A REVIEW OF THE CRIMINAL LAW OF THE COMMONWEALTH OF KENTUCKY

circa 1840

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By

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CHAPTER XI.

OF RAPE.

RAPE is the carnal knowledge of a woman by force and against her will. (1)

By the statute of Westminster 2, c. 34, the offence of rape is made felony. "If a man ravish a married woman, dame or damsel, where she neither assented before nor after, he shall have judgment of life and member. Although she consent after; he shall have such judgment as before is said, if he be attainted at the king's suit, and there the king shall have the suit." And by the statute of the 18th, Eliz. c. 7th, the principals in rape are ousted of clergy, whether they be principals in the first degree, viz. those that committed the fact, or principals in the 2nd degree, viz. present, aiding and assisting: but accessaries before and after have their clergy. (2)

By an act passed in the year 1801, entitled "an act to amend an act entitled an act to amend the penal laws of this commonwealth," it is enacted that "any man from henceforth, who shall carnally and unlawfully know any woman against her will or consent, and all persons who are accessary thereto before the fact, shall be deemed guilty of felony; and upon due conviction thereof, shall undergo a confinement in the jail and penitentiary house, for a period not less than ten years, nor more than twenty-one years." (3)

As to slaves, the act to amend the penal laws, passed in 1798, left them to the punishment provided by the statutes above mentioned: but by the amendatory act of 1802, the punishment of death is confined to the case of the rape being committed on a white woman; for it is enacted

(1) 1 Hawk. 169. (2) 1 Hale 627-633. (3) Acts of Kentucky 1801, p. 120.—Bill § 20.

by the said law, that "any slave convicted of murder, arson, rape (committed on a white woman), robbery from the person or burglary, shall suffer death: any slave convicted of any other offence, or of being accessary thereto before the fact, shall be sentenced to receive on his or her bare back, at the public whipping post, any number of lashes not exceeding 39."

The former part of this clause says nothing of accessaries; but there is a general provision contained in the act which is applicable to this case. "In all felonies accessaries before the fact shall be liable to the same punishment as their principals respectively; and may be prosecuted, though their principals be not taken." (4) Nor does the clause above recited expressly take away clergy, in the cases therein mentioned; for slaves notwithstanding the act of 1798, are still entitled to clergy for clergyable offences: but it is to be considered, that clergy was previously taken away in the cases above mentioned, by former statutes,—that nothing is said to invalidate those statutes, and that the intention of the legislature obviously appears to have been, not to change the punishment of the offences enumerated, but of other subordinate offences.

In the farther prosecution of this subject, it will be necessary to examine more particularly,

1. The nature of the offence:—for though the material facts requisite to be given in evidence and proved upon an indictment of rape are by no means a fit subject of public discussion; yet in a criminal treatise, in which it is required by legislative authority to exhibit a faithful delineation of the law; it is necessary that they should be stated, for the conviction of the guilty and the preservation of the innocent.

To constitute a rape there must be an actual penetration or entry, (as also in buggery) and therefore though a seminal emission is indeed an evidence of penetration, yet singly of itself it makes neither rape nor buggery, but it is only an attempt at rape or buggery, and is severely punished by fine and imprisonment.

But the least penetration maketh it rape or buggery, yea although there be no seminal emission.

(4) Acts of 1802, ch. 53 § 18—19.

If A actually ravisheth a woman, and B and C were present, aiding and abetting, they are all equally principals, and all subject to the same punishment, whether they be men or women. (5)

This offence is in no degree mitigated by shewing that the woman at last yielded to the violence, if such consent was forced by the fear of death or duress. Nor is it any excuse that she consented after the fact, that she conceived in consequence of it, or that she was a common strumpet; for she is still under the protection of the law, and cannot legally be forced. (6)

2. Another point necessary to be attended to, relates to the persons who may be convicted of a rape.

A male infant under the age of fourteen years, is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it. For though in other felonies, malice supplies the want of age; yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind.

He may however be, in this as well as in other felonies, a principal in the second degree as aiding and assisting though under fourteen years, if it appears by sufficient circumstances, that he had a mischievous discretion. (7)

A, the husband of B, intended to prostitute her to a rape by C, against her will, C accordingly ravished her, A being present, and assisting to this rape. In this case these points were resolved, 1. That this was a rape in C, notwithstanding the husband assisted in it, for though in marriage she hath given up her body to her husband; she is not to be by him prostituted to another. 2. That the husband being present, aiding and assisting was also guilty as a principal in rape, and therefore was indictable for it at the king's suit as a principal. 3. That in this case the wife may be a witness against her husband, and accordingly she was admitted, and A and C were both executed. (8)

If A by force take B, and by force and menace, compel her to marry him, and then with force A hath the carnal knowledge of B, against her will, though this marriage be

(5) 1 Hale 628.—3 Instit. 59. (6) 1 Hale 623.—1 Hawk. 170.
(7) 1 Hale 630. (8) 1 Hale 629.

voidable, yet it is not so simply void as to render him punishable for a rape. But if a dissolution of the marriage be obtained by a declaratory sentence in a court having competent jurisdiction ; then if the carnal knowledge of her were forcible and against her will, as well as the marriage ; such rape is punishable by indictment, for it was really a rape, only the actual, though not lawful marriage was an impediment to its punishment, so long as the actual marriage continued ; but that impediment being removed by the declaratory sentence and the marriage made void from the beginning, it is the same as if no such marriage had ever taken place : and since the marriage and carnal knowledge were one entire act of force, the rape committed shall remain punishable as if there had been no marriage at all.

The lord chief justice Hale, goes on to observe, that the statute of the 3d of Henry 7th, chapter 2d, (by which a forcible taking away and marrying of a woman against her will, is made felony) hath provided a remedy in this case, so that this difficulty need not come in question.

Were this really the case it would have been needless to quote the preceding observations of the chief justice :— but it will be perceived, when we examine the decisions which have been made upon this statute, that they have restrained its operation to cases in which women of property are concerned. The difficulty stated by the chief justice, will therefore still arise, where women not included within the provisions of the statute are married against their will, and forcibly defiled.

3. It will be proper to take some notice of the nature of the evidence in an indictment of rape given to the grand jury or petit jury.

And first, the party ravished may give evidence upon oath, and is in law a competent witness ; but the credibility of her testimony, and how far she is to believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance : if the witness be of good fame ; if she presently discovered the offence, and made search for the offender ; if the party accused fled for it ; these, and the like, are concurring cir-

cumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alledged to have been committed, was where it was possible she might have been heard and she made no outcry: these, and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned.

Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath, or even to be sensible of the wickedness of telling a deliberate lie.—Nay, though she hath not, it is thought by Sir Mathew Hale, that she ought to be heard without oath, to give the court information; and others have held that what the child told her mother, or other relations may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled, that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath: and that there is no determinate age at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet after being heard, may prove not be credible, or such as the jury is bound to believe. For one excellence of the trial by jury, is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

It is one thing whether a witness be admissible to be heard:—another thing whether he is to be believed when heard. It is true, adds the learned judge Hale, that a

rape is a most detestable crime, and, therefore, ought to be severely and impartially punished with death : but it must be remembered, that it is an accusation easy to be made, hard to be proved, and harder to be defended by the party accused though innocent. He then relates two very extraordinary cases of malicious prosecution for this crime, that had happened within his own observation, and concludes thus, " I mention these two instances that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease, be imposed upon, without great care and vigilance, the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are overhastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of false and malicious witnesses. (9)

In a case which was just now cited from judge Hale, where the husband was charged to have assisted to the rape of his wife, it was stated that the wife was admitted as witness against her husband. This point requires some farther observation. It was the case of Lord Audley, whose wife was admitted as a witness, because it was a personal violence done to her, and of such secret violence there could be no other proof but by the oath of his wife.

But, on the whole, this piece of law hath since been exploded, that in a personal wrong done to the wife, the wife may be evidence against the husband ; because it may be improved to dreadful purposes, and must be a cause of implacable quarrels, if the husband chance to be acquitted.

And in a very recent case, singular indeed, and I believe, observes Mr. Loft, without example in this country, where a wife was the prosecutrix and sole direct witness in proof of an execrable charge against her husband, which came before the grand jury for the county at large, at the summer assizes at Bury in 1784, the judge recommended in his charge that the bill should not be found, if unsupported, by any other evidence : since otherwise a cause very

(9) 1 Hale 634.

peculiarly unsuitable to be brought without effect before the public ear, would come to trial with a legal necessity of the prisoner being discharged from the indictment, for want of evidence competent to go to the jury.

There is a great difference between a wife by *a mere actual marriage* and a wife by *a legal marriage*,* for a wife by a legal marriage cannot be an evidence for or against her husband, but a wife by an *actual* (if not legal) *marriage* may: as if a woman be taken away by force and married, she may be an evidence against her husband, indicted on the statute against the stealing of women; for a contract obtained by force hath no obligation in law: and therefore she is a witness in this case as well as in any other case whatsoever. (10)

In addition to what has been observed with relation to rapes in general, it will be necessary to note two particular cases for which our laws have made especial provisions. They are those of females under ten years of age, and between the ages of ten and twelve.

As to those under ten years of age, it is provided by a clause in the act of 1801, borrowed from the 18th of Elibeth chapter the 7th, that "if any person shall carnally know and abuse any woman child, under the age of ten years, every such carnal knowledge shall be felony; and the offender being convicted thereof, shall undergo a confinement in the jail and penitentiary house for a period not less than ten years nor more than twenty-one years." (11)

Upon an indictment for this offence, it is no way material whether such child consented or were forced; yet it must be proved, that the offender entered her body, &c. (12)

The same observation may be made relative to the carnal knowledge of any female under the age of twelve for by the statute of the 3d of Edw. 1st, called the statute

*The words of the chief baron Gilbert, are "a wife *de facto*" and a "wife *de jure*." (10) Gilbert's Law of Ev. 253. (11) Acts of 1801, p. 120. (12) 1 Hawk. 170.

of Westminster 1st, chapter 13th, the offence of ravishing a damsel within age, (that is twelve years old) either with her consent or without, subjects the offender to two years imprisonment and a fine at the king's will.(13) Damsels, therefore, between ten and twelve are still under the protection of the statute of Westminster 1st, the law with respect to their seduction not having been altered by either of the subsequent statutes.

CHAPTER XII.

OF SODOMY.

THOUGH this offence does not properly belong to that part of our subject which relates to offences against the persons of individuals; yet, it is in it's nature so nearly allied to the offence of which we have just been treating, that it will be more convenient to notice it here, than to refer it to that section of our revision which will comprehend a view of offences relating to religion and morality.

Any unnatural carnal copulation between men, or of a man or a woman with a beast, is denominated sodomy or buggery.(1)

By the act to amend the penal laws, passed in 1798, every person duly convicted of the crime of sodomy, shall be sentenced to undergo a confinement in the jail and penitentiary house, for a period of time not less than two nor more than five years. In the case of a slave the punishment is any number of lashes not exceeding 39.(2)

What is necessary to constitute this offence has already been stated when describing the nature of the crime of rape.

(13) 4 Black. 212. (1) 1 Hawk.—3 Instit. 58. (2) Laws of Kentucky p. 347.—Acts of 1802 § 53.

If this offence be committed upon a man of the age of discretion; both the agent and consentant are felons within the law. But if it be committed with a man under the age of discretion, (viz. fourteen years old); then the agent only is the felon. (3)

When any offence is felony either by the common law or by statute, all accessaries both before and after are incidentally included. So if any be present, abetting & aiding any to do the act, though the offence be personal, and to be done by one only, as to commit rape; not only he that doth the act is a principal, but also they that are present aiding and abetting the misdoer, are principals also. (4)

What has been observed in the last article with regard to the manner of proof, which ought to be more clear in the proportion as a crime is the more detestable, may be applied to the crime of sodomy, a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false and malicious, it deserves a punishment equal at least to that of the crime itself. (5)

CHAPTER XIII.

OF FORCIBLE ABDUCTION AND MARRIAGE, AND ADULTERY.

WE shall now return from a digression which the nature of the subject naturally invited, to another offence more immediately affecting the personal security of individuals.

The statute of the 3d of Henry 7th, chapter 2d, rendered the forcible abduction of women of substance a felo-

(3) 3 Instit. 59.—1 Hale 670. (4) 3 Instit. 59. (5) 4 Black. 215.

nious offence: and the provisions of that statute have been incorporated in the act of 1801 to amend the act amending the penal laws of this commonwealth. They are in the following words; "Whereas women, as well maidens, as widows and wives, having substance; some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substance, have been often taken by misdoers, contrary to their will; and afterwards married to such misdoers, or to others by their consent, or defiled:

"*Be it therefore enacted*, that whatsoever person or persons shall take any woman so against her will unlawfully such taking and the procuring and abetting the same, and also the receiving wittingly the same woman so taken against her will, shall be felony; & such misdoers, takers, and procurers to the same, and receivers, knowing the offence in form aforesaid, being duly convicted thereof, shall undergo a confinement in the jail and penitentiary house, for a period not less than two years, nor more than seven years: Provided always, that this act shall not extend to any person taking away any woman, shewing reasonable claim to her as his ward or bond woman." (1)

The punishment of slaves will be regulated by the general provision mentioned in page 130.

In the construction of the said statute of 3d of Henry the 7th, chapter 2d, the following points have been resolved:

First, That the indictment must expressly set forth, both that the woman taken away had land or goods, or was heir apparent, and also that she was married or defiled, because no other case is within the preamble of the statute, to which the enacting clause clearly refers; for it does not say that what person &c. that taketh any woman against her will;—but what person that taketh any woman *so* against her will.

Secondly, That the indictment ought also to allege, that the taking was for lucre; because the words of the preamble are so.

Thirdly, That though it is necessary that she be taken away against her will to bring the offence within the sta-

(1) Acts of 1801, p. 120 § 9.

tute, yet it is no manner of excuse that the woman at first was taken away with her own consent, because if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for till the force was put upon her, she was in her own power.

Fourthly, That those who after the fact receive the offender but not the woman, are not principals within this statute, because the words are, *receiving wittingly the same woman so taken*, &c. but it seems clearly that they are accessaries after the offence, according to the known rules of common law.

Fifthly, That those who are only privy to the marriage, but no ways parties to the forcible taking away, or consenting thereto, are not within the statute. (2)

In Fulwood's case in the thirtieth year of Charles I. these points were likewise resolved: 1. That if a woman be taken away forcibly in the county M, and married in the county of S, the fact is indictable in neither county; for the taking without the marriage, nor the marriage without the taking, make not felony. 2. But if she were taken in the county of M, and carried into the county of S, so that it is a continuing force in S, though begun in M, and then she is married in S, there the offender may be indicted upon this statute in S. 3. Though possibly the marriage or the defilement might be by her consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking away were against her will. 4. That if as well the marriage as the taking away were against her will, so that the marriage was voidable, yet it is an actual marriage, and therefore being taken away against her will, and also married against her will, it is felony within this statute. 5. That it is not necessary in the indictment to say, that she was taken *with the intention* to marry or defile her, because the statute had no such words of "*with that intention.*"—But farther, he marrying her the same day he took her, it must needs appear, that it was *with that intention*; yet the words, "*with the intention to marry,*" are usually added in indictments upon this statute, & it is safest so to do.

(2) 1 Hawk. 171.

6. That the woman thus taken away and married may be sworn and give evidence against the offender who so took and married her, though she be in fact his wife.*

And all these points were accordingly resolved in Brown's case, 24th & 25th Charles the 2nd, upon this statute, only the indictment ran, *he took with the intention to marry*: the offender was convicted and executed, and the reasons why the woman was sworn and gave evidence in the case of Brown were, 1. Because the taking away of the woman and marrying were on the same day, and she was rescued out of their hands, and the offender taken the next day, and so all was done whilst they were actually engaged in perpetrating the offence.† 2. It was but a forced marriage, and so no legal marriage. 3. There was no cohabitation. 4. Concurring evidence to prove the whole fact.(3)

In cases, however, where the actual marriage is good, by the consent of the inveigled woman, obtained after her forcible abduction, Sir Mathew Hale seems to question how far her evidence should be allowed; but other authorities seem to agree, that it should even then be admitted; esteeming it absurd, that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should, (by a forced construction of law,) be made use of to stop the mouth of the most material witness against him.(4)

An inferior degree of the same kind of offence, but not attended with force, is punished by the statute 4th and 5th of Philip & Mary, chapter 8th, which enacts "that whoever above the age of fourteen (by flattery, trifling gifts & fair promises) shall allure & take any woman child, unmarried, within the age of sixteen, from and against the consent of her guardians, shall suffer two years imprisonment and fine at discretion. If the offender deflower, or marry her, five years imprisonment, and fine as before; and if any female above twelve shall consent to unlawful matrimony, she shall forfeit all her lands to the next of kin, during the life of such person as shall so contract matrimony." Upon which statute it has been decided, that the forfeiture extends as well to the infant who consents, as

* His wife *de facto*. † *Flagrante crimine*. (3) 1 Hale 660.
(4) 4 Black. 209.

to the husband who takes. The marriage must be clandestine, and to the disparagement of the heiress. If the guardian once consents, he cannot retract. A bastard under the care of her putative father is within this act. The court will grant an information for procuring an improvident or unequal marriage.(5)

But this statute is in part superseded by the tenth section of the before mentioned act of assembly, by which it is provided that "If any person above the age of fourteen years, shall unlawfully take or convey away, or shall cause to be taken or conveyed away, any woman child, unmarried, being within the age of fourteen years, out of or from the possession, and against the will of the father or mother of such woman child, or out of or from the possession, and against the will of such person or persons as then shall have, or by any lawful way or means hath the keeping, education, or governance of any such woman child, and being thereof duly convicted; shall undergo a confinement in the jail and penitentiary house for a period not less than six months, nor more than five years."(6)

Somewhat analogous to the offences of which we have been speaking are those of *abduction* or the taking away of a man's wife, and *adultery* or criminal conversation with her.

As to the first sort, abduction or taking her away, this may either be by fraud and persuasion, or open violence, though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of ravishment, or action of trespass by force of arms, for ravishment and abduction of the wife. This action lay at the common law; and thereby the husband shall recover, not the possession of his wife, but damages for taking her away: (7) and by statute Westminster the first, the 3d of Ed. 1st, chapter 13th, "the king prohibiteth that none do ravish, nor take away by force, any maiden within age, (neither by her own consent, nor without,) nor any wife or maiden of full age, nor

(5) 1 Hawk. 172. (6) Acts of 1801, p. 121. (7) 3 Black. 139.

any other woman against her will; and if any do, at his suit that will sue within forty days, the king shall do common right; and if none commence his suit within forty days, the king shall sue; and such as be found culpable, shall have two years imprisonment, and after shall fine at the king's pleasure; and if they have not whereof, they shall be punished by longer imprisonment, according as the trespass requireth." (8)

And by the chapter of Westminster 2d, chapter 34th, passed in the same reign, it is provided, that "women taken away with the goods of their husbands, the king shall have the suit for the goods so taken away. And if a wife willingly leave her husband and go away and continue with her adulterer, she shall be barred for ever of action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon; except that her husband willingly and without coercion of the church, reconcile her, and suffer her to dwell with him, in which case she shall be restored to her action." (9)

This latter provision is likewise comprehended in the act concerning the dower and jointure of widows. (10)

Although the words in the preceding clause are in the conjunctive; yet if the woman be taken away not of her own accord, but against her will, and afterwards consent and remain with her adulterer, without being reconciled &c. she shall lose her dower; for the cause of the bar of her dower, is not the manner of her going away, but the remaining with the adulterer in avowtry without reconciliation. (11)

If the wife go away with A. B. with her husband's agreement and consent, and afterwards A. B. commit adultery with her, and she remain with him without reconcilation, she shall be barred of her dower by this statute.

It is likewise observed by Sir Edward Coke, that although she doth not continually remain in avowtry with her adulterer; yet if she be with him and commit adultery; it is a tarrying within this statute. Also, if she once remain with the adulterer in avowtry, and he after-

(8 2 Instit. 179.—Bill § 27. (9) 3 Instit. 432.—Bill 28. (1) Laws of Kentucky 277. (11) 2 Instit. 435.

wards keep her against her will; or if the avowterer turn her away, yet she shall be said to continue with her adulterer within this act.

If the wife elope from the husband's dwelling house and commit adultery in other lands belonging to her husband; it is still within the purview of this statute.(12)

As to *adultery* simply, or a criminal conversation with a man's wife, though considered as a civil injury the law gives a satisfaction to the husband for it by action of *trespass with force and arms*, against the adulterer, wherein the damages recovered are usually very large and exemplary; yet it is as a public crime left by the laws of England to the coercion of the spiritual courts. (13)

By the law of Kentucky, however, every offence of adultery subjects the offender (not being a servant or slave) to a fine of five pounds, and every offence of fornication to fifty shillings, on conviction by the oath of one or more credible witness, or by the confession of the party.(14)

(12) 2 Instit. 436. (13) 3 Black. 139. (14) Laws of Ken. 372.