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Contributions to Obstetric Jurisprudence. By HORATIO R. STORER, M.D., of Boston, Assistant in Obstetrics and Medical Jurisprudence in Harvard University; Surgeon to the New England Hospital for Women; and Professor of Obstetrics and the Diseases of Women in Berkshire Medical College.

No. IX. A MEDICO-LEGAL STUDY OF RAPE.

Following the example of my friend, Dr. Elliot, who has transferred to this Journal, from the now silent pages of the *American Medical Times*, the continuation, in regular sequence, of his series of Difficult Obstetric Cases, I recommence my own "Contributions to Obstetric Jurisprudence," which were initiated in 1859 in the late *North American Medico-Chirurgical Review*, of Philadelphia, and interrupted by the cessation of that journal. The articles already published under the above title are the following:

I. Is Abortion ever a Crime? *N. A. Med.-Chir. Rev.*, Jan., 1859, p. 64.

II. Its Frequency and the Causes thereof. *Ibid.*, March, 1859, p. 260.

III. Its Victims. *Ibid.*, May, 1859, p. 446.
IV. Its Proofs. *Ibid.*, p. 455.
V. Its Perpetrators. *Ibid.*, p. 465.
VI. Its Innocent Abettors. *Ibid.*, July, 1859, p. 643.
VII. Its Obstacles to Conviction. *Ibid.*, Sept., 1859, p. 833.
VIII. Can it be at all controlled by Law? *Ibid.*, Nov., 1859, p. 1033.

To this series of papers there already belong, in reality, six others, bearing as they do directly upon the medico-legal relations and responsibilities of women: to wit, three articles upon Insanity in Women, published in the *Boston Medical and Surgical Journal* for April, October and November, 1864; a fourth upon the same subject, that will be found in the Transactions of the American Medical Association for that year; still another, read before the Association at its late session in Boston, as the Report of the Standing Committee upon Insanity; and a sixth, my Prize Essay, upon the Physical Evils of Forced Abortions; both of these latter articles being now in press. I have, however, preferred to take the thread up where it was broken, in pursuance of my original plan, with the simple prefatory remark that in no department of Obstetrics and the Diseases of Women, or of Legal Medicine, is there greater need of investigation, and in none more prospect of practical gain to our science, than where these fields join each other, namely, in Obstetric Jurisprudence.

The subject upon which I desire at this time to fix the attention of medical jurists, is a more practical and important matter than might at first be supposed. It is one concerning which much conflict of opinion has arisen, both upon abstract points and the circumstances of individual cases; it is also one of those happily rare questions where the sympathies of a jury are apt to be found instinctively tending against the prisoner.

It may be supposed that a topic upon which so much has been written, and which possesses an interest, even if unconfessed, for every professional reader, must long ere this have been exhausted. In reality, however, it will be found, that just in proportion as it has received attention, so have the medico-legal opinions concerning it, prevalent at any given time, been modified. The crime was formerly punished by

castration or by death; its penalty now varies in different countries, but is almost everywhere confined to fine and imprisonment, either or both. For its commission it was formerly necessary that every step and stage in sexual intercourse should have been completed; now the mere fact of contact of the genital organs would seem practically to constitute the offense. So that the literature and the law of rape have alike become effete and need careful revision.

I would not detract from the labors of the late Casper of Berlin, and his many predecessors in this discussion, and freely acknowledge the excellence in many respects of the rulings and reasonings of Wharton and Stillé, our own latest authorities; but in certain material points I am compelled to differ from them all.

A case that has lately occurred at Boston, where four young men have been sentenced *to the State-prison for life* for compelling intercourse from a notorious strumpet, and their so severe punishment, apparently indorsed by the entire community, warrants my examining into details that, though repulsive in themselves, are of value as establishing upon a firmer basis the right of a woman to her chastity, however infinitesimally small this may be. The right involves that of distributing her favors, such as they are, or withholding them altogether; the right to refuse to obnoxious purchasers wares that may have been exposed in open market; and the right to cancel or continue consent to an act, however unlawful in itself.

The instance to which I have now referred, that known as the Bates case, has created such intense excitement throughout New England, and is withal so directly pertinent to conclusions I may hereafter enunciate, that I have thought best here, at the outset, to present a brief commentary upon its more salient points. This has been kindly furnished me by the only medical witness called for either side at the trial referred to, my friend Dr. John Green, of Boston, one of the Surgeons to the City Dispensary, to whose interesting experiments and intelligent deductions concerning certain matters connected with the case I may take occasion subsequently to allude. The case, as I have said, was that of a courtesan, abused by several men; the conviction turning upon the testimony of one of their

comrades, incapacitated by acute disease from sharing in the fray. The criticisms now offered I believe to be strictly just.

"The chief points, as they strike me," says Dr. Green, "are:

"1st, The utterly bad character of the prosecutrix and her bad appearance on the stand, lying, as she did, upon many points which could be proved against her by good witnesses, but being supported by the sick soldier as to the particular points necessary technically to constitute a rape;

"2dly, The proof, by an eye-witness, of those essential points which are usually settled by presumption, viz., the unwillingness of the woman, her resistance, and the use of force by the accused;*

"3dly, The insignificant injuries, if any, which were received by the woman, and which, in the absence of other positive testimony, would have weighed most heavily against her statement that she resisted.

"As regards the character of the woman, there can be no doubt; married to a man named Pettingill, she has been since publicly known as the concubine of Mellen Bent, and now of the witness Bates, whose names she has successively borne. She has been proved in the habit of walking the streets at improper hours of the evening, and in neighborhoods and upon routes which leave no doubt that she was also a most degraded common prostitute. Her visit to the room where the offense was committed was against her will, as she said, but entirely voluntary, according to another witness, whose appearance was at least much better than hers. Her description of the acts of violence was contradictory in important points, so much so that it would have been easy completely to have demolished her testimony, had it not been confirmed in the essential points by the sick soldier, who was an eye-witness to the circumstances attending the intercourse.

"The facts proved by this witness were:

"1st, Much rough usage, constituting an assault; and

"2dly, Connection by the four defendants in turn, and once or more repeated; and

* On the other hand, it ought to be the presumption, in any case, on the ground of the prisoner's assumed innocence, that the woman was not unwilling, but consented.

"3dly, That the connection was effected by the use of superior force, to which the woman wisely yielded without very violent resistance—having no honor to defend, and consequently no very strong instinct to save herself from embraces to which she would willingly have sold herself, and had, perhaps, previously bargained for with one of the accused.

"That the accused had probably no idea of the terrible nature of the offense of which they have since been thus technically convicted, is shown by the fact that they retired to rest in the very room in which it was committed, and where they were afterwards arrested. They were rough boys, and had dealt roughly with a whore—a crime, it is true, but certainly one not to be compared with the brutal violation of a virgin or chaste matron.

"As regards the line of defense, there was nothing to be done. Enough was proved to show that *technically* a rape had been committed, and the court imposed the only sentence permitted by the statute. In *reality*, the case lacked every feature of horror usually belonging to the crime, and seems to call for the exercise, at a very early period, of the pardoning power vested in the Executive.

"The details of the evidence have been pretty fully reported in some of the papers; and will, I think, fully sustain the views which I have expressed; certainly they do not justify the congratulations of the daily press over the speedy bringing to justice of the perpetrators of an almost unprecedented outrage."

It is not, however, the merits or demerits of merely isolated cases, however interesting, that I would at this time discuss. The war, now so happily over, has suddenly loosed from the strict bonds of enforced discipline hundreds of thousands of able-bodied men whose blood has been heated by a Southern sun and by long privations, now replaced by the license of victory, of return to their homes, and of freedom from the hard but necessary thraldom of the camp and field.

At no time in the history of this country have the self-restraint and moral sense of the masses been so severely tested as at the present; at no time, if we may believe current reports, have so many forcible attempts been made upon the chastity of women. Allowing that flying rumor may have

magnified every instance that has really occurred into a hundred, still no one can deny that there has been abundant cause for general anxiety, if not alarm. There is, therefore, a twofold reason for examining into the subject at the present time. On the one hand, that in the trials that are just now so prevalent, those exerting themselves in the interests of justice may wield a sharper sword; and on the other that the accused, more likely to be the deserter or bounty-jumper than the true soldier, may not come to harm greater than he in reality deserves.

THE ABSTRACT NATURE OF THE CRIME.

The exact character of rape, as a crime, is not always, even yet, understood. This remark is true, not merely of lewd fellows of the baser sort who may ignorantly render themselves liable to a punishment that in some countries is still death, and in others, as in Massachusetts, would be, in the absence of reprieve, a worse one than death, but of juries and of medical men. In these trials, more than in many others, the issue may entirely depend upon the medical testimony; and in most instances the medical expert has it in his power, where he chooses to lend himself intelligently to the purposes of justice, to point out the existence or the absence of relevant or critical elements to the counsel by whom he is called.

In the legal classification of crimes, rape is enrolled among offenses against the person, the element of violence or compulsion being present, while fornication, or willing intercourse, is only considered an offense against society. The distinction that the law has drawn between the attempt and the completion of the crime, marked, as was formerly the case, by extreme and at times disproportionate differences in punishment, was based not upon the intrinsic harm, moral or physical, to the woman, but, as it were, upon her market value. The view to which I refer is thus stated by Chitty: "An unmarried woman, who has had sexual intercourse, *even by such violence* that she was unable to *resist* with effect, is, in a degree, disgraced, or rather no longer retains her virgin purity in the estimation of society; and there is a natural, delicate, though perhaps indescribable feeling that deters most men who know

that a female has been completely violated, though manifestly after every effort of resistance, from taking her in marriage, but which does not exist, at least in so powerful a degree, if he be certain that the sexual intercourse was *incomplete*. According to the ancient law of rape, which, intending to distinguish between the degrees in the enormity of offenses of this description, made a marked distinction between *ineffectual attempts* completely to violate, and cases where the violation was so complete that the female could no longer be considered in fact a virgin, there was, therefore, required the most explicit evidence of such a *completion* of the offense, that might, under ordinary circumstances, occasion conception; without which proof it was supposed that no man could object to the female as actually contaminated or affected in her virgin purity."*

The law resting upon this unfounded basis, the fallacy of which is, in part, shown by the well known readiness with which widows obtain a second husband, it was very natural that objections should be made to its modification in accordance with the teachings of medical science. The most unfounded of all these objections seemed valid to the high authority I have just quoted, who was one of the few instances of a medico-legal teacher who has passed the double curriculum of law and physic. A change, he says, "may unfortunately have had the effect of inducing some offenders to *complete the outrage* in cases where, under the old law, the fear of the higher punishment might, especially if opposed with sturdy resistance, have prevented. Under the existing law, capital punishment is the result, although there have been an incomplete assault and the slightest introduction of the male organ infra labia, without further perforation or the slightest laceration or actual injury to the vagina, and although seminal discharge be clearly negatived. An offender, under such circumstances, knowing that

* Chitty, Med. Jur., 381. If the argument here advanced were really valid, one ought to hear or see more of a "natural, delicate, and indescribable feeling" that would "deter most" women "from taking in marriage" a man who was known or supposed to have previously indulged in coition. It will not do to answer that such facts are never known or discussed by women, for the gossip, everywhere, of good society disproves this; nor is the fact that a woman who has been dishonored, willingly or by force, loses more in caste than an immoral man, alone sufficient to support the view.

he may be equally punished whether he complete his purpose or not, naturally resolves to complete the really greater offense; and thus cases may have occurred where, contrary to the sound policy of legislators in framing an ascending scale of punishment in proportion to the injury or evil to be repressed, the offender is not induced to exercise any locus penitentiæ, but completes what is confessedly a *greater* injury."*

Elwell, who has done more, perhaps, than any one else to establish for medical evidence in this country its due appreciation by the bar, has defined rape as the violent assault (upon a woman, for this is implied by his context) or the overcoming (her) resistance by artificial means, by which (her) chastity is destroyed.† To this definition may be urged the following objections:

1. The crime is not confined to a single sex. It may be committed by females upon males, as proved in repeated instances by the infection of boys with the venereal disease where the lesion was directly traceable to its source.

2. The term *chastity* is uncertain. It may mean one or another of four distinct though correlative states, of which two are moral and two physical.

a. The absence of all previous carnal knowledge or connection whatever.

b. The absence of all to which the party herself was not consenting.

c. The state of virginity, absolute.

d. The state of virginity, relatively to the prisoner alone.

Now the offense may be committed upon a married woman, or even a notoriously unchaste person or prostitute—nay, even upon a woman with whom the offender had himself in times previous been allowed connection by her own consent—although a husband can not be convicted of the offense upon his wife;‡ and, on the other hand, no destruction of any physical sign of virginity is required, nor any further carnal penetration of the female than is implied by the slightest, most momentary, and most external contact of the respective generative organs with each other.

* Chitty, 382. † Elwell, Malpractice and Medical Evidence, 571.
‡ Wharton, Criminal Law of the United States, sec. 1131.

3. Violent assault is unnecessary, as with children, or persons whose intellect is permanently or temporarily in abeyance, or those in sleep.

4. Artifice is not required, for similar reasons.

5. Resistance is by no means impliedly present, as in the cases just instanced, and those of excessive fear, or mistake as to identity.

Taylor, the present leading medical jurist of England, defines rape as "in law, the carnal knowledge of a woman (still a woman) by force and against her will."* But there is still a simpler definition. It is as follows: Carnal knowledge *without* or *against* consent.†

There must, therefore, to constitute the crime, have been, on the one hand, carnal knowledge, and on the other, absence or refusal of consent.

I. What then, in law, constitutes the carnal knowledge of a woman?

It was at one time held in England that, to constitute rape, there must have been an emission of semen within the parts of the female. By the statute of that country now in force, emission is not essential. It has always been held that the entrance of the man within the private parts of the woman, when proved, constitutes rape.‡ In this country it is the general rule that some entrance must be proved, but that there need be neither rupture of the hymen nor emission.§ The English statute is, in the 18th section, thus explicit: "Carnal knowledge shall be deemed complete upon proof of penetration only."‖ Does this mean not unless there is decided proof of penetration, or if there is any the slightest proof of penetration? In accordance with such doubt the law was interpreted by one judge as follows: carnal knowledge, *i. e.* penetration, is not complete unless the hymen be ruptured. This would not only rest the crime upon a most uncertain and deceptive

* Taylor, Med. Jurisprudence, 499.

† The above is allowed to be correct by Elwell, but he still confines its application to the cases of women. Loc. cit., 570.

‡ R. v. Allen, 9 C & P., 31; R. v. Russell, 1 East P. C., 438, 439; R. v. Jordan, 9 C. & P., 118; R. v. Hughes, 8 C. & P., 752; R. v. Sims, 1 C. & K., 393; W. & S., Med. Jur., sec. 432.

§ Elwell, 572. ‖ 9 Geo. IV., c. xxxi., sec. 18.

sign, the frequent absence of the hymen even in virgins being now so well established, but it would divide penetration into vulval and vaginal; the former not constituting rape, but a common assault. The majority of judges, however, have not admitted a distinction of this kind. They have strictly adhered to the obvious meaning of the words of the law, and have regarded the rupture of the hymen as in no respect essential. The question of penetration is not for the medical witness, but for the jury to decide from the whole of the facts. In the case of a child, the prisoner was seen perpetrating the act, and though the hymen was normal and unruptured, the crime was yet decided complete.* Actual penetration by an adult without extensive physical injury, must be considered impossible in a child of tender age. The above decision, therefore, settles the true character of the penetration in law, that merely a contact of the genital organs is sufficient fully to effect it.

Upon this point it will be seen that I am at variance with the doctrine still upheld by our medico-legal text-books. I have already quoted Elwell. Taylor, although referring to a case strongly corroborative of my position, yet avoids committing himself upon the subject. Beck avows a doctrine entirely at variance with the knowledge of our time. I have stated the opinion of those best placed to judge, that the presence or absence of the hymen is a most equivocal sign. "I am, however," says Beck, "unwilling to go as far as most of the late writers on legal medicine, who virtually reject it altogether. While it must be allowed that it can very often be destroyed by causes which do not impair the chastity of the female, we are justified, I think, in attaching considerable importance to its presence. It would be difficult to support an accusation of rape where the hymen is found entire."†

Mr. Wharton has expressed himself in similar language: "While the slightest penetration is sufficient, the English practice is decisive that there must be specific proof of *some*.‡ It must be shown, to adopt the phraseology of Tindal, C. J., and afterwards of Williams, J., that the private parts of the male

* Taylor, 539. † Beck, i., 153.

‡ R. v. Russen, 1 East P. C., 438; R. v. Allen, 9 C. & P., 31; R. v. Jordan, 9 C. & P., 118.

entered, at least to some extent, those of the female.* The law may now indeed be considered as settled, that while the rupturing of the hymen is not indispensable to conviction, there must be proof of some degree of entrance of the male organ within the labia of the pudendum,† and the practice seems to be, not to permit a conviction in those cases in which it is alleged violence was done, without medical proof of the fact, wherever such proof was attainable."‡

And again he says: "It has been said that penetration may be presumed from circumstances, without specific and positive proof of the organ by which it was effected. This method of proof, however, ought never to be resorted to except in extreme cases, where, from the nature of the case, no other evidence can be had."§

It is generally ruled, therefore, that proof of some degree of penetration is essential. But how, in the generality of cases, is this fact to be ascertained, save from the testimony of the woman herself, who is often a very unreliable witness? It can not be reached on medical grounds merely, for, as I shall hereafter show, all evidence in this direction may be negative; nor upon the evidence of eye-witnesses, even when they are present, for the exact local relations of the parties are concealed from view, and may, therefore, give rise to mistake as to whether penetration or merely close approximation has occurred.

To this question I may appropriately apply, with only one slight modification, the language of Mr. East: "A very considerable doubt having arisen as to what shall be considered sufficient evidence of the actual commission of this offense, it is necessary to enter into an inquiry which would otherwise be offensive to decency. Considering the nature of the crime, that it is a brutal and violent attack upon the honor and chastity of the weaker sex, it seems more natural and consonant to those sentiments of laudable indignation which in-

* R. v. Russen, 1 East P. C., 438; R. v. Allen, 9 C. & P., 31; R. v. Jordan, 9 C. & P., 118.

† R. v. Lines, 1 C. & K., 393; Wharton & Stillé, Med. Jur., sec. 432.

‡ Wharton, Cr. Law, sec. 1138.

§ Ibid., sec. 1139; Com. v. Beale, Phila. Q. S., Nov., 1854.

duced our ancient lawgivers to rank this offense among felonies, if all further inquiry were unnecessary.* * * * * * * * The quick sense of honor, the pride of virtue, which nature, to render the sex amiable, hath implanted in the female heart, as Mr. Justice Foster has expressed himself, is already violated past redemption, and the injurious consequences to society are in every respect complete. Upon what principle and for what rational purpose any further investigation came to be supposed necessary, the books which record the dicta to that effect do not furnish a trace."†

Formerly, as I have said, proof of complete penetration was required; now evidence of partial penetration is sufficient. But, as Wharton has admitted in a statement I have lately given, this may be presumed in extreme cases. Such was allowed in the famous Philadelphia case, where a dentist was convicted, probably unjustly, of rape upon one of his patients. Let me prove this assertion by an extract from the judge's ruling on discharging the motion for a new trial.

"The only remaining question is, whether the evidence given by the prosecutrix was sufficient, if believed, to sustain the verdict. It is true that the Commonwealth failed to produce the corroboratory evidence, which an inspection of the person of the witness and of her garments might possibly have afforded; and it is equally true that we should have been more fully satisfied if such evidence had been produced. There is no rule of law, however, which imperatively demands that the witness shall be corroborated by such evidence. The want of such corroboration is a circumstance to be considered by the jury; and, after being carefully advised on this point by the court, if they regard the evidence produced as satisfactory, the court should not interfere, unless satisfied that their decision was clearly unjust. This we are not prepared to say. The witness, it is admitted, was an innocent, pure-minded girl; she told her sad story with apparent candor; detailed all that occurred from the

* The words I have omitted in the above quotation are the following: "after satisfactory proof of the violence having been perpetrated by actual penetration of the unhappy sufferer's body." A proof that, as I have shown, in many undoubtable instances can not be afforded.

† Wharton, Cr. Law, 622.

time the ether was administered; the feeling of her pulse, her arm, her bosom, her person, the fixing of her feet, the drawing down of her body to the edge of the chair, and finally the pain she suffered. It is not strange that the jury believed her, for the question might well be asked: how could an innocent girl detail such occurrences, and with such precision, if it had not really occurred? There is nothing that appears so inconsistent in her story, or so apparently devoid of probability, that a jury should be instructed to disregard it, or that the court should interfere with their decision upon it. But it is said that even if her statement be believed, it shows no legal evidence of penetration.

"It is impossible to lay down any general rules regulating the nature and amount of proof required to establish the commission of such an offense. Each case must be viewed under its own circumstances, and legitimate inference drawn from all the facts proved. Here the witness states the preparation made by the defendant—her feet, which had been crossed, were spread apart, one on each end of the stool; her body was drawn down to the edge of the chair, the defendant was before her, she felt his breath upon her face, which shows that the position of his body must have been leaning over her, and at that time she felt the pain which enabled her to say that she had no doubt that the defendant entered her person. If this evidence as to sensation and position is believed, upon such an issue as here presented of the condition and knowledge of the witness, may not the jury determine from it whether the penetration sworn to was such as the law requires to constitute a rape?"*

The ruling now given is irrespective of the main point in the case, that the patient had been etherized, and was probably laboring under an entire delusion as to the whole matter. It rests the proof of penetration wholly upon the patient's allegations as to preparations made, position taken, and pain endured —all of which do indeed bear directly upon the question of an attempt; but in the absence of corroborative medical testimony, which is often wanting, they are wholly insufficient to prove the fact of penetration, or the effected crime. On the

* Wharton, Cr. Law, 623.

other hand, allowing the truthfulness of the witness, there was sufficient presumption for the alleged relative position of the parties, to satisfy the jury, upon this supposition, that there had occurred a certain amount of penetration, as, indeed, was decided to have occurred in a case I have already referred to from Taylor.

Wharton, while challenging the decision on the ground of possible delusion, allows the point now made. "The general result of both medical and legal opinion," he says, "is that while the learned and able judge who tried the case properly left it to the jury as a question of fact, as he was obliged to do, to determine whether penetration had taken place, the verdict was not sustained by the evidence, and forms an unsafe precedent for the future."*

I agree fully in this statement as regards the merits of the special case involved. When, however, we are told that, save in extreme and therefore very exceptional cases, penetration can not be presumed, "without specific proof of the organ with which it was effected,"† it is at once seen that the prosecution of many otherwise perfectly simple cases ought to fall to the ground. This has, indeed, often occurred, and may again—witness, for instance, the following case, tried in 1844, of rape upon a child, where, as is well known, it is often impossible for any real penetration to occur.

The surgeon here deposed that "the hymen of the child was not ruptured, but that upon the hymen was a venereal sore, which must have arisen from actual contact with the virile organ of a man."‡ Mr. Baron Parke left it to the jury to say "whether, at any time, any part of the virile member of the man was within the labia of the pudendum of the prosecutrix; for, if ever it was, no matter how little, that will be sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offense." The verdict was, not guilty.§

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* Wharton & Stillé, Med. Jur., sec. 471. † Wharton, Cr. Law, sec. 1139.

‡ I shall, hereafter, call attention to other modes than the usual way by which syphilitic inoculation of an infant's genitals may take place. In the present instance, the verdict seems to have turned upon the question of degree of penetration only.

§ R. v. Lines, 1 C. & K., 393.

The same is shown by another English case, where the judges, Bosanquet, Coleridge, and Coltman, concurred in saying that, "when that which is so very near the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain a charge of rape." There was evidence from the surgeon in attendance that the vulva and vagina were so much inflamed as to render it impossible to ascertain whether or not the hymen remained entire, yet the defendant was acquitted.*

In former times, when it was necessary to prove that the seminal fluid had been discharged within the vagina, it was very naturally allowed that impotence, when existing, should be considered an effectual bar to the consummation of the offense. Now that seminal ejaculation is no longer required, it would seem that the mere allegation of impotence should not be allowed its former protective weight. This, however, is still permitted. "Impotency," says Wharton, "is undoubtedly a sufficient defense to an indictment for the consummated offense, though not for an assault with intent."†

I need merely refer to the facts that the power of erection, and therefore of penetration, may be retained by actual eunuchs, and that some men may be impotent towards one woman, in consequence frequently from some displacement of her uterus, for instance, while perfectly potent in the case of all others, to make the impropriety of longer allowing the excuse alluded to perfectly evident. There are many questions in Obstetric Jurisprudence where proof of absolute impotence, so difficult or impossible to obtain, may be of great importance; but now that conception, or the risk of conception, has nothing to do with the offense of rape, and inasmuch as every woman would suppose from the attempt at coitus that the person attempting at least supposed himself virile enough to complete the act, the shock to her modesty, and the physical violence which she may undergo, alike demand that the law should extend to her the additional protection I have now claimed.

I do not endorse the opinion of Chief-Justice Carlton, that it is always enough if the prosecutrix swear to "carnal knowl-

* R. v. McRue, 8 C. & P., 641. † Wharton, Cr. Law, sec. 1135.

edge of her person;"* but I do assert that rape, and attempts at rape, ought not to be separated from each other so distinctly as even at the present day medical jurists would do, and that convictions should occur and penalties be imposed more completely in accordance with the merits of each individual case. This, as I have proved by the late case at Boston, a summary of which has been given, is impossible in Massachusetts, during the continuance of the present statute. That the laws against rape vary in the different states of the Union I shall soon show, and shall point out a grave inconsistency in the New York code. I shall have accomplished good work if I prove to the profession the necessity of insuring uniformity and better justice by their general revision throughout the country. For this, the present time is especially favorable, now that the exigences of returning peace are submitting the statutes of so many of our States to the saving influences of reconstruction.

II. With regard to consent, there are certain parties to whom the word "*without*" directly applies.

These are:

1. Those women who could not possibly have consented for intrinsic reasons—as children of tender age, insane persons, and idiots.

2. Those who could not have consented, for accidental reasons—as those in deep sleep, natural or artificial, from the effect of stimulants, narcotics, or anæsthetics—or in a swoon consequent on disease or wounds, recent, or of long standing, accidentally or intentionally inflicted.

By the former of these classes consent can not be legally given; if granted, it is invalid for removing criminal imputation. By the latter, it would seem necessary for successful defense that the sleep or swoon should have followed, not preceded, the intercourse—an important distinction, as it is certain that with many women of extremely sensitive and irritable nervous organization, loss of consciousness, attended even with hysteriform or epileptic convulsions, may ensue immediately upon or during ordinary sexual intercourse. The support that these accidents, particularly the last instanced, epilepsy, might lend to a criminal charge, is very obvious.

* R. v. Lidwell, 1 McNally's Evid., 606.

As to the other word, "*against*," its character as valid or not in an indictment, will have to be settled by the circumstances of each individual case. The chance of wrongful allegation is so great that these circumstances can not be too closely scrutinized, by the parties on both sides having the case in charge.

The frequency of rape or attempts at the crime is not to be estimated by the number of cases brought to trial. It was formerly everywhere a capital offense. In Massachusetts, the punishment has been lately lowered to imprisonment for life. In New York, the extreme penalty for ravishing a woman in full possession of her senses is only a ten years imprisonment,* while if she has been drugged or otherwise stupefied, so as to be rendered wholly incapable of defending herself, the punishment, strangely enough, though already so slight, is lessened by one-half.† So in England, during the present reign, it has been changed from death to permanent transportation beyond the seas.‡ Judging by the remarkable increase in prosecutions induced in Great Britain by this change, 57 per cent. on the average of four years to 1845, and by official statement in Parliament, an increase of 90 per cent. to 1847, it would seem as though the crime itself were frightfully extending. Moreover, there is no doubt that in many instances the woman's natural shame at publishing her own disgrace prevents disclosure, where there are no other witnesses cognizant of the fact. On the other hand it must not be forgotten that the chance of false accusation, always great, has been infinitely increased now that the death penalty has been abolished. For one real rape, it has been remarked, that is now tried on the English circuits, there are at least twelve pretended cases.

I have already alluded to the danger of these false accusations being brought; this is owing to a variety of causes.

If the charge is made by the woman herself, it may be from

1. An intention to extort money, the technical black-mail;
2. Personal hatred, or sexual disappointment;
3. Unfounded mental delusions, as of disease, the anæsthetic state, intoxication, or sleep;

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*2 R. S., 663, sec 22. † Ibid., sec. 23. ‡ 4 & 5 Vict., c. lvi., S. 3.

4. To preserve character, so called, which has been voluntarily endangered.

If brought by a third party, the mother, for instance, the charges may be from the first or last of the reasons just alleged, here implying a conspiracy; or if made in good faith, then in consequence of mistake, depending in the case of a young girl, upon

5. An unnatural vaginal discharge, vulval or other bruise or abrasion, the result of disease, accident or self-abuse.

There is abundant proof that on each of these false grounds very many wrongful convictions have been effected, and that in consequence many innocent parties have perished upon the scaffold.

In these papers, treating as they do of subjects equally interesting and important to lawyers and medical men, I am compelled to cover double ground, and thereby, I trust, while rendering them of practical advantage to either party, to advance the best interests of both. It is requisite that the attorney should know what medical points in prosecution or defense are tenable in law, or are in accordance with facts or equity; and that the physician, who is so often called upon to decide doubtful questions in cases that may never reach the lawyer—often, indeed, to decide whether they shall reach him or not—as well as liable to testify as to fact, presumption or probability upon the witness-stand, should be informed what and to what extent the law assumes and the law requires.

In the first place, it is a presumption of law that innocence is to be taken for granted until the guilt is made to appear by conclusive evidence, so that the burden of proof is necessarily thrown upon the prosecution.

It is therefore always to be presumed that rape was not committed, and that if intercourse were effected, it was with the full consent of the female.

THE PROOFS OF COMMISSION.

I have already defined the character of rape in law. It is necessary then to prove—

1. That carnal intercourse, the so-called penetration, or

rather the reciprocal contact of the generative organs of the two parties, really took place at the time alleged; and

2. That the woman's consent was wanting.

To apply these principles to any given case, it is necessary in a trial for rape to prove, in the first place, that carnal intercourse, as defined above, has been effected.

Besides the allegation of the woman, as I have said, other direct evidence may be present, tending to prove, with the attempt at the act, that mutual contact of the genital organs did take place. Thus, the position in which the parties were found by a third person, or which it is admitted did for the time exist between them, may have been such as would afford very strong presumption that the contact required to complete the crime was really effected. Both parties may have been undressed and in bed together; or the clothes of each unloosened or disarranged, the place they were in under such circumstances being also perhaps retired and the time unusual, or for both these elements of privacy there may have been the use of lock and key—the parties having been surprised, or seen through a keyhole or window.

Such evidence as this, alleged by a third person who is a credible witness, is necessarily very strong. It is almost conclusive as regards sexual connection, but this is a very different thing from forcible and forbidden intercourse or rape. Where such evidence as the above, however, is procurable, the same witness is generally able to testify as to the existence of consent, that is if he or she were present at the time the assault is alleged to have been committed, and not merely immediately subsequently to that event.

On the other hand, if there was no one present besides the parties themselves, it becomes necessary to rest this point of carnal intercourse, so far as direct evidence is concerned, solely upon the testimony of the woman. In these cases, it will be seen, extreme caution is necessary, both regarding her testimony and any presumption from the circumstances attending, which are necessarily in great measure of a strictly medical character.

The medical evidence of carnal penetration without consent may be derived from four sources:

1. Marks of violence about the genitals of prosecutrix or prisoner, from the act itself or its repulsion.

2. Marks of violence on the person elsewhere of prosecutrix or prisoner, from the resistance offered or from general violence.

3. The presence of stains of the spermatic fluid or of blood on the clothes or person of the prosecutrix or prisoner.

4. The existence of gonorrhœa or syphilitic disease in one or both.

It is unnecessary, as I have said, to prove that the vagina had been really penetrated by the virile member, or that seminal emission had occurred within its cavity. The law has fortunately saved us this trouble. Were such proof required, it would have been in many cases almost impossible to furnish, for the following reasons:

1. The valvular membrane at the mouth of the vagina, the hymen, so long considered necessary as proof of virginity, is often congenitally deficient or wholly wanting;

2. It may have been previously destroyed by disease;

3. By accident;

4. By self-abuse, a vice, or rather habit, not at all uncommon even among women;

5. By previous intercourse. When this has occurred, and whether the complainant is a married woman or not—for frequent ccitus is by no means confined to those legally entitled to such privilege—the hymen is almost necessarily absent; certainly so, or at least with very rare exceptions, if she has had children at the full time, though the occurrence of an early abortion does not always destroy it.

6. And on the other hand, complete vaginal penetration is by no means necessarily followed or accompanied by intra-vaginal emission of the seminal fluid. It is now notorious that in a large proportion of the cases of illicit intercourse, and indeed, of conjugal intercourse, the completion of the act within the body of the woman is purposely withheld, for the purpose of preventing or avoiding an impregnation, rightfully or wrongfully thought inconvenient, destructive as this method undoubtedly is to the health of both parties engaged.*

* I can not too strongly express my belief that incomplete intercourse,

The law has also wisely refrained from requiring any proof that impregnation has been effected, it being now well known that this is by no means a necessary consequent of the fully completed act—indeed, an unlikely consequent, except at or very near the monthly period of ovulation and menstrual discharge. It was at one time supposed that the fright, disgust and aversion on the part of the woman attending true rape, would of itself be sufficient to prevent conception, and that the occurrence of this was so far proof of consent; but this theory is unfounded—the most frigid and apathetic women being often extremely fruitful, and conception often occurring with vaginal disease that induces great anguish and suffering during coitus.

We will allow then that the four medical presumptions of intercourse, any or even all of them, are present; marks of violence on the genitals or other parts of the person in one or both, stains of spermatic fluid and of blood on the clothes of one or both, and the presence of what are generally supposed conclusive signs of venereal disease. How can these be disproved or rebutted? I shall here deal in general statements, and not descend to the details of proof, some of them microscopic—as for such, accessible in every medical library, we have here neither space nor time.

1. It is of course presumed that an alibi can not be proved.

2. The next point of importance for the defense is to ascertain if the party alleged to have been outraged is really a woman, and on the other hand, if the prisoner is really a man. Both of these questions, it is evident, can only be solved by a thorough medical examination. Their pertinency and validity might easily be shown.

3. Regarding marks of violence. If it were allowed that sexual connection had thus been conclusively proved on the part of one or both persons, it would become a matter of

whether effected by the use of a protecting sheath or by untimely withdrawal, is very detrimental to the local and general health of both men and women. As regards the latter of these classes, I am constantly seeing the effect referred to; as regards the former, I am glad to find my views concurred in by so careful an observer and so competent an authority as my friend Dr. Bumstead, of New York, whose work on Venereal is undoubtedly the best, as yet, in any language.

no little difficulty to prove that this causative connection was between the two parties now in court, or that the marks of violence evidenced were not from recent connection with other parties unknown. Cases illustrative of these positions readily suggest themselves. It is no uncommon thing for such appearances to exist on the persons of women newly married, who, suffering acute physical pain upon the first conjugal approach, at times are inclined to resist completion of the act; and again it is often for the interest of women, married or not, who are yet not at all unfamiliar with sexual intercourse, to play the coquette, and by an appearance of refusal, to conceal the loss of their virginity. In either case the blind fury, so often brutal, of a lustful man, might overleap and violently break all barriers. Suppose, in such cases, an attempt, soon after, at rape upon the woman by another party; or in the latter of the instances suggested, that it is willfully charged upon an innocent person, to give still further color and credit to an attempt at regaining lost repute of chastity—the danger of an unjust conviction becomes very evident. Moreover, these injuries have at times been intentionally and artificially produced for the purpose of giving support to a false charge of the crime.

The marks of violence referred to may be either upon or in the neighborhood of the genitals, or upon other parts of the person. If of the latter kind, it is of as great importance as in the former case closely to scrutinize their character and location, to search for their direct exciting cause, and to decide upon the probable time of their infliction. Thus injuries upon the man, if inflicted by no weapon of defense, would have probably been caused by the woman's teeth or finger nails, or, indeed, if the act is alleged to have been committed in bed, then, perhaps, by the nails of her feet. The probability of their having thus been occasioned, and under the circumstances alleged, can only be reached by closely examining the position and extent of the injuries themselves, and comparing these with the alleged position occupied by the respective parties. If upon the person of the woman, these general injuries would be either from blows for the purpose of stunning or disabling, from efforts to trip or throw her down, from forcible attempts to open her thighs either by a knee or the hands, or from

ligatures that have been applied for the purpose of disabling her, or of compelling a position more favorable for the completion of the felonious assault. The possibility of these injuries having been inflicted, as is frequently the case, by an accomplice, must also be borne in mind. Their date, to a certain extent, is shown by their condition at the time of inspection, the existence of zones of discoloration, etc. And it is evident that any marked discrepancy between the time of their alleged occurrence, and the physical characters that they present, ought, so far, to vitiate the charge.

Thus far the evidence, so far as it goes, tends to the presumption, not that intercourse has been effected, but that it has been attempted.

Injuries upon the genitals are, in the case of either party, much the more important. As I have said, I do not intend here to enter into minute details, and will content myself with merely pointing out generally the more obvious sources of deception or mistake.

Contusions, abrasions, and discolorations around the male genitals, and injuries inflicted upon the organs themselves, are pretty positive evidence to the end borne upon by the class of injuries just instanced, that coitus has been attempted. The local injuries that we are considering are caused by the resistance of the woman, who, in her desperation, has sometimes sliced off the male member with a razor or knife, or even bitten it off. Almost the only successful rebutter of such evidence as this that could be alleged, would be proof of the previous occurrence of some unusual accident to the organs, as striking upon a sharp or projecting body during a fall, or that the prisoner had himself attempted self-mutilation, as is not unfrequently the case during an attack of insanity, or that he had recently been permitted intercourse with some other woman, of very compact genitals, not easily entered.

The result of disease, as we shall perceive, must be borne in mind, and carefully distinguished from the effects noticed.

Local injuries in the female, on the other hand, go further to prove that intercourse has been consummated. They are much less likely to be in the neighborhood of the organs than directly upon or within them, and their presence is in great

measure dependent upon the age of the subject. The younger she is, the more liable to external contusion and to internal laceration and injury, both the outer and the inner tissues being so much the more delicate and friable. If an adult, with whom connection had never by any one been previously effected, there would be a great deal of soreness and stiffness, elements chiefly to be ascertained by the testimony of the party herself, and to a certain extent, by her manner of carriage; and perhaps, though not necessarily, turgescence or abrasion of the external parts, the outer and inner lips of the vulva, the labia, and nymphæ.

The law, properly interpreted, does not require proof that further penetration than this, or even as much as this, has been effected. If such proof, however, exist, it should not be rejected. The remnants of a recently ruptured hymen, caruncule myrtiformes, as they are subsequently styled, the presence of visible hemorrhage, arising from the outlet or within it, or the detection of the so-called seminal animalcules or spermatozoa within the passage itself, or in the discharges issuing from it, would, within certain important limits, be acknowledged presumptive proof of effected coitus. The presence, however, of mucous, purulent or even hemorrhagic discharge should of itself be allowed to possess little or no conclusive weight.

With a married woman, especially of some little standing as to the time she has held this relation, these signs proportionately fail. If the vulva and vagina have been dilated by frequent intercourse, and especially by the birth of a child or children, coitus being infinitely easier, it is less likely to leave any visible or appreciable trace behind. But upon all these points and in every case that may be brought to trial, it must not be forgotten that however favorable the circumstances, and however consenting the woman, it is always difficult, and in many cases impossible, for the male fairly to enter the vagina of the female without direct manual assistance from himself or from her. In rape, the man can seldom attempt this assistance, both his hands being usually required to overcome the woman's resistance; so that if complete intercourse is alleged, or is proved, or indeed is even admitted by the defense, it might fairly be considered, in the absence of extreme local

injury or complete insensibility on the part of the woman, and this whether she be married or unmarried, as so far strong presumption of her consent, if not direct assistance in the act. To this point we shall necessarily again return.

4. The presence of stains of the spermatic fluid or of blood upon the clothes or person of the prosecutrix or prisoner, has always been thought among the most conclusive proofs. It is easy, however, to show that this is not actually so, except in the case of an infant or a person legally incapable of consent. Putting aside the possibility in microscopic examinations where the clothes, etc., have been soaked and macerated for the purpose of freeing, for more accurate scrutiny, the base of a suspected stain, of error by mistaking minute filaments of cotton fibre, etc., for the true spermatozoon, and, in ordinary cases, of being misled by stains of urine, mucus, or a blenorrhœal discharge, there is still abundant ground for successful defense. While it is not necessary to prove the occurrence of a seminal emission, there must not, on the other hand, be too much weight allowed to the fact of its existence.

We grant that seminal stains exist upon the clothes of the prisoner. What then? With the lower class it is nothing uncommon for the same underclothing to be worn day and night. It is well known that seminal emissions are of constant occurrence during erotic dreams, even among the chastest and most ascetic of men. It is as certain that at times, especially if the person has been of a sensual habit, these same involuntary emissions may take place in the daytime, during strong sexual excitement or desire, without implying sexual contact or even the woman's presence; and that in some men, plethoric or debilitated as the case may be, a similar discharge may occur, either by day or by night, without the consciousness of a lustful thought. Of course, if the stains are upon the external clothes the presumption of intercourse increases. If the seminal traces are detected upon the prisoner's person they prove nothing more, save that the emission was with greater probability or certainty of recent date.

If they are upon the woman's person, their evidence is merely to the same effect, that coitus has been attempted by the prisoner or some one else. If upon or within the genital

organs, there is merely presumption, not positive proof, that complete coitus has been effected, for the spermatic jet, during her struggle, may have been thrown from some little distance, and thus have entered the opening. This supposition, of itself plausible, receives additional weight from the fact that impregnation has been effected, in the known absence of a third party, by men whose appendix was nearly or indeed entirely wanting, or hypospadial, but their testicles and ejaculatory apparatus yet normal. And, moreover, great care must be exercised that the spermatozoon is not confounded with the Trichomonas vaginæ, an animalcule of somewhat similar appearance, though much larger, usually present only in cases of disease, but that may occur, it is alleged, in the vaginal mucus of the chastest virgin.

If the stains are upon the night-dress, they may have been there some little time, and date from some other man than the prisoner. If upon her day-clothing, of course the presumption of his implication is increased, except that, among the lower class, the same carelessness as to changing the underclothes from day to night, obtains as with men.

It will be noticed that the weight of presumption regarding the two parties in court, while coinciding in some points, alternates in others. Thus, spermatic stains upon the *external* clothing of either of the parties, or of both, render it probable that there has been intercourse between them, or an attempt at it. Stains upon the *under* clothing of both parties also imply intercourse of both, probably together. Upon the underclothing of the woman alone, the approach of a man, some man. Upon the underclothing of the man alone, possibly the presence, probably the thought of a woman, either when awake or in an erotic dream. This latter alternative is not, however, absolutely necessary, as in weakened subjects such emissions do undoubtedly take place unconsciously, both by night and by day, just as, on the other hand, the stain may have been effected merely by self-abuse. Upon the *person* of both parties, and, therefore, necessarily quite recent, spermatic stains render the assumption of attempted coitus more certain; effected and accomplished, probably, if the discharge is detected upon or within the organs of the female.

5. The presence of blood stains upon the clothing is of weight similar to the above; much greater if they are coincident, not so great if upon the person of one alone, no matter which of them it may be.

There are but two sources whence recent blood of an at all arterial character, which is that only in any way here conclusive, would be likely, in the absence of a noticeable wound, to stain a man's clothing, except from carnal intercourse. These are some forms of hemorrhoids or bleeding piles, the existence of which could, upon examination, be ascertained with tolerable certainty, and hæmaturia, or a bloody discharge from the urethra, kidney, or bladder; but this, as with that from the rectum, more certainly if from the intestine above it, would be likely to be changed in character, and thus afford quite decisive evidence of its origin. In the absence of either of these alternatives, the blood was probably derived from a woman, but her identity with the prosecutrix ought hardly to be taken for granted, unless she be proved to have been menstruating at the time alleged—in that discharge the blood being ordinarily, but not always, of a more venous character, the coagulum of the uterine excretion being prevented or dissolved by the acid of the vaginal mucus; or to be affected with certain forms of uterine disease, more especially of a malignant or cancerous type; or to have received positive and recent laceration of some portion of the genital organs. The chance that the hemorrhage came from injury inflicted upon the penis during resistance must also be borne in mind. To blood stains on the woman's clothing I have also referred in the above remarks. If coincident upon the clothes of both, the presumption of intercourse, as I have already said, is increased.

6. The last of the several evidences of a medical character usually relied upon in trials for rape, has generally been considered far more certain. It is, however, just as unreliable as the others. I mean the existence of one or other of the three forms of venereal disease.

Respecting their value as signs of recent intercourse, there is still much ignorance prevalent among medical men, but well authenticated cases enable me to express myself very decidedly. The specific characteristics of the three diseases to which I have

referred are now well known; pox, as commonly recognized, consisting of the chancroid, a strictly primary lesion, and of syphilis proper, which latter, undergoing a period of incubation at whose close it presents an open sore or chancre, has yet, by primary absorption of the virus, become a constitutional and general disease, while gonorrhœa, or clap, is wholly local in its seat—a purulent discharge from the lining membrane of the genital or genito-urinary canals, and may be initiated and be found contagious in character from a connection perfectly legitimate and without suspicion.

I shall enter into none of the pathological peculiarities of these three affections, or of the differences between them; merely premising that they can not beget each other—that merely syphilis is taken from syphilis, chancroid from chancroid, and gonorrhœa from gonorrhœa; and that, contrary to usually received opinion, both stages of syphilis, the primary and secondary, the latter in at least one of its forms, are directly communicable, the mucous tubercle occasionally or always engendering a primary sore, the chancre.

If, then, both parties are found to have precisely the same form of disease, the evidence is so far conclusive that they have carnally known each other; whereas, if they are both diseased, but in a different way, the evidence is as conclusive, or even more so, of the other extreme, namely, that though both have become diseased from impure connection, they have done nothing towards infecting each other. This last conclusion can not, however, be considered as positively proved, inasmuch as both syphilis and gonorrhœa may perhaps coexist in the same subject, a fact the possibility of which is yet under discussion.

But how is it when only one party seems infected? and are the essential signs of the diseases in themselves perfectly reliable?

In the case of the male, of whatever age, I have little hesitation in saying that the presence of any form of venereal disease upon the genitals, is so far positive evidence of previous sexual connection, except in cases of inherited taint. It has, however, been observed that Jewish children have received the infection, and presented true chancres on the penis after the division of the prepuce during circumcision, by the organ having been

sucked, to arrest the hemorrhage, by an operator in whose mouth there existed primary lesions.* Such lesions are certainly met with from time to time in the mouths of women of the lowest class, and of men also; how they were originated, there can be but little doubt. If a prisoner admit that he had subjected his organ to such unnatural chance of infection as I have now implied, it is more than likely that he had also exposed himself to it in the more customary manner.

In deciding upon how recent was the connection that had taken place, due care must of course be paid to those medical signs and symptoms decisive of the age of the venereal lesion. On the other hand, it must be borne in mind that all affections of the male generative organs are not necessarily the result of coitus, whether excessive or impure. Some of them are the effect of want of personal cleanliness; others the result of masturbation; or of malignant disease, general, as cancer, or special, as the scrotal disease of chimney sweeps; or of over-fatigue or structural relaxation, as varicocele; or of distant irritation, as infra-Poupartian bubo; or of accidental violence or disturbance, as swelled testicle from horseback riding, exposure to cold, or metastasis from another portion of the body. These and others are points requiring in their solution the aid of the medical man, but it is nevertheless important that the lawyer should know and recollect the fact of their existence. If there is little doubt of the specific and venereal nature of the disease, and there can be little hesitation in their diagnosis by an expert, judgment must not be led astray by unfounded excuses, however plausible. I refer here to the common notion that it is possible to obtain syphilis and gonorrhœa by contact with foul bed linen, or with the surfaces of common privies, as at hotels and the like, where the virus, if deposited, must become neutralized by cold and the action of the atmosphere. After having carefully studied many such alleged cases, I have been compelled to believe that in each and all of them there had been indiscretions by which inoculation had been more naturally effected. I know of no means by which syphilis can thus be accidentally communicated to the male, save the direct ones to which I have already

* Ricord, Lettres sur la Syphilis, p. 98.

alluded, and but one by which gonorrhœa, or rather I should say blenorrhœa, as the suspicious purulent discharge from the urethra, occurring under such circumstances, should more properly be called. The case to which I refer is where intercourse has taken place while the woman's monthly courses were upon her, the menstrual fluid being at times excessively irritating to the mucous membrane of the male, or while she was suffering from some one or another of the forms of leucorrhœa. Even here, however, such purulent discharge in the male would have been consequent upon coitus, and therefore evidence of its occurrence. I know that it is alleged that the same identical condition may occur in chaste bachelors who have never touched women, but I doubt; though of course allowing for the effects of well authenticated injury, or organic lesion, or constitutional disease.

With the woman, however, there is far more necessity for hesitancy in expressing a decided opinion as to any given case.

1. In the first place, I have no scruple in asserting that gonorrhœa in the female is not to be distinguished by the microscope, by chemical analysis, or in any other way, from purulent discharges entirely innocent in their character, and that may even exist in the chastest virgin, although adult. This remark applies to all stages of the disease.

2. The fact that no external chancre or chancroid is visible, is no proof of the non-existence of actual primary syphilitic disease. In the male, these signs are almost necessarily patent when they exist, cases of such lesion strictly urethral being very rare; in the female, on the contrary, the parts are chiefly concealed from easy inspection, so that the most virulent and infectious sores may be upon the walls of the vagina, upon or within the neck of the womb, or even just internal to the opening of the urethra, requiring, therefore, the most careful examination, especially when the disease is present in the criminal at the bar. It is possible that the newly suggested endoscope may go far to clear up these cases, but it is evident that a drop of pus, or mucus, or serum may here prevent success; an obstacle absent to the ophthalmoscope, and but seldom present in examinations of the larynx.

3. The charge of connection is often made by or in behalf of female children of tender age, even infants. Young girls whose personal cleanliness is neglected, either by themselves or their parents, are not infrequently attacked by ulcerative affections of the external genitals; in some cases slight in character and extent, in others causing their death.

4. Besides such diseases as we have just enumerated, in which the circumstances of a criminal charge would very naturally be suggestive of carnal and infectious intercourse, there is another affection to which young girls are frequently liable, of which complication I have now seen many instances, as also several of the former. A catarrh of the genital organs, consequent upon ordinary exposure to cold, insufficient clothing of the lower extremities, standing over furnace registers, or, in younger children, arising from local or distant and reflex causes of irritation, as after scarlatina, during dentition, or from the presence of ascarides or the scrofulous diathesis, often all of them attended by a purulent discharge from the vagina closely simulating that of gonorrhœa. Convicted upon such evidence as this, more than one poor fellow has been condemned and executed for rape, of which he was undoubtedly innocent. It should never be admitted except—

1st. When the accused party is laboring under a gonorrhœal discharge that existed previously to the time of the alleged intercourse;

2d. When the date of its appearance in the child is from the second to the eighth day after this time; or,

3d. When it has been satisfactorily established that the child had not, previously to the alleged assault, any such discharge. Though, however, any or all of these conditions be present, they do not disprove the innocence of the prisoner, for they may still be mere coincidences, or the child through mistake or design may have accused the wrong person.

5. In the instance of very young female children, who have yet furnished the occasion of very many of the reported trials, there is still another possibility of error, which is no less an important one. I refer to cases where there is undoubtedly present the venereal disease, yet caused by no attempt at sexual intercourse. As this is a matter as yet new, in great measure,

to courts of law, I shall give other and well authenticated instances, in addition to that of the Jewish children, already quoted. In this I am well aware that I am at variance in opinion with Taylor, now the leading medical jurist of Great Britain, who says that, "if a child is really laboring under syphilis or gonorrhœa, this is cœteris paribus evidence of impure (carnal) intercourse, either with the ravisher or some other person."* Afterwards, however, he contradicts himself by allowing, in the case of gonorrhœa at least, the chance of other origin, relating the cases reported by Ryan,† where two sisters, one of a year, the other of four, were infected by being washed with a sponge used by a young woman who had a profuse gonorrhœal discharge.

I shall now, however, instance cases of syphilis, or chancroid, accidentally occurring—a matter of far more importance, as the possibility of their thus being engendered is generally disbelieved.

I have quoted an instance from Ricord. Trousseau saw a little girl of twelve months who had contracted a deep chancre on the buttock. He learned that the mother took the child into the same bed with herself, and as the cold was extreme, pressed it closely to her body to warm it. This woman had primary sores in the vulva.‡ It will be seen, recollecting what I have already said upon this subject, primary sores being only *directly* communicable, that the infection was here clearly by contact, and not by inheritance.

Bertin instances a little girl four months old, healthy herself, as were also her father and mother, who became the subject of a chancre on the upper and inner surface of the left labium.§ It was discovered that an aunt of this child, affected with syphilis, tended and kissed it, sometimes gave it the breast to quiet it, and lastly, that she washed its genital organs with water which she had previously put into her mouth to warm.

Diday treated a lady with a primary chancre on the lower lip, communicated to her by her husband in a way that may be imagined. The mother of a child four months old, she felt it a

* Taylor, Med. Juris., 503. † Med. Gaz., xlvii., 744.

‡ Gaz. des Hôp., 1846, 571.

§ Tr. de la Mal. Vénér. chez les Enf. Nouveau nez., 77.

great privation to defer until the time when her sore should be healed the kisses with which she had previously and frequently covered it. She one day lost patience, and the result was a deep ulcer upon the labial commissure of the poor child.*

Richet mentions a little girl, born of healthy parents and suckled by a healthy nurse, but yet affected with primary chancres about the anus, concerning the origin of which the medical attendants were much puzzled, until it was ascertained that a clerk of the house, himself infected, had been in the habit of holding the child, bare, on his hands, which were frequently soiled, and which he had not always taken the precaution to wash.

On the other hand, it must not be forgotten that in attempts at connection with young children or virgins, abrasions and excoriations necessarily result, which afford a condition especially favorable to the inoculation of the contagious matter of syphilitic disease. So that in the case of its presence in the prisoner, its absence in the prosecutrix, under such circumstances, would so far afford some presumption of an unfounded charge.

There are still other obscure points in this interesting and important, though as yet little understood subject, the presence of syphilitic disease as proof of special connection—two of which I should do wrong not to mention. They are the facts,

1st. That a woman can be infected vicariously in a variety of ways: through her child during labor, or even before, it having received the poison directly from the father at its conception; by suckling; and, as in the case of the male, by inheritance—the symptoms, save in instances from nursing or infection during labor, being of the so-called secondary type, which, with a single exception, can hardly be considered contagious; and,

2d. That in cases of this special exception just referred to, the so-called mucous tubercle, the disease, although secondary and although, like the chancre, not auto-inoculable by the lancet, is yet directly communicable during connection, and gives rise to the primary lesion, namely, a chancre. This is

* Syphilis in New-born Children, 51.

not owing, as has been supposed, solely to the excess of heat and moisture attending the act, as is proved by inoculation in a similar manner from mouth to mouth. Numerous authorities admit fully, on the evidence of facts, its transmissibility in this manner, by sexual contact,* and it must therefore be borne in mind during our present inquiry.

One other point, though negative, is of such importance that it must not be lost sight of, namely, that connection may be fully effected, one of the parties being extensively diseased, and yet the other receive no infection, nay, even that the disease may be thus transmitted by an uninjured second to a third party. This impunity may be owing to a variety of causes: to precautions taken before or after the act, protective or compensatory; or to unusual toughness of the mucous membrane, approximating in character to ordinary epidermis, from long exposure, perhaps, to external agencies, as in males with a prepuce constantly retracted, more certainly if it is entirely wanting, as with the circumcised Jew; or to idiosyncrasy—just as I believe that the contagious virus of erysipelas, or its congener, puerperal fever, while it ought theoretically to be carried from house to house by every physician who has it in charge, does in reality attach itself to the persons or the finger of certain unfortunates, thus more fully indicating its claims to the title of a private pestilence. This I believe to be as evident as that there are individuals who, from idiosyncrasy, constant or increased by extraneous causes, special or general, debilitating or exciting, are peculiarly prone to receive the disease; a fact that none will deny.

There is a single class of cases, to which it is necessary that I should incidentally allude, those, namely, where the female has been found dead. It would seem that if any marks of violence were present, the charge of murder would take precedence. In a case, however, tried at Edinburgh, the jury convicted the prisoner of rape, and yet acquitted him of the murder, although the proof of the latter crime was much the clearer. The evidence in these cases, in the absence of other personal testimony than that of the woman, must of necessity be wholly circumstantial and presumptive.

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* Diday, Loc. Cit., 132.

We have now considered, at considerable length, the various proofs for and against the fact of sexual connection in cases of rape, and incidentally those also which bear upon the existence of the attempt alone. Formerly, before the abolition of the death penalty, the distinction here implied was one of extreme importance, but too often, however, and unfortunately, lost sight of at trials. Whatever opinion may be entertained as to whether or not that penalty was greater than was really demanded by the essential nature of the crime, there is no doubt that many convictions have been effected where the crime, as defined in law, had never been accomplished.

The attempt is now, in Massachusetts, punishable or not to the full extent with its completion, at the option of the Court; in Pennsylvania, imprisonment may be inflicted to the extent of five years and a fine of a thousand dollars; while in New York, the penalties are even less. It may seem, therefore, of less importance to search in every case for such extenuative evidence as I have now presented, were it not that instances are liable to occur where a jury, at all mindful of human infirmity, would be glad to find in the fact that the completion of the offense could not be fully proved, opportunity to ward from the sudden and momentary outburst of passion, provoked, perhaps, by willful temptation from the prosecutrix, the terrible penalty, possible in my own State, and there compulsory where the act has been really effected, of life-long imprisonment.

I agree with Chitty, that "every brutal attack upon a female deserves very severe punishment," and though considering that the offense should be punishable as an injury upon herself and her own moral sense, rather than in deference to "the natural feelings of man and his repugnance to form a matrimonial connection with a female who has been completely violated," yet I do not "hesitate in admitting that an incomplete attempt is not so great an injury as that which, according to the ancient law, must have been completed; and that in legislating, some distinction in punishment should be introduced;"* but I contend that this distinction and the degree of punishment righteous in any given case should be left, more than now, to the discretion of the Court.

* Chitty, 382.

In my next article I shall proceed to the second of the questions involved by the definition of the crime. Carnal knowledge having been effected, was it without or against the consent of the woman?