

these elements be wanting, it is not consent. Thus in *Flattery's* case, where she consented to the performance of surgical operation, and under pretence of performing it the prisoner had connexion with her, it was held clearly that she never consented to the sexual connexion; the case was one of rape. So if she consents to her husband having connexion 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 connexion with her, and it is rape. The general principles of the law as to the consent apply to this case. To constitute consent there must be the free exercise of the will of a conscious agent, and therefore if the connexion 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 not consent. These are the true principles of law which govern the case, and which I have always heard laid down by the judges in Ireland; and the cases which contravene this principle I should not be disposed to follow, and they have never been followed in this country."

O'Brien, J., said: "The crime is the invasion of a woman's person without her consent, and I see no real difference between the act of consent and the act being against her will, which is the language of the indictment, though the distinction is taken by Lord Campbell, or between the negation of consent and positive dissent. Whether the act of consent is procured by 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 the concrete, for otherwise the consent in principle would be just like the act of handing money in the dark to a person which was received by another, who would nevertheless in that case be guilty of a crime."

Murphy, J., said: "Where the will does not accompany the act, there is no consent. Every invasion of a man's person or property without consent or will, is against consent and will. A written document is placed before a man, which he reads and

understands, and by signing which he knows that some right or privilege is passing to another—he consents to sign it. Then turning aside for a moment, another document is substituted for that which he had read—believing it to be the same, he signs it. Is he bound by the contents of that which he signed? Has he consented to it? He certainly has not. This woman consented to intercourse with her husband. The accused induces her to believe he is her husband, and so obtains possession of her person. She never consented to this violation of her virtue—counsel for the crown said she did not consent to adultery; this was the act the accused committed. If the accused was not guilty of the crime of rape, which involves an assault on a woman's chastity and virtue, he was guilty of an assault, having done violence to her person by even touching her, without or against her consent; for before he can be held guilty of an assault this must be assumed. But at the same time, it is said he is not guilty of any assault on her virtue because she consented to the act of sexual intercourse. In my opinion, this is not law. If not guilty of the crime of rape, he was not guilty of assault. The accused was guilty of the felonious assault on this woman, just as much as a man, coming behind another and stunning him with a blow, before he was aware even of his presence, would be guilty of an assault causing actual bodily harm."

Bishop lays it down that the act of the prisoner in question is not rape, citing many authorities. 2 Cr. Law, § 1122. Wharton lays down the contrary. 1 Cr. Law, § 561. A recent holding like that in *Queen v. Flattery*, much relied on in the principal case, is in *Pomeroy v. State*, 94 Ind. 96; S. C., 48 Am. Rep. 146; 7 L. N. 278. The question is very much in doubt upon the authorities, but we think the Irish court is right in principle. The woman's consent to intercourse with her husband is not consent to intercourse with another man, and it is barbarous and illogical to hold that it is.—*Albany Law Journal*.

COURT OF APPEAL REGISTER.

MONTREAL, January 15.

Peters & Canada Sugar Refining Co.—Motion for substitution granted.