The Legal News.

Vol. VII. AUGUST 30, 1884. No. 35.

THE FRENCH DIVORCE ACT.

The new law, as our readers may have observed, has provided the courts with the semblance of a vast amount of work. Within a fortnight after the measure became law several thousand suits were set down on the cause list in Paris alone. The explanation of this is the fact that all couples who have been judicially separated for more than three years, can now have the decree made absolute as a divorce on a simple application from either of them. As there have been over a hundred thousand judicial separations in France during the last twenty years it is obvious that the number of parties qualified for divorce must be very large, but we presume that these cases will be disposed of without much delay or difficulty.

The law itself differs essentially from that which prevails in England. It goes even further than our own law, and makes it easier to obtain a divorce in France than it is to obtain a judicial separation in this Province. One of the leading features is that the infidelity of the husband is put on the same footing as the misbehaviour of the wife. Further, if a husband or wife is sentenced to a *peine infamante*, *e. g.*, penal servitude or transportation, the consort has simply to prove the conviction in order to obtain a divorce. Besides the ordinary cases of cruelty, habitual drunkenness is now a ground of divorce. So, too, a wife has her remedy where her husband has been guilty of disgraceful conduct, such as cheating at cards, or the more vulgar offence of theft. But, as we have remarked, the law goes even further, and enacts that the fact of a husband or wife "habitually insulting the relatives of the other" is sufficient to support the claim of the aggrieved consort to a divorce. This clause, it is said, has been styled by the Parisians a law "for the protection of mothers-in-law," and it certainly makes that dreaded relative omnipotent to disturb and separate couples at her pleasure.

The procedure is to be that which has been followed hitherto in applications for judicial separation. No special court is created, but the cases are to be tried in the ordinary civil courts by three judges without a jury. Provision is made for an attempt at reconciliation. After a petition has been filed, the parties will be summoned before the presiding judge, who will endeavour to settle the conjugal difficulty, if the case admits of it, and he may even adjourn the hearing for a twelve month where it seems desirable. The provisions of the Act are in some respects so novel and extraordinary that it cannot fail to have an important influence upon society.

A QUESTION OF COSTS.

A case of *Ginger* v. *Beale* is reported in the *Times* (London) of Aug. 12, which exceeds almost anything we have heard in connection with fights for costs. Judgment was obtained against three parties on a bill of exchange. The plaintiff made a claim against Beale, one of them, for £5 10s. for costs, and the amount was disputed. The matter was carried in succession to the Master, then to a Judge in Chambers, then to another Judge in Chambers, and finally the Taxing Master struck off 5s. 8d. Mr. Beale's counsel then applied in the Queen's Bench Division for his costs, as he had succeeded on taxation. Questions of costs are proverbially perplexing, but the following extract from the report shows the spirit in which the English Court dealt with the difficulty:—

Lord Coleridge.—Succeeded after four appeals in striking off 5s. 8d.—something more than a shilling by each proceeding! Well, if there is an Act of Parliament which says that you must have your costs, why, then you shall have them, not otherwise.

Mr. Justice Field.—I offered to settle it at the time, and could have done so in two minutes. But your client insisted on taxation. I thought I had disposed of the case.

Mr. Pitt-Lewis appeared for the plaintiff, but

The Court, without hearing him, dismissed the application, and made the applicant pay all the costs.

COUNTY COURT JUDGES.

It appears that the rank and precedence of Judges of County Courts in England and Wales have not been declared or defined by due authority. To supply the omission a warrant has been issued, which appears in

the *London Gazette* of the 8th instant, in which the rank of these functionaries is defined as follows:—"Know ye, therefore, that in the exercise of Our Royal Prerogative, We do hereby declare Our Royal will and pleasure that in all times hereafter the Judges of County Courts in England and Wales shall be called, known, and addressed by the style and title of 'His Honour' prefixed to the word 'Judge' before their respective names, and shall have Rank and Precedence next after Knights Bachelors."

EXHIBITION OF PORTRAIT.

In the case of *Dumas* v. *Jacquet* the First Chamber of the Civil Tribunal of Paris, by a judgment delivered June 21, enjoined the public exhibition of a picture in which the artist had represented Alexandre Dumas, the novelist, as a "Marchand Juif." The following is the judgment as published in the *Law Journal* (London):—

"Seeing that it is not denied, and that it follows otherwise from the documents in the cause, that Jacquet yielded to a feeling of personal resentment when, in February, 1882, he sent to the exhibition of Water Colour Painters, and publicly exhibited in the galleries of Georges Petit, under the title 'Marchand Juif,' a picture which represented Alexandre Dumas habited in a caftan and keeping a bazaar; that Alexandre Dumas would have been entitled to bring an action even had the defendant reproduced his features without any malicious intention and simply because his authority had not been obtained; that still more his claim is well founded when the artist has manifestly given way to a feeling of disparagement with the object of attacking his reputation;

"Seeing that in these circumstances Jacquet ought to be forbidden to exhibit publicly the picture in question in any manner whatever;

"That this injunction is sufficient, so far, to preserve the rights of the plaintiff without ordering at the present moment, as Alexandre Dumas claims, the destruction of the picture, in case the injunction should be disregarded, or granting the other prayers and conclusions of the claim;

"The tribunal forbids Jacquet and his agents to send for public exhibition the 'Marchand Juif' in any manner whatever, and to allow it to appear at a sale or public exhibition under any title whatever, reserving to Alexandre Dumas his rights and remedies in case the injunction is contravened. It declares, besides, that the plaintiff is not well sustained in the rest of his prayer requiring in particular the insertion of the judgment in twenty newspapers."

The same Court some time ago gave judgment in *Duverdy* v. *Zola*, enjoining a novelist from giving to a character in a novel the name of a real person.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1884.

Before DORION, C. J., MONK, RAMSAY, CROSS, BABY, JJ.

BOISSEAU et al. (defts. below), Appellants, and THIBAUDEAU et al. (plffs. below), Respondents.

Payments made in fraud of creditors—C. C. 1036—Knowledge of insolvency.

A creditor who alleges that his debtor while insolvent has made payments to another creditor knowing his insolvency, has a right under C. C. 1036, to sue the latter in his own name, and to ask that such sums be paid into Court for the benefit of the creditors according to their respective rights.

The relation of the parties and other facts established in the present case, proved the creditor's knowledge of the debtor's insolvency.

The respondents who were creditors to an amount exceeding $4,000 of an insolvent firm of Chaput & Massé, complained that Boisseau & Frère (the appellants) had received from Chaput & Massé a sum of $3,824 while the latter were insolvent, and the object of the action was to have Boisseau & Frère ordered to pay this money into court for the benefit of Chaput & Massé's creditors generally.

The appellants demurred to the action, on the ground that the respondents were not entitled to come into court individually and (without alleging any transfer to themselves of the rights of the other creditors, or any authorization by the creditors) claim to have

the payments set aside, and the money brought into court for the benefit of the creditors generally. The appellants also pleaded to the merits that they had no opportunity of knowing, and did not in fact know that Chaput & Massé were insolvent before the date of their assignment; that at the very time referred to (February, May and June, 1882), the appellants Boisseau & Frère themselves made considerable advances to Chaput & Massé in the belief that they would be able to meet their engagements.

The court below (Mathieu, J., in the Superior Court, Montreal), maintained the action in part. The facts, as they appeared to the court, were that in the beginning of 1881, the defendants Boisseau & Frère, wishing to encourage Chaput and their relative Massé, advised them to form a partnership and commence business in Montreal. The partnership was formed, and by clause 7 of the deed it was stipulated that the books of Chaput & Massé should be regularly kept, and that Boisseau & Frère should have access to all the accounts and transactions. The book-keeper of Chaput & Massé, one Noel, was also book-keeper to Boisseau & Frère. From April, 1881, up to 26th December, 1881, Chaput & Massé bought goods from Boisseau & Frère to a considerable amount. They also bought goods from J. G. Mackenzie & Co., from March, 1881, to November, 1881, Boisseau & Frère becoming responsible to the extent of about $1,200. In January, 1882, Chaput & Massé made an inventory of their affairs by which they showed assets $15,386.90 and liabilities $16,489.68, leaving a deficiency of $1,102.78, or rather of $1,600, as certain items of assets had been counted twice over. The court was of opinion from the relations between the parties that Boisseau & Frère must have known of the insolvency of Chaput & Massé in May, June and July, 1882. By article 1036 of the code, every payment by an insolvent debtor to a creditor knowing his insolvency, is deemed to be made with intent to defraud, and the creditor may be compelled to restore the amount received, for the benefit of the creditors according to their respective rights. As it was proved that Chaput & Massé were insolvent when the payments were made, and as Boisseau & Frère were aware of the insolvency, the article applied, and the action was maintained to the extent of $1,490. The payments made to J. G. Mackenzie & Co., to pay liabilities for which Boisseau & Frère were endorsers were not shown to have been requested by Boisseau & Frère, and the action was dismissed as to this part. The appeal was by the defendants from this judgment.

It was contended on the part of the appellant that Article 1036 above cited applies only where the insolvency is open and notorious. The article says the creditor may be compelled to restore the amount. This indicated that the legislature did not intend to make an absolute rule, but on the contrary wished to give the court the power of appreciating the circumstances and ordering the money to be restored only where fraud is apparent or at least strongly presumed. On the evidence, which is voluminous, it was submitted that fraud was not established. The stipulation that Boisseau & Frère should have access to the books of Chaput & Massé had in view the case of difficulties arising between the partners, and as a fact Boisseau & Frère were not aware of the transactions of the other firm.

It was argued by the respondents that the insolvency of Chaput & Massé and the knowledge of that fact by the appellants were clearly established; that article 1036 applied, and that the judgment was, therefore, correct.

Ramsay, J. This is an action brought against the members of the insolvent firm of Chaput & Massé and the members of the firm of Boisseau & Frère, creditors of Chaput & Massé, to set aside certain payments of the firm of Chaput & Massé to Boisseau & Frère as being made in fraud of the creditors of Chaput & Massé, and to compel Boisseau & Frère to pay into court the sums so received by them, and for other purposes. The judgment ordered Boisseau & Frère to pay back $1,490 to be distributed according to the rights of the creditors of the insolvent firm. Boisseau & Frère appealed, and contend that there is no such action known to the law, and that the respondents can only set up the extent of their interest and have the payments set aside in so far as it affects them.

It would be impossible to presume that in a system of law based on equity like ours, there should be any express rule taking away the right to such an action as this. What the respondents ask is the exercise of their own right, and to say that they should ask to be paid by privilege is to contend that they should ask more than they are entitled to, at all events since the repeal of the insolvent act. Of course they might be disinterested, and their action be thus defeated.

The only question, then, is one of evidence. Is it proved that at the time of the payments referred to Chaput & Massé were insolvent? If so, did Boisseau & Frère know it?

As to the first question, there is no doubt that they were insolvent from the time of the inventory at the beginning of 1882. As to the knowledge of Boisseau & Frère it seems to be established in the only way in which it is usual to prove a guilty knowledge. It is proved by inductions or deductions of different degrees, and when sufficiently strong to remove all reasonable doubt it forms complete proof. Now here we have the relation of the parties,—the agreement that Boisseau & Frère should supply them, that Boisseau & Frère should have access to their books, that they took the means to exercise this power, that when events showed that Chaput & Massé were insolvent the supplies ceased and the payments increased solely to the discharge of Boisseau & Frère. There is not an attempt to answer this.

The judgment is, therefore, confirmed.

Judgment confirmed.

R. & L. Laflamme, for the Appellants.

Mercier, Beausoleil & Martineau, for the Respondents.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1884.

Before DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, JJ.

PINSONNAULT (plff. below), Appellant, and HEBERT et al. (defts. below), Respondents.

Action en réintégrande—Proof of possession.

The appellant brought an action *en réintégrande* in the court below, complaining that the respondents (defendants) had taken possession of a certain immoveable belonging to him, and the appellant asked to be maintained in possession of the immoveable, and that the respondents be compelled to pay him $400 damages.

The defence was to the effect that David Hebert's wife, with the heirs of her brother Joseph Girardin, owned a strip of the immoveable in question, 24 feet wide, and always had the use of it as a passage across the appellant's land.

The court below dismissed the action.

DORION, C. J. The action is *en réintégrande*. This is an action which the party has when he has been dispossessed. But in this case in the first place the appellant has not been dispossessed, and in the next place the evidence is contradictory. The dispute is as to a piece of land which was formerly a road. There was a ferry there, and the road led to it. Upon the conflict of evidence we are not disposed to reverse.

RAMSAY, J. This is an action *de réintégrande* brought by the owner of a lot of land on the bank of the river Richelieu, complaining of the invasion of his possession of another piece of land forming part of an old road leading from the front road to the river, and being the continuation of a road called the "Grande Ligne."

The two respondents severed unnecessarily in their defence, which amounts to this: that David Hebert's wife is the owner of this piece of road, and that the plaintiff is not only not the proprietor of it, but that his title excludes the bit of land in question, and that appellant had never any exclusive possession of the road.

The judgment of the court below seems to have turned on this, that neither of the parties had established a sufficient possession *animo domini*, and sent them to discuss the difference between them *au pétitoire*. The appellant feels aggrieved by this judgment and contends that in all cases the court must decide between two parties whose possession is the better. The authority cited by appellant does not say that; but "que deux possessions égales et de même nature ne peuvent concourir sur le même objet, l'une repoussant nécessairement l'autre, que la possession est exclusive," etc. This is obvious; but it is not

less clear that of two parties it may be that neither has possession.

It is evident by his own testimony that David Hebert has no possession. He did not put up the fence, and he did not know who put it up, and the fitful and occasional use of this lane to the river is no indication of a possession *animo domini*.

The next question is—has the appellant such a possession? I think not, his possession was neither continuous nor even apparent. I am to confirm.

Judgment confirmed.

E. Z. Paradis for Appellant.

S. Pagnuelo, Q. C., counsel.

Beique & McGoun for Respondent.

COURT OF REVIEW.

MONTREAL, November 30, 1883.

Before SICOTTE, TORRANCE, RAINVILLE, JJ.

TURCOTTE v. BRISSETTE dit COURCHENE.

Malicious prosecution.

The inscription was from a judgment of the Superior Court, district of Richelieu (Gill, J.), July 7, 1883.

TORRANCE, J. The demand here was for damages for a malicious criminal prosecution.

The plaintiff was defendant in a case in which the Sheriff had seized land which he had been unable to sell for want of bidders. Some months afterwards the defendant bought a small quantity of wood off this land from Turcotte for the price of $3. He cut the wood and was then threatened with proceedings for contempt in the case in which Turcotte was defendant, at the suit of the plaintiff. Alarmed, he and his brother, similarly situated and threatened, paid the lawyer of the plaintiff in the other suit $25 each. They then turned round upon Turcotte and threatened him with criminal proceedings on the charge that the sum of $3, paid by them to Turcotte, had been obtained from them by false pretences. They endeavored to obtain a cow and horse from his father in settlement, and, failing, lodged an information which led to an indictment and trial before a petit jury in the Court of Queen's Bench.

The Court below has found that plaintiff had ground for claiming damages, and gave him $75 and full costs. It found that the prosecution was malicious and without probable cause. I think so, too. It was a malicious and spiteful abuse of the process of the Criminal Court, in order to extort money.

Judgment confirmed.

A. Germain for plaintiff.

E. U. Piché for defendant.

COUR SUPÉRIEURE.

MONTRÉAL, 4 octobre 1877.

Coram TORRANCE, J.

JONES v. ALBERT, et BERTRAND, opposante.

Saisie-gagerie—Insaisissabilité—Sous-bail.

Jugé—Que même lorsque le bail principal contient une prohibition de sous-louer, un sous-locataire peut former opposition à la saisie par le propriétaire de ses meubles qui sont déclarés insaisissables par l'article 556 *du C. P. C.*

Le demandeur en cette cause avait loué une maison à un nommé Albert et ce dernier, quoique la chose lui fut prohibée par son bail, avait sous-loué une partie de cette maison à l'opposante. Sur une saisie-gagerie prise par Jones, tous les meubles de l'opposante furent saisis comme garnissant les prémisses. Mais, cette dernière fit une opposition réclamant les meubles déclarés non saisissables par l'article 556 C. P. C.

Sur contestation de l'opposition,

La COUR a maintenu les prétentions de l'opposante, et main-levée fut accordée de la saisie quant aux dits effets insaisissables. Le surplus de l'opposition fut renvoyée, chaque partie payant ses frais.

Doherty & Doherty pour le demandeur.

T. & C. C. de Lorimier pour l'opposante.

(J. J. B.)

COUR SUPÉRIEURE.

MONTRÉAL, 29 novembre 1877.

Coram JOHNSON, J.

GIROUX v. NORMANDIN.

Décharge—Interprétation—Ambiguité.

PER CURIAM. L'action du demandeur est basée sur un acte d'obligation du 18 avril 1874, consenti par le défendeur en sa faveur. Le demandeur demande maintenant le paiement de la balance due en vertu de cet acte,

savoir: $148.63 avec intérêt et frais. Le défendeur plaide paiement. La réponse au plaidoyer reconnait (comme fait aussi la déclaration) le paiement de $261.37 par les mains d'Olivier Berthelance. Le demandeur produit une quittance du 16 avril 1873 par les exécuteurs de Berthelet, qui montre qu'ils payèrent Giroux $40 "pour obtenir sa décharge du dit Normandin." Giroux accepta ce paiement pour ce but. Il donna cette quittance aux exécuteurs dans ce but. Mais on lui demande quel but? Pour obtenir sa décharge du dit Normandin; ceci est ambigu, et peut vouloir dire que Giroux était le débiteur intéressé à obtenir la décharge de Normandin; mais ces mots interprétés dans la supposition que cette somme était la balance due sur la dette principale, forment une expression inexacte, mais non inintelligible; car il n'y a rien pour faire supposer que Giroux fut le débiteur de Normandin, et il est certain au contraire, que Normandin était le débiteur de Giroux. Conséquemment un paiement fait par Normandin équivaut en droit à un paiement fait par lui-même, et la décharge de Giroux est suffisante. Il eût été plus exact, sans doute, de dire "pour obtenir sa décharge envers Normandin." Le plaidoyer de paiement est donc prouvé, et l'action déboutée avec frais.

Duhamel & Cie. pour le demandeur.

DeBellefeuille & Turgeon pour le défendeur.

(J. J. B.)

COUR DE CIRCUIT.

MONTRÉAL, 6 mai 1876.

Coram JOHNSON, J.

MAROIS v. DAME DESLAURIERS.

Renonciation à insaisissabilité—Bail—Illégalité.

Jugé—Que la clause insérée dans un bail par laquelle le locataire renonce au bénéfice que la loi lui garantit de l'insaisissabilité de ses meubles, en faveur de son locateur est illégale.

Le 9 mars 1876, le demandeur fit émaner une saisie-gagerie et fit saisir tous les biens de la défenderesse, même ceux déclarés insaisissables par la loi, sur le principe que par le bail passé entre les parties, la défenderesse s'était départie de l'exemption de saisie que lui accordait la loi sur certains de ses meubles.

La défenderesse plaida que cette renonciation était illégale et immorale; qu'elle avait été forcée d'y consentir, ne pouvant trouver à cette époque d'autre logis; qu'elle exposait la défenderesse et sa famille à rester exposées aux rigueurs des saisons sans les choses nécessaires à la vie.

La COUR maintint les prétentions de la défenderesse, alléguant qu'il n'y avait rien d'odieux comme d'enlever à un pauvre malheureux pendant nos rigoureux hivers, le seul lit où repose sa famille et seul poële qui réchauffe sa maison.

Théo. Bertrand pour le demandeur.

Chs. Thibault pour la défenderesse.

(J. J. B.)

INDIANA SUPREME COURT.

December, 1883.

POMEROY v. STATE.

Indecent assault upon patient by physician—Competency of testimony of prosecutrix.

The accused, a physician, while examining the person of a female patient believed to be suffering from a disease of the womb, had carnal connection with her. There was no evidence of consent upon her part obtained by fraud or otherwise. Held, that the accused was guilty of rape.

At the trial the female assaulted, though of weak mind, and an epileptic, was permitted to testify for the state. Held, no error.

HOWK, J. The appellant, Pomeroy, was indicted for rape. The indictment charged "that Mark Pomeroy, on the 8th day of October, 1881, at and in the county of Gibson, and State of Indiana, did then and there unlawfully, feloniously and violently make an assault in and upon one Rebecca R. Reavis, a woman then and there being, and did then and there unlawfully, feloniously, violently, forcibly and against her will, ravish and carnally know her, the said Rebecca R. Reavis, contrary to the form of the statute, &c.

A verdict was returned finding him guilty as charged. His motion for a new trial having been overruled, and his exception saved to such ruling, the Court ordered judgment against him in accordance with the verdict.

In this Court, the only error assigned by

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

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. *Flatery*, 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.