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## Consent As a Defense to Crimes Against the Person

James J. Lorimer

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## NOTES

### CONSENT AS A DEFENSE TO CRIMES AGAINST THE PERSON

Consent of the person injured is a defense to certain crimes against the person. The purpose of this note is to review the Pennsylvania cases in which the defense of consent has been considered, in an effort to determine: (1) in what crimes is consent a defense? (2) what constitutes consent?

The most complete discussion of the law of consent in Pennsylvania is to be found in the crime of rape. There are few cases in which consent as a defense to other crimes against the person has been considered. Because of this fact, we will first discuss consent as a defense to rape, then as a defense to assault and battery and related crimes, and, finally, consent as a defense to other crimes.

#### RAPE

Applying the above two inquiries to the crime of rape we find: (1) consent of the female is a defense to this crime against the person; and, (2) the female may be said to have consented if (a) she was legally capable of consenting, (b) she did not manifest unwillingness that the act be done, and (c) her consent was not vitiated by fraud or duress.

Lack of consent on the part of the female is the most important element of the crime of rape.<sup>1</sup> The distinction between rape at common law and other acts of illicit carnal knowledge is the element of consent.<sup>2</sup> Nearly all the cases referred to in this section may be cited for the proposition that consent is a defense to rape. This is a rule of the common law which, as will be noted, has been but slightly modified by statute. The important consideration remaining, then, is when may the female be said to have consented? This problem will be discussed in the light of the Pennsylvania cases under the headings above set out; i.e., capacity of the female to give consent, manifestations of unwillingness, and the effect of fraud or duress on consent.

#### *Capacity To Give Consent*

Consent will not be a defense to the crime of rape if the female is legally incapable of giving such consent.<sup>3</sup> A female is said to be legally incapable of giving her consent to acts which would otherwise constitute rape if she is insane, unconscious, or under the "age of consent." In *Commonwealth v. Stephens*,<sup>4</sup> the defendant was indicted for raping an insane woman and he based

<sup>1</sup> *Commonwealth v. Exler*, 243 Pa. 155, 89 A. 968 (1914).

<sup>2</sup> *Commonwealth v. Moon*, 151 Pa. Super. 555, 30 A.2d 704 (1943); *Commonwealth v. Parr*, 5 W. & S. 345 (Pa. 1843).

<sup>3</sup> *Commonwealth v. Stephens*, 143 Pa. Super. 394, 17 A.2d 919 (1941); *Commonwealth v. Cyaus*, 88 Pa. Super. 227 (1926); *Commonwealth ex. rel. Case v. Smith*, 134 Pa. Super. 183, 3 A.2d 1007 (1939).

<sup>4</sup> 143 Pa. Super. 394, 17 A.2d 919 (1941).

his defense on the fact that the woman had given her consent. It was held, in finding the defendant guilty, that an act of sexual intercourse is presumed to be without the woman's consent when, from any cause, she is not in a position to exercise any judgment about the matter. "Where intercourse is had with a nonresisting and consenting insane woman who has not the capacity to understand the nature of her act, it constitutes rape." It would appear from this that if the female has sufficient intellect to know the *nature of the act*, and gives her consent, it is not rape. There are several old lower court decisions in Pennsylvania which have discussed the incapacity of the female to consent when she is unconscious. In one case,<sup>5</sup> the prosecutrix had fainted and was unconscious when the attack took place. It was held that connection with a woman, when insensible or unconscious from whatever cause, is rape. In another case,<sup>6</sup> the defendant was convicted for rape committed on a woman while she was under the influence of ether. Still another Pennsylvania case indicated that consent would be negated by the fact that the female was asleep at the time of the attack.<sup>7</sup> In *Commonwealth v. Parr*,<sup>8</sup> broader language was employed by the Supreme Court in stating that "consent would not be a defense if the defendant had *in any way* rendered the prosecutrix incapable of consenting."<sup>9</sup>

There is another important class of cases in which the female is said to be incapable of consenting. Thus, females below a certain age cannot give legally effective consent. At common law the age below which a female could not give effective consent was ten years.<sup>10</sup> As late as 1886 in Pennsylvania, the consent of an eleven year old girl would have reduced the offense from rape to fornication.<sup>11</sup> It was not until 1887 that consensual intercourse between a male of sixteen or more years and a female under the age of sixteen was made rape by statute.<sup>12</sup> This statute raised the age of consent to sixteen, and there it has stayed. There are many Pennsylvania cases which illustrate the problems which arise with respect to the "age of consent." In *Commonwealth v. Exler*,<sup>13</sup> the lower court had found the defendant guilty of murder in the first degree under the statutory felony-murder doctrine.<sup>14</sup> He had killed a twelve year old girl in an attempt to have sexual intercourse with her. The conviction was reversed by the Supreme Court on the grounds that the word "rape," as used in the murder statute,<sup>15</sup> is limited to com-

<sup>5</sup> *Commonwealth v. Childs*, 2 Pitts. Rep. 391 (1863).

<sup>6</sup> *Commonwealth v. Beale*, Phila. Q. S., see Whart. & S. Med. Jur. §245 et. seq., 596, 612. For reasons unknown to the writer the correctness of this verdict was doubted and the Governor later granted the defendant a pardon.

<sup>7</sup> *Commonwealth v. Duchnicz*, 42 Pa. Co. Ct. Rep. 651 (1914).

<sup>8</sup> 5 W. & S. 345 (Pa. 1843).

<sup>9</sup> Italics supplied.

<sup>10</sup> *Commonwealth v. Miller*, 80 Pa. Super. 309 (1922); *Commonwealth v. Exler*, 243 Pa. 155, 89 A. 968 (1914); *Commonwealth v. Montgomery*, 66 Pa. D. & C. 246 (1948).

<sup>11</sup> *Commonwealth v. Stevick*, 78 Pa. 460 (1875).

<sup>12</sup> Act of May 19, 1887, P. L. 128, 18 P. S. 2261; Act of June 24, 1939, P. L. 872 §721, 18 P. S. 4721.

<sup>13</sup> See note 1, *supra*.

<sup>14</sup> Act of June 24, 1939, P. L. 872 §701, 18 P. S. 4701.

<sup>15</sup> Act of March 31, 1860, P. L. 382 §74, 18 P. S. 2221; Act of June 24, 1939, P. L. 872 §701, 18 P. S. 4701.

mon law rape and does not include statutory rape as denounced by the Act of 1887.<sup>16</sup> Hence, the fact that the Commonwealth was unable to disprove that the girl had consented to the intercourse led to the acquittal of the defendant on the charge of murder. This case illustrates the great importance which can attach to the defense of consent in some crimes against the person.<sup>17</sup> One qualification should be noted to the rule that consent is not a defense to "statutory rape." Thus, if the jury finds the girl to be of "bad repute," the grade of the offense is reduced from rape to fornication if the girl was between the ages of ten and sixteen and she consented to the intercourse.<sup>18</sup> If the girl is under ten years of age the question of her consent is immaterial.<sup>19</sup> A child under the age of ten is said to be "so young as to be incapable of any will or consent in sexual matters, and does not and cannot take in the meaning of what is done."<sup>20</sup>

So, in summary of capacity to give consent, the courts and the legislature of Pennsylvania have established that a female is legally incapable of giving consent if she is insane, unconscious, or below the age of consent.

#### *Manifestations Of Unwillingness*

Consent will not be a defense to the crime of rape if the female manifested unwillingness that the act be done.<sup>21</sup> She must clearly manifest her unwillingness and mere submission in such cases is equivalent to consent.<sup>22</sup> The question of the woman's willingness at the time of the act is for the jury.<sup>23</sup> There are three important factors, however, the presence or absence of which weigh heavily in favor of the respective parties. Thus, proof of failure to resist, to cry out, or to complain promptly after the attack, tends strongly to indicate that there was willingness that the act be done.

The amount of *resistance* required to negative consent depends upon the circumstances of the particular case. The same attempt to resist need not be expected of a small child as would be expected of an older woman.<sup>24</sup> In *Commonwealth v. Montgomery*,<sup>25</sup> the defendant had simply told the ten and eleven year old girls "to stand still" while he made the improper advances. It was held that even though the girls made no effort to resist, the relative strength of the defendant as compared to the physical and mental conditions of the girls was sufficient to enable

<sup>16</sup> See note 12, *supra*.

<sup>17</sup> See *Commonwealth v. Neill*, 362 Pa. 507, 67 A.2d 276 (1949), for a comparison.

<sup>18</sup> *Commonwealth v. Calvery*, 130 Pa. Super. 575, 198 A. 450 (1938); *Commonwealth v. Howe*, 42 Pa. Super. 136 (1910); *Commonwealth v. San Juan*, 129 Pa. Super. 179, 195 A. 433 (1937).

<sup>19</sup> *Commonwealth v. Cyaus*, 88 Pa. Super. 227 (1926).

<sup>20</sup> *Commonwealth ex. rel. Case v. Smith*, 134 Pa. Super. 183, 3 A.2d 1007 (1939).

<sup>21</sup> Consent has been defined as an indication of willingness that an act be done. The tautological effect which this definition gives the first sentence is felt not to detract from its meaning in light of subsequent discussion.

<sup>22</sup> *Commonwealth v. Parr*, 5 W. & S. 345 (Pa. 1843).

<sup>23</sup> *Commonwealth v. Berkowitz*, 133 Pa. Super. 190, 2 A.2d 516 (1939).

<sup>24</sup> *Commonwealth v. Montgomery*, 66 Pa. D. & C. 246 (1948).

<sup>25</sup> *Ibid*.

the jury to find that the attack had been made without the consent of the girls. In an earlier case,<sup>26</sup> the defendant was held not guilty of rape when the prosecutrix failed to testify that she made the least effort to prevent the defendant from having intercourse with her, nor that he in any way rendered her incapable of doing so. She testified, "I did not give my consent." The Supreme Court interpreted this to mean "I did not give my *express* consent" and held that this was not a sufficient manifestation of unwillingness to negative consent.<sup>27</sup> In *Commonwealth v. Childs*,<sup>28</sup> the court said "when there is nothing to deter a woman from resisting, and she is conscious and able to show dissent, and does not do so, it will be taken as her assent." The degree of force manifested has an important bearing on the question of resistance. Two Pennsylvania cases have mentioned this factor. In the earlier case,<sup>29</sup> it was stated that absence of consent can be proved by showing that the woman's resistance was overcome by "fear of great personal injury." In the later case,<sup>30</sup> the prosecutrix had refused to have intercourse with the defendant so he took hold of her, pulled her into a corner, and threatened to shoot her if she cried out. This was a sufficient display of force to negative consent even in the absence of any proof that the prosecutrix had resisted.

Failure on the part of the woman to *cry out* when she is being attacked tends to show consent. Again, as in the case of resistance, all the circumstances of the case must be considered in determining whether the woman reacted reasonably.<sup>31</sup> "We could expect a grown woman whose cries could by possibility be heard, to cry out, while a young girl of tender years might be excused from doing so."<sup>32</sup> It is a question for the jury, not a legal rule.<sup>33</sup> In *Commonwealth v. Morgan*,<sup>34</sup> the defendant relied on the fact that the prosecutrix had not cried out in order to establish that he had done nothing improper, and that what he did do was done with the prosecutrix's consent. Defendant was a practicing physician. Prosecutrix, a patient, while she was ostensibly being given medical treatment felt that she had been violated when, in pursuance of defendant's directions, she was in such a position as to be unable to see what he was doing. She made no outcry but she complained to the defendant immediately, and soon after reported the incident to her husband. The Superior Court, in sustaining the conviction of rape, felt that the case was distinguishable from others,<sup>35</sup> for here the prosecutrix had no reason to fear that such penetration was about to take place and, hence, her failure to cry out was understandable. If there were other people nearby, and the alleged victim

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<sup>26</sup> See note 22, supra.

<sup>27</sup> Italics supplied.

<sup>28</sup> See note 5, supra.

<sup>29</sup> *Ibid.*

<sup>30</sup> See note 11, supra.

<sup>31</sup> *Commonwealth v. Oylar*, 130 Pa. Super. 405, 197 A. 508 (1938).

<sup>32</sup> See note 11, supra.

<sup>33</sup> *Ibid.*

<sup>34</sup> 162 Pa. Super. 105, 56 A.2d 275 (1948).

<sup>35</sup> *Commonwealth v. Berkowitz*, 133 Pa. Super. 190, 2 A.2d 516 (1939); *Commonwealth v. Moran*, 97 Pa. Super. 120 (1930).

of rape knew this, her failure to cry out is a strong indication that she was not unwilling that the act be done.<sup>36</sup>

Failure to make *prompt complaint* of the alleged attack points strongly towards establishing consent at the time of the offense, and is deemed an important test of a woman's sincerity.<sup>37</sup> In *Commonwealth v. Oylar*,<sup>38</sup> the attack took place some distance from the prosecutrix's home. After the attack she had (1) gotten a ride with two strangers back to town, but said nothing of the attack to them; (2) an associate at the school where she taught drove her to a friend's house, but she said nothing to the associate of the attack; (3) reported the attack to the police within five days. The defendant's conviction was sustained by the Superior Court since the prosecutrix complained within a reasonable time. In other cases, the lapse of several months until the prosecutrix found herself pregnant,<sup>39</sup> and until a child was born,<sup>40</sup> has been deemed strong enough evidence of consent to reduce the offense from rape to fornication.

So, in summary of manifestations of unwillingness, evidence of resistance, outcry, and prompt complaint, is strongly indicative of unwillingness that the act be done. Such evidence is not material if the female is under the age of consent.<sup>41</sup>

#### *Effect Of Fraud Or Duress On Consent*

Consent of the female is a defense to rape even though the consent was obtained by certain types of fraud.<sup>42</sup> In *Commonwealth v. Duchnicz*,<sup>43</sup> the defendant had been a boarder in the prosecutrix's house. On the evening in question he had gotten in bed with the prosecutrix posing as her husband. She, believing him to be her husband, had intercourse with him. It was not until the act was completed that the woman discovered that the defendant was not her husband. The court clearly doubted the credibility of the woman's testimony. It appeared that a light had shown in the room from the hallway, and there was contradiction in the prosecutrix's statements as to just when she had awakened. The court found the defendant not guilty of rape and held that there can be no conviction where a man has carnal knowledge of another man's wife, who consents to such intercourse in the belief that he is her husband, simply because she finds him in her bed. Another lower court said, in an earlier case,<sup>44</sup> "no amount of deception or fraud, however villainous or outrageous, will make illicit intercourse constitute rape where the woman consents to the act." These cases are the only ones in Pennsylvania which

<sup>36</sup> *Ibid.*

<sup>37</sup> *Commonwealth v. Jordan*, 156 Pa. Super. 109, 39 A.2d 527 (1944); *Commonwealth v. Mlynarczyk*, 34 Pa. Super. 256 (1908).

<sup>38</sup> See note 31, *supra*.

<sup>39</sup> See note 22, *supra*.

<sup>40</sup> *Commonwealth v. Moran*, 97 Pa. Super. 120 (1930).

<sup>41</sup> *Commonwealth v. Feist*, 50 Pa. Super. 152 (1912); *Commonwealth v. Ebert*, 146 Pa. Super. 362, 22 A.2d 610 (1941); *Commonwealth v. Krick*, 164 Pa. Super. 516, 67 A.2d 746 (1949).

<sup>42</sup> *Commonwealth v. Duchnicz*, 42 Pa. Co. Ct. Rep. 651 (1914).

<sup>43</sup> *Ibid.*

<sup>44</sup> See note 5, *supra*.

consider the vitiating effect of fraud on consent given to acts which would otherwise constitute rape. No cases could be found in which our higher courts have considered this point.

Duress may negate effective consent. Thus, if the female consents under threats of personal injury the consent is not effective. The Pennsylvania cases which have dealt with this question were discussed above,<sup>45</sup> and they would indicate that the threat must be of "great personal injury."<sup>46</sup>

### ASSAULT AND BATTERY AND RELATED CRIMES

There is a dearth of material in Pennsylvania on consent as a defense to the crime of assault and battery. There is sufficient authority, however, for the proposition that there is no assault and battery if the person against whom the act was directed gave his consent.<sup>47</sup> Lack of consent, then, is an element of the crime of assault and battery.<sup>48</sup> There are not enough cases in which the consent element has been considered to give a clear picture of just what constitutes consent in this crime against the person. It appears that the same tests which apply to consent in rape would also apply to consent in assault and battery. What discussion there is on this point must be found in relation to other crimes in which the crime of assault and battery is itself an element. Thus, the common law offense of indecent assault and the statutory "assault with intent to ravish" both comprehend an assault and battery.<sup>49</sup> Many of the cases involving the latter two crimes were considered above in our discussion of rape. Still, in view of the fact that these crimes partake of some of the characteristics of assault and battery, as well as of rape,<sup>50</sup> it is felt that a short, separate consideration of them would not be amiss in a discussion of consent as a defense to crimes against the person.

Consent is a defense to the common law crime of indecent assault.<sup>51</sup> This crime has been defined as "the taking by a man of indecent liberties with the person of a female without her consent and against her will, but with no intent to commit the crime of rape."<sup>52</sup> The age of consent in this crime is ten years.<sup>53</sup> As in the crime of rape, all the circumstances of the case must be considered in determining whether

<sup>45</sup> See notes 29 and 30, *supra*.

<sup>46</sup> See note 29, *supra*.

<sup>47</sup> *Commonwealth v. Jaynes*, 137 Pa. Super. 511, 10 A.2d 90 (1939); *Commonwealth v. Gregory*, 132 Pa. Super. 507, 1 A.2d 501 (1938); *Commonwealth v. DeGrange*, 97 Pa. Super. 181 (1929); *Commonwealth v. Shrodes*, 354 Pa. 70, 46 A.2d 483 (1946).

<sup>48</sup> See *Commonwealth v. Bird*, 152 Pa. Super. 648, 33 A.2d 531 (1943); and *Commonwealth v. Gregory*, *ibid*, which cite RESTATEMENT, TORTS §18, lack of consent of battery with approval.

<sup>49</sup> *Commonwealth v. Kuhns*, 7 Pa. D. & C. 670 (1925) (indecent assault); *Commonwealth v. Moon*, 151 Pa. Super. 555, 30 A.2d 704 (1943) (assault with intent to ravish).

<sup>50</sup> *Commonwealth ex. rel. Conrad v. Warden of Eastern State Penitentiary*, 165 Pa. Super. 374, 67 A.2d 645 (1949); *Commonwealth v. Moon*, 151 Pa. Super. 555, 30 A.2d 704 (1943).

<sup>51</sup> *Commonwealth v. Balles*, 163 Pa. Super. 467, 62 A.2d 91 (1948); *Commonwealth v. DeGrange*, 97 Pa. Super. 181 (1929); *Commonwealth v. Shrodes*, 354 Pa. 70, 46 A.2d 483 (1946).

<sup>52</sup> *Ibid*.

<sup>53</sup> *Commonwealth v. Miller*, 80 Pa. Super. 309 (1922); and note 51, *supra*.

the female did, in fact, consent.<sup>54</sup> In "assault with intent to ravish,"<sup>55</sup> the offense consists of an assault and battery committed with the specific intent to accomplish sexual intercourse forcibly and without the consent of the victim.<sup>56</sup> Where criminal conduct falls short of the completed offense of rape or statutory rape, it is essentially equivalent to the crime of assault and battery with intent to ravish.<sup>57</sup> Consensual intercourse is not within the terms of such assault and battery as is required by the statute.<sup>58</sup> The age of consent in assault with intent to ravish is the same as at common law. The consent of a five year old, again, is immaterial.<sup>59</sup> In this crime the conduct of the actor must be such as to justify the inference that he intended forcibly to have unlawful carnal knowledge of the woman if he could not obtain her consent.<sup>60</sup>

Our Pennsylvania cases indicate that consent obtained by fraud is no defense to the crime of assault and battery, nor is it a defense to these two related crimes. In *Commonwealth v. Gregory*,<sup>61</sup> the defendant had obtained the consent of the prosecutrix to inspect the condition of her artificial leg by representing that he was a doctor of medicine when he was, in fact, a doctor of theology. Defendant was indicted for (1) assault and battery, and (2) indecent assault. He relied on the defense of consent. The Superior Court, in sustaining the conviction, held that any consent the defendant had obtained was vitiated by perpetration of the fraud. A statement to the same effect was made in an earlier case in an indictment for assault with intent to ravish.<sup>62</sup>

In some situations the consent of the person touched is not material in a prosecution for assault and battery. Thus, the touching may be privileged because of the relationship between the parties,<sup>63</sup> or because the person doing the touching is acting in defense of his person or property.<sup>64</sup>

<sup>54</sup> *Commonwealth v. Montgomery*, 66 Pa. D. & C. 246 (1948); *Commonwealth v. Hunter*, 81 Pitts. L. J. 333.

<sup>55</sup> Act of June 24, 1939, P. L. 872 §722, 18 P. S. 4722.

<sup>56</sup> *Commonwealth v. Moon*, 151 Pa. Super. 555, 30 A.2d 704 (1943).

<sup>57</sup> *Commonwealth ex. rel. Conrad v. Warden of Eastern State Penitentiary*, 165 Pa. Super. 374, 67 A.2d 645 (1949).

<sup>58</sup> See note 56, supra.

<sup>59</sup> *Commonwealth v. Cyaus*, 88 Pa. Super. 227 (1926); *Commonwealth v. Barber*, 45 Pa. D. & C. 620 (1942).

<sup>60</sup> *Commonwealth v. Jaynes*, 137 Pa. Super. 511, 10 A.2d 90 (1939); *Commonwealth v. Shrodes*, 354 Pa. 70, 46 A.2d 483 (1946); *Commonwealth v. Heaton*, 145 Pa. Super. 223, 20 A.2d 921 (1941).

<sup>61</sup> 132 Pa. Super. 507, 1 A.2d 501 (1938).

<sup>62</sup> *Commonwealth v. Bell*, 13 Pa. Super. 576 (1900).

<sup>63</sup> *Commonwealth v. Blaker*, 1 Brewst. 311 (1869) (parent-child); *Commonwealth v. Fell*, 11 Haz. Pa. Reg. 179 (teacher-child); *Commonwealth v. D Angelo*, 29 Pa. Super. 378 (1905) (touching by arresting officer).

<sup>64</sup> *Commonwealth v. Sutton*, 51 Pa. Super. 191 (1912) (defense of person); *Commonwealth v. Warner*, 13 Pa. Super. 461 (1900) (defense of property).



## CONSENT IN OTHER CRIMES

From an examination of the foregoing crimes it should be noted that if lack of consent is an element of a crime, then consent will usually be a defense to that crime. One other test must be applied in determining whether or not consent is a defense to a particular crime. Thus, consent is not a defense in a prosecution for an act which is made criminal because it primarily injures the public.<sup>65</sup> This latter test makes the consent of the victim immaterial in a very large number of crimes. The courts and the legislature do not make clear their reasons for classifying some crimes as crimes against the public and others as crimes against the person. Whatever the basis for the distinction, such a distinction is made,<sup>66</sup> and consent is not a defense to those crimes which are "made" criminal because they primarily tend to injure the public. Hence, in an indictment for sodomy,<sup>67</sup> fornication,<sup>68</sup> adultery,<sup>69</sup> or incest,<sup>70</sup> the defense that the victim consented cannot be interposed. These are crimes against the public rather than crimes against the person, and consent is not a defense.

Robbery is a crime against property and against the person. Although there is little Pennsylvania authority on the point, it appears that our courts would adhere to the view that consent of the victim is a defense to the crime of robbery.<sup>71</sup> In *Commonwealth v. Hollister*,<sup>72</sup> however, a paymaster, who was about to be robbed, was informed of the plot by the police, and he agreed not to resist the robbery. It was held that the defendants were not any the less guilty even though the victim had, in effect, consented to be robbed.

Consent will not excuse the taking of life. In *Smith v. Commonwealth*,<sup>73</sup> the defendant, who was indicted for burglary, had agreed in writing that he would not appeal his case. The Supreme Court held that this agreement would not serve as a basis for quashing the appeal. The Court said, "What consideration can a man have received, adequate to imprisonment at hard labor for life? It is going but one step further to make an agreement to be hanged. I presume that no one would be hardy enough to make an agreement to be hanged." This case has been cited for the proposition that consent will not be a defense to homicide.<sup>74</sup>

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<sup>65</sup> HITCHLER, *THE LAW OF CRIMES* 206 (1939).

<sup>66</sup> Act of June 24, 1939, P. L. 874, 878; CHAND, *THE LAW OF CONSENT*, p. 9 (1897).

<sup>67</sup> *Commonwealth v. Donahue*, 136 Pa. Super. 306, 7 A.2d 13 (1939); *Commonwealth v. Pichierre*, 36 Luz. L. Reg. 409 (1942).

<sup>68</sup> *Commonwealth v. Moon*, 151 Pa. Super. 555, 30 A.2d 704, (1943).

<sup>69</sup> *Ibid.* *Helfrich v. Commonwealth*, 33 Pa. 68 (1859).

<sup>70</sup> *Commonwealth v. Ebert*, 146 Pa. Super. 362, 22 A.2d 610 (1941).

<sup>71</sup> *Commonwealth v. Snelling*, 4 Binney 379 (Pa. 1812); *Commonwealth v. Hollister*, 157 Pa. 13, 27 A. 386, 25 L. R. A. 349 (1893).

<sup>72</sup> 157 Pa. 13, 27 A. 386 (1893).

<sup>73</sup> 14 S. & R. 69 (Pa. 1826).

<sup>74</sup> CHAND, *THE LAW OF CONSENT*, p. 393.

## CONCLUSION

Consent is a defense to crimes against the person if (1) lack of consent is an element of the crime, (2) the crime is not one injurious to the public generally: provided, that (a) the person injured was legally capable of consenting, (b) the person did not manifest unwillingness that the act be done, and (c) the consent given was not vitiated by fraud or duress.

JAMES J. LORIMER