

the wrongful act itself, all the force which the law demands as an element of the crime."

The evidence tends to show that the appellant, as a physician, informed Rebecca and her mother that the former was suffering from a terrible womb disease, and was losing her mind. If the jury believed, as they might well have done under the evidence, that the appellant, as a physician, obtained possession and control of Rebecca's person, under her mother's command, 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 in hand falls fairly within the doctrine declared in *Queen v. Flattery*, 2 Q. B. D. 410, decided in 1877, and that the appellant was lawfully convicted of the crime of rape. In the case cited, as in this, the defendant professed to give medical and surgical advice for money. The prosecutrix, a girl of nineteen, like the prosecutrix in this case, was 'subject to fits,' and she and her mother consulted the defendant in regard to her case, and informed him of her condition. The defendant, as in this case, made an examination of the person of the prosecutrix, and advised that a surgical operation be performed, and under the pretence of performing it, had carnal connection with her. It was held by the court that the prisoner was guilty of rape. Kelly, C. B., said: "It is plain that the girl only submitted to the defendant's touching her person, in consequence of the fraud and false pretences of the prisoner, and that the only thing that she consented to was the performance of the surgical operation. Up to the time when she and the prisoner went into the room alone, it is clearly found on the case that the only thing contemplated either by the girl or her mother, was the operation which had been advised; sexual connection was never thought of by either of them. And after she was in the room alone with the prisoner, what the case expressly states is that the girl made but feeble resistance, believing that she was being treated medically, and that what was taking place was a surgical operation. In other

words, she submitted to a surgical operation and nothing else. It is said, however, that having regard to the age of the prosecutrix, she must have known the nature of sexual connection. I know of no ground in law for such a proposition. And, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument. The case is, therefore, not within the authority of those cases which have been decided, decisions which I regret, that, where a man by fraud induces a woman to submit to sexual connection, it is not rape." In the same case, Mellor, J., also said: "It is said that submission is equivalent to consent, and that here there was submission. But submission to what? Not to carnal connection. The case is exactly within the words of Wilde, C. J., in *Reg. v. Case*, 1 Den. C. C., at p. 582: 'She consented to one thing, he did another materially different, on which she had been prevented by his fraud, from exercising her judgment.'"

In *People v. Crosswell*, 13 Mich. 427, after citing some decisions both in England and in this country, to the effect that if the woman's consent is obtained by fraud the crime of rape is not committed, Cooley, J., said: "But there are some cases in this country to the contrary, and they seem to us to stand upon much the better reason, and to be more in accordance with the general rules of criminal law. *People v. Medcalf*, 1 Whart. C. C. 378, and note 381, *State v. Shepherd*, 7 Conn. 54. And in England where a medical practitioner had knowledge of the person of a weak-minded patient, on pretence of medical treatment, the offence was held to be rape. *Reg. v. Stanton*, 1 C. & K. 415. The outrage upon the woman, and the injury to society, is just as great in these cases as if actual force had been employed; and we have been unable to satisfy ourselves that the act can be said to be any less against the will of the woman, when her consent is obtained by fraud, than when it is extorted by threats or force."

In the case at bar we are of opinion that the verdict of the jury was fully sustained by the evidence appearing in the record, and that it was not contrary to, but in strict accordance with the law applicable to such evidence. The Court committed no error, therefore, in overruling appellant's motion for a new trial.

Judgment affirmed.