

the appellant is the overruling of his motion for a new trial. In this motion the following causes were assigned by appellant for such new trial: "(1) The verdict is contrary to law. (2) Verdict contrary to evidence. (3) Verdict contrary to law and evidence. (4) Error of law occurring at the trial of the cause, in this, to wit, the Court permitted Rebecca R. Reavis to be examined as a witness on behalf of the State, she being incompetent to testify, for want of mental capacity; and to the allowing her to testify the defendant objected, but the Court overruled the objection.

The record of the cause discloses the following facts: In October, 1881, James Reavis and his wife Margaret, were living on a farm in the eastern part of Gibson county, in this State. Their daughter, Rebecca, was then 22 years of age, large and stout, "but had been affected with epileptic fits since she was a year old, which came oftener and harder the older she got." The natural tendency and effect of these oft-repeated fits of epilepsy were to produce what the appellant himself calls in his motion for a new trial, her "want of mental capacity and imbecility."

On the 8th of October, 1881, in the afternoon, the appellant Pomeroy, in company with one Patterson, went to the farm house of Reavis. Pomeroy was an itinerant doctor, "travelling from place to place," and was an utter stranger to the Reavis family. In a private interview with the parents Pomeroy said to them: "I am a physician, and have heard about the affliction of your daughter. I have bought property at Oakland city, and I am going to build a hospital on it to treat cases like hers, and have already secured one young lady to treat, and have called to see about treating your daughter." Rebecca's parents answered that she had been under the treatment of a good many doctors, none of whom had done her any good. To this Pomeroy replied: "Yes, but the physician is now come who will revive your drooping spirits and cure your daughter." He then asked to see Rebecca, and said in the presence of her mother he would have to examine her, and put his hand up under her clothes for that purpose. She objected

to such an examination, but her mother told her that she must let him examine her. After the examination Pomeroy declared that Rebecca "had a terrible womb disease, and was losing her mind." Her parents then employed him to cure her, and he and his driver stayed all night at Reavis' house. The next morning Pomeroy took Rebecca into a private room, and, while pretending to make a further examination of her person, succeeded in having sexual intercourse with her. She made no outcry at the time, but after Pomeroy had gone, her mother found her crying, and she then complained to her mother that he "had committed an outrage upon her." Shortly afterwards Pomeroy was arrested upon the charge for which he was indicted, tried and convicted in this case.

The bill of exceptions appearing in the record fails to show that appellant objected or excepted, on any ground, to the competency of Rebecca, a witness for the State. Therefore the only question presented is this: is the verdict of the jury sustained by sufficient legal evidence?

The offence of which the appellant was convicted is defined by Sect. 1917, Rev. Stat. 1881: "Whoever unlawfully has carnal knowledge of a woman, forcibly, against her will \*\*\* is guilty of rape," &c. On behalf of the appellant, it is earnestly insisted that the evidence wholly fails to show that he had carnal knowledge of Rebecca Reavis "forcibly, against her will." Whether the carnal knowledge was had forcibly, against her will, or not, would seem to be a question of fact for the jury, rather than of law. We are of opinion, however, that the jury were justified by the evidence in finding, as they must have done, under the instructions of the Court, that the carnal knowledge was had forcibly and against the will of the prosecuting witness. The evidence wholly fails to show that Rebecca ever consented to, or ever 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. Thus in 2 Bishop Crim. Law (7th Ed.) § 1120, it is said: "Whenever there is a carnal connection and no consent in fact, fraudulently obtained or otherwise, there is evidently in