litigation, and the presence of an assessor having an adverse interest can, in no case, be for the benefit of the minor.

Statutory disqualification of a judge may not be waived.

249. The disqualification in India and most of the States of the American Union is expressly enacted or recognized by some statutes. Thus in India, the Criminal Procedure Code provides that no judge or magistrate shall, except with the permission of the court to which an appeal lies from his court, try or commit for trial any case to or in which he is a party, or personally interested, and no judge or magistrate shall hear an appeal from any judgment or order passed or made by himself.[46] There are similar provisions in regard to civil proceedings in most of the Provinces of British India, even without any such qualification as that of a permission by the Appellate Court.[47]

The prohibition in all such cases of a statutory disqualification is held to go to the jurisdiction,[48] and such as may not be waived,[49] except when it is also provided by the statute

[43] Adams *v.* State, 11 Ark., 466.
Shropshire *v.* State, 12 Ark., 190.
Peebles *v.* Rand, 43 N. H., 342.
[44] Ersk. Inst., 17.
[45] Kashinath *v.* Collector of Poona, I. L. R., VIII Bom., 553.
Swamirao *v.* Collector of Dharwar, I. L. R., XVII Bom., 299.
[46] S. 555, Act X of 1882.
[47] S. 17, Act III of 1873.
S. 23, Act XIII of 1879.
S. 38, Act XII of 1887.
[48] State *v.* Sachs, 29 Pac. Rep., 446.
Frevert *v.* Swift, 19 Nev., 363.
Templeton *v.* Giddings, 12 S. W. Rep., 851.
[49] Claunch *v.* Castlebury, 23 Ala., 85.
Darling *v.* Pierie, 15 Hun., 542.
Haverley Min. Co. *v.* Howcutt, 6 Colo., 574.
State *v.* Weiskittle, 61 Md., 48.
Cobb *v.* People, 84 Ill., 511.
Bedell *v.* Bailey, 58 N. H., 62.
Fechener *v.* Washington, 77 Ind., 366.
Estate of White, 37 Cal., 190.

creating the disqualification that it may be waived by consent generally, or subject to any particular conditions. And the rule will apply even to a disqualification arising subsequent to the institution of the suit, which also will oust jurisdiction, so as not to be waived by consent.[50] The judge is divested so completely of his jurisdiction, and his acts are so utterly void, that they cannot be made good by any omission, waiver, or even the express consent of the parties.[1] It has been repeatedly held that there can be no waiver of the disqualification, and even express consent cannot restore jurisdiction to him over the consenting party's offence.[2] It has been held recently by the Texas Supreme Court in *January* v. *State*,[3] that where a judge is disqualified from sitting in a case, the judgment rendered by him is a nullity, even though the parties agree to waive objections to the jurisdiction.

This is on the ground that it is the policy of the law to withhold from a judge all power or jurisdiction to act in any matter in which he has a personal interest, irrespective of the wishes or consent of the parties interested.[4] Mr. Works, in his work on the Jurisdiction of Courts, says:[5] "If the question of interest were one affecting the parties alone, they might properly be held to waive it by consent or a failure to raise an objection. But it is a matter in which the whole public is interested. The rule that forbids one to sit as judge in his own case is one of public policy affecting the due and proper administration of justice, and should render void the proceedings of a judge affecting matters of private concern to himself, whether objection is made by the parties directly interested or not." In *Chambers* v. *Hodges*[6] also, the disqualifying interest of the judge was attempted to be removed by consent, but the attempt was disallowed on the same high grounds of

---

[50] Low *v.* Rice, 8 Johns., 409.
Clayton *v.* Per Dun, 13 Johns., 218.

[1] Chambers *v.* Clearwater, 1 Keyes, 314.
Hancock, 27 Hun., 82.
Choonmaker *v.* Clearwater, 41 Barb., 200.
Peninsular R. Co. *v.* Howard, 20 Mich., 25.
People *v.* De la Guerra, 24 Cal., 73.
Murray *v.* State, 34 Tex., 331.

[2] Oil City *v.* McAboy, 74 Pa. St., 249.
Batchelder *v.* Currier, 45 N. H., 460.
People *v.* Granice, 50 Cal., 447.

[3] 38 S. W. Rep., 179.

[4] Heilbron *v.* Campbell, 23 Pac. Rep., 123.

[5] P. 402.

[6] 23 Tex., 583.

public policy that the prohibition was designed, "not merely for the protection of the party to the suit, but for the general interest of justice."

The decision in *Oakley* v. *Aspinwall*[7] is a particularly strong authority against the validating effect of consent in such a case. The Court which heard the appeal consisted of eight judges, only one of whom was said to be disqualified, the disqualification being that he was a second cousin, related in the sixth degree to the defendants, who were sued merely as sureties and having been fully indemnified, had no personal interest in the suit. Counsel on both sides united in requesting the judge to sit before he would do so. Bronson, C. J., maintained that there was no question of jurisdiction involved, as the disqualification of one of the judges could not affect the jurisdiction of the entire court, that jurisdiction over a person may be and often is acquired by consent, and that in this case consent would operate as an estoppel, no party being "at liberty first to invite a judge to sit and after taking the chances of having an opinion in his favor, turn round, when he found the opinion to be the other way, and repudiate his own act," and that it would be the same if the request to sit were made by counsel, as a "party is concluded by the acts of his counsel." Jewett and Harris, J.J., agreed with the Chief Justice, but the contrary was held by four judges of the Court. Hurlbut, J., who delivered the leading opinion, based it on the ground that the prohibition of law "was not designed merely for the protection of the party to a suit, but for the general interest of justice." He said: "It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the State, the community is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind. The party who desired it might be permitted to take the hazard of a biased decision, if he alone were to suffer for his folly,

[7] 3 N. Y., 547.

but the State cannot endure the scandal and reproach which would be visited upon its judiciary in consequence. Although the party consent, he will invariably murmur if he do not gain his cause; and the very man who induced the judge to act, when he should have forborne, will be the first to arraign his decision as biased and unjust. If we needed an illustration of this, the attitude which the counsel for the moving party in this case assumed toward the court, the strain of argument which he addressed to it, and the impression which it was calculated to make upon an audience, are enough to show, that whatever a party may consent to do, the State cannot afford to yield up its judiciary to such attack and criticism as will inevitably follow upon their decisions made in disregard of the prohibitions of the law under consideration."

It may, however, be observed that in this case the prohibitory statute was very broad, and provided that, "no judge of any court can sit as such in any cause to which he is a party or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties." So that the question was not of jurisdiction; but even the sitting of the judge was barred, the exclusion wrought by the statute being as complete, as is in the nature of the case possible.

The rule is applicable with still greater force to proceedings *in rem*, in which the decision must affect not only the parties before the judge, but all those having any interest in matters forming the subject of the proceedings. Thus in *Sigourney* v. *Sibley*,[8] Shaw, C. J., in delivering the opinion of the Court said: "It is a general rule, that want of jurisdiction, especially of a court of limited and special jurisdiction, cannot be aided by any waiver of exceptions or even by express consent. If this is true in ordinary cases, it is so, *a fortiori*, in a case of a probate decree, granting administration, which binds not only all those who happen to be before the court as litigant parties, but all those, who as creditors, heirs, or otherwise, may be interested, directly or remotely, in the settlement of the estate." No such absolute disqualification affecting jurisdiction will be inferred, however, where a statute only provides for its exercise by a justice "who shall not be interested in the matter." In *Wakefield Local Board of Health* v. *West Riding Ry. Co.*,[9] it was held that in such a case, the words

[8] 21 Pick., 101.

[9] L. R., 1 Q. B., 84.

would be merely declaratory of the common law, and, therefore, a waiver by the parties might be held valid, and they not able to object to the jurisdiction after waiving it once.

In *Baldwin* v. *Calkins*[10] also, the statute required that the application should be to disinterested judges, and the proceedings did not show that the judges were disinterested, and yet they were held valid on the ground of waiver, as no objection had been made to the judges on the ground of interest, Savage, C. J., observing, that "consent cannot give jurisdiction, but cures irregularity . . . the parties appeared and made no objection; this was an admission of the competency of the judges."

When the law only gives a party the right of having certain proceedings transferred from the court of any judge, there shall, however, be no disqualification or divesting of his jurisdiction till the transfer has been made.[11]

Waiver of defect of personal jurisdiction by appearance.

250. It is a general principle, that the defect of personal jurisdiction may be waived by appearance.[12] Thus in *Forbes* v. *Smith*,[13] a British subject residing abroad was served with a writ endorsed with a claim in respect of promissory notes executed abroad; the defendant appeared; and it was held that the appearance waived the irregularity in the service. Martin, B., in his judgment, said: "I think, that, even if a foreigner came before the Court and stated, that being in ignorance what course to pursue, he appeared, the Court would, except under very peculiar circumstances, deal with him as with any other person, and refuse his application to set aside the appearance." This case was cited with approval in *Oulton* v. *Radcliffe*,[14] in which the writ was duly issued, and the defendant (through his attorney) having heard that a writ had issued, said to the plaintiff's attorney, "you need not take the trouble to serve me: I will appear": and he did enter an appearance. Brett, J., said: "It is true that a party residing out of the jurisdiction cannot be compelled to come before the Court without service of the writ, or that which amounts to service: that

[10] 10 Wend., 167.
[11] *Vide* S. 191, Act X of 1882.
[12] Mostyn v. Fabrigas, Cowp., 72. Barrington v. Vennables, L. Raym., 34. Trelawny v. Williams, 2 Vern., 484.
[13] 10 Exch.. Rep., 717.
[14] 9 C. & P., 189.

would be contrary to natural justice. But, however irregular a writ may be, no objection can be taken to it on that ground after the defendant has chosen to appear to it." Denman, J., observed that "if the defendant appears, that gives the Court jurisdiction to proceed, provided the subject-matter of the action is one over which the Court has jurisdiction." Honyman, J., said: "If the defendant choses to waive it, or to accept service out of the jurisdiction, and appears to the writ, I am at a loss to see what irregularity there can be in the subsequent proceedings."

This question has often arisen in India also, generally in suits on foreign decrees. The Madras High Court has repeatedly laid down that an appearance to defend a suit in a court is a bar to an objection against the jurisdiction of that court. Thus in *Kandoth Mammi* v. *Neelancherayil*,[15] Morgan C. J., and Holloway, J., thought that justice required them "to hold that a man who has thus taken the chances of a judgment in his favor which would, if obtained, have relieved him from all liability is equitably estopped from afterwards setting up the objection." In *Fazalshau Khan* v. *Gafar Khan*[16] the defendant in the Bastar Court had not protested against the jurisdiction of that Court, but appeared and defended the suit by an agent, and the Madras High Court held that "having done so, and having taken the chance of a judgment in his favor, he cannot now, when an action is brought against him on the judgment, take exception to the jurisdiction." An appearance by an uninstructed solicitor, however, is not such an appearance as will effect a waiver.[17]

The principle is recognized in the United States also. There also it is held that the defect of personal jurisdiction may be waived by a general appearance or by some act equivalent to it, such as the filing of a pleading in the case, or some similar act recognizing the authority of the court to proceed in the action.[18] Thus in *Smith* v. *Elder*,[19] Vanness, J., observed that "the defendant has submitted to the jurisdiction of this court, and by pleading a plea in bar, has, in fact, affirmed it, and is, therefore, now precluded from making the objection."

[15] VIII M. H. C. R., 14.
[16] I. L. R., XV Mad., 82.
[17] Sivaraman Chetty *v.* Iburam Saheb, I. L. R., XVIII Mad., 327.
[18] Wasson *v.* Cone, 86 Ill., 46.
Fee *v.* Big Sand Iron Co., 13 Ohio, 563.
Aurora Fire Ass. Co. *v* Johnson, 46 Ind., 315.
Slanter *v.* Hallowell, 90 Ind., 286.
Damp *v.* Town of Dane, 29 Wis., 419.
Carpenter *v.* Shepardson, 43 Wis., 406.
Smith *v.* Curtis, 7 Cal., 584.
Roy *v.* Union Merc. Co., 26 Pac. Rep. 996.
Young *v.* Ross., 31 N. H., 205.
[19] Johns., 105.

In *Jones* v. *Jones*,[20] Andrews, J., in delivering the opinion of the court observed, that "jurisdiction of the person may be acquired by consent, although not of subject-matter; and it is well settled that a general appearance of a defendant in an action is equivalent to personal service of process." In *German Bank* v. *Am. Fire Ins. Co.*[21] the action of the defendant Bank in appearing was regarded as voluntary, and, therefore, as a waiver of its right to object to the jurisdiction of the court. In *Mays* v. *Fritton*,[22] Hunt, J., in delivering the opinion of the United States Supreme Court, said: "It is not competent to a party to assent to a proceeding in the court below, take his chances of success, and upon failure, come here and object that the court below had no authority to take the proceeding." In *Scott* v. *Kelly*,[23] the assignees in bankruptcy voluntarily submitted themselves and their rights to the jurisdiction of the State Court. Being summoned, they appeared without objection, and presented their claim for adjudication by that court; and it was held that after that an objection to the jurisdiction would not be entertained. And if a court has lost jurisdiction of the person, it may also be restored in the same manner by personal appearance.[24]

The rule applies even to corporations. Thus in *McCormick* v. *Pennsylvania Central Railroad Co.*,[25] Folger, J., said: "It has been often held that a voluntary appearance confers jurisdiction of the person, and the rule seems so reasonable in itself that we have no hesitation in adopting it." In *Faulkner* v. *Del. & Rar. Can. Co.*,[26] Beardsley, J., after quoting Taney, C. J., to the effect that a corporation, though it must live and have its being in the State of its creation, yet it may be recognized and contract in another, said: "Hence it may prosecute and defend suits out of the State in which it was created."

But, unless it is expressly provided to the contrary, as it is in some of the States, a special appearance may be entered for the purpose of questioning whether the court has acquired jurisdiction, by the service of process, as required by law, without giving the court jurisdiction to proceed further than to determine whether it has acquired jurisdiction or

---

20 108 N. Y., 425.
21 83 Iowa, 491.
22 20 Wall., 414.
23 22 Wall., 57.
24 Taylor v. Atlantic & Pac. R. Co. 68 Mo., 397.
25 49 N. Y., 309.
26 1 Den., 441.

not.[27] Thus, if the defendant appears merely for the purpose of contesting jurisdiction, it will not estop him from contesting it.[28]

Pleading after objection to jurisdiction not a waiver of its absence.

251. If a party object, however, to the jurisdiction, no consent or waiver on his part will be presumed, if after the objection has been overruled, he continues to appear, and even acts or pleads up to the end of the proceedings. He is not bound to retire from the case as soon as the court decides in favor of its jurisdiction, on pain of being deemed to be a consenting party to its exercise. In *Hamlyn* v. *Betteley*,[29] it was protested on behalf of the defendant that the issue which had arisen in the proceedings could not be tried by the judge without the jury. The objection was overruled, and the defendant's counsel did not withdraw or offer to withdraw from the conduct of the case. On appeal from the final order, the court held that there was no waiver of jurisdiction. Lord Selborne, with whom Lord Coleridge, C. J., and Brett, L. J., concurred, observed that the amount of protest made in the case was quite sufficient, and that "even in arbitrations, where a protest is made against jurisdiction, the party protesting is not bound to retire; he may go through the whole case, subject to the protest he has made."

This is the view repeatedly taken by the United States Supreme Court also. Thus in *Harkness* v. *Hyde*,[30] Field, J., in delivering the opinion of the Court said: "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground or what we consider as intended, that the service be set aside; nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the Court to such irregularity; nor is the objection waived when, being urged, it is

---

[27] Green *v.* Green, 42 Kan., 554.
Alderson *v.* White, 32 Wis, 308.
Nelson *v.* Campbell, 1 Wash. St., 261.
Branner *v.* Chapman, 11 Kan., 118.
New Albany R. R. Co. *v.* Combs, 13 Ind., 490.
Linden Grand M. Co. *v.* Sheplar, 53 Cal., 245.
Southern Pac. R. R. Co. *v.* Superior Court Kern Co., 53 Cal., 471.

[28] Walling *v.* Beers, 120 Mass., 540.
Wright *v.* Andrews, 130 Mass., 149.

[29] 6 Q. B. D., 63.

[30] 8 Otto, 476.

overruled and the defendant is thereby compelled to answer He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality that the objection is deemed to be waived."

This has been held repeatedly by the Court in what are usually called removal cases. In *Home Life Ins. Co.* v. *Dunn*,[31] the plaintiff (Company) in error resisted the reversal of the order of removal made by the Common Pleas, and did all in its power to that end; and Swayne, J., in delivering the opinion of the Court observed, that "having failed, and being forced into a trial, it lost none of its rights by defending against the action." In *Meyer* v. *Delaware R. C. Co.*,[32] it was contended that, "though the lower Court ought to have withheld all further proceedings in the suit, that error was waived by the subsequent appearance of D. and going to a hearing." The contention was overruled, however, Waite, C. J., observing that the question was settled by the case of *Home Life Ins. Co.* v. *Dunn*, "where it is distinctly held, that if a party failed in his efforts to obtain a removal and was forced to trial, he lost none of his rights by defending against the action."

In *New Orleans M. & T. R. R. Co.* v. *Mississipi*,[33] Harlan, J., in delivering the opinion of the Court said: "In view of our decisions in *Ins. Co.* v. *Dunn*, in Removal cases,[34] and in other cases, it is scarcely necessary to say, that the Railroad Company did not lose its right to raise this question of jurisdiction by contesting the case, upon the merits, in the State Courts after its application for the removal of the suit had been disregarded. It remained in the State Court under protest as to the right of that Court to proceed further in the suit, and there is nothing in the record to show that it waived its right to have the case removed to the Federal Court, and consented to proceed in the State Court, as if there had been no petition and bond for the removal." In *Kern* v. *Huidekoper*,[35] Woods, J., in delivering the opinion of the Court said: "It has been expressly held by this Court that when a case has been properly removed from a State into a United States Court, and the State Court still goes on to adjudicate the case, against the resistance of the party at whose instance the removal was made, such

[31] 19 Wall., 214.
[32] 10 Otto, 457,
[33] 12 Otto, 135.
[34] 10 Otto, 457.
[35] 13 Otto, 185.

action on its part is a usurpation, and the fact that such a party has, after the removal, contested the suit, does not, after judgment against him, constitute a waiver on his part of the question of the jurisdiction of the State Court to try the case."

In *Baltimore & Ohio R. R. Co.* v. *Koontz*,[36] Waite, C. J., in delivering the opinion of the Court again said: "We have uniformly held, that if a State Court wrongfully refuses to give up its jurisdiction on a petition for removal, and forces a party to trial, he loses none of his rights by remaining and contesting the case on its merits. . . It is, also, a well settled rule of decision in this Court, that when a sufficient case for removal is made in the State Court, the rightful jurisdiction of that Court comes to an end, and no further proceedings can properly be held there, unless in some form its jurisdiction is restored."

In *Nat. Steamship Co.* v. *Tugman*,[37] Harlan, J., in delivering the opinion of the Court said: "The right of the Company to have a trial in the Circuit Court of the United States became fixed, upon the filing of the petition and bond. But the inferior State Court having ruled that the right of removal did not exist, and that it had jurisdiction to proceed, the Company was not bound to desert the case, and leave the opposite party to take judgment by default. It was at liberty, its right to removal being ignored by the State Court, to make defence in that tribunal in every mode recognized by the laws of the State, without forfeiting or impairing, in the slightest degree, its right to a trial in the Court to which the action had been transferred, or without affecting, to any extent, the authority of the latter Court to proceed. The consent, by the Company, to a trial by referee was nothing more than an expression of its preference (being compelled to make defence in the State Court) for that one of the several modes of trial permitted by the laws of the State. It is true that when the cause was taken up by the referee, as well as when heard in the Supreme Court of the State and in the Court of Appeals, the Company protested that the Circuit Court of the United States alone had jurisdiction after the petition and bond for removal were filed. But no such protests were necessary, and they added nothing whatever to the legal strength of its position. When the State Court adjudged that it had authority to proceed, the Company was entitled to regard the decision as final, so far as that tribunal was concerned, and was not bound, in order to

[36] 14 Otto, 5.

[37] 16 Otto, 118.

maintain the right of removal, to protest, at subsequent stages of the trial, against its exercise of jurisdiction."

The same view has been taken by the New York Courts. Thus in *Avery* v. *Slack*,[37a] it was held that a party who appeared and objected to the validity of the process against him, did not waive the objection by answering and going to trial on the merits after his objection had been overruled. In *Jones* v. *Jones*,[38] Andrews, J., in delivering the opinion of the court, said:—"There is substantial uniformity in the decisions to the effect that a party not properly served with process, so as to give the court jurisdiction of his person, does not waive the objection or confer jurisdiction by answering over and going to trial on the merits after he has ineffectually objected to the jurisdiction, and his objection has been overruled." It was contended that in such a case, the objection to the jurisdiction might be urged on error or appeal, but not in a collateral proceeding. The contention was overruled, however, and Andrews, J., continued: "The principle upon which the doctrine proceeds is, that a party who has objected to the jurisdiction, and whose objection has been overruled, is not bound, as was said by Harlan, J., in *Steamship Co.* v. *Tugman*,[39] 'to desert the case, and leave the opposite party take judgment by default.' It is difficult to see why a party proceeding under such circumstances should be permitted to raise the question on error, and not be permitted to assail the judgment collaterally in another state, where the judgment is set up as a binding adjudication. The court does not acquire jurisdiction over the person by deciding that it has jurisdiction. If the acts of the defendant do not constitute a legal waiver of the objection, or a submission to the jurisdiction so as to preclude raising the question on error in the state where the judgment is rendered, how can the same acts preclude the party from raising the question in another state in answer to the judgment."

Waiver of irregularities in initiating proceedings.

252. Jurisdiction is sometimes deemed to depend also on the regularity of the manner in which the proceedings are brought before the court. Thus in *Bassick Mining Co.* v. *Schoolfield*,[40] it was held that to confer actual jurisdiction in

[37a] 17 Wend., 85.
[38] 108 N. Y., 415.
[39] 16 Otto, 118.
[40] 10 Cal., 46.

a particular case, the jurisdictional power of the court must be invoked by such proceedings as are requisite in accordance with the law of the particular tribunal. Thus generally speaking, a court has no jurisdiction over a suit or appeal unless it is duly instituted in or transferred to it. Thus in *Motilal Ramdas* v. *Jamnadas Javerdas*,[41] the decision of an Assistant Judge was set aside for defect of jurisdiction, even though the plaint was made over to him by the District Judge to whom it had been presented, as on the day of the presentation the court of the Sadar Ameen, in which the suit ought to have been instituted was closed. No objection to the jurisdiction was made before the Assistant Judge, but it was first taken in argument on appeal before the District Judge. Couch, J., in delivering the judgment of the Bombay High Court, observed that the objection, though not raised in the memorandum of appeal to the District Judge ought to have been considered by him, as involving a question of jurisdiction.

It appears to be settled, however, that the irregularity of the initiation or institution may be waived by the parties, so as to give jurisdiction over the proceedings notwithstanding the irregularity. Thus *In ex-parte Pratt*[42] Bowen, L. J., observed, that "there is a good old-fashioned rule that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, 'you have no jurisdiction.' You ought not to lead a tribunal to exercise jurisdiction wrongfully." This observation was quite correct with reference to the facts of the case, in which the court was possessed of the subject-matter, and the error consisted only in its having been invoked wrongly. In *Raghunandan Lal*,[43] no formal order was passed for transferring the proceedings to the Magistrate, who finally tried the prisoner, and had jurisdiction to try him; and the Court observed that though there was some formal defect, any such omission or irregularity would not vitiate the proceedings.

In *Sankumani* v. *Ikoran*,[44] the order of the transfer of a suit was made on the application of one party without giving any notice to the other as was required by law, and no objection against jurisdiction was taken in the court to which the transfer was made, nor on appeal from the decree of that

[41] II B. H. C. R., 40.
[42] 12 Q. B. D., 341.
[43] 1889 All. W. N., 84.
[44] I. L. R, XIII Mad., 211.

court. In a subsequent suit on the decree, it was decided to be void for want of jurisdiction ; but the High Court set aside that decision, it being considered "clear that as the objection was not taken by the parties in the suit, but on the contrary waived, any defect in the order conferring jurisdiction on the Cochin Court must be held to have been cured."

So also where consent is given to the hearing of an application for transfer, merely on affidavits and without the production of oral evidence, the irregularity will be deemed waived.[45]

The principle will, however, not apply where the proceedings are essentially bad, as for example, instituted by a person other than the plaintiff without any written authority from the plaintiff. Thus in *Shivram Vithal* v. *Bhagirthi Bai*,[46] the suit was brought by the mother of a person on military duty, and though no objection was raised against it in the original court, the suit was dismissed on second appeal on that ground, the High Court observing that a power of attorney then given by the son would not cure the defect.

Waiver of the irregularity of the first institution of proceedings in a Court not having jurisdiction.

253. The question of the waiver of the irregularity generally arises in cases where a suit is instituted in a court without jurisdiction, and transferred from it to a court having jurisdiction. It appears to be settled that the transfer in such a case even if made to a court having jurisdiction is invalid,[47] and insufficient to give jurisdiction over the suit transferred to the court to which the transfer is made. It is generally held, however, that the irregularity of the transfer may be waived by the consent of the parties ; and if either of the parties remain silent, his silence will preclude or estop him from asserting an objection to the jurisdiction almost or quite as effectively as would his consent in open court to the transfer.[48]

Thus in *Modunmohun Ghose* v. *Boroda Sondori*,[49] certain property was sold in execution of a decree of a court transmitted for execution to another court. In a suit to set aside the sale, it was contended that the court transmitting the decree had no authority to transmit the same ; but the contention was not allowed, on the ground that the objection taken was not that

[45] Kelly *v.* Alcona Circuit Judge, 79 Mich., 392.
[46] VI. B. H. C. R., A. C., 20.
[47] Pachaoni Awasthi *v.* Ilahi Bakhsh. I. L. R., IV All., 478.
[48] Township of Center *v.* County Marion, 110 Ind., 579.
[49] VIII C. L. R., 261.

there was no jurisdiction on the part of the court which effected the sale, but that the preliminary proceedings by which the decree had been brought to that court were not strictly regular.

The decision in *Ledgard* v. *Bull*,[50] as to the proceedings in that case in the District Judge's Court being void is not against this view, as it proceeded only on the ground that the application for the transfer of the suit to that court from the court of the Subordinate Judge did not in the particular circumstances of the case constitute a waiver of the irregularity of its institution in the Subordinate Judge's Court. On the other hand, that decision clearly supports the view here advanced, as Lord Watson in delivering it expressly observed, that "there are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit." In the United States also, it is generally considered, that an appearance in the court to which the proceedings are transferred will be deemed a waiver of the irregularity in the application for transfer, and of any other defects in the proceedings taken to procure the same.[1]

The same principle will apply also, when the proceedings go before a court of competent jurisdiction not by transfer, but on an appeal from a decision passed by a court not having jurisdiction. Thus on an appeal from a judgment passed by a court not having jurisdiction, the Appellate Court, if it should have original jurisdiction also over the subject-matter of the suit, would, if the parties consented, be able finally to dispose of the same.[2] In such a case it would not obtain jurisdiction by virtue of the appeal from a court not having jurisdiction; but on account of the consent of the parties, the suit might be treated as if it had been originally commenced in that court, and the parties voluntarily appeared in the proceedings and gone to trial.[3] It will be different, however, if the Appellate Court has no original jurisdiction. This was the case in *Velayudam* v. *Arunachala*,[4] in which a suit for less than Rs. 2,500 was filed in the court of a Subordinate Judge, who had

[50] L. R. XIII I. A., 144.
[1] Aurora F. Ins. Co. v. Johnson, 46 Ind., 315.
[2] Randolph County v. Ralls, 18 Ill., 29.
[3] Harington v. Heath, 15 Ohio, 483.
[4] I. L. R., XIII Mad, 273.

jurisdiction to hear suits only for more than that amount. No objection to the jurisdiction was taken in the original or the lower Apellate Court, but still it was allowed on second appeal in the High Court, which said: "An appeal could not be heard on the merits, unless the decree from which the appeal was preferred was passed by a Judge having jurisdiction over the matter in dispute. No doubt the District Judge was the appellate authority, whether the suit was heard and determined either by the Subordinate Judge or District Munsiff, but it must be remembered that the Appellate Court is only a Court of error, and the trial by the Appellate Court cannot be accepted in place of a trial by the Court of First Instance."

For the purposes of this rule, a court having extraordinary jurisdiction will apparently be deemed as having jurisdiction. Thus in *Vishnu Sakharam* v. *Krishna Rao*,[5] a decree had been passed against a Sirdar under the exclusive jurisdiction of the Agent for the Sirdars, and on the Sirdar's death execution-proceedings against his heirs were carried on in the court of a Subordinate Judge for years under the orders of the High Court to which the proceedings had gone up twice on appeal. At a later period, it was held in another case that a decree of the Agent could not be executed by mere transfer to an ordinary court, but that the remedy in such a court was by a suit on the decree. Thereon the Subordinate Judge refused to recognize the transfer of the decree, and put a stop to the execution-proceedings. West, J., in delivering the judgment of a Division Bench of the Bombay High Court, said: "Where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence. The Subordinate Judge has for many years been carrying on the execution under an order of the High Court which he was bound to obey. The High Court had jurisdiction over the matter in every aspect of it, and the sons of the judgment-debtor contested in the High Court the right of the judgment-creditor as against them on exactly the same grounds as they could have taken if they had been sued on the decree. They did not contend that their liability could be enforced only by a fresh suit in the Subordinate Judge's Court; and having chosen their ground, and taken their chance of victory in the execution-proceedings, they could not, and indeed

[5] I. L. R., XI Bom., 153.

did not, ask to fight the battle over again. Had there indeed been no jurisdiction over the subject-matter, the acquiescence of the parties concerned could not create it; but as there was a jurisdictional power, and the questions at issue were investigated and determined, the irregularity was covered by the assent with which this Court acted."

Waiver of irregularity of initiative process in criminal proceedings.

254. As a general rule, criminal proceedings may be commenced by a complaint and an examination on oath, after which process is issued, if there appear to be a sufficient ground for proceeding. It appears to be established,[6] however, that any irregularity in the complaint, process or its service does not affect the jurisdiction of the court in criminal cases, and may be waived. It is said to be quite an old rule, that if one who may insist on faults of procedure, waives them, submits to the judge, and takes his trial, it is afterwards too late for him to question the jurisdiction which he might have questioned at the time.[7] Thus it has been repeatedly held that to found jurisdiction to take cognizance of an offence, a written information or process is not necessary,[8] and an information *instanter* is sufficient.[9] A flood of authorities may be cited in support of the proposition that no process at all is necessary, when the accused being bodily before a magistrate, the charge is made in his presence,[10] and he appears and answers to it. In *Turner* v. *Postmaster-General*,[11] the conviction was under 24 & 25 Vict., C. 97, S. 62 of which required the information to be on oath, and it was held that though there was no information on oath, yet after appearance without making any objection, no objection could be taken to the jurisdiction of the justices to convict summarily, and that any defect in bringing the party before the justices was cured by appearance, and by the merits of the case being gone into, and that the justices had jurisdiction.

In England the question has risen generally under Jervis's Act,[12] the first section of which provides that in all cases where an information shall be laid before one or more justices of the peace that any person has committed, or is suspected to have committed, any offence or act within the jurisdiction of

---

[6] S. 204, Act X of 1882.
[7] Queen *v.* Hughes, 4 Q. B. D., 614.
[8] Rex *v.* Thompson, 2 T. R., 18.
Reg. *v.* Millard, 22 L. J. M. C., 108.
[9] Rex *v.* Heber, 2 Barn., 101.
[10] 2 Hawk. P. C., 28.
Rex *v.* Stone, 1 East P. C., 649.
[11] 10 Cox C. C., 15.
[12] 11 & 12 Vict. C., 43.

such justice or justices, ... and also in all cases where a complaint shall be made to any such justice or justices upon which he or they shall have authority by law to make any order for the payment of money or otherwise, it shall be lawful for such justice or justices to issue his or their summons directed to such person, requiring him to appear before a justice or justices to answer thereto. In *Reg.* v. *Shaw*,[13] the summons was filled up by the magistrate's clerk, and handed to a superintendent of police, who took it to a magistrate, who read and signed it, without making any inquiry, or requiring any statement of facts. The accused appeared before the justices and answered to the charge; and the conviction for giving false evidence of a person who gave evidence during the proceedings was sustained. Erle, C. J., observed, that "if a party is before a magistrate and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued, unless the statute creating the offence, imposes the necessity of taking some such step." Blackburn, J., similarly observed that "when a man appears before justices, and a charge is then made against him, if he has not been summoned, he has a good ground for asking for an adjournment; if he waives that, and answers the charge, a conviction would be perfectly good against him." In *The Queen* v. *Hughes*,[14] the facts were much the same. There was no written information nor oath, Hughes having merely got a form of a warrant from a clerk to the justices, telling him that he wanted a warrant against Stanley for assaulting and obstructing him in the discharge of his duty. Hughes took the form to a magistrate, who signed it, and Stanley was arrested in execution of it, but raised no objection, and during the trial Hughes gave false evidence, for which he was convicted; and on a case reserved, the conviction was sustained. Hawkins, J., delivered the leading decision (with which Pollock, B., and Lindley, J., concurred) and observed, that "it is altogether immaterial, so far as the jurisdiction of the justices to hear that charge is concerned, whether the accused was before them voluntarily or otherwise; or on legal or illegal process." Lopes, J., observed that the warrant was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdicion of the justices;

[13] 10 Cox C. C., 66.

[14] 4 Q. B. D., 614.

and that whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force, or under an illegal warrant, was immaterial: being before the justices, however brought there, the justices, if they had jurisdiction, in respect of time and place over the offence, were competent to entertain the charge, and being so competent, a false oath, wilfully taken, in respect of something material would be perjury. Huddleston, B., said: "The information on oath is not necessary to give the justices jurisdiction to try, though it is necessary to give them jurisdiction to issue a warrant to apprehend. The jurisdiction to try arises on the appearance of the party charged, the nature of the charges, and the charging of the defendant. . . . . Principle and the authorities seem to shew that objections and defects in the form of procuring the appearance of a party charged will be cured by appearance. The principle is, that a party charged should have an opportunity of knowing the charge against him, and be fully heard, before being condemned. If he has the opportunity, the method by which he is brought before the justice cannot take away the jurisdiction to hear and determine, when he is before them. The arrest of Stanley was no doubt illegal, there had been no information on oath to justify the warrant; and it might be, that if the objection had been taken the magistrates might have entertained it, but they could then and there have issued their summons for Stanley's apprehension at once on a verbal information, which would be good; and have proceeded to hear and determine, though if the defendant objected, they ought to adjourn, so that he might know the charge and be prepared to meet it." In both the above cases, there was no protest against the jurisdiction on account of the informality, which, being only a fault of procedure, was considered waived.

In *Dixon* v. *Wells*,[15] the accused on being brought before the Magistrate objected that there was no summons and no information, that the whole proceeding was irregular, and that the court had no jurisdiction to try him because he was not properly brought there. Lord Coleridge, C. J., said: "Although the fact of his protest ought to be a complete answer to the assumed jurisdiction, I cannot disguise from myself the fact that from the language of many of the judges in *Reg.* v. *Hughes*, and the judgments of Erle, C. J., and Blackburn, J., in *Reg.* v. *Shaw*, they seem to assume that if the two conditions precedent of the presence of the accused

[15] 25 Q. B. D., 249.

and jurisdiction over the offence were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference, but I find no such qualification." The proceedings were, however, held to be without jurisdiction, as they were under the statutes 42 and 43 Vict. c. 30, section 10 of which enacts that "the summons to appear before the magistrate shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug, for the sale of which in contravention to the terms of the principal Act, the seller is rendered liable to prosecution, and particulars of the offence or offences against the Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned." Lord Coleridge observed that the provision as to time was of the essence of the jurisdiction to try the offence, and said: "It is possible to say that it can be treated like the other section as mere procedure, and that as the defendant was present, the magistrate had jurisdiction to try the charge. But it seems to me that in this case the legislature has made it a condition precedent to the magistrate's jurisdiction that the proceedings should be brought within the operation of S. 10, and that in all prosecutions under the Act certain things shall be done and certain things shall not be done. The section is not only directory but strongly imperative. In the present case there was, in my opinion, no summons. I think that, according to S. 10, which applies to this case, it was essential to the jurisdiction that it should be exercised in twenty-eight days, and that it was not so exercised, and the appellant is entitled to our judgment."

It will of course be different if the proceedings are under any particular statute making certain information a condition precedent to the proceedings, as for example in the case of *Reg.* v. *Scotton*,[16] in which, by the words of the statute 6 & 7 Wm. 4, c. 65, s. 9, it was a condition precedent to any further step that the matter of the information should be deposed to on the oath of the informer, or some other credible witness, and information was the only possible basis of the magistrate's jurisdiction.

[16] 5 Ad. & El., N. S., 493.

Waiver of conditions of exercise of civil jurisdiction.

255. There is some conflict of opinion as to the exact effect of the waiver of the conditions of the exercise of jurisdiction by a civil court. Certain preliminary conditions are prescribed in some cases for the institution of suits, having reference usually to the obtaining of a certain consent, to the production of a certain certificate, to the giving of certain notices, and to the lapse or non-lapse of a certain period. S. 433 of the Civil Procedure Code thus provides that no Sovereign Prince or Ruling Chief, or Ambassador or Envoy of a Foreign State may be sued in any court in British India, without the consent of the Governor-General in Council, certified by the signature of one of the Secretaries to the Government of India. Similarly S. 424 of the Civil Procedure Code provides that no suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action and the name and place of abode of the intending plaintiff and the relief which he claims ; and the plaint must contain a statement that such notice has been so delivered or left.

The general opinion appears to be that such conditions do not affect the jurisdiction of the court, and that though their non-fulfilment may be pleaded in bar to the suit, yet it cannot render the final judgment, if passed, null or open to collateral attack. This has been held recently in *Chandulal* v. *Awad bin Umar*[17] with reference to the consent of the Governor-General in Council required under S. 433 as an essential preliminary to the institution of the suits referred to in that section. Speaking of the absence of consent, Strachey, J., said : "In my opinion, it has nothing to do with jurisdiction, except in the loose sense in which jurisdiction is continually confounded with procedure. At all events, if it can properly be called a question of jurisdiction, it is not so in the sense in which it is true that consent cannot confer jurisdiction, or that defects of jurisdiction cannot be waived . . . . the absence of consent was a good ground of objection to the hearing, a

[17] I. L. R., XXI Bom., 351.

special defence which the defendant was entitled by the section to plead as a bar to the suit. The fact, however, that a particular defence is allowed by statute in a suit within the general jurisdiction of the court, and may be fatal to the suit *in limine*, does not in that event withdraw the suit from the court's jurisdiction."

It may be different, however, where the condition precedent is not for the personal interest of the defendant, but on account of general policy for the protection of the public. Thus in *Babaji Hari* v. *Rajaram*,[18] the question arose with reference to the Pensions Act, 1871, S. 4 of which provides, that with certain exceptions, " no civil court shall entertain any suit relating to any pension or grant of money or land-revenue conferred or made by the British or any former Government." No objection was raised to the non-production of the certificate in the original court, but the suit was dismissed on the objection being raised on appeal. West, J., in delivering the judgment of the High Court, observed that "on the mere grammatical interpretation of S. 4 of that Act, no doubt could reasonably be entertained of its shutting the jurisdiction of the Civil Courts in a case like the present." There was no offer in that case of obtaining the certificate pending the appeal, but in *Mahammad Azmat Ali* v. *Lalli Begum*,[19] the certificate was obtained while the case was before the Chief Court, and a decree was then given by the Court. On appeal, it was contended before their Lordships of the Privy Council, that the suit ought to have been dismissed altogether as regards the property held under the grant, because no certificate had been obtained before the commencement of the suit; but their Lordships thought that the Court, although up to a certain time it had proceeded, apparently without objection, with the suit without a certificate, was justified in going on with the suit when it was received. This decision was followed by the High Court of Bombay in *Ramayyangar* v. *Krishnayangar*,[19a] in which a sanction of a Collector obtained by an added plaintiff to a suit falling within S. 539 of the Code was held to relate back to the institution of the suit; and in *Jijaji Pratapji* v. *Balkrishna*,[20] in which Sargent, C. J., observed that "the District Judge was wrong in treating the suit as bad *ab initio* by reason of its having been filed without a certificate." The decision of the Privy Council turned to great extent on

[18] I. L. R., 1 Bom., 75.
[19] L. R., 9 I. A., 20.
[19a] I. L. R., X Bom., 185.
[20] I. L. R. XVII. Bom., 169.

the language of S. 6 of the Pensions Act, which provides that the "Civil Court shall take cognizance of any such claim upon receiving a certificate from such Collector."

In the Deccan Agriculturists' Relief Act (No. XVII of 1882) there is no such provision, however, and S. 47 provides that no suit shall be entertained by any Civil Court unless the plaintiff produces a certain certificate. In *Nyamtulla* v. *Nana*,[21] the question arose under that Act, and the same view was taken. The plaintiff had produced a certificate, but it was from a wrong conciliator. No objection was taken against it in the lower courts; and Birdwood, J., in delivering the opinion of the Bombay High Court, observed, that they felt bound to consider it as one affecting the jurisdiction of the courts below. The suit was, however, not dismissed for want of jurisdiction, but time was given to the plaintiff to make good the defect by obtaining the certificate from the proper Collector. The irregularity of presenting the certificate so long after the institution of the suit instead of before it was not considered fatal to the suit.

On general principles, such conditions are not essentially different in their character from those enacted for barring suits before the accrual of the cause of action or after the lapse of the period of limitation provided for them. And the weight of opinion is in favor of the view that a judgment on a premature, limitation-barred or even a void cause of action is not void. In British India,[22] a suit or application barred by the law of limitation must be dismissed, even though limitation is not set up as a defence, yet such a bar is held not to affect the jurisdiction of the court.[23] Thus in *Payne* v. *Constable*,[24] Markby, J., observed, that "it is not in any sense a question of jurisdiction; that the judge has no jurisdiction, in the strict sense of the word, seems to me hardly capable of argument. If so, all the proceedings before him would be *coram non judice*, and void, his decision in favor of the defendant worthless, and we, sitting here, should have no jurisdiction to hear this case." Norman, J., concurred with him, and said: "If the judge had no jurisdiction, we could not have pronounced any judgment at all. An enactment obliging a judge to pronounce a particular judgment, does not deprive him of jurisdiction. Suppose the plaintiff failed to prove his case, and it appeared plainly there never was any cause of action, it

[21] I. L., R., XII Bom., 424.
[22] S. 4, Act XV of 1877.
[23] Mehtab Rai *v.* Nanakchund, 1878 P. R., No. 59.
[24] I R. L. R., O. C., 49.

might as well be said that the court would have had no jurisdiction, because it would have been bound to dismiss the suit." Peacock, C. J., also concurred in that same view.

Much assistance cannot be derived in this matter from the practice of the English and the American Courts; as on account of the rigidity of the procedure there, the question of the effect of the non-performance of conditions precedent does not arise there often from the point of view of practice. It is generally held that if a statement of claim does not allege their performance, it will be bad, and deemed even to fail to show a cause of action;[25] but there is not much authority as to the effect of the non-performance on the jurisdiction of the court. It is only in cases in which leave has to be obtained for the institution of a suit in a certain court, that it has been held that the defect of leave does not affect the jurisdiction of that court over the suit, and may be waived.[26]

Mr. Vanfleet, in his work on the Law of Collateral Attack on Judicial Proceedings[27] observes that it is difficult to see how jurisdiction is touched by such defects or omissions. In *State* v. *Lancaster County Bank*,[28] it was held that in the absence of such an averment in the complaint, the Attorney-general's consent to the judgment would not render it valid. The weight of authority appears, however, to be in favor of the view that the non-averment of the performance of the conditions may be waived. In California, for instance, the non-presentation of the claim to the administration is a matter in abatement, but the Supreme Court there has repeatedly held that the advantage of the plea must be taken in the trial court, and that the plea will be too late on appeal.[29] Mr. Truman Waldron, in his Article on Conditions Precedent in the Encyclopædia of Pleading and Practice,[30] observes that if the performance of the condition precedent is essential to the right of action, an omission to allege performance is a defect which can be taken advantage of at any stage of the action, unless it is waived; thus implying clearly that there may be a waiver of it.

The cases in which the contrary has generally been held are either proceedings *in rem*, which are really against the world,

---

[25] Graham *v.* Scripture, 29 How. Pr., (N. Y. Sup. Ct.), 50.

[26] *In re* Jones v. James, 10 L. J. (Q. B.), 257.
Moore v. Gamjee, 25 Q. B. D., 244.

[27] P. 225.

[28] 8 Neb., 218.

[29] Smith *v.* Compton, 6 Cal., 24.
Hentsch *v.* Porter, 10 Cal., 555.
Coleman *v.* Woodworth, 28 Cal., 568.
Stockton Bank *v.* Howland, 42 Cal. 129.

[30] IV. 660.

and in which, therefore, waiver or consent by any particular persons can receive no effect ; or those in which the precedent condition is not merely of a supplemental character as it is in India, but the very basis of the commencement of proceedings. Even in India, Farran, C. J., in delivering the judgment of the court in *Ishwardas Tribhovan Das* v. *Kalidas Bhaidas*,[31] observed that "Section 69 of the Presidency Small Cause Courts Act[32] makes it a condition precedent to the drawing up of a statement of the facts of the case by the Small Cause Court, and referring it for the opinion of the High Court, that a question of law or usage having the force of law or as to the construction of a document which may affect the merits, arises in the case;" and "if upon the findings of the judge no such question arises, the Small Cause Court has no authority to refer the case for the opinion of the High Court, and the High Court has no jurisdiction to deal with it."

It is evidently with reference to such conditions, that Mr. Works, in his work on the Jurisdiction of Courts,[33] observes that "where certain steps are required to be taken, as the foundation of the proceeding, as, for example, the filing of a petition containing certain facts, or signed by certain persons, the giving of bond, or the like, such steps are jurisdictional, and must be taken, or the proceeding will be void;" and being jurisdictional, they cannot be supplied by waiver or consent.[34] He, however, immediately proceeds to qualify that general statement, and adds: "But the rule that defects cannot be supplied by consent, or the party be estopped by a failure to make the necessary objections at the proper time, is only applicable to matters affecting the public or jurisdiction of the subject-matter. A party to the action may waive personal notice upon himself in the matter of a special statutory proceeding, or in a court having only a limited or special jurisdiction, as well as in any other. But where some proceeding is required affecting the public, for example, where notice, not to any individual, but to all persons, is required, no one person or any number of persons, can give jurisdiction to the court or other tribunal by consenting that such proceeding may be omitted, or by an appearance or other act of submission to the authority of such tribunal."

In illustration of this difference, reference may be made to the proceedings in garnishment in *Steen* v. *Norton*,[35] which, as

[31] I. L. R., XX Bom., 783.
[32] XV of 1882.
[33] P. 89.
[34] Ruhland *v.* Supervisors, 55 Wis., 568, Steen *v.* Norton, 45 Wis., 412.
[35] 45 Wis., 412.

distinguished from an ordinary suit against the debtor or the debtor's debtor, can only be commenced by an affidavit, and in which the affidavit is the foundation,—an essential condition,—of the jurisdiction. Bell, J., in delivering the opinion of the Court, said: "Failure of the affidavit is therefore failure of jurisdiction over the subject-matter. The justice's jurisdiction of the proceeding is conditional, not absolute, and remains dormant until the affidavit supplies the condition. Without the affidavit, the proceeding could be no more than a personal action of the plaintiff, in his own right, against the garnishee. . . . . It is quite certain that the officer takes no authority to summon the garnishee, without the statutory affidavit. And his summons without the affidavit cannot operate to fix the garnishee's liability to the plaintiff. In that case, the garnishee may discharge his liability to his own creditor. And the assumption of jurisdiction by the justice, or the submission of the garnishee to his jurisdiction, cannot cure want or material defect of the affidavit, or absolve the garnishee from liability to his own creditor, or fix his liability to his creditor's creditor, which the statute determines and makes wholly dependent upon service of the summons, founded on the statutory affidavit. All the subsequent proceedings of garnishment rest upon the liability of the garnishee to the plaintiff, the change of his creditors, the substitution of a stranger for his own creditor, by operation of law, upon the service of the summons which the officer takes authority to issue and serve by force of the statutory affidavit only; mere waste paper in the absence of the proper affidavit. Without the affidavit, the officer is not acting within the scope of his office in summoning the garnishee. And, when he makes his return, the jurisdiction of the justice of the proceeding of garnishment rests wholly upon the effect of the statutory affidavit and summons, in subrogating—so to speak—the plaintiff for the garnishee's creditor; in other words, upon the sufficiency of the affidavit to charge the garnishee with liability to the plaintiff. If that be materially defective, the justice's want of jurisdiction over the subject-matter is apparent on the face of the affidavit. And the affidavit, taken as a complaint, discloses no cause of action against the garnishee, no ground of jurisdiction of the proceeding; being defective in a material averment, not cured by verdict or judgment. Even in courts of justices of the peace, voluntary appearance and submission, without objection, under void process, will cure the justice's defect of jurisdiction over the person of the defendant; but it can go no further. It

cannot operate to give the justice jurisdiction of a proceeding which he could not take without such appearance and submission. His jurisdiction of the subject-matter must come by statute; and if the statute makes his jurisdiction of the subject-matter dependent on preliminaries or conditions precedent, the justice can take jurisdiction only by force of the statutory preliminaries or conditions precedent. This is well exemplified by the writ of attachment, as mesne process. If the affidavit on which the attachment issues be materially defective, the defendant is entitled to have the action commenced by it dismissed *in toto*. But, if the defendant appear and submit without objection, he cures the defect of the process as a personal summons, but not as an attachment of property. The justice takes jurisdiction to render personal judgment against him, but not against the property attached."

Waiver of conditions of exercise of criminal jurisdiction.

256. In criminal proceedings, conditions precedent are generally held to affect jurisdiction. Thus in England, the Summary Jurisdiction Act taken with the rules framed under it provides that when an order is made by the Justices, a case will be stated for the hearing of the Queen's Bench Division, if an application in writing is made to them by the party dissatisfied with the order, and it has been held that a case stated on an oral application will not give jurisdiction to the court to hear the case.[36] In the case first cited, after the oral application, an application in writing also addressed to the justices was served on their clerk but not brought to their notice, and it was held that the court had no jurisdiction to hear the appeal. Lord Esher, who delivered the leading decision, observed that "there are a series of decisions beginning with *Morgan* v. *Edwards*,[37] which appear to be to the effect that, where a statute made with regard to a precisely similar subject-matter contained a similar direction to that contained in this rule, such direction was not directory only, but compliance therewith was a condition precedent to the jurisdiction to entertain the appeal." In the case last cited, the judges expressed their consent to state the case on an oral application, and subsequently a written application was made, but only to two of the Justices. Before the court, both the parties wished the

[36] Lockhart *v.* Mayor of St. Albans, 21 Q. B. D., 188. | Westmore *v.* Paine, (1891) 1 Q. B., 482.

[37] 5 H. & N., 415.

case to be argued, but the court held that it had no power to hear the case, and that the statutory requirements as to proceeding by case stated were conditions precedent of the right of appeal, and could not be waived by the parties or justices."

A good illustration of the principle is furnished by the decision in *Thorpe* v. *Priesthall*,[38] in which information was laid of an offence under the Sunday Observance Prosecution Act, 1871, which provides that no prosecution shall be instituted for any offence under that Act, . . . except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed. The chief constable had given his verbal consent before the information was laid, but the written consent, though dated the same day, was not signed till the morning of the next day, and the conviction was quashed on the ground that there was no sufficient consent.

In India the question arises generally in cases in which the previous sanction of a court or other officer is required for the initiation of proceedings in certain cases. There are several provisions in the Criminal Procedure Code and several special Acts, in which the sanction of the Government or other officer has been laid down as necessary. Thus S. 132 of the Code lays down that no prosecution against any magistrate, military officer, police officer, soldier or volunteer for any act purporting to be done under chapter IX of the Code shall be instituted in any criminal court, except with the sanction of the Governor-General in Council. Similarly no prosecution of any offence punishable under the Indian Stamp Act can be instituted without the sanction of the Collector or such other officer as the Local Government generally, or the Collector specially, authorises in that behalf.[40] The most general provisions of this sort are those contained in SS. 195, 196 and 197 of the Criminal Procedure Code. Thus S. 195 of the Code provides that "no court shall take cognizance—(*a*) of any offence punishable under SS. 172 to 188 (both inclusive) of the Indian Penal Code, except with the previous sanction, or on the complaint, of the public servant concerned, or of some public servant to whom he is subordinate; (*b*) of any offence punishable under SS. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211, or 228 of the same Code, when such offence

[38] (1897) 1 Q. B., 159.

[39] 34 & 35 Vict., c. 87, S. 1.

[40] S. 69, Act I of 1879.

is committed in, or in relation to, any proceeding in any court except with the previous sanction, or on the complaint, of such court, or of some other court to which such court is subordinate ; (*c*) of any offence described in S. 463, or punishable under SS. 471, 475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any court in respect of a document given in evidence in such proceeding, except with the previous sanction, or on the complaint, of such court, or of some other court to which such court is subordinate." The failure to obtain this sanction does not affect the validity of the proceedings, but only in certain cases and under a special provision of the Code,[41] which provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on reference for confirmation, or on appeal or revision, on account of the want of any sanction required by S. 195, unless such want has occasioned a failure of justice.

A sanction is required in some other cases also. Thus S. 196 of the Criminal Procedure Code provides that no court shall take cognizance of any offence punishable under chapter VI of the Indian Penal Code, except S. 127, or punishable under section 294A of the same Code, unless upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf. Similarly S. 197 of the Procedure Code provides that when any judge, or any public servant not removable from his office without the sanction of the Government of India or the Local Government, is accused as such judge or public servant of any offence, no court shall take cognizance of such offence, except with the previous sanction of the Government having power to order his removal, or of some officer empowered in this behalf by such Government, or of some court or other authority to which such judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government. There is no express provision in the Code as to the effect of the want of sanction in these cases; and from the special provision in regard to the sanction required under S. 195, the presumption is that in cases in which the sanction is required under section 196 or 197 of the Code, the want of sanction will be fatal to the proceedings.

[41] S. 537, Act X of 1882.

This has been the view taken by the High Court of Bombay. In *Reg.* v. *Parshram*,[42] Melvill, J., in delivering the decision of a Division Bench of that court, observed that "until the sanction is obtained the Magistrate has no jurisdiction, and a conviction founded on evidence taken without jurisdiction would be bad." He distinguished the case from that of *Reg.* v. *Jivan Vasudev*, in which the court had held that the trial might be proceeded with, though the sanction to the prosecution had not been given until after the committal of the accused, on the ground that the prosecution had been duly authorised before the trial commenced, and the irregularity of the preliminary enquiry did not prevent the Court of Session from trying the case. The same was held by a full Bench of the Court in *Queen Empress* v. *Morton*,[43] in which the magisterial enquiry was held without the necessary sanction which was obtained about two months after its termination, and Sargent, C. J., who delivered the leading decision, observed that "the language of S. 197 of the Criminal Procedure Code (X of 1882) is so strong in requiring a previous sanction that, in my opinion, if no such sanction has been obtained there is no jurisdiction; and I think Colonel Dobbs had no jurisdiction to commit this case." Bayley, J., also expressed it as his opinion, that "all the proceedings were illegal and without jurisdiction," and "a sanction subsequently obtained cannot ratify illegal proceedings." The committal was not quashed, however, simply as under S. 532 of the Procedure Code, the court was competent to act on an irregular commitment.

The Madras High Court has taken the same view of the necessity of the sanction in such cases,[44] as the High Court of Bombay. A contrary opinion was expressed in *Kristna Rau*,[45] in which the Head Assistant Magistrate who was competent to sanction the prosecution had given no formal sanction to prosecute, but had himself taken up the case, and after enquiry committed it to the Session Court for trial. On appeal from conviction, Holloway, J. (with whom Kindersley, J., agreed) observed: "If there had not been sanction, it does not follow that the objection could have availed the prisoner after trial and decision. The objection is not one going to the root of the Court's jurisdiction, but something (like notice of action in certain civil cases) needed to justify

[42] VII B. H. C. R., Cr. 61.
[43] I. L. R., IX Bom., 288.
[44] Ponnu Sami Auyangar, M. H. C. Pro., 2nd Dec. 1886; Weir, 1136.
[45] VII M. H. C. R. 58.

a court in going on, and preventing it from going on if the objection is taken." The observation was *ultra vires*, however, and no authority was referred to in support of it, and it may now be considered as overruled.

There is a similar provision in S. 339 of the Criminal Procedure Code to the effect that no prosecution for the offence of giving false evidence in respect of a statement made by a person who has accepted a tender of pardon shall be entertained without the sanction of the High Court; and the Punjab Chief Court held in *Sharina* v. *Empress*,[46] that the omission to obtain the sanction was a defect of jurisdiction that vitiated the whole of the proceedings. Plowden, J., with whom Burney, J., concurred, said: "In regard to these latter sections (196 and 197), the giving of sanction is a condition of the jurisdiction, and the absence of such sanction is a defect which vitiates the proceedings *ab initio* and is not a mere irregularity curable under S. 537. I consider that the sanction under S. 339 is not a sanction under S. 195, and that it belongs to the same class as sanction under S. 196 and S. 197. The language employed in S. 339 is similar to and as strongly prohibitive as that employed in S. 196 and S. 197, and I consider that in cases falling under any of these three sections, the sanction of the proper authority is a matter essential to the validity of the judicial proceedings to which the sanction is requisite, that such sanction is indispensable, and its omission is not a curable irregularity but a fatal defect."

Waiver of rights in matters of procedure.

257. The maxim *Quilibet potest renunciare juri pro se introducto*, has special operation in matters of mere procedure, applying as well to constitutional law as to any other.[47] That a party may waive any provision of a statute intended for his benefit is even more true to-day than it was among the ancients, as a relaxation of formal rigidity in procedure is the chief characteristic of all legal advancement. It is a general rule that a party may waive any constitutional or statutory provisions for his benefit, except where compliance is positively required.[48]

---

[46] 1884 P. R., Cr., No. 42.

[47] Baker *v.* Braman, 6 Hill., 47.
Pierson *v.* People, 79 N. Y., 439.
Heyward *v.* Mayor of New York, 8 Barb., 489.
Bucklin *v.* Chapin, 53 Barb., 493.
Taylor *v.* Atlantic R. R. Co., 57 Barb., 45.

[48] Keater *v.* Ulster Road Co., 7 How. Pr., 42.

It has been repeatedly laid down that where a party has requested[49] or consented[50] to any step taken in the proceedings, he cannot afterwards complain of it, however contrary it may have been to his constitutional,[1] statutory[2] or common law[3] rights.

The question of the waiver of constitutional rights has arisen chiefly in the United States, where the State constitutions generally provide that no person shall be deprived of life, liberty or property without due process of law; and it is often attempted to impeach even statutes on the ground of their infringement of that important constitutional provision.

In *People* v. *Florence*,[4] the objection was against the summary method of perfecting judgments upon forfeited recognizances, authorized by the law of 1844 and 1861; and Allen, J., in delivering the opinion of the Court, said: "The defendants are not in a situation to take this objection. A party may by his voluntary act waive any and every right or privilege personal to himself, and affecting only his rights of property, conferred or secured to him either by the constitution or by Statute. The law permitting judgment to be perfected upon the recognizances upon default in the condition was in force at the time the recognizances were entered into and made a part of the terms and conditions of the undertaking and covenant of the parties, as much as if inserted bodily in the instrument. By the recognizances the defendants acknowledged an indebtedness to the people in the sum named, subject to a defeasance, and consented that upon a failure to perform the condition the debt should become absolute, and might be made a debt of record and judgment perfected thereon, which should be a lien upon real property, and upon which execution might issue as upon other judg-

---

[49] Loew *v.* State, 60 Wis., 559.
[50] State *v.* McMahon, 17 Nev., 365.
State *v.* Bangor, 41 Me., 534.
[1] Mattingly *v.* State, 8 Tex. App., 345.
Hancock *v.* State, 14 Tex. App., 392.
State *v.* Garney, 37 Me., 156.
[2] Kelley *v.* People, 132 Ill., 363.
People *v.* McGann, 43 Hun., 55.
Lynch *v.* State, 15 Wis., 38.
Home Ins. Co. *v.* Security Ins. Co., 23 Wis., 171.
Ned *v.* State, 33 Miss., 374.
Burtine *v.* State, 18 Ga., 534.
Maul *v.* State, 25 Tex., 166.
Smith *v.* State, 88 Ala., 7.
Bulliner *v.* People, 95 Ill., 394.
State *v.* Speaks, 95 N. C., 689.
[3] State *v.* Larger, 45 Mo., 510.
State *v.* Waters, 62 Mo., 196.
Croy *v.* State, 32 Ind., 384.
State *v.* Polson, 29 Iowa, 133.
[4] 59 N. Y., 83. Cited also as People *v.* Quigg.

ments for the recovery of a sum certain. The cognizors voluntarily waived their right to any day in court other than that given them by the terms of the recognizance, and their consent to the remedy given by law, subject to and pursuant to which the recognizances were taken, was as in the case of a bond and warrant of attorney for the confession of a judgment, a substitute for, and a waiver of, the necessity of any other process of law."

Right of waiver unlimited in civil proceedings.

258. This is particularly the case in civil actions, which usually affect only individual rights, and are, therefore, mainly under individual control. The object of such actions is to enforce private obligations and duties, and any departure from the usual and constitutional mode of procedure, where the Court has jurisdiction of the subject-matter, is for the parties to consent to or object to, as they see fit. No question of public policy is involved in them.

It has been repeatedly held that where mere property rights of a citizen are involved and no principle of public policy is violated, the maxim *Privatorum conventio juri publico non derogat*, gives way to the maxim *Modus et conventio vincunt legem*, and he may waive the constitutional right or privilege designed for his protection, and consent to such action as would otherwise be invalid. Thus in *Phyfe* v. *Eimer*[5] Rapallo, J., in delivering the opinion of the Court, observed, that "a party can waive a statutory or even a constitutional provision in his own favor, affecting simply his property or alienable rights, and not involving considerations of public policy."

The most important right is that of trial by jury, and in civil proceedings, it is settled that a party may waive even that right.[6] In *Lee* v. *Tillotson*,[7] Cowen, J., speaking of the consent to the reference of a cause, said: "It is a waiver of the objection, even if the constitution stood in the way. A party may waive a constitutional, as well as a statute provision, made for his own benefit. The contrary argument would deprive a criminal of the power to plead guilty, on the ground that the consti-

---

[5] 45 N. Y., 102.

[6] Town of Ohio v. Marcy, 18 Wall., 552.
Bailey v. Joy, 132 Mass., 356.
Vitrifield Co. v. Edwards, 135 Mass., 591.
Cushman v. Flanagan, 50 Tex., 339.
Harris v. Shaffer, 92 N. Car., 30.
Grant v. Reese, 82 N. Car., 72.
Gregory v. Lincoln, 13 Neb., 352.
Heacock v. Hosmer, 109 Ill., 245.

[7] 24 Wend., 337.

tution has secured him a trial by jury." In *People* v. *Florence*[8] Allen, J., in delivering the opinion of the Court, said: "The right to a trial by jury, if any such right would have existed but for the special laws affecting the obligations and liability of the defendants, was waived by the terms of the recognizances and assent of the cognizors, and in all civil proceedings the right of a trial by jury may be waived." In England, the Common Law Procedure Act enacted in general words that "the parties to any cause may, by consent in writing, signed by them or their attorneys, as the case may be, leave the decision of any issue in fact to the court, provided that the court, upon a rule to show cause, or a judge on summons, shall, in their or his discretion, think fit to allow such trial"; and it has been held that the decision will not be void, even where there is no consent or order in writing, as to the trial, because the parties who have consented to the exercise of the general jurisdiction possessed by a judge in a case in which they knew that the statutable preliminaries had not been complied with, cannot be allowed to question the jurisdiction on that ground.[9]

In India there are no constitutional rights in the ordinary sense of the word, and in civil cases no trial by jury; but the waiver of statutory rights in civil proceedings, is recognized as in the English law. Thus in *Beer Chunder Roy* v. *Tumeezood-deen*,[10] the purchaser of a plaintiff's rights was substituted for the plaintiff on the record, and the irregularity was held to be cured by the defendant's consent, implied in his offering no opposition, and in his appealing from the judgment on the merits, making the substituted plaintiff one of the respondents. The same was held in *Shushee Bhoosun* v. *Muddon Mohun Chattopadhya*,[11] Ainslie, J., observing that "as the substitution took place before judgment in the first court and was not objected to, it is too late to take the objection now." This decision proceeded chiefly on the ground that the irregularity of the substitution did not prejudice anyone, and was therefore not to be noticed, as S. 350 (now 578) of the Civil Procedure Code provided that no decree would be reversed or substantially varied, "on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the court."

---

[8] 59 N. Y., 83.

[9] Andrews *v.* Elliot, 5 E. & B., 502; 6 E. & B. 538.

[10] XII W. R., 87.

Vide to similar effect Lall Mahomed *v.* Peer Nuzur, XVIII W. R., 511.

[11] II. C. L. R., 297.

In *Parbutty* v. *Higgin*,[12] the plaintiff having died, two persons claiming to be her legal representatives adversely to each other were made co-plaintiffs; and Jackson, J., in delivering the judgment of the Court, observed that he was not prepared to say that that was strictly regular, "but that which is in itself unusual and irregular may often be cured by the consent of the parties; and in this case it appears that every one did agree to the course taken; and it is clear that such agreement having taken place, it was a more convenient course for every one that the trial should proceed and a decision be given than that the suit should either be dismissed or be allowed to remain in abeyance for an indefinite time, while the question between the claimants as to who was to succeed the deceased plaintiff in the suit was being determined."

In *Parvatibai* v. *Vinayek Pandurung*,[13] a defendant allowed the plaintiff to be wrongly represented in an appeal by an agent, and it was held that he was estopped from objecting to the agent carrying on the execution-proceedings on behalf of plaintiff, and appealing in course of them when necessary. West, J., in delivering the judgment of the High Court observed, that "his right to represent Parvatibai might have been challenged in the appeals, and possibly the same reasons would apply to representation in an appeal as in an original suit, but the objection having been virtually waived, cannot be taken after the defendants have had their chance of success in the litigation."

The rule is not restricted to the case of the plaintiff's substitution. Thus in *Ram Das* v. *The Official Liquidator*,[14] it was held that the entertaining of an application, and the deciding upon a matter within the ordinary jurisdiction of the court, on a close holiday, was at the furthest an irregularity, "the right to object to which can be, and was in this case, waived by the conduct of the parties."

So far is the rule carried, that even agreements as to certain steps in proceedings are considered binding. Thus in *Davies* v. *Burton*,[15] the defendant's attorney, having by his consent orally agreed, at a private interview with the plaintiff's attorney, to admit on the trial, all the facts except the merits, provided the plaintiff waived the holding him to bail, the court held the defendant specifically bound by the agreement, and

[12] VIII B. L. R App., 98.
[13] I. L. R., XII Bom., 68.
[14] I. L. R. IX All., 382.
[15] 4 C. & P., 166.

thus took the facts as actually admitted at the trial, specially on the ground that the defendant had received a benefit for it.

Essentially different character of criminal proceedings in regard to right of waiver.

259. The right of waiver stands, however, on a different footing in criminal proceedings, which are to be distinguished from civil proceedings, as involving a breach and violation of the public rights and duties affecting the whole community. The public as well as the individual have an interest in every criminal trial. "The king has an interest in the preservation of all his subjects." [16] The life and liberty of the citizen is a matter of supreme importance to the state; and it cannot allow him to throw either away by failure, intentional or unintentional, to take advantage of constitutional safeguards. This was all the more necessary in early times when counsel were not allowed to defend even persons indicted for murder, and it was a particular duty of judges to see in the interest of such persons that the proceedings against them were regular and strictly legal. The change in that system of defence did not altogether change the practice of the courts, traces of which may still be noticed in some matters. In *People* v. *McKay*,[17] Spencer, C. J., observed, that it was "a humane principle, applicable to criminal cases, and especially when life is in question, to consider the prisoner as standing upon all his rights, and waiving nothing on the score of irregularity."

In *Cancemi* v. *People*,[18] Strong, J., in delivering the opinion of the Court, said: "Criminal prosecutions involve public wrongs, 'a breach and violation of public rights and duties, which affect the whole community considered as a community, in its social and aggregate capacity.' The end they have in view is the prevention of similar offences, not atonement or expiation for crime committed. The penalties or punishments, for the enforcement of which they are a means to the end, are not within the discretion or control of the parties accused; for no one has a right, by his own voluntary act, to surrender his liberty or part with his life. . . . Criminal prosecutions proceed on the assumption of such a forfeiture (as may be incurred by way of punishment for crime), which, to sustain them, must be ascertained and

[16] 4 Black. Com., 189.

[17] 18 Johns., 218.

[18] 18 N. Y., 136.

declared as the law has prescribed. . . These considerations make it apparent that the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case, should be much more limited than in civil actions. It should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws."

Rights may be waived to a certain extent in criminal proceedings.

260. Even in the administration of criminal law, however, many legal provisions are made for the security and benefit of the accused, which he may waive at his pleasure. It will not do to say that because the State has a peculiar interest in protecting one accused of crime to the extent of his constitutional rights, he shall in no case be allowed to waive any of them, for in some cases it is to his interest to waive them, and the denial of the right to do so would defeat the very object in view when the rights were given, and cause them to operate to the injury rather than to the benefit of the accused. The true distinction appears to be, as observed by Mr. Elliott in an article on the waiver of constitutional rights,[19] that "where the right is solely for the "benefit of the accused, and not jurisdictional, it is right, it is "just, that a waiver of it by him of his own free will and desire, "without solicitation or persuasion, causing some action to be "taken, upon the faith of such waiver, that would not other-"wise have been taken, should be binding upon him." The various Supreme Courts in the United States have repeatedly laid down the same.

Thus in *State* v. *Kaufman*,[20] Seevers, J., in delivering the opinion of the Supreme Court of Iowa, observed: "The first impression would be, we think, that a constitutional provision could be waived as well as a statute. Both, in this respect, have equal force, and were enacted for the benefit and protection of persons charged with crime. If one can be waived, why not the other? A conviction can only be legally obtained in a criminal action upon competent evidence; yet if the defendant fails at the proper time to object to such as is incompetent, he cannot afterward do so. He has a constitutional right to a speedy trial, and yet he may waive this provision by obtaining a continuance. A plea of guilty ordinarily dispenses with a

[19] VI Cr. L. M., 189.

[20] 51 Iowa, 578.

jury trial, and it is thereby waived. This, it seems to us, effectually destroys the force of the thought, that 'the State, the public, have an interest in the preservation of the lives and the liberties of the citizens, and will not allow them to be taken away without due process of law.' . . . . It matters not whether the defendant is, in fact, guilty; the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the State may be deprived of the services of the citizen, and yet the State never actually interferes in such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect."

In *People* v. *Rathbun*,[21] Cowen, J., observed: "The prisoner may even waive his right to a trial at the hands of a jury on the merits, by pleading guilty. Having this power, no one will pretend that he cannot consent to any thing less. He may waive any matter of form or substance excepting only what may relate to the jurisdiction of the court." In *Cancemi* v. *People*,[22] Strong, J., in delivering the opinion of the court observed that "effect may justly and safely be given" to the consent of the accused "in many particulars, and that the law does, in respect to various matters, regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts are allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid, what without it would be erroneous."

In *Pierson* v. *People*,[23] Earl, J., observed: "We are of opinion that the prisoner could withdraw his challenge and waive any irregularity which existed in this case. The maxim *Quilibet potest renunciare juri pro se introducto* is of quite a general application. One may waive constitutional provisions intended for his benefit. A prisoner may waive a trial by jury and plead guilty; he may waive a plea of *autrefois acquit* by not interposing it or withdrawing it; he may waive or withdraw a challenge to a juror; he could waive his right to have a challenge of a juror for favor tried by triers, and consent that it be tried by the Court; he may waive

[21] 21 Wend., 542.
[22] 18 N. Y., 137.
[23] 79 N. Y., 429.

objections to improper or incompetent evidence; in a Court of Special Sessions he may waive a trial by jury and be tried by the Court; he may waive a challenge to the array of jurors by a challenge to the polls; he could consent to the separation of the jury during the trial, when such separation, without such consent, would be ground of error. A man cannot legally be indicted and tried as accessory to a felony until the principal be convicted; and yet, if he go to trial, without insisting on the objection, he is held to have waived it."

In *State* v. *Albee*,[24] Smith, J., observed: "A person ought not to be heard to complain of that to which he has consented. For instance, he may not object to the grand jury after he has pleaded to the indictment; nor challenge a petit juror for a known cause after verdict; nor object after trial that a copy of the indictment was not furnished him, when the statute requires it; nor that inadmissible evidence was received without objection; nor that the jury separated after verdict with his consent. These are familiar examples of the waiver of well-recognized provisions, intended for the protection of a party."

In *re Staff*,[25] Lyon, J., in delivering the opinion of the Court observed: "Section 7 of Article 1 (of the Constitution) confers many rights upon a person accused of crime, every one of which he may waive without authority of statute, as has often been judicially determined, except the right to be tried by a jury. Such waiver may be express, or it may be by failure to make due objection and exception. The accused shall enjoy the right to be heard by himself and counsel; yet he need not have counsel unless he chooses, and need not say a word in his own defence; he may plead guilty, and thus waive every right conferred in the section. He may demand the nature and cause of the accusation against him; yet when arraigned he may waive the reading of the indictment or information. He has the right to meet the witnesses face to face, yet he may lawfully consent to the reading of depositions of absent witnesses in evidence. He is entitled to compulsory process to compel the attendance of his witnesses, yet he may not avail himself of such process. He is entitled to a speedy public trial, yet with his consent trial may be delayed for years, and no doubt the public at large may properly be excluded from the trial at his request. He is entitled to a trial in the county or district previously ascertained by law wherein the offence was com-

[24] 61 N. H., 423. [25] 63 Wis., 285.

mitted, yet he may have a change of venue, and with his consent the cause may be sent to some county or district and tried therein, hundreds of miles distant from that in which the crime was committed. He is entitled to be tried by a jury, that is, a common-law jury, which must consist of twelve qualified jurors; yet if one of the jurors is disqualified for alienage or other cause, in this State the objection is waived by the failure of the accused to challenge such juror." [26]

Waiver of accused's right of not being asked to criminate himself.

261. One of the most important constitutional rights of an accused is, that no person shall be compelled in criminal case to be a witness against himself. In the United States, this is provided for by the Constitution. It is quite settled law, however, that the accused may waive this provision, this constitutional protection by giving evidence on oath, when he will be bound to answer even questions which may criminate himself. By offering himself as a witness, he waives his right to object to any question pertinent to the issue, and his constitutional privilege of refusing to furnish evidence against himself; and subjects himself to the peril of being examined as to any and every matter pertinent to the issue.[27] If he answers any questions upon the subject, he cannot afterwards interpose his privilege, but is liable to be fully examined and cross-examined upon the matter. If he testifies that he did not commit the crime imputed to him, he renders himself liable to be cross-examined upon all facts relevant and material to that issue.

In *Connors* v. *People*,[28] Church., C. J., in delivering the opinion of the Court, broadly said :—"We think the rule against being a witness is one which may be waived by an accused person. . . . By consenting to be a witness in his own behalf under the Statute of 1869, the accused subjected himself to the same rules and was called upon to submit to the same tests which could by law be applied to the other witnesses; in other words, if he availed himself of the privilege of the Act, he assumed the burdens necessarily incident to the position. The prohibition in the Constitution is against compelling an accused person to become a witness against himself. If he assents to become a witness in the case voluntarily and without any compulsion, it would seem to follow that he occupies for the time being the position

[26] State v. Vogel, 22 Wis., 471.
[27] McGarry v. People, 2 Lans., 227.
[28] 50 N. Y., 243.

of a witness with all its rights and privileges, and subject to all its duties and obligations. If he gives evidence which bears against himself, it results from his voluntary fact of becoming a witness and not from compulsion. His own act is the primary cause, and if that was voluntary he has no reason to complain."

This was quoted with approval in *State* v. *Ober*,[29] in which Foster, J., in delivering the opinion of the Court, said:—"If the respondent had not seen fit to make himself a witness in his own cause, the fact that he did not choose to testify could not have been commented upon by the State's counsel, nor would the jury have been at liberty to draw any inference detrimental to him from his silence. But, when he made himself a witness-in-chief, he subjected himself to the government's right of cross-examination. By electing to testify, he placed himself in the attitude of any ordinary witness, irrespective of any interest in the cause. . . . The respondent was not bound to volunteer any statement concerning the matter of the charge against him, nor could he be compelled to disclose any fact, or answer any question which would expose him to another criminal prosecution, or tend to convict him in this. Such immunity from confession, examination, argument or prejudicial inference, was his undoubted privilege; but he chose to waive it, and insisted upon his right to testify; and having testified concerning a part of the transaction, in which it was alleged that he was criminally concerned, without claiming his constitutional privilege, it was too late for him to halt at that point which suited his own convenience. It is clear, upon reason and authority, that he might have been compelled to answer the question propounded by the State's counsel. It was material to the issue, if not directly involved in his own proffered testimony. At this point, for obvious reasons, he saw fit to close his lips, and the Court allowed him to remain silent. Of this mistaken clemency he cannot now be heard to complain." Judge Cooley in his work on Constitutional Limitations speaking of that decision, says:[30] "We not only approve of this ruling, but we should be at a loss for reasons which could furnish plausible support for any other. It is in entire accord with the practice which has prevailed, without question, in Michigan, and which has always assumed that the right of comment, where the party makes himself his own witness and then refuses to answer proper questions, was as clear as the right to exemption from unfavorable comment when he abstained from asserting

[29] 52 N. H., 459. [30] P. 317(*n*).

his statutory privilege." In *State* v. *Albee*,[31] Smith, J., said: "The cross-examination of a prisoner who volunteers himself as a witness is permissible, because by electing to testify he subjects himself to the scrutiny of a cross-examination, and consents to waive the constitutional provision that no subject shall be compelled to accuse or furnish evidence against himself." [32]

The Supreme Court of Massachusetts also has repeatedly held that if the accused puts himself on the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he thereby waives his constitutional privilege, and renders himself liable to be cross-examined upon all facts relevant and material to that issue, and cannot refuse to testify to any facts which would be competent evidence in the case, if proved by other witnesses.[33]

In *State* v. *Wentworth*, [34] a person accused of selling intoxicating liquors offered himself as a witness, and was on cross-examination questioned concerning other sales of intoxicating liquors made by himself. Objection was taken to this on the ground that the waiver of his privilege as to giving no evidence tending to criminate himself applied only to the charge on trial. The objection was overruled however, and though the accused was not compelled to answer, yet his refusal to answer was taken into consideration against him. Appleton, C. J., in delivering the opinion of the Court, said: "A witness on cross-examination must answer as to all matters pertinent to the issue, whether inquired about in the direct examination or not, unless a personal privilege is invoked and the matters elicited would tend to criminate him; in which case the cross-examination can be extended only to the subject-matters of enquiry of the direct examination." Still more recently, the Supreme Court of Florida has held that it is a just and correct rule that if a witness, with full knowledge of his rights, consents to testify about the very matter that may criminate him, without claiming his privilege, he must submit to a full, legitimate cross-examination in reference thereto; as otherwise a witness would have it in his power to make a partial statement of a matter to the detriment of one party without any adequate means of relief." [35]

Questions tending to discredit his veracity may be put to him,[36] even though they operate materially against him as the accused, because having voluntarily placed himself in the wit-

[31] 61 N. H., 423.
[32] State v. Archer, 54 N. H., 465.
[33] Com. v. Lannan, 13 Allen, 563. Com. v. Mullen, 97 Mass., 545.
[34] 65 Me., 234.
[35] Edward Senior, 32 L. R. A., 133.
[36] State v. Huff, 11 Nev., 17.

ness-box, he must abide the consequences. He may be asked as to whether he made statements inconsistent with those he may make as a witness before the Court.[37] Indeed, it becomes the duty of the Court to interrogate him as fully as may be needful to test the truth of his direct testimony.[38]

Waiver of ordinary forms of procedure.

262. There can be still less objection to a waiver of mere ordinary forms of procedure. Thus, any right given by statute or otherwise to the accused for his benefit—such as to have a copy of the indictment, or a list of the jurors or of the witnesses for prosecution, at a particular time or before trial—may be waived, either in words, or by omission to apply for the same.[39] Thus, where a list of the witnesses for the crown is required to be given to the accused person at the same time with the copy of the charge, and it is given later, but the accused pleads not guilty, he is deemed to have waived the irregularity, and the witnesses will notwithstanding be examined at the trial.[40] Similarly, the irregularity of introducing evidence before the indictment is read, may be considered waived if not objected to[40a]; and when the defendant enters into a recognizance for his appearance in court, without making any objection to the sufficiency of the warrant, or to the sufficiency of the verification thereof, he is estopped from all objection to the warrant.[40b] So also where a statute requires the sentence to be postponed for a given time after verdict, the accused may waive the delay, and consent to its immediate rendition.[41]

On the same principle, it is established as a general rule, that exceptions to the rulings or the instructions of the Court must be taken at the time they are given;[42] and where an exception is not taken to the instructions to the jury before the jury gives its verdict, they are considered waived. Nor is this rule a merely technical one, as if the objection is brought to the notice of the court in time, the court has an opportunity of modifying, or explaining the instructions.[43]

---

[37] Com. *v.* Tolliver, 119 Mass., 312.
[38] Gill *v.* People, 5 Thomp & Co., 308.
[39] Driskill *v.* State, 45 Ala., 21.
Miller *v.* State, 45 Ala., 24.
Barnett *v.* State, 83 Ala, 40.
Dawson *v.* State, 29 Ark., 116.
Johnson *v.* State, 43 Ark., 391.
McCoy *v.* State, 46 Ark., 141.
State *v.* Axiom, 23 La. Ann., 621.
State *v.* Vester, 29 La. Ann., 620.
State *v.* Russel, 33 La. Ann., 135.
McCall *v.* UnitedStates, 1 Dak., 320.
Record *v.* State, 36 Tex., 521.
Barrett *v.* State, 9 Tex, App. 33.
Peterson *v.* State, 45 Wis., 535.
[40] Reg. *v.* Frost., 9 C. & P., 162.
[40a] Loem *v.* State, 67 Iowa, 641.
[40b] State *v.* Longton, 35 Kans., 375.
[41] People *v.* Robinson, 46 Cal., 94
[42] Turner *v.* Yates, 16 How., 14.
United States *v.* Breitling, 20 How., 252.
Barton *v.* Forsyth, 20 How., 535.
[43] Phelps *v.* Mayer, 15 How., 160.

Similarly exceptions to evidence must be taken as soon as the Court decides to admit or reject it ; and if not made at the time, they are considered waived,[44] unless in case of the incompetency of evidence, the incompetency was not known at the time. In *Sheetul Pershad* v. *Junmejoy Mullick*,[45] Macpherson, J., in delivering the judgment of the Court said that there was "no doubt that it is the duty of the party, who wishes to object to evidence, to object to it in the first instance, and not to lie by in both the lower courts, and then come in special appeal here, and raise objections for the first time." Nor is this rule merely of form, as in this case also, the opposite party may, if apprised of the objection in time, be able to remove it by further testimony.[46]

In *State* v. *O'Connor*,[47] Henry, J., in delivering the opinion of the Court observed, that such was "the interest of the State that none but the guilty should be confined on criminal charges, that the Court should exclude from the jury, all improper evidence against the accused whether the objection be general or special." The correct rule, however, appears to be that if secondary evidence is not objected to at the time of its admission, it will be taken "that the parties have chosen to come to trial upon the materials put before the Court, and the evidence will not be excluded when objection is raised against it on special appeal."[48]

So also objections to the incompetency of a witness must be taken at the time when his deposition is taken, as they may then be removed by the opposite party, and if not made at that time, they will be considered waived.[49] And this statement of law was approved in *Shutle* v. *Thompson*,[50] in which a deposition was admitted in evidence, even though it had not been recorded by an authorized officer, nor as required by law after affidavit of the cause or reason for taking, and it was not even certified that the witness had been sworn to testify to the whole truth. Strong, J., in delivering the opinion of the Court, said: "It is obvious that all the provisions made in the statute respecting notice to the adverse party, the oath of the witness, the reasons for taking the deposition, and the

[44] Griggs v. Howe, 31 Barb., 100.
Poole v. Fleeger, 11 Peters, 185.
State v. Crosswhite, 130 Mo., 359.
Heely v. Barnes, 4 Den. N. Y., 73.
[45] XII W. R., 244.
[46] *Vide* Phelps v. Mayer, 15 How., 160
66
[47] 65 Mo., 374.
[48] Choolie Lall v. Kokil Singh, XIX W. R., 248.
[49] U. S. v. One case of hair pencils, 1 Paine, 400.
[50] 15 Wall, 151.

rank or character of the Magistrate authorized to take it, were introduced for the protection of the party against whom the testimony of the witness is intended to be used. It is not to be doubted that he may waive them. A party may waive any provision, either of a contract or of a statute, intended for his benefit. If, therefore, it appears that the plaintiff in error did waive his rights under the Act of Congress—if he did practically consent that the deposition should be taken and returned to the court as it was—and if by his waiver he has misled his antagonist—if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objections at all." In *Ray* v. *Smith*,[1] the deposition had been taken *de bene esse*, and before the trial the defendant moved to suppress it. But when it was offered at the trial, it was read without objection, and without exception, and the objection was held to be waived.

In *Levin* v. *Russell*,[2] Grover, J., in delivering the opinion of the Court, observed, that it was "entirely clear that a party who has sat by during the reception of incompetent evidence without properly objecting thereto, and thus taken his chance of advantage to be derived by him therefrom, has not, when he finds such evidence prejudicial to him, a legal right to require the same to be stricken out."

A party having the power to waive most rights, may under various circumstances waive the right of being confronted with his witnesses,[3] and he does so by absconding during the trial.[4] He may by consent submit to evidence by depositions, and to other testimony not delivered orally at the trial.[5] And the accused is held to waive his right to be confronted by the witnesses by allowing their depositions to be put in.[6] So also where certain witnesses were absent, and counsel for the prisoner offered in open court to admit that they would testify to the facts stated in the affidavit supporting a motion for adjournment on that ground, it was held a

[1] 17 Wall, 411.
[2] 42 N. Y., 251.
[3] Hancock *v.* State, 14 Tex. App., 392.
Allen *v.* State, 16 Tex. App., 237.
Williams *v.* State, 61 Wis., 281.
State *v.* Fooks, 65 Iowa., 452.
Butler *v.* State, 97 Ind., 378.
[4] Price *v.* State, 36 Miss., 531.
Fight *v.* State, 7 Ohio, 180.
Gore *v.* State, 52 Ark., 285.,
[5] Rex *v.* Morphew, 2 M. & S. 602.
Hurley *v.* State, 29 Ark., 17.
Wightman *v.* People, 67 Barb., 44.
People *v.* Guidice, 100 N. Y., 503.
[6] People *v.* Murray, 52 Mich., 288.
Hancock *v.* State, 14 Tex. App., 392.

waiver by the accused of his constitutional right to be confronted by the witnesses against him.[7]

So far is the rule carried, that S. 532 of the Criminal Procedure Code provides, that "if any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless, during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority."

The present tendency is, even apart from such waiver, not to allow any effect to mere irregularities of procedure, except when they should have occasioned a real failure of justice. Thus in British India, it is expressly provided, that even the fact of an inquiry or trial being held in a wrong district or other local area,[8] or of a charge not being framed[9] does not necessarily invalidate the final finding or sentence, except when a failure of justice has resulted from the same. S. 537 of the Criminal Procedure Code further provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on reference for confirmation or on appeal or revision, on account of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under the Code, or of the omission to revise any list of jurors or assessors in accordance with Section 324, or of any mis-direction in any charge to a jury; unless such error, omission, irregularity, want or misdirection has occasioned a failure of justice.

The presence of the presiding Judge at a trial before him is not a matter of mere form, and may, therefore, not be waived; and the verdict was set aside, where for two days during the argument, the Judge was not in the Court-room, but in another part of the building, engaged in other business, and

---

[7] United States v. Sacramento, 2 Mon., 239.

[8] S. 531, Act. X of 1882.

[9] S. 535, Act X of 1882.

by the respondent's consent, certain members of the bar presided in his place.[10 A]

The same was held in India in *Shumbhu Nath Sarkar* v. *Ram Kamal*,[13] in which a stipendiary magistrate and two honorary magistrates heard and disposed of the case, but the conviction was set aside, *inter alia*, on the ground that though the Bench would have been properly constituted by the stipendiary magistrate, and one honorary magistrate, yet one of the honorary magistrates was absent on one day, and a very important portion of the evidence was recorded in his absence, and yet he joined again in proceedings and took part in the final discussion, which resulted in the conviction, and this mode of trial must have seriously prejudiced him.

The accused may bind himself by agreement in criminal proceedings.

263. In the United States, it is considered that an accused may even bind himself by his agreement in a criminal cause,[14] as "where a great number of people are indicted for a riot, they may move that the prosecutor should name a few of them, and try it only against them, the rest entering into a rule, if the few are found guilty to plead guilty too; and this has often been done to prevent multiplicity of charges." [15]

A. The decision in *Soorendro Pershad* v. *Nundun*, [11] is not against this view. Phear J., no doubt, in delivering the judgment of a Division Bench of the Calcutta High Court observed that the parties might, "as no doubt often happens in this country, either expressly or impliedly, consent to the suit being determined by a Judge who has not been present throughout the trial, and to his taking into consideration evidence which had not been given before him." The observation had no reference to a case in which the presiding judge was absent from the court while the evidence was being recorded, but to a case in which after some of the evidence had been recorded the suit was transferred without the consent of the parties to another judge, who gave his decision without personally hearing the whole of the evidence. Phear, J., used similarly broad language in *Syud Mahomed* v. *Oomdah Khanum*,[12] having observed, that "it is often the case that the parties do consent to a judge determining the case between them on evidence which he has not himself orally heard, and which having been given before another judge thus comes before him only in the shape of depositions." The evidence in that case had been recorded by the predecessor of a judge, and the observation can be no authority for a judge (one of the judges forming the trying Bench) leaving the court, while the evidence is being recorded before him, and for the parties being able to waive the irregularity of the record having gone on during his absence.

---

10 Meredith v. People, 84 Ill., 479.
11 XXI W. R., 196.
12 XIII W. R., 184.
13 XIII C. L. R., 212.
14 State v. Jones, 18 Tex., 874.
Grant v. State, 3 Tex. App. 1.
State v. Mansfield, 41 Mo., 470.
Rosenbaum v. S., 33 Ala., 354.
Bell v. State, 44 Ala., 393.
Jackson v. Com., 19 Grat., 656.
Wilson v. State, 42 Miss., 639.
Williams v. State, 12 Ohio, 622.
Wightman v. People, 67 Barb., 441.
15 Anonymous, Holt. 635: 3 Salk., 317.
Reg. v. Middlemore, 6 Mod., 212.

Thus in *State* v. *Polson*[16] it was agreed in open court, between the district attorney and the defendant's counsel, in the presence of the defendant and of the jury, that, in order to save time and facilitate the trial of the cause, the testimony taken upon the former trial should be read to the jury, as a substitute for the oral testimony of witnesses in court. A conviction followed, and it was held that the constitutional provision was a personal right, and in no manner affected the jurisdiction of the court, and that it might be waived.

Agreements to be binding in criminal proceedings must generally be as to mere forms or matters of procedure. Thus in *People* v. *Rathbun*,[17] Cowen, J., said: "The courts specifically enforce agreements made in respect to the course of the cause, by persons properly authorized. They do not allow the party to violate a stipulation and put his antagonist to an action. What ought to be done, they will consider either as having been done, or summarily enforce its execution by process of contempt. . . . . I will not deny that agreements may be thus enforced in a criminal case. Suppose a prisoner to declare on full advice that he will plead guilty, on which the prosecutor's witnesses are all dismissed; might not the court order the plea entered as if the same consequence had been produced in a civil cause on an attorney stipulating to give a *cognovit?* All this sounds harsh, and no court would enforce a stipulation to plead guilty, unless in a case where they plainly saw that the object of the prisoner was to defraud the course of justice. Agreements to waive his personal rights ought not to be enforced except in such cases, though the right of the court may be exercised to the same extent as in civil causes. *People* v. *Mather*,[18] was referred to as a case in which the accused had been allowed to revoke his agreement. He had stipulated that every juror called should be considered as challenged by each side. The juror examined appeared to be biased against the accused, who was allowed to revoke his side of the agreement; that is, waive his challenge. The court put his rights on the general ground that a party may always waive an advantage to himself. The rule has no application where he is seeking to frustrate an agreement made for the benefit of the prosecution. But in the case at bar, the agreement of the prisoner when he sought to

[16] 29 Iowa., 133.
[17] 21 Wend., 543.
[18] 4 Wend., 229.

revoke it by demanding the ordinary triors, had been executed. The juror had been put upon his trial before the court, and it did not lie with the prisoner to revoke it at that stage, any more than if the trial had terminated, and the juror had been sworn and taken his place in the box. Nothing indeed appears, in the instance before us, which would have seriously affected the interests of justice, had the court given way, but the principle put was convenience. The delay arising from a formal trial for each juror was doubtless alluded to, which is, to be sure, a mere inconvenience. But it is sometimes an harassing and vexatious, not to say a dangerous inconvenience, even for the prisoner. A jury fatigued by delay cannot well appreciate his defence. The Attorney-General had waived the same right on his part, upon the same reason, and the formation of the jury had progressed upon both sides. Had the court given way to one side, justice would have demanded the same thing for the other; and thus, perhaps, the jury, so far as it was formed, might have been withdrawn, and a new jury throughout placed in the box. The prisoner had but to intimate his desire to have triors, in reply to the suggestion of the court, when his right would, no doubt, have at once been recognized. I do not deny its importance; and the court will allow and even advise him to recall any improvident concession which is apparently prejudicial to his rights. They will do so on the mere suggestion of counsel that the concession was prejudicial; but not where injury is evidently out of question on the side of the prisoner, while the prosecution may sustain a serious inconvenience."

An agreement by the accused will, however, not receive any effect, where the matter agreed upon is important and material to the charge. Thus, where on demurrer to an indictment for the larceny of a dog and a collar, counsel had agreed to treat the indictment as charging the dog to be tame and as being silent about the collar, the stipulation was held to be void; because, otherwise, it was observed, "the defendant would not be tried upon the presentment of the grand jury, but rather upon the consent of the counsel."[19] An indictment or presentment is necessary to give the court jurisdiction, and without one or the other, the court has no jurisdiction to try a person, even with his consent.[20] It is in

[19] People v. Campbell, 4 Park. Cr., 386. NewComb v. State, 37 Miss., 383. State v. Jones, 18 Tex., 874.

[20] Ex-parte Mc Clusky, 40 Fed. Rep. 71.

fact a general principle, that "where the matter is jurisdictional and affects the public, no agreement of individuals should be allowed to alter it. The State has an interest in punishing the guilty for the good of society, as well as in protecting the innocent, and it would never do to permit an accused to select his own tribunal and be tried in his own way, by agreement with a careless or dishonest prosecutor."[21]

Waiver not allowed where it is prejudicial to accused.

264. Certain mere rules of procedure also are not allowed to be waived, and this is specially the case where it is considered that the waiver will prejudicially affect the accused. Thus the accused is not allowed to waive his plea; so that a trial and verdict without plea, even where the accused consents will not authorize a judgment against him.[22]

As a general principle, proceedings on a criminal prosecution will therefore be bad unless they are conducted in the manner prescribed by law; and if they are substantially bad in themselves, the defect will not be cured by any waiver or consent of the prisoner.[23] In the case cited, the Bench of Magistrates trying a jailor deputed one of them who was the Superintendent of the jail to examine some of the persons whom the accused applied to call for his defence and who were connected with the jail, in order to guard against deviation, and the depositions so taken were placed on the record, "to be used by either party, though not themselves as evidence." The District Magistrate said that the accused had agreed to that, and relied on that agreement as justifying and sanctioning what was done. The High Court held, however, that the consent of the accused could not justify such an irregularity, and said: "When the irregularities are all unfavorable to the prisoner, as in our opinion they clearly were in the present case, it is impossible for any court to consider a waiver or consent as binding on him. It is the duty of Magistrates and all Criminal Courts to follow the procedure prescribed by law, and there is no law which sanctions their intentional departure from that procedure; and then attempting to protect themselves against the consequences of such departure by getting the accused

---

[21] VI Car. L. M., 189.

[22] Douglass v. State, 3 Wis., 820. Hoskins v. People, 84 Ill. 87. People v. Heller, 2 Utah, 133.

[23] Queen v. Bholanath, I. L. R., II Cal., 30.

person to say he consents to it. In the *mofussil*, most prisoners, not properly defended, would probably assent to any irregularity which the Judge or Magistrate trying him chose to suggest. There would be an end to all proceed ure, if such an assent were held to warrant material and important irregularities."

In *The Attorney General of New South Wales* v. *Bertram*,[24] the depositions of the witnesses taken at the first trial of the prisoner were read, and the witnesses having been asked in time whether what was read was true, they were submitted to fresh oral examination and cross-examination, and it was attempted to justify that on the ground of the prisoner having given his consent to it, but their Lordships disregarded the prisoner's consent, and spoke of the wisdom of the general understanding that a prisoner on his trial could consent to nothing. This decision does not appear to be correct law at present, and the weight ofopinion is certainly against it. Thus in *Purmessur Singh* v. *Soroop Audhikaree*[25] the witnesses were not even examined *de novo*, but only the evidence given by them at their former trial was read over, and after attestation they were allowed to be cross-examined. The final decision did not indeed turn on the existence of mere consent, but on an inference to be derived from it as to the prejudicial character of the effect of the irregularity. However, Hobhouse, J., in delivering the opinion of the Court said: "It appears that it was at the express request of the prisoners themselves that the witnesses were examined in the way indicated; but still, as a fact, they were examined, and this in a way to which the prisoners not only consented, but which they proposed and pressed; and, this being so, it is impossible not to say that the prisoners by their own conduct have shown that they have not been prejudiced by the error."

265. The question of the waiver by consent of the incompetency of evidence has lost much of its importance by the increasing removal of the incompetency. Absolute incompetency is hardly recognized in any case at present. In all civil proceedings the parties to the suit and the husband or wife of any party to the suit, and in criminal proceedings, against any person, the husband or wife of such person, are now, by a general concurrence, deemed competent to give evidence.[26]

Waiver of incompetency of evidence.

[24] 36 L. J., P. C. C., 51. | [25] XIII W. R. Cr., 40.
[26] S. 120, Act I of 1872.

Before the removal of this incompetency, the evidence of the wife was in some cases admitted with the consent of the husband, on the supposition that the incompetency was based only on the interest of the husband in preserving the confidence reposed in her.[27] It was sometimes held, however, that the wife could not testify against her husband, even with his consent; as the public also have an interest in the preservation of the domestic peace, which may be disturbed by her testimony, notwithstanding his consent.

The question of consent is still important, however, in some cases of what may be called privileged communications, and in which the privilege may be waived by consent. Thus, as a general rule, no married person is permitted to disclose any communication made between the husband and the wife, except with the consent of the person who made it or of his representative in interest.[28] So also no person is permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned.[29] Nor are barristers, attornies, pleaders, or vakils, or their clerks or servants, or interpreters, permitted, unless with the client's express consent, to disclose any communication made to them in the course and for the purpose of their employment as such, by or on behalf of the client, or to state the contents or condition of any document with which they should have become acquainted in course and for the purpose of such employment. This obligation continues after the appointment has ceased, but does not extend to communications made in furtherance of any illegal purpose, nor to facts showing that any crime or fraud has been committed since the commencement of their employment.[30] As to the nature of the consent, it is provided that the client shall not be deemed to have consented to the disclosure by himself giving evidence, and not even by calling any such person as a witness, unless he questions him on matters which, but for such question, he would not be at liberty to disclose on account of his employment.[31] In some countries confidential communications to clergymen and physicians are also privileged in the same manner.

---

[27] Barker v. Dixie, Cases temp. Hard., 264.
Pedley v. Wellesley, 3 C. & P., 558.
Colbern's Case, 1 Wheel., C. C., 419.

[28] S. 122, Act I of 1872.
[29] S. 123, Act 1 of 1872.
[30] S. S. 126, 127, Act I of 1872.
[31] S.S. 126, 127, 128, Act I of 1872.

Waiver of right of trial by jury.

266. One of the most important constitutional rights of Englishmen is that of a public trial by an impartial jury. The great Magna Charta provides that no free person is to be imprisoned "unless by legal decision of his equals." And this is taken to be not the conferring of a privilege which may be waived, but the prescription of a trial, and Lord Dacres [32] and Lord Audley" [33] were held not able to waive their right of trial by the Lords.

In India, even this right of a trial by jury may be waived. S. 536 of the Indian Criminal Procedure Code expressly provides, that "if an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the court records its finding."

There is a similar provision in the statutes of several of the States of the American Union for the waiver of a trial by jury, and it is settled that such statutes are not unconstitutional, and that under them the right of trial by jury may be waived. It has repeatedly been held that a statute allowing a waiver of trial by jury, allowing the accused to elect to be tried by a court in lieu of a jury is not a violation of the constitutional provision that the right of trial by jury shall remain inviolate. [34] The public policy which stands in the way of an effectual waiver of a jury by the accused in a criminal case, has been held to be not so inherent in the form and the framework of the government of the United States, as to place it beyond the reach of legislative interference. [35] Thus where authorized by a statute, and the constitution not withholding any needful jurisdiction from the tribunal, the defendant consents to be tried by a court without a jury; he cannot afterwards complain. [36]

Where, however, there is no statute, the general rule appears to be that a court without jury has no power of trial. [37]

---

[32] Kelyng's C. C., 89.
[33] 3 How. St. Tr., 401.
[34] State *v.* Warden, 46 Conn., 349
Ward *v.* People, 30 Mich., 116.
Dillingham *v.* State, 5 Ohio, 280.
State *v.* Mansfield, 41 Mo, 470.
Brown *v.* State, 16 Ind., 496.
[35] *In re* Staff, 63 Wiss., 285.
[36] Moore *v.* State, 32 Tex. App., 117.
State *v.* Robinson, 43 La. Ann., 383.
Murphy *v.* State, 97 Ind., 579.
State *v.* Moody, 24 Mo., 560.
Vaughan *v.* Scade, 30 Mo., 600.
Bailey *v.* State, 4 Ohio, 57.
Ward *v.* People, 30 Mich., 116.
[37] League *v.* State, 36 Ind., 259.
People *v.* Smith, 9 Mich, 193.
State *v.* Maine, 27 Conn., 281.
Wilson *v.* State, 16 Ark., 601.
Bond *v.* State, 17 Ark., 290.

Thus in *Williams* v. *State*,[38] a jury trial was waived, and the accused convicted, but on appeal, the Attorney-General submitted to a reversal, on the ground that a jury trial could not be waived. Some courts, notably the Supreme Court of Iowa, in view of the peculiar terms of the constitutional provision under consideration have held, however, that the rights guaranteed therein are merely privileges granted to the accused, which he may waive without the aid of any statute.[39]

Many of the cases which hold that the prisoner cannot effectually waive a jury are those of capital offences. The judgment in them may well be sustained on the principle or rule which has sometimes been asserted that in capital cases, in *favorem vitae*, the prisoner can waive nothing. Some cases seem to make a distinction between felonies and misdemeanours, holding that in a prosecution for a misdemeanour a jury may be dispensed with by the consent of the accused. Thus in *Darst* v. *People*,[40] the waiver of a jury in a misdemeanour case was held valid; Lawrence, J., in delivering the judgment of the court observing, that "we know of no reason why it may not be (waived) in trials for misdemeanours." This distinction was, however, ignored in *State* v. *Lockwood*;[41] and there seems to be no substantial ground upon which to rest any distinction in respect to misdemeanours punishable with imprisonment. If a line can be drawn between different grades of crime, a plausible reason may perhaps be given for holding that misdemeanours punishable by fine only are distinguishable from other crimes; as a criminal prosecution for such a misdemeanour is in its results essentially like a civil action sounding in tort.[42]

Waiver of the number of jurymen.

267. The general rule appears to be that even the right of trial by the fixed number of jurymen cannot be waived, that a person cannot consent to be tried by a larger or smaller number; and that no other number of men, than that fixed by law, will meet the requirements of the law. This has been laid down repeatedly in regard to the trial of capital offences and felonies, on the ground that the State has an interest in the preservation of the lives and liberties of its subjects, and they cannot be allowed to be taken away

[38] 12 Ohio, 622.
[39] State v. Kaufman, 51 Iowa, 578.
[40] 51 Ill., 286.
[41] 43 Wis., 403.
[42] In re Staff, 63 Wis 285.

without due process of law. Besides waiver and consent can have no application in a criminal prosecution, which is wholly *in invitum* in its relation to the tribunal by which the accused is to be tried.[43]

The leading case in the United States on the subject appears to be that of *Cancemi* v. *People*,[44] in which twelve jurors were impaneled for the trial, and during the trial the accused agreed that one juror might be withdrawn, and the trial proceeded with eleven jurors. It did so proceed, but the conviction was held to be illegal, on the ground that the fixed number of jurors could not be waived. This decision was based upon the ground, that the parties could not by consent alter the substantial constitution of the Court, and that the State had an interest in the preservation of the liberties and lives of its citizens, and would not allow them to be taken away without due process of law, even by the consent of those accused of crime. Strong, J., in delivering the opinion of the Court said: "The substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties . . . . . The State, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away without due process of law; . . . . . the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case . . . . should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the Constitution and the laws." He further said: "A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the Constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant. . . . The conclusion necessarily follows, that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the Court, and was a nullity. If a deficiency of one juror might be waived, there appears to be no

[43] Hill v. People, 16 Mich 351.,

[44] 18 N. Y. 128.

good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the Court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the Constitution and laws establishing and securing that mode of trial, for the Court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated." (B)

(B) Similarly in *State* v. *Mansfield*, [45] Wagner, J., said: "The prisoner's consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law. He can unquestionably waive many of his legal rights and privileges. He may agree to certain facts and dispense with formal proofs, he may consent to the introduction of evidence not strictly legal, or forbear to interpose challenges to the jurors; but he has no power to consent to the creation of a new tribunal unknown to the law to try his offence. The law in its wisdom has declared what shall be a legal jury in the trial of criminal cases; and a defendant cannot be permitted to change the law and substitute another and a different tribunal to pass upon his guilt or innocence. The law as to criminal trials should be based upon fixed standards, and should be clear, definite and absolute. If one juror can be withdrawn, there is no reason why six or eight may not be, and thus the accused, through persuasion or other causes, may have his life put in jeopardy or be deprived of his liberty through a body constituted in a manner unknown to the law. Aside from the illegality of such a procedure, public policy condemns it. The prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him."

In *Hill* v. *People*, [46] the Court said: "There would be great danger in holding it competent for a defendant in a criminal case, by waiver or stipulation, to give authority, which it could not otherwise possess, to a jury of less than twelve men, for his trial and conviction; or to deprive himself in any way of the safeguards which the Constitution has provided him, in the unanimous agreement of twelve men qualified to serve as jurors by the general laws of the land. Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow. . . . One act or neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially filtered away. The only safe course is to meet the danger *in limine*, and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

In *Territory* v. *Ah Wah*, [47] Wade, C. J., in delivering the opinion of the Court said: "A common law jury consists of twelve persons. Can a defendant, on his own motion change the tribunal and secure to himself a trial before a jury not authorized by and unknown to the law? The law has established certain tribunals, with defined powers and forms of proceeding, for the trial of persons charged with crime. Security to the defendant and to the public is only found in a strict compliance with the law of the land. Jurisdiction comes by following the law. Disorder and uncertainty follow a departure therefrom. Neither the prosecution nor the defendants, by any act of their own, can change or modify the law by which criminal trials are controlled. If with the consent of the Court and the prosecution, the defendant may have a trial with one juryman less than a constitutional jury, why with like consent might he not have a trial with one juryman more than a constitutional jury? If by his own act, the defendant might take one from a lawful jury, we do not see why he might not add one thereto. In either case there would be failure of jurisdiction, because jurisdiction attaches and makes valid a verdict when rendered by a jury, and a jury is twelve men. . . . In the absence of a statute, consent would not confer jurisdiction."

---

[45] 41 Mo., 475.

[46] 16 Mich., 357.

[47] 4 Mont., 149.

In *Territory* v. *Ah Wah*,[48] during the progress of the trial, one of the jurymen was excused on account of sickness in his family, and, thereupon, with the consent of the defendant, the trial proceeded to a final conclusion before the remaining eleven jurors, who returned a verdict of murder in the first degree. It was held that the verdict was a nullity, and that the court erred in permitting the trial to proceed to a verdict, after the withdrawal of one of the jurors. Wade, C. J., in delivering the opinion of the court, observed that there did not seem to be any authority justifying a waiver of a full jury of twelve by the accused in a capital case; and said: "Instances may be found in the books in cases of misdemeanours, and also, but more rarely, in cases of felonies, where it has been held that a defendant might waive his right to a jury of twelve and consent to be tried by a less number; but the weight of authority in cases of felony is clearly against the proposition."

It has been argued against this, and in favour of the recognition of the effect of consent in such cases, that it "is not inconsistent with any rule of law or with public policy. Nor does it tend to defeat public justice. On the contrary, it may tend to promote it, by facilitating the despatch of business in court, and preventing unnecessary and embarrassing delay." Thus in *Com.* v. *Dailey*,[49] it was said: "It may be important to the accused, for the preservation of evidence, and on various accounts, to have a speedy trial, and that where parties and their counsel have exercised their judgment in the conduct of the trial, as to what they will insist on and what they will waive, as they may safely be allowed to do, and have taken their chances on a verdict, it would be inconsistent with ordinary good faith and fair dealing for them to turn round and insist on legal exceptions, which they had pledged themselves to the court that they would not take. From an examination of the cases upon this subject, it must be concluded that the weight of authority is with the doctrine, that in prosecutions for crime, at least where the crime charged is other than mere misdemeanour, the defendant cannot waive his right to trial by a jury of twelve men, and be tried by a less number." The weight of authority, in cases of felony, is clearly against any right on the part of the accused to waive the full number of jury.

---

[48] 4 Mont., 149.

[49] 12 Cush., 80.

The case generally cited in favor of the opposite view is that of *State* v. *Kaufman*,[50] which has been followed in *State* v. *Sackett*,[1] and in which it was held, that upon a trial for a crime, the accused might waive his right to a trial by jury of twelve men, and with his consent might be tried before eleven jurors. Seevers, J., said: "The defendant may have consented to be tried by eleven jurors, because his witnesses were then present, and he might not be able to get them again, or that it was best he should be tried by the jury as thus constituted. Why should he not be permitted to do so? We are unwilling to establish such a rule. It may be said that if one juror may be dispensed with, so may all but one, or that such trial may be waived altogether, and the trial had to the court. This does not necessarily follow." In support of this view, reference was made in the decision only to the cases of *Com.* v. *Dailey*; *Murphy* v. *Com.*,[2] and *Tyra* v. *Com.*,[3] which were all cases of misdemeanour, in respect of which a distinction is generally recognized. Seevers, J., observed, however, that in the first case, the fact of the offence having been a misdemeanour possessed no significance, and said: "The ruling is based on principle applicable to all criminal actions. We are unable to see how it is possible to draw a distinction in this respect between misdemeanours and felonies, because the Constitution does not recognize any such distinction." Referring to the contrary cases,[4] he continued, "In neither of these cases was the question largely considered. Substantially, they all seem based on the thought that it would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and, we think, ought not to be tolerated. This would have been much more convincing and satisfactory if we had been informed why it would be highly dangerous, and should not be tolerated, or at least, something which had a tendency in that direction. For if it be true, as stated, it certainly would not be difficult to give a satisfactory reason in support of the strong language used."

The weight of authority clearly seems to be in favour of the view, that it is only in prosecutions for misdemeanour that the court may with defendant's consent proceed to try him

---

[50] 51 Iowa, 578.
[1] 38 N. W. R., 773.
[2] 1 Metc., 1365.
[3] 2 Metc., 1.
[4] Cancemi v. People, 18 N. Y., 123. Allen v. State, 54 Ind., 161. Bell v. State, 44 Ala., 393.

with less than full number of jurors.[5] In *Warwick* v. *State*,[6] it was even held that where, under a special statutory provision, misdemeanour cases might by agreement of the parties, be tried by a jury of less than twelve jurors; a mere waiver of the requisite number by merely failing to object to less would not authorize a trial by less than twelve.

A distinction similar to that taken in *In re Staff*[7] in regard to the waiver of a trial by jury, was taken in *Murphy* v. *Com.*,[8] in regard to prosecutions for misdemeanours punishable by fine only, because it is considered, that in the case of such misdemeanours, the defendant may agree to be tried by a jury of not less than twelve persons, as nothing more "is involved in the issue of the case than is frequently involved in the decisions of actions in civil cases, and the citizen has an undoubted right to make any disposition of his money or his property which is not prohibited by law." In Missouri, the reasoning in this opinion has been stated and endorsed, and it is said that "in prosecutions for misdemeanour, where the penalty imposed is simply a fine, the only contest is about money and property, and the defendant may consent to waive some of the prescribed formulas of trial."[9]

Waiver of formal rules for impanelling jury.

268. Merely formal rules for impanelling jury may, however, be waived. In *People* v. *Ransom*,[10] it was held that non-compliance by the clerk to put the names of all the persons returned as jurors into a box, from which juries for the trial of issues were to be drawn according to the statute, was not a sufficient ground for setting aside a verdict, either in a criminal or civil case, where the court was satisfied that the party complaining had not and could not have sustained any injury from the omission. The trial in the case was for a capital offence, and after twenty-eight jurors had been called, eleven of whom were approved and sworn, and 17 peremptorily challenged, it was discovered that the ballot containing the name of a juror who had answered on the calling on the general panel, was not in the box containing the names of the jurors returned for the court, and which on search was found and put into the box, and drawn out of it by the direction of the court, and the jurors sworn to serve on the jury. The court held that the irregularity

---

[5] State v. Borowsky, 11 Nev., 119.
[6] 47 Ark., 568.
[7] 63 Wis., 285.
[8] 1 Metc., 1365.
[9] State v. Mansfield, 41 Mo., 470.
[10] 7 Wend., 417.

or neglect of the officer was not such as to entitle the prisoner to a new trial, it appearing to the court that the omission to put the ballot into the box proceeded from neglect, and not from design.

In *Pierson* v. *People*,[11] the only irregularity was, that of the three jury boxes required to be kept by the statute the second, which should have contained the names of all jurors who had attended a term of court and served, was not kept and, of course, not produced in court. The prisoner challenged the array of jurors, but afterwards withdrew it, and a jury having been then impanelled, the trial duly proceeded. It was contended afterwards that the challenge could not be withdrawn, but the contention was overruled, and Earl, J., in delivering the opinion of the Court, said: "The objects of all the jury laws are to distribute the burden of jury service among all those liable to such service and to secure impartial jurors of the requisite qualifications. To secure the first object, lists of jurors are required to be made and returned to the county clerk in each county every three years. The names thus returned are required to be put into a box, from which jurors for any term of court are required to be drawn, and when a juror has once attended and served, his name is not to be returned to that box, but is to be placed in another box, to the end that he may not be drawn for service again until all have been drawn from the box first named. The second object is attained by requiring that only persons of the prescribed qualifications shall be returned for jurors, and that they shall be chosen by lot. Now all these substantial provisions were observed in this case. The jurors upon the array were all persons who had been returned as such by the proper officials. They all possessed the statutory qualifications, and they were chosen by lot. When these substantial conditions exist, the rest must generally be matter of form, which can be arranged or waived by consent, tacit or expressed. Here the only irregularity alleged is that the second box was not kept or brought into court. The fact that it was not kept was not known to the court at the time it made the order designating the box from which the jurors were to be drawn. In the exercise of its discretion, and to carry out the manifest purpose of the law, it ordered the jurors to be drawn from the first box. A court would not be expected to order jurors to be drawn from the second box, containing the names of those who had

[11] 79 N. Y., 424.

once served, so long as there were sufficient names in the first box. It cannot, therefore, be inferred, if all the boxes had been kept and brought into court and the orders then made, that different jurors would have been drawn and summoned from those who were actually drawn and summoned. But even if it could be thus inferred, it cannot be denied that the persons empanelled to try the prisoners were jurors made so in the mode prescribed by law and possessing lawful qualification. If, therefore, there was any irregularity which would be ground of error, it was merely formal, affecting no public interest, trenching upon no public policy; and to hold that it could not be waived would be without precedent and against reason." It has often been held that even apart from consent, merely formal irregularities in empanelling the jury, which are not calculated to prejudice the parties, do not affect the validity of the verdict.

CHAPTER XIII.

Evidence of Consent.

269. There are no special rules relating to the evidence of consent, which, generally speaking, is proved like any other fact. To discuss this mode of proof will involve a consideration of the general principles of the law of evidence, and attempt will therefore here be made only to refer to a few points having special reference to the subject of consent. As a general rule, consent must be proved by the person who alleges and relies on its existence. Speaking, however, of the cases, in which consent operates as a justification, Mr. Mayne observes "that every proper consent should always be presumed where the act is in itself proper and beneficial; as, for instance, a surgical operation. And this is in accordance with the principles of the law of evidence, that innocence will always be presumed, and therefore where the act is *prima facie* lawful, but may be unlawful by omitting certain precautions, it will be assumed that those precautions have been taken until the contrary is shown."[1]

Onus probandi as to consent.

The Indian Evidence Act[2] provides, however, that "when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances." Under this provision, consent, when alleged as a justification or mitigation, will have to be proved by the person alleging it. The absence of consent, when alleged as a ground of aggravation of an offence, has, on a similar principle, to be proved on behalf of prosecution.

270. That principle has no application however, to the cases in which the absence of consent is an essential constituent of an offence, and in which it must therefore always be proved on behalf of the prosecution. In *Brij Basi* v. *The Queen-Empress*,[3] Sir John Edge, C. J., and Aikman, J., observed, that "it is the first principle of criminal law that

Onus probandi as to the absence of consent essential for an offence.

[1] Mayne Com., Ind. Pen. Code, 88.
[2] S. 105, Act I. of 1872.
[3] I. L. R. XIX. All., 74.

where a statute creates a criminal offence the ingredients of that criminal offence must be strictly proved, and that where the doing of an act without consent or without authority is made a criminal offence, and the statute does not expressly put upon the accused the proof of such consent or authority, it is a necessary part of the case for the prosecution to negative by evidence such consent or authority."

It is thus settled that in a prosecution for theft, it must be affirmatively proved that the taking was without the owner's consent.[4] Unless taking the property without the owner's consent is proved, it cannot be held that larceny has been committed.[5] The same has been held in regard to rape. In Georgia, it is an offence to permit a minor to play billiards without his parent's consent, and it has been held[6] that the burden of proving the absence of consent is on the State. In *Rex* v. *Allen*, *Rex* v. *Argent*, and in *Rex* v. *Chamberlain*, all reported in Moody's Crown cases,[7] the indictment was for taking deer or fish without consent, and it was held that the *onus* of proving non-consent was on the prosecution.

In British India, to sustain a conviction for the offence of house-trespass with intent to commit adultery with a woman, it is necessary to show that there has been no consent or connivance on the part of her husband to the trespasser having carnal intercourse with her. This was held in *Brij Basi* v. *The Queen-Empress*,[8] in which Sir John Edge, C. J., and Aikman, J., said: "If Brij Basi had actually been caught in the act of sexual intercourse with the wife of Ram Gopal, assuming that he knew her to be Ram Gopal's wife, the offence of criminal adultery would not have been made out without proof, that such sexual intercourse was without the consent and without the connivance of Ram Gopal. Brij Basi was convicted of a house-trespass in order to commit a criminal adultery with the wife of Ram Gopal. It was consequently necessary to support the prosecution to prove that if Brij Basi had had sexual intercourse on that occasion with the wife of Ram Gopal, it would have been without Ram Gopal's consent or connivance. It was not even proved that Brij Basi had committed criminal trespass on this occasion. There would be no intent on his part to commit criminal adultery or to insult or annoy the owner

[4] Rapal. Larceny, 180.
[5] Garcia *v.* State, 26 Tex., 209. State *v.* Morey, 2 Wis., 494. Pollard *v.* State, 3 Iowa, 567.
[6] Conyers *v.* State, 50 Ga., 103.
[7] I. 154.
[8] I. L. R., XIX All., 74.

of the house, Ram Gopal, unless Brij Basi was there to commit criminal adultery with the wife of Ram Gopal, *i.e.*, to have sexual intercourse with her without the consent and without the connivance of Ram Gopal. There could be no intent to insult or annoy Ram Gopal if Ram Gopal was consenting or conniving at the adultery, and there is nothing in this case to show whether or not Ram Gopal was a consenting or conniving party." This is in accordance with the general principle of the Indian Law of Evidence that the burden of proof lies on that person who would fail if no evidence at all were given on either side.[9] A particular form of that general principle, is the no less generally recognized rule that every essential part of the offence must be proved on behalf of prosecution.[10]

In *Conyers* v. *State*,[11] McCay, J., in delivering the opinion of the Court, observed : "Undoubtedly the general rule is, that in criminal cases the burden of showing all the facts necessary to make out the defendant's guilt is upon the State. In rape, the proof must show that the act was against the will of the female; in robbery, that the taking was against the consent of the person robbed ; in larceny from the person, that the taking was without the knowledge of the possessor in the case; and in the various acts of trespass against property, as cutting wood, &c., on another's land, that they were without the owner's consent."

Application of the rule of *onus probandi* as to the person alleging the affirmative.

271. The contrary has been argued sometimes on the ground of the principle that the burden lies on the party who asserts the affirmative of the issue. This principle has no application, however, to a case like that of the absence of consent. This was well explained in the case of *Conyers* v. *State* already cited, in which McCay, J., said : "There is a class of negations which it is almost impossible to prove affirmatively. Where the field to be covered by the evidence is so broad as that the burden would be intolerable upon the public, to afford the time necessary for hearing the proof, as where it is only possible to prove that one was not present, by examining a large number of persons who did not see him, or where the proof that one did not do a thing can only be established by proof following him from movement to movement, through a considerable time. But there are negations

[9] S. 102, Act I. of 1872.

[10] Elkins v. State, 13 Ga., 435.

[11] 50 Ga., 103.

that are just as easily proven as an affirmative, as where the negation depends upon a moment of time and a particular place, or is within the knowledge of a single person. In the former class, even the general rule that the prosecutor in criminal cases must prove all the ingredients of the crime, has, in some cases, been relaxed. As in prosecutions under the English Game Laws, where one may kill game if he has one of a large number of qualifications, it has been held that it was not necessary for the Crown to go to the expense and the public to suffer the inconvenience of proving the absence of each of the required qualifications, especially (and this is perhaps the true point on which the exception turns) if the facts lie peculiarly in the defendant's knowledge. . . . . And the Courts have not always kept in mind the distinction between cases when the negative is part of the description of the offence, and when it is by a provision or a subsequent section, or by a subsequent act.[12] The books are full of illustrations of the position we have asserted, to wit, that if in order to make the defendant guilty, it be necessary to show a negative, the burden of showing it is upon the State,[13] as when the defendant was indicted for keeping a greyhound, not being a person qualified.[14] In the same volume is a case for profane swearing, under the Act of 6 and 7 Wm. III. The Act put a penalty of one shilling on a servant, and two shillings on every other person. The conviction was quashed, because it was not proven that the defendant was not a servant. See 10 East, 211, where it was held that the burden was on the Crown to show that the defendant had not taken the sacrament. In 5 Rich. 57, that a practicing physician had no license; that one was not qualified to vote."[15]

Application of the rule of *onus probandi* as to the person alleging the negative.

272. The contrary has sometimes been held also on the ground that consent is a fact specially within the knowledge of the person receiving and acting on it. This is generally the case in prosecutions for doing an act which the statutes do not permit to be done by any person, except him who is duly licensed therefor, as for selling liquors, exercising a trade or profession, and the like. Here the party licensed can immediately show the license without the least inconvenience; whereas, if

---

[12] 12 Barb., 26.
3 Dev., 299.
3 B. Mon., 342.
34 Me., 293.
[13] May v. State, 4 Ala.
[14] 1 Str 66.
[15] 9 Meto., 286.

proof of the negative were required, the inconvenience would be very great. In Massachusetts, there is a special provision of the law, throwing the burden of proving the license on the person selling liquor under it. Even in other states it has often been held on an indictment for retailing spirituous liquors without license that if the sale of the liquors is proved, the prosecution need not prove the absence of the license, but the accused will be convicted unless he proves the existence of the license as by his plea of non-guilty he affirms its existence.

A decision to this effect in *Sharp* v. *State*,[16] has been justified on the following ground: "The license is a written authority to the dealer to sell, and the presumption is that he has it in his possession. It is peculiarly within his knowledge. The negative cannot be shown conclusively by the State. It could only be proven that no such license was recorded; but the defendant might have the license and be not guilty, though the license was not recorded. All the proof in the power of the State would be inconclusive, to wit, that no such license was recorded. The license is in writing, and cannot be proven by parol, and it is in the defendant's possession, if it exists, and on this ground there are many cases making this special crime an exception to the general rule."

This principle was not held to apply in *Conyers* v. *State*,[17] as there, the consent of the parent was not required by the statute to be in writing, and, therefore, it did not, as in the case of the license to sell, lie peculiarly within the knowledge of the defendant, the fact that consent was not given being as well known to the parent or guardian as to the accused.

Evidence of absence of consent.

273. Absence of consent may be proved by any evidence, either direct or circumstantial. As a rule, no objection can be taken to the latter, on the ground that the former is not produced; though in practice there may be some difficulty in accepting circumstantial evidence as true, unless there is a reason for not producing the direct evidence. The question has generally arisen in connection with larceny and theft. In some early cases, it appears to have been held even in England, that to prove that consent was not given, the person said to have given the same must first be called.[18] This was, however, not considered necessary in *Rex* v. *Allen*, and *Rex* v. *Chamberlain*.[19]

[16] 17 Ga., 290.
[17] 50 Ga., 103.
[18] Rex *v.* Rodgers, 2 Campb., 654.
[19] 1 Mood. C. C., 154.

The rule in the United States also, except in Texas and a few other States,(A) is the same, and the absence of consent may be proved by circumstantial evidence alone.[25] Thus, it is not necessary to prove from the person having possession of the goods stolen that they were taken without the owner's consent, as that may be proven by others having a knowledge of the facts.[23]

It is generally settled, that the fact that the owner caused search to be made for the property is a cogent circumstance to show the want of his consent to the taking.[27] At a trial for larceny of money by trick, the testimony of the complainant as to what was said and done at subsequent interviews with the accused by appointment, at which he proposed ways in which a return of the money could be secured, is admissible to show that complainant had not intentionally parted with his money or the title to it.[28]

Evidence in rape cases of female's prior connection with accused.

274. In cases of indictment for rape or assault with intent to commit rape on a female, the circumstance of his having had connection with her on other occasions is material and may be proved.[29] This is on the ground that a woman who already has had connection with a man is more likely to yield to his overtures and less likely to offer resistance to his act on another occasion, than one who never had anything to do with him. In *Reg. v. Cockcroft*,[30] Willes, J., held that she could be questioned as to the particular acts of

(A) In these States, it is still held that the owner's absence from the witness-stand must be accounted for before the production of circumstantial evidence.[20] If the owner is known, and his attendence can be procured, his testimony that the property was taken from him without his consent, is then considered indispensable to a conviction for larceny;[21] and the want of the owner's consent can be shown by circumstantial evidence, only when it appears that the owner's evidence on the point is not obtainable.[22] Thus in *Davis* v. *State*,[23] on a trial for theft of boots from a store, it was held that in order to prove that the boots were taken without the consent of the owner, the State could not prove an altercation between the clerk of the store and the accused at the time the boots were taken, by witnesses who were present and heard the altercation, and that they must call the clerk in charge of the stores. Even in Texas, it has, however, been held that an objection to the circumstantial evidence on the ground that the owner himself has not been called cannot be taken on appeal, unless it was taken at the trial.[24]

20 Jackson *v.* State, 1 Tex. App., 363.
21 Wilson *v.* State. 12 Tex App., 481. State *v.* Moon, 41 Wis., 684.
22 Clayton *v.* State, 15 Tex. App., 348. Love *v.* State, 15 Tex. App., 563.
23 37 Tex., 277.
24 Stewart *v.* State, 9 Tex App., 321.
25 McMahon *v.* State, 1 Tex. App., 102 Schultz *v.* State, 20 Tex. App., 308.
26 People *v.* Jacks, 76 Mich., 318.
27 Rains *v.* State, 7 Tex. App., 588.
28 People *v.* Dean, 58 Hun., 610.
29 Rex *v.* Aspinwall, 2 St ark 700. Rex *v.* Martin, 6 C. & P., 562.
30 11 Cox. C. C., 410.

connection with the accused, and in case of her denial, evidence might be given to contradict her.

The leading authority in favor of this view is that of *Reg.* v. *Riley*,[31] in which she denied having had intercourse with the accused, and on a case reserved, it was held that witnesses could be called to prove that she had. Lord Coleridge, C. J., delivered the leading decision, and said: "To reject evidence of her having had connection with the particular person charged with the offence is a wholly different matter, (from that of having connection with other persons), because such evidence is in point as making it so much the more likely that she consented on the occasion charged in the indictment. This line of examination is one which leads directly to the point in issue. Take the case of a woman who has lived, without marriage, for years with the accused before the alleged assault was committed. Can it be reasonably contended that the proof of that fact, or evidence tending to prove that fact, is not material to the issue, and if material to the issue that such evidence should not be admitted."

Taylor in his Work on Evidence[32] says that the accused cannot prove specific immoral acts of the prosecutrix with himself, unless he has first given the prosecutrix an opportunity of denying or explaining them. This appears, however, to be neither correct in principle nor established by authority. It would be correct, if the acts were to be proved to impeach her credit as a witness; but there can be no reason for it when the object is only to shew the probability of her consent.

Evidence of female's character for unchastity on charge of rape.

275. In cases of indictment for rape or even for indecent assault,[33] the character of the prosecutrix for chastity is material, as bearing on the probability or improbability of her consent to the intercourse alleged to be rape. A common prostitute is less likely to withhold her assent to the intercourse with the accused than a virgin or a woman who has carefully preserved her marriage vows. A female who has been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure; and even one who has already started on the road of prostitution would be less reluctant to pursue her way than another who yet

[31] 18 Q. B. D., 481. | [32] I. 257.
[33] Com. v. Kendall, 113 Mass., 210.

remains at her home of innocence and looks upon such a career with horror. Assent may be inferred more readily in the practised Messalina in her loose attire than in the reserved and virtuous Lucretia: to raise a presumption of consent on her part, her chastity may therefore be impeached, and she proved to be a common strumpet. There has thus long been a general unanimity of opinion that evidence of general reputation of character is admissible.[34] Witnesses as to general character must, however, confine their testimony to what they knew prior to the date of the offence charged.[35]

Individual acts of unchastity with persons other than accused may be proved.

276. It was long considered, however, that evidence of particular acts of unchastity with other men was not admissible, [36] and that she could not be questioned as to such particular acts, as to her having had intercourse with any man other than the accused. Thus in *Rex* v. *Hodgson*,[37] she was not allowed to be questioned as to whether she had not before had connection with other persons, or with a certain other person; and evidence of an individual act of connection with a person was disallowed.

In the United States also, it was repeatedly held that she could not be questioned as to her having had connection with other persons.[38] In *McDermott* v. *State*,[39] evidence was offered of the prosecutrix having, on her way to the place where the rape was alleged to have been committed, agreed with a third person that she would meet him on a future day, and have sexual intercourse with him, and also that if she did not meet her husband where she was going, she would go with him that same night for that purpose. The evidence was not admitted however, Peck. J. saying: "It is difficult to give a reason for permitting proof of an agreement to commit the act. The reason which excludes proof of the act applies with still greater force to the mere agreement to do it. We have been furnished with a very elaborate agreement in favor of its admissibility, as tending to show the awakened desires and lascivious propensities of the prosecutrix

[34] King *v.* Clarke, 2 Stark., 243.
R. *v.* Martin, 6 C. & P., 562.
Reg. *v.* Clay, 5 Cox. C. C., 146.
[35] State *v.* Forshner, 43 N. H., 89.
[36] King *v.* Clarke, 2 Stark., 241.
[37] Russ. & R., 211.
[38] Ritchie *v.* State, 58 Ind., 355.
State *v.* Vadnais, 21 Minn., 382.
Com. *v.* Regan, 105 Mass., 593.
Pleasant *v.* State, 13 Ark., 624.
State *v.* White, 35 Mo., 500.
State *v.* Knapp, 45 N. H., 148.
[39] 13 Ohio, 332.

shortly prior to the alleged assault, thereby lessening the probabilities that it was consummated forcibly and against her will. It by no means follows that a desire to have sexual intercourse with one person tends, legitimately, to prove a willingness to have like intercourse with another and different person. Indeed, the reverse is much the most probable; but however this may be, the introduction of such proof is opposed to the well-settled rules of evidence."

Evidence of past completed acts also was disallowed in many cases. Thus in *McQuirk* v. *State*,[40] Somerville, J., in delivering the opinion of the Alabama Supreme Court said : "The impeachment of her character in this particular must, however, be confined to general evidence of her reputation. Particular instances of her unchastity cannot be proved for this purpose, except that she may be interrogated as to her previous intercourse with the prisoner, although not as to particular instances with third persons."[41] In *McCombs v. State*[42] also it was held that the prosecutrix's character for chastity could not be impeached by evidence of particular acts of unchastity with persons other than the accused, and that evidence of such other instances was not admissible.

Similarly in *Rice* v. *State*,[43] Liddon, J., said : "On a trial for rape the character of the prosecutrix for chastity, or the want of it, is competent evidence as bearing upon the probability of her consent to defendant's act, but the impeachment of her character in this respect must be confined to evidence of her general reputation, except that she may be interrogated as to her previous intercourse with the defendant, or as to promiscuous intercourse with men, or common prostitution : the rule we here adopt is one sanctioned by the preponderance of authority. Not only is the rule which we adhere to better founded in authority, but we think more in accordance with reason and justice. The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indication to warrant the conclusion that she would probably be guilty with any other man who sought such favors of her. If she was a woman of general bad reputation for chastity, or had been guilty of acts of lewdness with the defendant, the case would be different. In the first instance the evidence would bear directly upon the question

[40] 84 Ala., 435.
[41] Boddie v. State, 52 Ala., 395.
[42] 8 Ohio, 643.
[43] 35 Flo. 236.

as to whether such a woman would be likely to resist the advances of any man; and, in the second, as to whether, having yielded once to the sexual embraces of the defendant, she would not be likely to yield again to the same person. The greatest objection to such testimony is that it introduces collateral issues which have no bearing upon the defendant's guilt. Although the prosecuting witness may have been guilty of specific acts of unchastity, such acts afford no justification to the defendant for having ravished her; she is still under the protection of the law, and not subject to a forced violation of her person by every man who has the strength to overpower her. If she denied having acts of carnal intercourse with other men, of course the defendant would attempt to prove specific acts in contradiction of her denial, and there would be presented to the jury other collateral issues calculated to embarrass and mislead them, and in no way decisive of the guilt or innocence of the accused." So also, in *State* v. *Fitzsimon*,[44] Fillinghast, J., said: "While the character of the prosecutrix for chastity may be attacked by the defendant in a case of this sort, we do not think that specific acts of improper conduct with other men can be shown. In civil cases growing out of an alleged indecent assault, it has been held that both the character of the woman assaulted for chastity, as well as specific acts of unchastity, may be shown in defence."[45] It was repeatedly laid down, that "general reputation alone was to be received because it was not to be presumed the prosecution could come prepared to meet evidence of the particular fact."

On the other hand, it is contended that it is not right to reject evidence of the fact, and to receive evidence of the reputation of the fact, to prefer in evidence the reputation of a want of chastity to the fact of unchastity itself. As pointed out by Cowen, J., in delivering the opinion of the United States Supreme Court in *The People* v. *Abbot*,[46] "such a reason would go to show that every circumstance in a chain must be shown by reputation instead of ocular proof, and it is not fair to deprive prisoners of any evidence sanctioned by authority. Nor was it in accordance with the general rules of evidence that one may go into evidence of the bad character of the prosecutrix, and yet not cross-examine as to specific facts."

---

[44] 18 R. I., 236.

[45] Mitchell v. Work, 13 R. I., 645.

[46] 19 Wend., 197.

Besides the presumption which justifies the enquiry into her chastity is applicable to individual acts of unchastity. There is the same presumption that one who has already submitted herself to the lewd embraces of another is more likely to have given her consent to the alleged act of rape than the coy and modest female, severely chaste and instinctively shuddering at the thought of impurity. Connection with both against their will or consent will equally be a rape, but consent is more likely to be inferred in the case of the former than in the case of the latter. This view has prevailed, and it appears now to be generally agreed that the prosecutrix may be proved to be a common prostitute in fact and not merely by general reputation. In *Woods* v. *People*,[47] the prisoner offered to prove by seven witnesses that the complainant was in the habit of receiving men for the purpose of promiscuous intercourse, and especially for liquor; and Grover, J., said: "It was competent for him to prove, by any one knowing the fact, that the prosecutrix was in the habit of receiving men at her dwelling for promiscuous intercourse with them, and the weight of such testimony was in no respect impaired by the further fact that the men so received took liquor with her on these occasions, of which they and she partook to great excess. The testimony offered, if true, would have shown the complainant to be a common prostitute; proof more satisfactory than that of a bad general reputation for chastity. The trial court, as well as the General Term, regarded the offer as nothing more than that of proof of some particular acts of lewdness. But it was much more. It was an offer to show by direct evidence not only this, but that the complainant was a common prostitute and in the habit of plying her vocation at the place where she dwelt."

Now, however, evidence even of individual acts tending to prove the general character is also often considered admissible, and the prisoner is held entitled to show that the prosecutrix was in the habit of receiving men into her house for the purpose of promiscuous intercourse with them, as bearing upon the question of her consent;[48] thus in *People* v. *Benson*,[49] Murray, C. J., in delivering the opinion of the court, observed: "I cannot understand why, upon any sound rule, general reputation should be preferred to particular facts. It is true that it is said the party comes prepared to prove her general character, and her at-

[47] 55 N. Y., 515.
[48] State v. Reed, 39 Vt., 417. | State v. Murray, 63 N. C., 31.
[49] 6 Cal., 221.

tention is not directed to the special facts. It appears to me that proof of particular acts of lewdness should be admitted in preference to general reputation, which may be good or bad, either deservedly or undeservedly. Facts tend to make up the sum of reputation, and the course, and not the result, would be the safer testimony to rely on." An elaborate opinion in favor of the admissibility of the evidence of her connection with other men was delivered in the case of *The People*, v. *Abbot*,[50] though the final judgment in that case turned on the absence of jurisdiction, and the decision has, on that account, been discounted as *ultra vires*.

Complainant may be questioned as to individual acts of connection with other persons.

277. As a natural result of the admissibility of the evidence of individual acts of unchastity with other men, it soon came to be considered as settled that the prosecutrix might also be questioned as to her having had intercourse with other men.[1] The leading authority in favour of the view may be considered the decision in *State* v. *Johnson*,[2] which was followed in *State* v. *Iteed*[3] in which Steele, J., in delivering the opinion of the court, observed that testimony of the general reputation of the female as well as of her previous illicit intercourse with the accused was unanimously admissible as tending to show that the act of which she complained might not have been against her will, and the information sought to be elicited from her by questions as to her having had intercourse with other men, "has practically the same tendency, though inferior in force and conclusiveness. If the woman alleged to have been forced had admitted on her cross-examination that she had sexual intercourse beside the railroad track with the person named, the admission would justly have had considerable weight in favor of the prisoner, particularly connected as it was with testimony of her general bad reputation for chastity. The jury would be less ready to conclude that a woman who had once improperly yielded afterwards properly resisted, than they would if she had been a woman of unquestioned virtue." In *Titus* v. *State*, decided in 1874, the complainant was asked upon cross-examination, whether she had recently before had sexual intercourse with any person other than the defendant. The question was objected to, and the objection sustained, and for this error the judgment was rever-

---

[50] 19 Wend., 192.
[1] State v. Murray, 63 N. C., 31.
[2] 28 Vt., 512.
[3] 39 Vt., 417.

sed, Freeman, J., using language similar to that used by Cowen, J., in *People* v. *Abbot*.[4]

In England in *Reg.* v. *Barker*,[5] questions were allowed to be put to the complainant even as to whether she had walked the streets of Oxford on occasions subsequent to the alleged rape, looking out for men, or in company with a common prostitute.

Complainant's denial as to individual acts may be contradicted.

278. It may also be considered as now settled that if the complainant deny having had intercourse with other men, evidence may be produced to contradict her.[6] In some cases, it was contended against this, on the one hand, that as a rule of the law of evidence, evidence of her acts of unchastity could not be given unless she was first questioned about them; and, on the other hand, that if she were questioned, her answer must be taken as conclusive, and could not be contradicted anyhow.

Thus in *People* v. *Benson*,[7] Murray, C. J., observed: "If these facts or instances of lewdness are admitted, it was not necessary to inquire of the prosecutrix concerning them. They were not introduced so much for the purpose of impeaching her evidence directly as for the purpose of doing away with the presumption that there was a total absence of assent on her part." In *Reg.* v. *Cockcroft*,[8] Willes, J., dissenting from the decision in *Robin's case*, held that the replies could not be contradicted, as the questions which elicited them were collateral. In *Reg* v. *Holmes*,[9] the Court of Criminal Appeal overruling the decision in *Robin's case*, held that if the female being questioned denied having intercourse with another person, evidence could not be produced to contradict her, and to prove her adulterous act. Kelly, C. B., who delivered the leading decision, said: "The general rule of evidence is that if a question be put in cross-examination as to a collateral point, the answer must be taken for better or for worse. And the reason is obvious. If such evidence as that here proposed were admitted, the whole history of the prosecutrix's life might be gone into; if a charge might be made as to one man, it might be made as to fifty, and that without notice to the prosecutrix. It would not only involve a multitude of collateral issues, but an enquiry into matters as to which the prosecutrix might be wholly un-

[4] 19 Wend., 192.
[5] 3 C. & P., 589.
[6] Reg. *v.* Robins, 2 Mo. & Rob., 512.
[7] 6 Cal., 221.
[8] 11 Cox. C. C., 410.
[9] 1 C. C. Res., 334.

prepared, and so work great injustice."(B) It is denied, however, that the questions are collateral. They would be collateral, if unchastity was intended to be proved to discredit the female as a witness, but that is not the object in these cases of the enquiry as to her unchastity, which is as a fact, considered material as bearing on the probability or improbability of her consent.

The inadmissibility of the contradicting evidence is often placed on the ground of the hardship and inconvenience to the complainant, the ground on which she was long not allowed to be interrogated. Thus in *Reg.* v. *Holmes*, Hannen, J., maintained the inadmissibility on the ground, "that the prosecutrix cannot come prepared to try all the issues which would be thus raised." In *Strang* v. *People*,[11] Cooley, J., speaking for the court, said: "The prosecutrix could not be supposed to have come prepared to meet charges of this character; and though the defence might question her regarding them, the right to go into proof of particular facts is not very clear." In *People* v. *McLean*,[12] the prosecutrix denied having had intercourse with a third person, and having told certain persons that she had it; and it was held that those persons could not be called to show that she had told them, and that her denial as to that was conclusive.

The ground of hardship to the female can hardly have force in support of concluding the evidence to contradict her denial, after it has been established that independent evidence may be produced to prove her individual acts of unchastity with other men. Thus, in *Benstine* v. *State*,[13] McFarland, J., in delivering the opinion of the court, said: "If the previous illicit intercourse between the injured female and other persons be regarded as facts collateral to the main issue, then it might be legitimate to propound these questions to the female herself,

(*B*) In *The Queen* v. *Riley*[10], Lord Coleridge also incidentally observed that there were very good grounds for rejecting this evidence. "It should," he said, "in my view be rejected, not only upon the ground that to admit it would be unfair and hardship to the woman, but also upon the general principle that it is not evidence which goes directly to the point in issue at the trial. The question in issue being whether or not a criminal attempt has been made upon her by A, evidence that she has previously had connection with B and C is obviously not in point." This observation was quite *ultra vires*, and none of the other Judges concurred in it.

[10] 18 Q. B. D., 483.
[11] 24 Mich., 1.
[12] 71 Mich., 309.
[13] 2 Lea., 169.

under the latitude allowed in cross-examination for the purpose of testing the credibility of the witness, and yet it might not be legitimate to prove the intercourse by other witnesses, as in that view her asnwer upon collateral questions would be conclusive; but it is manifest from the cases referred to, that this is not regarded as a mere cross-examination of the witness as to the collateral facts, but it is regarded as testimony as to the facts bearing directly upon the issue. . . . . If the facts sought to be proven either upon the cross-examination of the injured female or by other witnesses are such as do not bear upon the issue, but tend only to disgrace the female, the testimony ought to be rejected, and it may be a matter of doubt whether a previous act or acts of illicit intercourse upon the part of the injured female, committed at a remote period of her life ought to be admitted, inasmuch as such facts might be true, and yet her subsequent life may have fully established her claim to virtue. In such case, to disclose the previous acts might tend only to expose her to disgrace, without throwing any material light upon the issue involved. But while the injured female ought to be protected as far as possible from disgrace, on the other hand these considerations ought not to exclude evidence bearing directly upon the issue, for defendant's rights ought to be equally protected. The crime of rape is one hard to disprove, and experience has shown that where the charge rests upon the testimony of the injured female alone, there is sometimes danger of unjust conviction, and defendants ought not to be unjustly exposed to this danger from fear of exposing the injured female to disgrace. To the position that the character of the injured female may be proven, it may be replied that her previous acts of illicit intercourse may be unknown to the public, and her general reputation may be good, and yet her total want of virtue may be shown by proving the facts which, if known, would totally destroy her character. In the *Titus case* the character of the prosecutrix was shown. It appeared that she was a prostitute, yet this was held not to be sufficient to deprive the defendant of the right to prove particular acts of illicit intercourse. These facts are material, as they bear upon the question of consent, and may in some cases tend to explain or account for the condition of the injured female immediately after the alleged rape, and it may also bear upon the credibility of the principal witness.'

INDEX.

PAGE

ABDUCTION, Consent in— 361
Consent obtained by fraud does not affect— 294

ABETMENT,
Penality of—of suicide 385
—of suicide in English Law 387
—of suicide punishable in India 388
—of suicide distinguished from murder 391

ABSENCE, Pleading after objection to jurisdiction not a waiver of its—... 486

ABSENCE OF CONSENT,
Moral character of offence not a criterion of the necessity of— 343
Necessity of— must be determined by the object of the offence 344
Onus Probandi as to—when essential for an offence... 539
Evidence of—... 543

ACCUSED, may waive right of not being asked to criminate himself 517
—may bind himself by agreement in criminal proceedings... 524
Waiver not allowed where prejudicial to— 527

ACT,
Consent does not authorize doing of an— 11
Consent to an—does not involve knowledge of its non-essential incidents 28
Knowledge of character of an—not necessary for consent to it... 30
Consent to the doing of an—not implied from an obligation to have the—done 159
Consent to natural and contemplated consequence of an—implied from consent to the— 161
Consent to everything necessary for doing an—implied from consent to the— 176
Consent to an—not implied by providing facilities for it by laying traps... 179
Consent to an—not implied by creation of opportunity for it 183
Consent to an—not implied by encouraging or co-operating in it with a view to discover the doer 185
Consent to an—implied by inducing a person to do it ... 185
Consent to an—implied by soliciting a person to do it ... 187
No question of consent where criminal—is done by injured person 188
Consent is merely to an— 192

PAGE

ACT—*continued*,
Consent can only be to another's— 192
Consent to one—is not consent to another— 197
Identity of an—how far affected by difference of its subjective and objective incidents 200
Consent to an—is to the—as usually done... 210
Consent to an—is not consent to all the consequences of the— 211
Consent must be to a future— 213
Consent must exist at the time of the— 219
Criminal—done to a person after causing intoxication to him is not excused by that person's consent 336
Consent by an intoxicated person does not excuse criminality of—done with a knowledge of the intoxication ... 337
Penality of—merely known as likely to cause death not affected by consent... 406
Greater effect of consent on—done for benefit of person giving consent 422
—done for benefit of person giving consent to be justified must be done in good faith 423
Extent of justification by consent in case of—for benefit of person giving consent 424
—for a person's benefit not justified if consent is not given to them by him 425
What—causing harm justified when done without consent 428
Consent is not justification of—constituting other offences irrespective of harm caused by them to person giving consent 432
Evidence may be given of individual—of unchastity with persons other than accused 546
Evidence may be given to contradict complainant's denial as to individual— 551
Complainant may be questioned as to individual—of connection with other persons 550
Act XLV of 1860, *vide* Penal Code, Indian.
— XXIII of 1871, *vide* Pensions Act.
— I of 1872, *vide* Evidence Act, Indian.
— IX of 1872, *vide* Contract Act, Indian.
— III of 1873, *vide* Civil Courts Act, Madras.
— XV of 1877, *vide* Limitation Act, Indian.
— I of 1879, *vide* Stamp Act, Indian.
— XIII of 1879, *vide* Civil Courts Act, Oudh.
— X of 1882, *vide* Criminal Procedure Code, Indian.
— XIV of 1882, *vide* Civil Procedure Code, Indian.
— XV of 1882, *vide* Presidency Small Cause Courts Act.
— XVII of 1882, *vide* Deccan Agriculturists' Relief Act.
— XII of 1887, *vide* Civil Courts Act, Bengal, N.-W.-P., and Assam.
ADULTERY, Consent in— 363

PAGE

AFFIRMATIVE, Application of rule of *onus probandi* as to person alleging the— 541
AGE, Restriction of the exemption from liability in regard to— 372
Limitation of the—of consent for homicide in India ... 440
AGENT, Delivery by an—to a wrong person by mistake ... 253
AGGRAVATED, Consent in cases of—assault 355
AGGRAVATION, Absence of consent is—of offences for which consent is not essential 458
AGREEMENT, Accused may bind himself by—even in criminal proceedings 524
ALIENAGE, as an incapacity to contract 134
APPEALS, Consent cannot give jurisdiction over— 463
APPEARANCE, Waiver of defect of personal jurisdiction by— ... 483
APPROVAL, Consent distinguished from subsequent— 216
Even—not amounting to consent is a mitigation of punishment 459
ARMS, Manly exercises with—how far allowed 421
Homicide in a premeditated fight between factions bearing —is murder... 450
ASLEEP, No consent by a person— 23
ASSAULT,
Absence of consent essence of— 4, 352
Consent obtained by fraud negatives— 289
Effect of minor's consent on indecent—in common law ... 312
Special legislation to make indecent—against minors an offence in spite of consent... 316
Consent in—... 352
Consent in—in disturbance of public peace 353
Consent in case of aggravated— 355
ATTEMPT,
Consent immaterial in case of an—to commit rape on minors 311
Penality of—of suicide 383
Penality of—of suicide in India 388
ATTRIBUTES, Knowledge of—of an act how far necessary to consent to the act 20
BARRISTER-AT-LAW, Profession of a—as incapacity to contract. 135
BELIEF, Mere—as to absence of consent not equivalent to its absence 233
—of consent how far deemed equivalent to consent in India 235
BENEFIT,
Greater effect of consent on acts done for—of person giving consent 422
Acts done for—of person giving consent to be justified must be done in good faith 423
Extent of justification by consent in case of acts for—of person giving consent 424

PAGE

BENEFIT—*continued.*
Acts for a person's—not justified if consent not given to them 425
BODILY, Consent is ground of mitigation of punishment in case of—injuries 457
CIVIL CODE, BELGIC, S. 1112 41
CIVIL CODE, CALIFORNIA, S. 1575 56
S. 6579 91
CIVIL CODE, DAKOTA, S. 890 91
CIVIL CODE, EGYPTIAN,
S. 195 ... ... 41, 71
206 117
207 117
CIVIL CODE, FRENCH,
S 1109 ... ... 35, 106, 107
1110 ... ... 70, 76, 81, 106, 107
1111 ... ... 41, 49
1112 36
1113 64
1116 64
1117 64
1124 135
1125 135
1131 106
1235 106
1356 106
1377 117
2052 106
CIVIL CODE, GERMAN,
S. 105 133
119 71
120 71
CIVIL CODE, ITALIAN (*Codice Civile*),
Art. 1106 135
1107 135
1108 35
1109 106
1110 ... ... 70, 76, 81
1111 65
1112 ... ... 36, 41
1115 65
1146 117
CIVIL CODE, LOUISIANA,
Art. 1123 70
1796 135
1824 88
1825 88
1826 89
1827 89

PAGE

CIVIL CODE, LOUSIANA,—*continued.*
Art. 1834 76
1836 75
1838 76
1840 77
1841 73
1843 85
1844 85
1845 85
1846 ... ... 92, 99
1851 41
1856 54
1857 54
1881 62

CIVIL CODE, SPANISH,
S. 1263 133
1266 ... ... 70, 76
1267 ... ... 36, 41

CIVIL COURTS ACT, Bengal, N.-W.-P. and ASSAM, S. 33 ... 479
—— ——Madras, S. 17... 479
—— ——Oudh, S. 23 479

CIVIL PROCEDURE CODE, INDIAN,
S. 20 474
424 498
433 498
578 511

CIVIL, Right of waiver unlimited in—proceedings 510

COERCION, *Vide* Duress.

COMPULSORY, Consent in offences relating to—labour 358

CONDITIONS, Waiver of—of exercise of civil jurisdiction ... 498
Waiver of—of exercise of criminal jurisdiction 504

CONFINEMENT, Consent in wrongful— 356

CONSENT,
Absence of—, *vide* Absence.
—to an act, *vide* Act.
—by drunken person, *vide* Drunkenness,
Effect of duress on—, *vide* Duress.
Effect of fraud on—, *vide* Fraud.
—caused by fear, *vide* Fear.
—as to harm, *vide* Harm.
Homicide by—, *vide* Homicide.
—as to hurt, *vide* Hurt.
—may be implied, *vide* Implied.
Effect on—of intoxication, *vide* Intoxication.
—cannot give Jurisdiction, *vide* Jurisdiction.
—caused by misconception, *vide* Misconception.
—by a minor, *vide* Minor.
—as a ground for mitigation of liability, *vide* Mitigation.

PAGE

CONSENT—*continued.*

Effect of Mistake on—, *vide* Mistake.
Effect of undue influence on—, *vide* Undue influence.
—by a person of unsound mind, *vide* Unsound mind.
General operation of— 1
Operation of—on contracts 1
Operation of—on torts 3
—does not affect public injuries 7
Operation of—in criminal law 9
Exact character of the operation of—in criminal law ... 10
Absence of—essence of most private crimes 12
Absence of—essence of assault 4, 13
Absence of—essence of theft 13
Absence of—expressly made essential for some offences ... 14
—as a mitigation 434
—distinguished from estoppel 18
—is an operation of mind 16
Nature of physical— 17
No—to an act without knowledge thereof 19
Knowledge of attributes of an act how far necessary to— 20
—in law of contracts 21
—in non-contract law 22
No—by a person asleep 23
No—of a person while unconscious 25
No—if mind incapable of knowledge 32
No—where mind is incapable of operation required for knowledge 32
Existence of—independent of subjective and objective considerations 33
In contracts—not free or fair may be— 33
—required to be free and fair for valid contracts 35
Absence of free and fair—makes contract only voidable ... 61
—distinguished from free—in Indian Penal Code 141
Necessity of the expression of— 143
The expression of—though in agreement is not identical with— 148
No question of—where criminal act is done by person injured 188
—distinguished from will 192
—to taking of one article is not—to taking of another article 206
—may be conditioned or limited in any manner 209
—distinguished from subsequent approval 216
—must be of person to whom harm is caused 222
Effect of—not affected by motive of its giving 228
—must have come to the knowledge of the doer of the act. 231
Mere belief as to absence of—not equivalent to its absence. 233
Belief how far deemed equivalent to—in India 235
Subjective incapacity to contract affects— 130

PAGE

CONSENT—*continued*.

As being incapacity to contract—distinguished from free consent in torts 137
—distinguished from free consent in criminal law ... 138
—of incompetent person not sufficient in criminal law ... 304
Limit of the age of—... 318
Effect of idiocy on—in the United States 324
Negative operation of— 340
—in theft 344
—in extortion... 360
—in other offences against property 347
—in rape 349
—in assault 352
—in assaults in disturbance of public peace 353
—in case of aggravated assault 355
—in wrongful confinement 356
—in offences relating to compulsory labour 358
—in slavery 359
—in other offences affecting personal freedom 360
—in abduction 361
—in kidnapping 361
—in adultery... 363
—to miscarriage 432
Offences in which—has no operation... 368
—as a ground of exemption from criminal liability ... 369
Principle of exemption from liability on ground of— ... 371
Restriction of the rule as to exemption from liability on the ground of— 372
Penality even of acts merely known as likely to cause death not affected by— 406
—justifies every hurt other than grievous 415
Greater effect of—on acts done for benefit of person giving— 422
Extent of justification by—in case of acts for benefit of person giving— 424
Acts for a person's benefit not justified if—not given to them by him... 425
Guardian's—equivalent to one's own— 426
Guardian's power of—not co-extensive with one's own power 427
Restrictions on the exercise of guardian's power of— ... 427
—is not justification for acts constituting public offences... 431
—is not justification for acts constituting other offences irrespective of harm caused by them to person giving— 432
Limitation of the age of—for homicide in India 440
Proposed English legislation in regard to homicide by—... 441
Onus probandi as to—... 539
Onus probandi as to absence of—when essential for an offence 539
Evidence of absence of— 543

PAGE

CONSEQUENCES,
Consent to natural and contemplated—of act implied from consent to that act 161
Recognition in law of contracts of the implied consent to— 163
Recognition in law of torts of the implied consent to— ... 164
Consent to an act is not consent to all the—of that act ... 211

CONSTRUCTIVE, Implied consent distinguished from—consent ... 150

CONTRACT,
Mistake even of one party may prevent formation of— ... 68
Mistake as to the parties to the— 75
Mistake as to the identity of the object of— 77
Mistake as to the existence of the object of— 78
Mistake as to the substance of the object of— 80
Mistake as to the motives for the— 87
Personality of parties how far essential to— 75
Absence of free and fair consent makes—only voidable ... 61
Subjective incapacity to consent affects—as being incapacity to— 132
Operation of consent on— 1
Consent in law of— 21
In—consent not free or fair may be consent 33
Consent required to be free and fair for valid— 35
Consent may be implied in— 148
Recognition in law of—of the implied consent to consequences 163
Effect of duress on—, *vide* Duress.
Effect of fraud on—, *vide* Fraud.
Effect of mistake on—, *vide* Mistake
Effect of undue influence on—, *vide* Undue Influence.

CONTRACT ACT, INDIAN,
S. 9 148
10 ... ...35, 136
11 137
12 134
14 35
15 ... ... 35, 54
16 ... ... 54, 57
17 61
17 Expl 145
18 61
19 62
20 ... ... 71, 78, 88
21 91
62 2
63 3
72 117
188 176

CO-OPERATING, Consent to an act not implied by encouraging or—in it with a view to discover the doer 185

PAGE

COUNTY COURTS ACT, 1888 (English),
S. 61 461
64 460
74 474
114 467

CRIMES, Absence of consent essence of most private— ... 12

CRIMINAL Liability, *vide* Liability.
Operation of consent in—law... 9
Exact character of the operation of consent in—law ... 10
—act done to a person after causing intoxication to him is not excused by that person's consent 336
Waiver of irregularity of initiative process in—proceedings 494
Waiver of conditions of exercise of—jurisdiction... ... 504
Right of waiver limited in—proceedings 513
Waiver of rights in—proceedings 514
Accused may bind himself by agreement in—proceedings. 524

CRIMINAL CODE, CANADA, S. 266 ... ... 140, 425

CRIMINAL LAW, AMENDMENT ACT, 1885 (English),
S. 3... ... 335
4... ... 307
5... 307, 328, 337

CRIMINAL PROCEDURE CODE, INDIAN,
S. 132 505
191 483
195 ... ... 505, 506, 508
196 ... ... 505, 506, 508
197 ... ... 505, 506, 507, 508
198 218
199 218
204 494
247 218
248 218
324 523
339 508
454 477
531 ... ... 475, 523
532 ... ... 507, 523
535 523
536 530
537 ... ... 506, 508, 523
555 479

CRIMINALITY, Consent by an intoxicated person does not excuse —of act done with a knowledge of the intoxication ... 337

CRIMINAL LAW,
Consent distinguished from free consent in— 138
Consent may be implied in— 149
Consent caused by fear is not consent in— 237
Consent caused by misconception of fact is not consent in— 237

PAGE

CRIMINAL LAW—*continued.*
Consent of incompetent person not sufficient in—... ... 304
Effect of mistake on consent in English— 249
Effect of fraud on consent in— 273
DEATH, Penalty even of acts merely meant as likely to cause— not affected by consent 406
Deccan Agriculturist's Relief Act, S. 47 500
DELIVERY, Possession may be transferred by mere physical— 126
DEPENDENT, Fear may be result of one's—position 245
DISQUALIFICATION,
Common law did not recognize unsoundness of mind as— of consent 321
Waiver of—of a judge at Common law 477
No waiver of statutory—of a judge 479
DOCUMENTS, Mistake as to legal effect or construction of— ... 101
DRUGGING, Sexual intercourse with a female by—her into intoxication is not rape though punished as such ... 334
DUEL, How far homicide in a—is murder 402
Homicide in a—is a mitigation of offence of murder in India... 444
Homicide in a—is only culpable homicide in India ... 444
Unsatisfactory effects of treating homicide in a—as murder. 445
Attempts in English law to reduce homicide in a—to murder 446
General concensus against treating homicide in a—as murder 448
DURESS, as affecting freedom of consent 35
General signification of— 36
Nature of threats constituting— 38
Extent of fear required to constitute— 39
Witholding possession of goods, how far—in English Law. 41
—of goods in the United States 43
In United States, lawful imprisonment if malicious may constitute— 50
Threats of prosecution may constitute— 53
Illegality of act or threat not necessary for—in India ... 54
Fear may be caused by— 242
EFFECT, Mistake as to legal—or construction of documents ... 101
ENCOURAGING, Consent to an act not implied by—or co-operating in it with a view to discover the doer 185
ERROR, *Vide* Mistake.
—in *Corpore* 77
—in *Ostativa* 77
—in *Materia* 80
—in *Substantia* 80
—concerning essential quality of object of agreement... 84

PAGE

ERROR—*continued.*

Mistake distinguished from—and ignorance 66
Fraud vitiates consent merely as an— 293

ESSENTIAL, Error concerning—quality of object of agreement ... 84

ESTOPPEL, Consent distinguished from— 18
—from plea of jurisdiction 466

EVIDENCE, Waiver of incompetency of— 528
—of absence of consent 543
—in rape cases of female's prior connection with the accused 544
—of female's character for unchastity on charge of rape ... 545
—may be given of individual acts of unchastity with persons other than accused 546
—may be given to contradict complainant's denial as to individual acts 551

EVIDENCE ACT, INDIAN,
S. 102 541
105 539
120 528
122 529
123 529
126 529
127 529
128 529

EXEMPTION, from criminal liability, *vide* Liability.
Waiver of personal—from jurisdiction 476

EXERCISES, Manly—with arms how far allowed 421

EXPRESSION, Necessity of the—of consent 143
The—of consent though in agreement is not identical with consent 143

EXTORTION, Consent in— 360

FACILITIES, Consent to an act not implied by providing—for it by laying traps 179

FACT, Nature of—mistake of which may affect consent ... 69
Mistake of law distinguished from mistake of— 93
Consent caused by misconception of—is not consent in criminal law... 237

FEAR, Extent of—required to constitute duress 39
Consent caused by—is not consent in criminal law ... 237
Knowledge by person acting on consent of its having been caused by—... 239
—may be caused by duress 242
—may be result of one's dependent position 245
Character of the injury causing— 246
—must be of some harm other than that contemplated to result from act consented to 247

PAGE

FEMALE, Married condition of—cause of incapacity to contract. 135
FORCE, Cases against conviction for rape often turned on supposed necessity of—for that offence 280
Signification of—extended constructively 281
—never deemed to include mere fraud 283
Substitution of minority for—in rape 307
Constructive extension of—in cases of minority 308
Causing intoxication in order to get consent is equivalent to causing—... 330
Effect of spiritual—on consent 339
FOREIGN, Mistake of law of a—country is mistake of fact ... 91
Forfeiture Act, 1870, S. 1. 383
FRAUD,
General notion of—as affecting freedom of consent ... 57
—in English Law 59
—in Indian Law 60
Effect of—on consent in criminal law 273
—negatives offences of which absence of consent is essential constituent 274
Force never deemed to include mere— 283
Penality of intercourse obtained by— 286
Consent obtained by—negatives rape chiefly under special legislation 288
Consent obtained by—negatives assault 289
—vitiates consent merely as an error 293
Consent obtained by—does not affect abduction 294
How far consent obtained by—is consent in theft cases ... 297
How far consent to entrance obtained by—is consent in house-breaking 300
FREE, Absence of—and fair consent makes contract only voidable 61
Consent distinguished from—consent in torts 137
Consent distinguished from—consent in criminal law ... 138
Consent distinguished from—consent in Indian Penal Code... 141
FREEDOM,
Duress as affecting—of consent 35
Undue influence as affecting—of consent 55
Fraud as affecting—of consent 57
Consent in other offences affecting personal— 360
FUNDAMENTAL QUALITIES, Mistake as to nature or—of subject-matter 84
GOOD FAITH, Acts done for benefit of person giving consent to be excused must be done in— 423
GOODS, Duress of—in the United States 43
GUARDIAN, Consent of—equivalent to one's own consent ... 426
Power of consent of—not co-extensive with one's own power 427

PAGE

GUARDIAN—*continued.*
Restrictions on the exercise of power of consent of— ... 427
HARM,
Consent must be of person to whom—is caused ... 222
Fear must be of some—other than that contemplated to result from act consented to 247
Restriction to the exemption from liability in regard to the nature of—caused 373
—to one's life among ancients 375
Influence of Church and State on—to one's life 376
Taking risk of—contrasted with consent to suffer— ... 417
What acts causing—excused when done without consent ... 428
Restriction on the power of causing—without consent ... 430
Consent is not justification of acts constituting other offences irrespective of—caused by them to the person giving consent 432
HOMICIDE,
by consent is real— 393
Objections to the treatment of—by consent as murder ... 395
General *concensus* as to penality of—by consent 400
How far—in a duel is murder 402
Distinction between suicide and—of consenting person ignored in England 391
—by consent punishable in India 405
Consent as a ground of mitigation in case of— 435
—in a duel is a mitigation of offence of murder in India ... 438
Limitation of the age of consent for—in India 440
Proposed English legislation in regard to—by consent ... 441
Burning the *Sati* is only culpable— 443
—in a duel is only culpable—in India 444
Unsatisfactory effects of treating—in a duel as murder ... 445
Attempts in English Law to reduce—in a duel to murder. 446
General *concensus* against treating—in a duel as murder... 448
—in a premeditated fight between armed factions is murder 450
HOUSE-BREAKING, How far consent to entrance obtained by fraud is consent in— 300
HURT, Penality of causing—to one's self... 408
Voluntary causing of—to another as affected by his consent 409
Consent justifies every—other than grievous 415
Even grievous—justified in certain cases by consent ... 416
IDENTITY, Mistake as to the—of the object of the contract ... 77
Mistake as to the—of person 75
Mistake as to the motive confused with mistake as to— ... 87
IDIOCY, Effect of—on consent in the United States 324
IGNORANCE, Mistake distinguished from error and— 66
—of law no excuse 90

PAGE

ILLEGALITY, of act or threat not necessary for duress in India ... 54

IMPLIED,
Consent may be— 145
Consent may be—in contracts 148
—consent distinguished from constructive consent 150
—consent distinguished from non-resistance... 152
Consent to the doing of an act not—from an obligation to do the act 159
Consent to natural and contemplated consequences of an act—from consent to that act 161
Recognition in law of contracts of—consent to consequences 163
Recognition in law of torts of—consent to consequences. 164
Consent to everything necessary for doing an act—from consent to that act 176
Consent not—from non-prevention 176
Consent to an act not—by providing facilities for it by laying traps... 179
Consent to an act not—by creation of opportunity for it ... 183
Consent to an act not—by encouraging or co-operating in it with a view to discover the doer 185
Consent to an act—by inducing a person to do it 185
Consent to an act—by soliciting a person to do it 187

IMPOSSIBILITY, of performance of contract prevents formation of contract 79

IMPRISONMENT, In United States lawful—if malicious may constitute duress 50

INCAPACITY, Subjective—to consent affects contract as being—to contract 132

INCIDENTS, Consent to an act does not involve knowledge of its non-essential— 28

INCOMPETENCY, Waiver of—of evidence 528

INCOMPETENT, Consent of—person not sufficient in criminal law... 304

INDUCING, Consent to an act implied by—a person to do it ... 185

INJURY, Consent does not affect public— 431
Character of the—causing fear 246

INSANITY, Test of—as incapacity to contract 134

INSTITUTION, Waiver of the irregularity of the first—of proceedings in a court not having jurisdiction 491

INTERCOURSE,
Sexual—with minor's consent punishable even outside England 309
Minor's consent to sexual—not consent 310
Sexual—with a female by drugging her into intoxication is not rape though punished as such 334

INTOXICATION,
as a vitiating cause of consent 329
Causing—in order to get consent is equivalent to force ... 330

PAGE

INTOXICATION—*continued.*
Effect on consent of causing— 331
Sexual intercourse with a female by drugging her into—is not rape though punished as such... 334
Criminal act done to a person after causing—to him is not excused by that person's consent 336
Consent by an intoxicated person does not excuse criminality of act done with a knowledge of the— 337
Recognition in India of—as vitiating consent 338
IRREGULARITY, Waiver of—in initiating proceedings 489
Waiver of the—of the first institution of proceedings in a court not having jurisdiction 491
Waiver of—of initiative process in criminal proceedings ... 494
JUDGE, Waiver of disqualification of a—at common law 477
No waiver of statutory disqualification of a— 479
JURISDICTION,
Consent cannot give— 460
Consent cannot give—over subject-matter 462
Consent cannot give—over appeals 463
Estoppel from plea of— 466
Waiver of defect of other— 470
Waiver of defect of local— 473
Waiver of defect of—over person 476
Waiver of personal exemption from— 476
Waiver of defect of personal—by appearance 483
Pleading after objection to—not a waiver of its absence ... 486
Waiver of conditions of exercise of civil— 498
Waiver of conditions of exercise of criminal— 504
JURY,
Waiver of right of trial by— 530
Waiver of the number of—men 531
Waiver of formal rules for empanelling— 536
JUSTIFICATION,
Acts done for benefit of person giving consent to find—must be done in good faith 423
Extent of—by consent in case of acts for benefit of person giving consent 424
What acts causing harm find—when done without consent. 425
Consent is not—of acts constituting public offences... ... 431
Consent is not—of acts constituting other offences irrespective of harm caused by them to person giving consent 432
KIDNAPPING, Consent in— 361

KNOWLEDGE,
No consent to an act without—thereof 19
—of attributes of an act how far necessary to consent ... 20
Consent to an act does not involve—of its non-essential incidents 28
—of character of an act not necessary for consent to it ... 30

PAGE

KNOWLEDGE—*continued.*
No consent if mind incapable of— 32
No consent where mind is incapable of operation required for— 32
Consent must have come to the—of the doer of the act ... 231
—by a person acting on consent of its having been caused by fear 239
—by person acting on consent of its having been caused by misconception 239
Consent by an intoxicated person does not excuse criminality of act done with a—of the intoxication 337

LARCENY,
Effect of mistake on consent in—cases 250
How far receiving of a thing given by mistake as to motive is— 262
No—if person receiving shared giver's mistake at time of receipt 267
No—if person receiving was not aware of giver's mistake at time of receipt 273
Consent in— 344

LAW,
Effect of mistake of—on consent, *vide mistake.*
Mistake of—distinguished from mistake of fact 93
Action of Courts of Equity in regard to mistake of— ... 98
Mistake of well-settled principles of— 103
Recovery of money paid under mistake of— 113

LIABILITY,
Consent as a ground of exemption from criminal— ... 369
Principle of exemption from—on ground of consent ... 371
Restriction of the rule as to exemption from—on the ground of consent 372
Restriction of the exemption from—in regard to the age ... 372
Restriction of the exemption from—in regard to the nature of harm caused 373
Consent as a ground for mitigation of— 434

LIFE,
Harm to one's—among ancients 375
Influence of church and state on harm to one's— 376
Immunity from punishment of taking one's—*vide suicide.*

LIMITATION ACT, INDIAN, S. 4 500

LOCAL, Waiver of defect of—jurisdiction 473

Materia, Error in— 80

MATRIMONIAL CAUSES ACT 1857, S. 31 364

MINORITY, Legal— 134
—as a ground of incapacity to contract 136
Substitution of—for force in rape 307

PAGE

MINORS,
Statutory protection of—in regard to rape 306
Sexual intercourse with—with consent punishable even outside England 309
Consent of—to sexual intercourse not consent 310
Consent immaterial in case of an attempt to commit rape on— 311
Effect of consent of—on indecent assault in common law ... 312
Special legislation to make indecent assault against—an offence in spite of consent 316
Attempted extension by analogy of rules concerning—to persons of unsound mind 325

MISCARRIAGE, Consent to— 432

MISCONCEPTION, Consent caused by—of fact is not consent in criminal law... 237
Knowledge by a person acting on consent of its having been caused by— 239
Scope of— 248

MISTAKE,
General effect of—on consent 65
—distinguished from error and ignorance 66
—even of one party may prevent formation of contract ... 68
Nature of facts—of which may affect consent 69
—as to the nature of transaction 72
—as to parties to the contract 75
—as to person 76
—as to individuality of a party 76
—as to personal quality of a party 76
—as to legal quality of a party 77
—as to identity of the object of contract 77
—as to existence of the object of contract 78
—as to continuance of proprietory right in object of contract 79
—as to substance of the object of contract 80
—as to substance in English law 82
—as to the nature or fundamental qualities of subject-matter 48
—as to quantity 87
—as to motives for the contract 87
Effect on consent of—of law 90
—of law of a foreign country is a —of fact 91
—of law distinguished from—of fact... 93
—of law 95
—as to existence of legal title or right 96
Action of courts of equity in regard to—of law 98
—as to legal effect or construction of documents 101
—of well-settled principles of law 103

PAGE

MISTAKE—*continued.*

Effect of—of law in Europe 106
Effect of—on transfer of ownership 108
Effect of—on transfer of ownership in case of non-specific chattels 109
Effect of—on transfer of ownership in case of specific chattels 110
Recovery of a thing given under— 113
Unconscientiousness of retaining money paid under— ... 116
Negligence does not interfere with recovery of a thing given under—of fact 115
Effect of—on transfer of rightful possession... 123
Effect of—on consent in English criminal law 249
Effect of—on consent in larceny cases 250
—as to identity of person 257
Delivery by an agent to a wrong person by— 253
—as to thing given 258
—has no effect on transfer of mere possession 128
—as to motive confused with—as to identity 260
How far receiving of a thing given by—as to motive is larceny 262
No larceny if person receiving shared giver's—at time of receipt 267
No larceny if person receiving was not aware of giver's—at time of receipt 273

MITIGATION,

Consent as a—of liability 434
Consent as a ground for—of liability... 434
Consent as a ground of—in case of homicide 438
Homicide in duel is a—of offence of murder in India ... 444
Consent is ground of—of punishment in case of bodily injuries 457
Even approval not amounting to consent is a—of punishment. 459

MOTIVES,

Mistake as to the—for the contract 87
Effect of consent not affected by—of its giving 228
Mistake as to—confused with mistake as to identity ... 260
How far receiving of a thing given by mistake as to—is larceny 262

MURDER,

Abetment of suicide distinguished from— 391
Objections to the treatment of homicide by consent as— ... 395
How far homicide in a duel is— 402
Homicide in a duel is a mitigation of offence of—in India ... 444
Unsatisfactory effects of treating homicide in a duel as— ... 445
Attempts in English law to reduce homicide in a duel from— 446
General concensus against treating—in a duel as— ... 448
Homicide in a premeditated fight between armed factions is— 450

PAGE

NEGATIVE, Application of rule of *onus probandi* as to person alleging the— 542

NEGLIGENCE, does not interfere with recovery of a thing given under mistake of fact 115

NEGOTIABLE INSTRUMENTS, Mistake as to nature of transaction of— 73

NON-CONTRACT, Consent in—law 22
Consent may be implied in—law 149

NON-PREVENTION, Consent not implied from— 176

OBJECT,
Mistake as to the identity of the—of contract 77
Mistake as to the existence of the—of contract 78
Mistake as to the substance of the—of contract 80
Error concerning essential quality of—of agreement ... 84
Necessity of absence of consent must be determined by the —of the offence 344

OFFENCES, Absence of consent expressly made essential of some— 14
Consent is not justification of acts constituting public— ... 431
Consent is not justification of acts constituting other— irrespective of harm caused by them to person giving consent 432
—against the Person Act (English), 1861 306
S. 49 291
52 311
53 295
56 294

ONEROUS CONTRACTS, In—consideration of the person not a motive 76

Onus Probandi, as to consent 539
—as to absence of consent when essential for an offence ... 539
Application of rule of—as to person alleging the affirmative 541
Application of rule of—as to person alleging the negative 542

OPERATION, Negative—of consent 340

OPPORTUNITY, Consent to an act not implied by creation of— for it 183

Ostativa, Error in— 77

OWNERSHIP,
Effect of mistake on transfer of— 108
Transfer of—in case of non-specific chattels 109
Transfer of—in case of specific articles 110

PARTIES, Mistake as to the—to the contract 75
Personality of—how far essential to contract 75

PAGE

PENAL CODE, BELGIC,
Art. 348 458
350 458
430 449

PENAL CODE, CALIFORNIA,
S. 220 314
261 ... ... 27, 246, 288, 314, 331

PENAL CODE, DANISH,
S. 196 436

PENAL CODE, FRENCH,
Art. 321 395
322 395
327 395
331 ... ... 318, 327, 352, 356
336 ... ... 365, 366, 367
337 ... ... 366, 367
338 ... ... 366, 367
354 ... ... 295, 361
356 362
379 258
393 303

PENAL CODE, GERMAN,
Para. 142... ... ... 409, 412, 413, 414, 457
172... 368
176... 140
179... 141
206... 449
207... 449
216... ... ... 394, 413, 414, 436
218... 458
223... ... ... 412, 414
224... ... ... 412, 413
225... ... ... 412, 414
236... 196
237... ... ... 196, 200
239... 357
240... ... ... 285, 334
242... 346

PENAL CODE, HOLLAND, S. 293 436

PENAL CODE, HUNGARY, S. 282 436

PENAL CODE, INDIAN,
S. 30 141
31 141
32 203
85 339
86 339

PENAL CODE, INDIAN, *continued.* PAGE

S. 87...15, 150, 192, 211, 321, 372, 373, 407, 416, 421, 422, 428, 431, 454
88 ...20, 150, 192, 372, 406, 423, 424, 428, 431
89 ...15, 150, 372, 373, 423, 426, 427, 428, 429
90 ... ... 142, 372, 305, 309, 311, 338, 441
91 ... ... 431, 432
92 ... ... 15, 423, 429
92 Expl. 406, 423
116 178
127 506
172 505
188 505
193 505
194 505
195 505
196 505
199 505
200 505
205 505
206 505
207 505
208 505
209 505
210 505
211 505
228 505
300 Excep. 4 ... ... 450, 451
300 Excep. 5 15, 248, 405, 419, 438, 450, 451, 452, 455
312 458
313 458
314 15
339 357
340 357
343 358
344 358
345 358
346 358
347 358
348 358
354 238
360 14
361 ... ...14, 223
362 294
368 358
370 359
374 358
375 ... ... 14, 142, 195
377 238
378 ... ... 14, 151, 227

PAGE

PENAL CODE, INDIAN, *continued.*
S. 379 178
390 361
415 297
463 506
471 506
475 506
476 506
493 142
496 142
497 14
498 358
503 360

PENAL CODE, ITALIAN (*Codice Penale*)
Art. 239 449
243 449
340 295
341 ... ... 295, 362
356 367
357 368
358 367
370 385
383 459
384 459
402 14
404 303

PENAL CODE, MINNESOTA, Art. 245 317

PENAL CODE, NEW YORK,
Art. 23 335
174 384
175 388
176 388
178 384
207 408
208 408
278 ... ... 27, 195, 246
278 (4) 338
278 (5) 310

PENAL CODE, SAXONY, Art. 272 226

PENAL CODE, SPANISH,
Art. 335 385
350 449
359 367
360 218
363 283
368 363
369 363
399 ... ... 223, 459

PAGE

PENAL CODE, SPANISH, *continued.*
Art. 410 363
421 436
431 303
432 303
433 303
437 346

PENSIONS ACT, S. 4... 499

PERFORMANCE, Impossibility of—of contract prevents creation of contract 79

PERSON,
Mistake as to— 76
Mistake as to the identity of— 257
Delivery by an agent to a wrong—by mistake 253
Waiver of defect of jurisdiction over— 476

PERSONALITY, of parties how far essential to contract 75

PERSONATION, Under common law no rape in—cases 276

PHYSICIAN, Profession of—as incapacity to contract 135

PLEADING, after objection to jurisdiction not a waiver of its absence 486

POSSESSION,
Effect of mistake on transfer of rightful— 123
Rightful—distinguished from— 124
—may be transferred by mere physical delivery ... 126
Mistake has no effect on transfer of mere— 128

PREMEDITATED, homicide in a—fight between armed factions is murder... 450

PRESIDENCY SMALL CAUSE COURTS ACT,
S. 20 460
69 502

PROCEDURE,
Waiver of rights in matters of— 508
Waiver of ordinary forms of— 520

PROCEEDINGS,
Right of waiver unlimited in civil— 510
right of waiver limited in criminal— 513
Waiver of rights in criminal— 514
Accused may bind himself by agreement in criminal— ... 524

PROCESS, Waiver of irregularity of initiative—in criminal proceedings 494

PROFESSION, of a barrister-at-law or physician as incapacity to contract 135

PROPERTY, Consent in other offences against— 347

PROSECUTION, Threats of—may constitute duress 53

PUBLIC PEACE, Consent in assault in disturbance of— 353

PAGE

PUNISHMENT,
Consent is ground of mitigation of—in case of bodily injuries 457
Even approval not amounting to consent is a mitigation of— 459

QUALITY, Error concerning essential—of object of agreement 84

QUANTITY, Mistake as to—... 87

RAPE,
Sexual intercourse with unconscious female is— 25
Under common law no—in personation cases 276
Cases against conviction for—often turned on supposed necessity of force for that offence... 280
Consent obtained by fraud negatives—chiefly under special legislation 288
Statutory protection of minors in regard to— 306
Substitution of minority for force in— 307
Consent immaterial in case of an attempt to commit—on minors. 311
Sexual intercourse with a female by drugging her into intoxication is not—though punished as such 334
Consent in — 349
Evidence in—cases of female's prior connection with the accused 544
Evidence of female's character for unchastity on charge of— 545

RECOVERY, of a thing given under mistake 113

RESTRICTION, of the exemption from liability in regard to the age 372
—on guardians' power of consent 527

RIGHT, Mistake as to the existence of legal title or— 96

RISKS,
Doctrine of obvious—in England 166
Doctrine of obvious—in the United States 169
Exact character of the voluntariness of the assumption of— 172
Taking—of harm contrasted with consent to suffer harm... 417

Sati, Burning the—is only culpable homicide 443

SERVANT, Possession of a— 127

SLAVERY, Consent in— 359

SOLICITING, Consent to an act implied by—a person to do it ... 187

SPIRITUAL, Effect of—force on consent 339

STAMP ACT, INDIAN, S. 69 505

SUBJECT-MATTER, Mistake as to the nature or fundamental qualities of— 84
Consent cannot give jurisdiction over— 462

PAGE

SUBSTANCE,
Mistake as to the—of the object of contract 80
Mistake as to the—in English law 82

SUBSTANTIA, Error in— 80

STATUTE,
3 Edw. I., c. 13... ... ... 193, 306
13 Edw. I., c. 34... ... ... 193, 219
33 Hen. VIII., c. 1 139
13 Eliz., c. 5 64
18 Eliz., c. 7 306
27 Eliz., c. 4 64
29 Car. II., c. 7 204
6 and 7, Wm. III 542
9 George IV., c. 31, s. 17 306
6 and 7 Wm. IV., c. 65, s. 9 497
11 and 12 Vict., c. 43, s. 1 494
12 and 13 Vict., c. 76, s. 1 291
24 and 25 Vict., c. 97, s. 62 494
24 and 25 Vict., c. 100—*vide* Offences against the Person Act.
3 and 35 Vict., c. 87,—*vide* Sunday Observance Prosecution Act, 1871.
48 and 49 Vict., c. 69, ss. 4, and 5 311
c. 94, ss. 3 and 4 306
42 and 43 Vict., c. 30, s. 10 497
43 and 44 Vict., c. 45 317
45 and 46 Vict., c. 61, s. 62 2
48 and 49 Vict., c. 69—*vide* Criminal Law Amendment Act, 1885.
51 and 52 Vict., c. 43—*vide* County Courts Act, 1888.
Statute of Westminster I.—*vide* Statute 3 Edw. I., c. 13.
Do. II. do. 13 Edw. I., c. 34.

SUICIDE, Immunity of punishment of— 377
—not an offence as it does not contemplate injury to any rights 378
—not punishable as indicative of unsoundness of mind at the time of its commission 379
Inadvisability of punishing— 380
—in English law 383
Penality of attempt of— 383
Penality of abetment of— 385
Abetment of— in English law 387
Attempt and abetment of—punishable in India 388
Abetment of—distinguished from murder 391
Distinction between abetment of—and homicide of consenting person ignored in England 389

SUNDAY OBSERVANCE PROSECUTION ACT, 1871, S. 1 505

PAGE

SURGICAL OPERATION, Sexual intercourse under pretext of—is rape 275

THEFT, Absence of consent essence of— 344
How far consent obtained by fraud is consent in— ... 297

THING, Mistake as to—given 258
How far receiving a—given by mistake as to motive is larceny 262

THREATS, Nature of—constituting duress 38
—of prosecution may constitute duress 53

TITLE, Mistake as to the existence of legal—or right 96

TORTS, Operation of consent on— 3
Consent distinguished from free consent in— 137
Recognition in law of—of the implied consent to consequences 164

TRAPS, Consent to an act not implied by providing facilities for it by laying— 179

TRIAL, Waiver of right of—by jury 530

UNCHASTITY, Evidence of female's character for—on charge of rape 545
Evidence may be given of individual acts of—with persons other than the accused 546

UNCONSCIOUS, No consent of person while— 25
Sexual intercourse with—female is rape 25

UNDUE INFLUENCE, as affecting freedom of consent 56

UNSOUNDNESS OF MIND, Common law did not recognize—as disqualification of consent 321
Attempted extension by analogy of rules concerning minority to 325
Statutory legislation for the protection of persons of— ... 327
Suicide not punishable as indicative of—at the time of its commission 379

VOIDABLE, Absence of free and fair consent makes contract only— 61

WAIVER, of defect of other jurisdiction 470
—of defect of local jurisdiction 473
—of defect of jurisdiction over person 476
—of personal exemption from jurisdiction 476
—of disqualification of a Judge at common law 477
No—of statutory disqualification of a Judge 479
—of defect of personal jurisdiction by appearance 483
Pleading after objection to jurisdiction not a—of its absence 486
—of irregularities in initiating proceedings 489

PAGE

WAIVER—*continued.*

—of the irregularity of the first institution of proceedings in a court not having jurisdiction 491
—of irregularity of initiative process in criminal proceedings 494
—of conditions of exercise of civil jurisdiction 498
—of conditions of exercise of criminal jurisdiction ... 504
—of rights in matters of procedure 508
Right of—unlimited in civil proceedings 510
—limited in criminal proceedings 513
—of rights in criminal proceedings 514
—of accused's right of not being asked to criminate himself 517
—of ordinary forms of procedure 520
—not allowed where prejudicial to accused 527
—of incompetency of evidence 528
—of right of trial by jury 530
—of the number of jurymen 531
—of formal rules for empanelling jury 536

WILL, Consent distinguished from— 192

BY THE SAME AUTHOR.

LAW OF RES JUDICATA;

INCLUDING THE DOCTRINES OF

JURISDICTION, BAR BY SUIT, LIS PENDENS, MERGER, &c.

About 900 pages, Royal 8vo.

EXTRACTS FROM SELECT LETTERS, LAW JOURNALS, &c.

The Right Honorable *Lord Herschell*, Lord Chancellor of England—I am much honoured by your wish to dedicate your work to me, and have much pleasure in acceding to your request.

The Right Honorable *Lord Macnaghten*, of the Judicial Committee of Her Majesty's Privy Council—Permit me to congratulate you on the *very successful manner* in which you have accomplished your undertaking, and to say that I *greatly admire* the *learning* and *research* the work displays.

The Right Honorable *Lord Hobhouse*, of the Judicial Committee of Her Majesty's Privy Council—A *valuable* addition to our law treatises.

The Right Honorable *Sir Richard Couch*, of the Judicial Committee of Her Majesty's Privy Council—A *valuable* work.

Whitley Stokes, Esq., C. S. I., C. I. E., Late Legal Member of the Viceroy's Council—*Valuable* and *interesting* book.

Sir John Scott, Judicial Adviser to H. H. the Khedive—Excellent work on *Res Judicata*. I have *tested* it in *various* ways and found it *most sound*. I wish we had in Egypt a few native lawyers such as India has produced.

The Honorable *Sir Alexander Miller, Kt., Q. C.*, Legal Member of the Viceroy's Council—The treatise on Res Judicata by Rai Hukm Chand, M. A., seems to me to have been prepared with great care, and is an almost *exhaustive reference to all the extant authorities* on a somewhat recondite subject. In particular I have been very much struck with the familiarity shown by the learned author with the American decisions. The learned author has collected and digested a vast mass of these judgments, and presented the result in a *clear* and *interesting form*. Some idea of the care and labour bestowed upon the work may be formed from the fact that the list of cases referred to fills of itself 61 octavo pages of closely printed small type.

The Honorable *Sir Arthur Collins, Kt., Q. C.*, Chief Justice, Madras High Court—*Learned and well arranged* treatise on Res Judicata—*a most valuable and useful work.*

The Honorable Mr. Lyttelton H. Bayley, Acting Chief Justice, Bombay High Court—A *valuable* work.

The Honorable Mr. C. A. Roe, Senior Judge, Punjab Chief Court—A *very valuable* book of reference.

The Honorable Mr. Woodburn, C. S. I., Chief Commissioner, Central Provinces—A treatise of *great learning* and *research.*

I. W. Crosthwaite, Esq., Governor-General's Agent for Central India—The subject is one of much interest, and you appear to have treated it with much care and ability. Your work will, I am sure, be *very useful.*

Hon. Melville W. Fuller, Chief Justice, Supreme Court, United States.—Valuable work on Res Judicata which I have found exceedingly interesting. You may well be congratulated on your *success in accomplishing* a main object you had in view in its preparation,—that of showing practically the great advantage to the administration of justice, of the knowledge of contemporary laws and decisions in other countries.

Judge John F. Dillon, Esq., Author of Commentaries on the Law of Municipal Corporations, and of the Laws and Jurisprudence of England and America—I have already read the preface and some parts of the text of the work—enough to satisfy me of its *great learning* and *intrinsic value.* It is my purpose to read the work consecutively at my earliest leisure. Allow me to say that I am *amazed* at the *marvellous* learning and industry which you have brought to this subject.

Judge John F. Dillon, Esq.—I recently delivered an Address before the State Bar Association of New York at Albany. While there I met the accomplished Librarian of the New York State Law Library, who was equally astonished and pleased that the technical subject of Res Judicata as it exists in the English law should have been so ably and learnedly expounded by a native of India.

H. C. Black, Esq., Author of Treatises on "The Law of Judgments," &c.—I cannot refrain from expressing to you, in a more direct and personal manner, my *high* appreciation of the *many excellencies* of the work with which I have been favoured, and my hope that you may be encouraged to make further contributions to the literature of the law, to its advancement, I doubt not, no less than to your own credit. That you and I—the one a representative of one of the very oldest civilizations of the globe, the other a product of almost its latest,—separated, moreover, by half the circuit of the earth—should both have travelled the by-ways of this difficult subject, and should, in the end, agree so nearly in the results of our labours, is surely a circumstance deserving of mention between us. I beg, therefore, that you will accept my congratulations upon your *very valuable* work, which shall occupy an *honoured* place in my library, as also the assurance of my distinguished regard.

S. B. Griswold, Esq., Law Librarian, New York State Library—I have had the pleasure recently of adding to this Library your work on Res Judicata. I believe that no law book has come under my observation during the 27 years of my service as Librarian of the Law Department of the Library which has commanded my attention to as great a degree as this. The book not only is well written and the subject thoroughly and broadly treated, but the remarkable feature disclosed by the work is that the author should be so familiar with American jurisprudence. You cite the American authorities as freely and familiarly as those of India and Great Britain, and have produced a work which can be used by American lawyers in American Courts. How you were able to do this while living in a country so remote from our own, in which I had supposed that there were no lawyers who took the slightest interest in American Law, I am not able to understand. I am certain that *no English lawyer has yet shown an equal degree of conversance with our law and authorities.* Judge John F. Dillon, of N. Y. City, than whom a more accomplished Jurist does not live in America, shares with me the views herein expressed. I had quite a chat with him a few days ago concerning your book. I have just received a letter from him in which he states that you are preparing a work on Fraud, also that you have some thought of coming to this country on a tour of observation. I sincerely hope that you will come and that I shall have the pleasure of welcoming you to this Law Library which is one of the four largest in the world, now having 54,000 volumes on its shelves.

Frank C. Smith, Esq., Editor, *American Lawyer.*—The work is one of *particular* value to practitioners, but especially to scientific students of law. I wish to commend most heartily the spirit and method which characterizes your work. I believe the time is fast approaching when the standard works of law will deal more largely with Comparative Jurisprudence than has been the case in the past. Your book is an *admirable* pioneer in this coming field of legal literature.

Preface to Mr. Van Fleet's treatise on *Res Judicata*, dated September 1895.—When the manuscript of the present work was about completed, I received a book published at Delhi, India, entitled "The Law of Res Judicata," by Hukm Chand. I am indebted to this excellent treatise for *valuable additions* to the present work. As I had no access to the Indian reports, I have quoted Mr. Chand's statements as to what these cases decided, always giving him proper credit*. The ability and learning of the author will be manifest to those who read the quotations from Mr. Chand's book.

The Law Times, London, 28th July 1894.—This is a work disclosing great industry and learning combined with a very clear apprehension of legal principles. . . . . Mr. Chand demonstrates most clearly the advantage gained by extended study in a single branch of law, and his present treatise will be found to be exhaustive of his subjects.

* In the first volume alone, out of 624 pages as many as 135 are taken bodily from Mr. Chand's work.

It is curious to see the principles of this branch of the law supported by citations from American text-workers and Judges, and Judges in India and England. But here they are, and therefore *lighted up as* we suppose *no legal principles have been illuminated before.* We have *no treatise in England* dealing with this subject. *None*, we venture to say, *can hope to excel Mr. Chand's work.* The true nature of *Res Judicata* is well defined—its difference from estoppel with which it is often confounded. Questions of jurisdiction, of persons affected, with ample quotations from all possible authorities, find their setting here. No portion can be selected which is better than the rest, *all is marked by thoroughness and appreciation.* We need not say we recommend the volume to all who desire to possess an exhaustive treatise upon a very important subject.

The Law Journal, London, 7th July 1894.—The work is a *remarkable* monument of industry and research. It appears to be a book of which *any school of law might justly be proud.* Its statements are well and clearly expressed, and its arrangement and plan are logical and comprehensive. . . . . We congratulate Mr. Hukm Chand on having *effectively* filled a vacant place in the shelves of our law libraries.

The Law Quarterly Review, July 1894.—This is a remarkable book. . . . . It is a stupendous book. . . . . The Author claims that he has referred in the text to four thousand cases, and to all the American and English text-books on the subject. He also makes copious references to French authors and to writers on the Civil Law. As far as can be gathered from a cursory inspection, Mr. Hukm Chand seems to have really done all that he claims to have done. His authorities seem, all of them, to have been carefully selected and judiciously compared. Mr. Hukm Chand writes excellent English. He rarely makes a slip; and his language is clear. He must also have a good knowledge of Latin and French. The book impresses one favourably: his quotations are apt, his arrangement is good; and his own remarks are sensible.

The Law Notes, December 1894.— This is an enormous and exhaustive work. It deals most thoroughly with subjects which in ordinary books are not sufficiently dealt with, and is a perfect mine of decisions on the doctrine it touches. We have but tasted at this fountain-head of learning. We congratulate the author on having compiled such a monumental work.

The Juridical Review, January 1895.—This work is something of a novelty in our legal literature. The chapters on jurisdiction and foreign judgments are of great general interest, presenting, as they do, a very complete statement of the English and American case law on these subjects. As such they will afford valuable aid to the student of international private law. The citation of authority appears to be fully up to date. Apart from the legal profession in India, for whom

it is principally intended, those elsewhere who have occasion to consult the work will no doubt find the hope of the author to be realised, that, "as a repertory of a mass of legal learning on the subjects treated in it, it will not fail to be useful in any country."

Law Book News, St. Paul, Minn. United States, October 1894.—The author of this learned treatise, Rai Hukm Chand, M. A., is the Chief Judge of the City Court of Hyderabad, India. Deeply versed in the learning of the English Courts and the traditions of English Jurisprudence as well as in that of his own country, he adds to these qualifications a *minute* and *scholarly* acquaintance with *several other systems of law,* ancient and modern, and a fluent mastery of several languages. He brings to bear upon the very difficult and intricate subject which he has chosen to treat the intellectual subtlety characteristic of his race, and also a *breadth of view, a capacity for generalization, and a faculty for patient and exhaustive research,* which were less to be expected. The work before us embodies what is probably the *most thorough* examination of the subject of Res Judicata which has yet appeared in any language. . . . . The motive (we might almost say the inspiration) which has mainly guided the author in the preparation of this work, and which has influenced his views on many of its most recondite topics, is his strong hope that the jurisprudence of the various civilized countries of the world, in regard to the great principles of the law, may ultimately be brought into some semblance of harmony, and a strong conviction of the assistance which the courts, and even the legislatures, of each country may expect to derive from a comprehensive acquaintance with the systems in force in other jurisdictions than their own. That these views are sound and wise cannot well be denied. Still less can it be doubted that their general recognition in this country would be productive of much advantage to our jurisprudence. . . . We cannot but think that the rational development of jurisprudence in this country would be much furthered by the general study by our courts and lawyers of such works as this of Hukm Chand's. Here he has brought together, in reasonable compass, all the learning of the English, Indian, American and British Colonial Courts, on a subject which, even at this day, bristles with difficulties and disputed points. . . . . The doctrines of the writer are sound and sensible, and *founded upon the very best authorities extant.* The reasoning, moreover, is generally clear and convincing, the treatment is exhaustive, and the style is easy and lucid. As the book is mainly intended for the courts and profession in the author's own country, we find, as we should expect, that the citations to the Indian reports are very complete. But he has also done full justice to the decisions of the various courts of England, and has not neglected those of England's other Colonies and Dependencies. But the most surprising feature is the author's *extraordinary* familiarity with the American cases. Without making an arithmetical calculation, we venture to say that all the most important authorities on the subject of Res Judicata, from the Federal and the State Courts, will be found quoted or referred to in this volume. Textwriters, too, of all countries and times, have lent their aid. The continental jurists,

such as Pothier, Lacombe, and Moreau, are frequently referred to, and on almost every page we find an extract from one of the standard American treatises, such as Story on the Conflict of Laws, Bigelow on Estoppel, Freeman on Judgments, or Van Fleet on Collateral Attack. With this great wealth of material at his command, with a broad and discriminating intelligence, and with patience to unravel all the intricacies of the subject, we should expect the jurist to produce a really valuable contribution to the literature of the law; and this expectation, in our judgment, Hukm Chand has *fully* realized. By H. Campbell Black, Esquire, Author of Treatises on "The law of Judgments," "Constitutional Prohibitions," "Tax-Titles," &c.

The American Law Register and Review, January 1895.—This formidable work, which lies before us for review, is a tribute and further recognition of this grand triumphal march which has circled the world and tells us anew how in these great Anglo-Saxon Empires, over which float the Cross of St. George and the Stars and Stripes, there is a still greater force than the British Oak at work to protect against trespass *vi et armis*. Thousands of jurists and judges are applying the same principles, drinking from the same fountains, solving the same problems, working out the evolution of law and equity along the same lines, with the same underlying aim and thought in view, and obedient to the same jurisprudence. Recognizing this common ancestry and common foundation of our common law, this learned Indian jurist expresses in his preface the conviction "That courts, and, to some extent, even the Legislatures of one country, do not derive that assistance from the deliberations and declarations of eminent jurists and judges of other countries to which their high judicial value entitles them; and lawyers in every country often devote their time and energies to the discussion and determination of questions that have been already most fully debated and elucidated in others. Enactments are thus sometimes made and cases frequently disposed of in one country, in accordance with principles which are there regarded as indisputable, but which are not only in direct conflict with those recognized and acted upon elsewhere, but have themselves, in some instances, after a long trial, been found inconsistent with the proper administration of justice, and deliberately abrogated or tacitly relinquished as unsound." It has been thought proper to quote freely from these two great writers (the other being Judge John F. Dillon) who seem to clasp hands across the seas, because they indicate and vindicate the broad spirit of philosophy with which our friend, writing "under Indian skies," has approached a branch of the law which is to-day of equal import at the base of the Rocky and Himalaya mountains. I find it in my heart to wish that the Law Register would give the space necessary for a reprint of the entire preface, so much does it commend itself as a convincing monograph illustrating "the great advantage accruing to the Municipal law of every country, both in regard to its development and practical application, by a familiar acquaintance on the part of those concerned in its administration with the corresponding principles recognized and acted upon in other countries, an advantage not restricted to any particular branch of law, and extending even to the codified branches

of it." Such a spirit, coupled with *an infinite capacity of research*, reinforced by a *truly judicial ability* to co-ordinate, marshall and weigh painfully acquired knowledge so that the resulting evolution may be entitled to be christened *wisdom*, may be fairly attributed as the endowment which our learned author has brought to the consideration of the doctrine of *res judicata* in its application to civil proceedings, and which, as he says, he has selected "to form the subject of his work on account of its practical importance and unusual difficulty." The decisions of England, India and America are all laid under tribute to elucidate the principles laid down, and the French and Roman jurists have not been overlooked in tracing these principles to their source. A fairly full index contributes to the utility of the book as a work of reference. The style is *clear, concise* and *attractive*, so far as it belongs to the author, although the enunciation of principles often has been left to the *ipsissima verba* of the judges or lawyers from whom he cites constantly and copiously. While the book is not likely to be thumbed over by the every-day case law practitioner, it is one that commends itself to the lawyer who believes that law should be studied as a science as well as practised as an art. It is certainly a *most valuable contribution* to legal literature.—Edward P. Allinson.

Harvard Law Review, November 1894.—A principal object of the author of this interesting treatise is, to show the great advantage to the administration of justice, of the knowledge of contemporary laws and decisions in other countries. This object has been *most* faithfully and *successfully* carried out. An enormous mass of authority has been intelligently gathered from the reports and from approved text-writers of England and the United States, as well as from the states of British India; and the advantage thereby gained is surely no slight one. . . . . The book is one to be cordially welcomed; and one that may well find a wide use in our country. The mere fact that the decisions of three great nations are brought together is enough to secure the work that place in legal literature which is due to *useful originality and broad learning*. But besides this, it gives to the American lawyer authorities equal to that contained in any work on the subject by an author of his own country, and to the student of law it presents a fascinating picture of the application of the Common Law to new and strange circumstances.

Law Book News, St. Paul Minn. United States, August 1894. A COSMOPOLITAN JURIST IN INDIA—This book is of more than ordinary interest because of the *extraordinary* breadth of learning shown by the author. The volume indeed shows a wide range of study and research. Besides the familiarity which is to be expected with the Indian, British and Colonial Reports, the learned author displays a knowledge of Continental jurisprudence and American Case Law that would put English lawyers and law-writers to the blush, if they considered ignorance of American law a thing to blush for. His pages fairly bristle with citations and quotations of American cases, including recent decisions from the publications of the National Re-

porter System. He seems to have followed a *truly scientific method* in the treatment of his subject, and to have made use of matter drawn from the *entire* field of International jurisprudence.

The American Law Review, November 1894.—We have received a most learned and exhaustive work on the *Law of Res Adjudicata*, written by Hon. Hukm Chand, M.A. The learned author shows singular insight, for a foreigner, into our complicated Federal and State Systems and the relation of the two systems to each other. Judge Dillon, in his letter to the publisher of Albany Law Journal, states that Judge Chand has furnished a work "in which this technical and recondite subject is treated with exhaustive learning:" a statement in which we are fully prepared to concur.

The University Law Review, January 1895 —The extension of the domain of Anglo-American law as an interesting illustration in this volume of nearly eight hundred pages which comes to us from Delhi. American decisions abound in the citations, among English and Indian authorities; and the student of general jurisprudence will find much which will aid him in an investigation into the essential elements upon which the quieting effect of a judicial decision upon a controversy depends . . . . It appears to us that the work of Mr. Chand is a very valuable exposition of the present condition of the law, and useful here in any thorough research into the principle of Res Judicata.

The Kansas City Star, April 7th, 1895.— Lawyers, who visit the State Library, are very much interested in a new work written in far off India, which J. L. King, the State Librarian, has recently placed on the shelves. It is entitled "A Treatise on Res Judicata," and is the work of Hukm Chand, a native of India, Chief Judge of the City Court of Hyderabad, Deccan. Mr. King's attention was attracted to the work by a review of it from the pen of John F. Dillon in the *Albany Law Journal*. . . . Lawyers say the book is a much needed one, and Judge Dillon, in his review of it, said it ranked high among the law literature of the world.

The Topeka Daily Capital, April 7th, 1895.—A new and valuable Treatise on the subject of Res Judicata has been received at the State Library, the gift of the author, Hukm Chand, Chief Judge of the City Court of Hyderabad, India. The work is the most voluminous now contained in the Library on this particular subject, which is treated exhaustively in all its phases. All the law reports of Great Britain and the United States having any bearing on the question are cited, together with reports and legal publications of other countries, and full references to the decisions.

EXTRACTS FROM INDIAN JOURNALS.

The Madras Law Journal, August 1894.—It will prove a *valuable* addition to the lawyers' shelf. The research of the author is highly praiseworthy. In the learning and comprehensiveness of the book it is much superior to Mr. Broughton's which we have noticed in our

pages before and to the Tagore Lectures of Mr. Caspersz. We can confidently say that *very* few Indian publications in the field of law come up to the level of ability attained by the author.

The Englishman, 22nd August 1894.—One of the *most notable treatises of recent years* is the massive volume on the "Law of Res Judicata" by Rai Hukm Chand, M. A. It is impossible not to admire the courage of the author in attacking a subject of such vastness and complexity, and the briefest examination will suffice to show that he brings to his task the necessary qualities of patient industry, lawyer-like sagacity, and lucid exposition. The work is undertaken with the object of showing that the continental text-books and the decisions of the American and Colonial Courts may form a valuable auxiliary to the literature of the Indian Law Courts. It would be difficult, indeed, to exaggerate the value of a work which would focus the law of *res judicata* of civilised nations. And when the enormous difficulties of the subject are considered, the present treatise must be regarded as *wonderfully comprehensive and exhaustive*. In his first chapter the author deals with the doctrine of *res judicata*, while the various questions connected with the "matter in issue," the "decision" and the "paras" occupy the next three chapters. The subject of the Jurisdiction of Courts are treated at length in three chapters, and in the concluding two chapters we have judgments *in rem* and foreign judgments. To complete the work, the doctrine of bar by suit, of lis pendens, of bar by jointness, of merger and other cognate subjects are discussed in three additional chapters. The literature on these subjects, both in England and India, is very scanty, and the present work will be all the more welcome on that account. At the risk of adding to its size the author has been careful to employ the *ipsissima verba* in the enunciation of important principles, and even in the statement of propositions of law. He has succeeded in collating with the *utmost clearness an extraordinary mass of judgments, and the literary treatment of his subject leaves nothing to be desired.*

The Civil and Military Gazette, 12th January 1895.—The learned author of the treatise before us may well describe the fruit of his labours as "a repertory of a mass of legal learning." It constitutes, in fact, a perfect library in itself, and, comprising, as it does, excerpts from all the more important judgments of the English, Indian and American Courts upon the subject with which it deals, such a storehouse of information cannot but prove to be of the utmost value to the legal practitioner in this country. The bulk of the volume, and the exhaustive character of its contents, may in some wise be gathered from the fact that the mere enumeration of the cases cited or referred to occupies no less a space than 61 pages of closely printed matter. Truly a *magnum opus*, and one of which an author might justly feel proud! But it is not merely upon the size and comprehensiveness of the treatise that we have to compliment Mr. Hukm Chand. The whole arrangement and treatment of the various intricate topics dealt with thoroughly deserve the high praise which the work has received from

such eminent legal authorities as Lord Hobhouse, Sir R. Couch, Sir A. Collins, Sir A. Miller and others. In addition to the volume before us, Mr. Arthur Casperz and Mr. Broughton have each brought out works on the subject. While, however, the two latter have produced excellent text-books, it is no disparagement to them to say that Mr. Hukm Chand stands forth as a giant, piling up, for the benefit of the practical lawyer, an "Ossa upon Pelion and an Olympus upon Ossa" of extracts from judicial decisions, of *dicta* of celebrated judges, and opinions of judicial writers. And, in this connection, we note with pleasure, as evidence of the non-insularity of the author's learning and research, the frequent quotations in their own language from the writings of French jurists. It being impossible within the limits of a brief review to do adequate justice to the treatise before us, it must suffice to point out that, in testing the value of the work, we have failed to discover the omission of references to any important decisions.

The Indian Daily News, 12th June 1894.—Whatever may be Hukm Chand's other qualifications for the task of elucidating this topic, there can be no question that he possesses the very necessary ones of great industry and extensive acquaintance with the literature of the doctrine. The book seems to us to thoroughly deserve the description the author himself gives of it, when he speaks of it as a "repertory of a mass of legal learning," and while we think the book will do far more than fulfil the requirements of the legal practitioners of this country. . . we must admit that, notwithstanding his researches amongst the work of Roman, French and American Jurists, Mr. Hukm Chand appears not to have overlooked the less ambitious, but perhaps not less valuable, efforts of the High Courts of this country towards the elucidation of the doctrine. We have *tested* Mr. Hukm Chand's work in this respect in connection with the application of the rule of Res Judicata to rent suits, and we have found it *fully up to date*. We can, therefore, safely recommend the work to those who seek for the latest ruling on the subject.

The Madras Mail, 8th June 1894.—In Mr. Hukm Chand's volume there are a good many hours of solid literary comfort for members of the profession. In fact, there are about a *thousand big pages* containing a mass of information on a legal topic of the very first importance. The work is dedicated, by permission, to Lord Herschell, and the countenance thus given to it by the Lord High Chancellor of Great Britain, is a sufficient guarantee of its value. Mr. Hukm Chand has evidently devoted himself to his work with the greatest industry. Not the least satisfactory features of his treatise are the elaborate Tables of Contents and Cases and the Index.

The Deccan Budget, 27th April 1894.—One of the main objects of this *magnum opus* is to supply lawyers with an exhaustive, and withal a systematic, commentary on the law of *res judicata* and its cognate doctrines. In doing this the labours of foreign Jurists, text-writers, and Judges have been fully availed of; another main object of the work

being to show practically the advantage, even to the domestic adiministration of justice, of the knowledge of laws and decisions in other countries. There are great difficulties involved in this mode of treatment of the subject, especially as it requires a very large library of foreign works, and an accurate acquaintance with the minutest details of the laws of at least some foreign countries. The Right Honorable Lord Herschell, the Lord Chancellor of Great Britain, has specially, after seeing the greater portion of the work, permitted him to dedicate it to him. The language of his Lordship's letter permitting the dedication shows beyond all doubt that he approves of the object of the work and of the plan of treatment adopted. Mr. Hukm Chand's main object is to induce other lawyers to adopt a similar node of treatment of legal questions in their works, and a similar mode of dealing with them on the Bench and at the Bar. The work is a vast mine of legal learning, much of which is now available for the first time to Indian students. We know that for some years Mr. Hukm Chand has been diligently cultivating the languages of Paris and Berlin in order to be able to consult the great continental jurists in the original.

The Pioneer, 31st August 1895.—We are honestly able to congratulate the learned author on having produced a scholarly and exhaustive work which should be welcomed in every law library. Mr. Hukm Chand has devoted to his subject an amount of labour and research which deserve the very highest praise. The doctrine of *Res Judicata*, though recognised in every civilised country, is not only very vaguely understood, but is also incomplete and often obscure. The task which Mr. Hukm Chand has set himself is to discuss the principles of the law of *Res Judicata*, not merely from an Indian, or even an English point of view, but by collating and examining the corresponding principles recognised and acted upon in all civilised countries in which Roman Municipal law forms the basis of their judicial administration. This implies an amount of labour and research which is simply enormous. In the absence of any definite or recognised Code, it is only natural to suppose that a host of contradictory and conflicting judgments have been passed. It is to meet this want that Mr. Hukm Chand has brought out the present treatise. He first of all gives a general conception of the doctrine of *Res Judicata*, and then presents the law by way of a review of the cases upon a statement of their facts. This necessarily involves an exhaustive examination not only of the jurists of different nations, but also of the rulings of the different Courts. This as regards English, French and especially American cases has been most exhaustively done. Mr. Hukm Chand writes in a clear and easy style, and whilst endeavouring to critically apply the recognised principles avoids in the case of conflicting judgments passing his own opinion. He has adopted a scientific arrangement of the subject under different heads, with the result that he has produced a work invaluable to the student and to the legislator. It is almost impossible to overestimate the value of this treatise to the latter functionary, for it presents in a compact form all the materials necessary for codification. In the meantime, before any steps can be taken

towards codification, it is necessary that this important branch of the law should receive special study, and should form a separate and obligatory course in every lawyer's training and education. For this purpose the present work can be safely recommended as a pioneer on a comparatively new field.