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Rape—Resistance of Female—Charge Relating to Outcry

RAPE—RESISTANCE OF FEMALE—CHARGE RELATING TO OUTCRY.—The defendant was charged with common law rape. He admitted the act of sexual intercourse with the prosecutrix but denied that it was without her consent. The evidence clearly established that the prosecutrix had received a serious injury from some source; her jaw was fractured and she was semiconscious for many hours. The alleged offense occurred a distance of from 350 to 500 feet from the defendant's car. Another young couple of the party had remained in the car and testified that they heard no outcry from the prosecutrix. The testimony of the defendant and the prosecutrix on this point was in conflict. The defendant requested the following instruction: "If the jury believed from the evidence that, at the time the offense is alleged to have been committed, the prosecuting witness made no outcry, and was in a position to have made an outcry, or could have made others hear who were in close proximity, then you should take this into consideration with all the other evidence in determining the guilt or innocence of the respondent, and whether a rape was in fact committed or not." This instruction was refused, but the court did charge as follows: "In determining her power to resist you must take into consideration all the facts connected with the time and place at which the act of intercourse took place, her physical powers at that time, the resistance she was able to make, her ability to summon help, in any way in her power, by screaming or otherwise. You are to consider all these things from the evidence that has been brought before you." The defendant was convicted and on appeal the court was divided four to four. Conviction affirmed. *People v. Rich,* (Mich. 1927) 212 N. W. 105.

The general rule is that in a prosecution for common law rape proof of the failure of the female to make an outcry, where the transaction occurred in a place not so remote from human help that the outcry would be unavailing, is for the consideration of the jury in determining the question of consent or non-consent. *State v. Cross,* 12 Ia. 66, 79 Am. Dec. 519; *Oleson v. State,* 11 Neb. 276, 9 N. W. 38. It is reversible error to refuse to instruct the jury that if the prosecutrix made no outcry it raised a strong presumption that no rape had been committed. *Barney v. People,* 22 Ill. 160. The Missouri doctrine is that where the act is committed within probable hearing of other persons a failure to make an outcry is a circumstance which would justify a strong, but not conclusive, inference that the act was with the consent of the prosecutrix and not by force, and that a refusal to charge that it was for the consideration of the jury to determine whether, in fact, rape had been committed, constituted reversible error. *State v. Witten,* 100 Mo. 525, 13 S. W. 871. Where the prosecutrix testified she believed she was too remote from human habitation and the accused testified that the intercourse was voluntary, the court on proper request must charge that the failure to make an outcry might be considered in connection with the other facts as showing want of resistance. *Jackson v. State,* 92 Ark. 71, 122 S. W. 101. It is not reversible error to refuse to charge that an outcry was necessary for conviction where the prosecutrix was an epileptic just above the age of consent, *Eberhart v. State,* 134 Ind. 651, 34 N. E. 637; or under the statutory age of consent, *Moore v. State,* 90 Tex. Cr. 604, 236 S. W. 477; or in "a mental stupor from alcoholic drink, which made her insensible and incapable of consenting," *Quinn v. State,* 153 Wis. 573, 142 N. W. 510. In the instant case the four judges for reversal of the conviction placed their judgment on the ground that the charge given was too general and that the defendant was entitled to a specific charge, hypothetically stated, of his theory upon this branch of the case which was supported by evidence. On the other hand, the four judges for affirmance of the conviction believed that the substance of the instruction requested was embodied in the charge given; that the charge given did not mislead the jury and did not prejudice the defendant. The latter position finds support in the case of *State v. Ingraham,* 118 Minn. 13, 136 N. W. 258, in which it was held that

a refusal to charge that the prosecutrix must use her "voice by calling for aid or giving an alarm" did not constitute error where the court did instruct that she must resist "to the utmost extent of her ability." T. S. '27.

SALE OF REGISTERED AUTOMOBILE WITHOUT ASSIGNMENT OF CERTIFICATE OF TITLE IS VOID UNDER MISSOURI STATUTE.—Defendant bought an automobile from a company into whose hands plaintiff had delivered it for sale. Plaintiff had made no assignment of the certificate of title as required by the Motor Vehicle Act of 1921, Special Session, page 88, section 18, which requires an assignment, and provides that failure to comply with the statute renders the transaction fraudulent and void. He sued in replevin for the recovery of the automobile. The trial court directed a verdict for the plaintiff and was sustained by the St. Louis Court of Appeals. *Held,* that the provision of the statute was mandatory and all sales without compliance therewith were fraudulent and void. *Quinn v. Gehlert* (Mo. 1927) 291 S. W. 138.

The decision of the court is based on the earlier decision of the Supreme Court of Missouri which first construed the statute and held the same to be mandatory. *Connecticut Fire Ins. Co. v. Cox,* 306 Mo. 537, 268 S. W. 87, 37 A. L. R. 1456. In this case the purchaser of an automobile had not had the certificate of title assigned to him but had taken out insurance on the vehicle. A loss occurred and he sued for the insurance. It was held that the sale was void and the plaintiff had no insurable interest in the automobile and hence could not recover. The statute is held to be mandatory the court, quoting with approval the statement of counsel, said: "The law as settled in Missouri seems to be that a disregard or a violation of positive law cannot be a consideration for a valid contract and that such contracts will not be enforced in our courts and this whether the act which is forbidden either at common law or by statutory law is *malum in se* or merely *malum prohibitum.*"

The court then cites numerous cases in which similar statutes were held mandatory and contracts in violation of the statute held void and unenforceable. Failure to comply with positive statute prohibiting possession of certain game during certain seasons of the year in that the contract sued on involved the possession of the game within the prohibited season was held void. *Haggerty v. St. Louis Ice Mfg. & Storage Co.,* 143 Mo. 238. Sale of a lot made without compliance with statute requiring plat of town to be made out, acknowledged, and recorded before sale, held void. *Downing v. Ringer,* 7 Mo. 585. Contracts made by foreign corporations which have not complied with the statute and secured a license to do business in the state, held void and unenforceable. *Tri-State Amusement Co. v. Forest Park Highland Amusement Co.,* 192 Mo. 404. There are few cases in other jurisdictions on this precise point and most of them are collected in the note, following the *Connecticut Fire Insurance Case* in 37 A. L. R. 1465. Most of the cases follow the rule laid down by the Missouri court and declare the transaction void when the statute had not been complied with. A vendor is not allowed to recover the purchase price from the vendee if the title has not been transferred in the manner required by the statute. *Arotzky v. Kropintzky,* (1923) 98 N. J. L. 344. And this is true even though notes have been given by the purchaser. *Swank v. Moisan,* 85 Ore. 662. Kansas courts seem to follow this general rule. *Hammond Motor Co. v. Warren,* 213 P. 810. In this case a mortgagee was allowed to replevin the automobile which had been sold by the mortgagor without making the assignment of the title required. On almost the same facts as the instant case a Texas court in *Ferris v. Langston,* 253 S. W. 309, held the same as the Missouri court, and for some time this was the doctrine of the Texas courts. Recent decisions have effected a complete reversal, however, and it is now held in that state that failure to comply with the statute will not void the transaction which is otherwise valid.