

CONSENT OF UNDER-AGE GIRLS TO SEXUAL ENCOUNTERS WITH ADULTS: ENGLISH LAW IN A HISTORICAL CONTEXT.

By Stephen J King. 1999.

This article considers the historical attitude of the English judiciary towards the question of consent as a consideration in cases involving the sexual conduct of under-age girls with older males. In particular it considers the case-material engendered by the introduction of a new law effected by the Act of Parliament, 1 Victoria, c.85, s.11. It is difficult to examine this subject where sexual activity between adults and young boys is concerned, as the number of prosecutions involving under-age females against those involving under-age males before the 20th century is numerically greatly weighted towards the former, in the ratio of about 30:1. Neither does case-law during the earlier period under consideration here, with the exception of one item, illuminate any aspects of the consent of boys to their sexual involvement with adult males or females.¹

If a young girl of any age over 7 took part, either through her own initiative or consent, or through compulsion, in any form of sexual activity with an adult short of vaginal or anal intercourse, or the attempt at either act, it was not an offence under English common law until the mid-nineteenth century². Jurisdiction for prosecuting these kind of activities lay with the ecclesiastical authorities until the mid-1600s, but penalties there were light and prosecutions infrequent³. However, for at least seven hundred years the consent of a young girl to participating in sexual practices with an adult, was of major import in evidential matters relating to the prosecuting of criminal charges in any English court. Examination of statute law illustrates why this was so. An Act passed during the reign of Elizabeth I in 1576 (18 Eliz.I, c.7) stated that "carnal knowledge of a woman-child under ten years of age shall be felony" without reference to the child's consent or non-consent. This was the first time in English history that any age lower than the one generally applied by the law had been given. Previous references on the girl's part were to the Statutes of Westminster I, c.13, and 2, c.34 (1275 and 1285), where the term "within age" was used, and this was taken to mean the age of twelve, being the age at which the marriage ceremony could take place. Mortimer Levine's conclusion⁴ that the judiciary's assumed consent given by a 7-year-old to her own rape in 1571 led to her attacker's acquittal because he had been indicted under the 'wrong' Statute of Westminster, and that the realisation of the law's inadequacy in dealing with consensual sexual intercourse with little girls, led directly to the 1576 Act, seems dubious, and I would entertain a doubt, as dependency upon this case alone leading to such a radical new law, without the presence of an added stimulus, seems unlikely. Rather, it would seem that sexual usage of pre-pubertal girls may have greatly increased during the 16th century, as a direct result of the ravages of syphilis among the population. Sex with a girl-child was firstly a high chance that one would not become infected with this horrible new disease, and secondly it was to become a very widespread myth that genital contact - not necessarily meaning penetrative intercourse - would *cure* syphilis. Perhaps this was the extra stimulus needed to create the 1576 law. There were relatively few cases of child-rape (and none of child sexual molestation) in English medieval court records; yet between 1560 and 1620 in the five rural south-eastern English counties which comprised the Home Circuit of Assize, 27% of all rape indictments concerned girls under 12. and in the metropolitan parts of Surrey which formed

London's suburbs, 72% of the rape indictments concerned such girls⁵. S.P.Scott remarks⁶ that the 1576 Act became law because the judges' opinion whether rape could be committed upon a girl aged under ten years was based rather on want of physical development, than on presumed mental incapacity to consent, and this is indeed stated by Sir James Dyer in the early seventeenth century. With regard to a case in the Queen's Bench in 1561 where a Scot residing in Westminster was found on the evidence of "matrons" to have raped six-year-old Christine Launde, the judges finding otherwise, Dyer remarks that the court felt no rape could have taken place if the girl was aged under 9 years of age. In a footnote to the case he gives another clue to why the 1576 Act was passed, stating that recorder Fletewood sitting in 1573 on a case where a man had been accused of raping a 10-year-old girl, pronounced that "the first bill in the next parliament to which he would set his hand would be that ravishers of women should be ousted of their clergy."⁷ It was a defence to rape charges to plead Benefit of Clergy, in effect a simple reading-test carried out in court.

A useful analysis of the law put into play by these formative pieces of legislature was made in 1803 by East.⁸ Regarding the 1576 Act he states "This last-mentioned offence (carnal knowledge of a girl under 10) however is not properly speaking a rape, which implies a carnal knowledge against the will of the party; but a felony created by this statute, under which the consent or non-consent of the child under the age of ten years, is immaterial.....it is now holden, that if the child be above 10, it is not a felonious rape unless it be against her will and consent. By the statute of Westminster I, c.13 the deflowering of a child above 10 years old and under 12, if with her own consent, is made only a misdemeanour; for the statute of Westminster 2, which restored rape to the crime of felony does not extend to this case: and the statute 18 Elizabeth, c.7makes no provision against the deflowering of children with their own consent, but only where the children so abused are under 10 years of age. As to those who are above 10 and under 12, it leaves the offence as it stood upon the statute of Westminster I, i.e. a misdemeanour only, if done with the party's consent." East's opinion was restated in 1837 by the clergyman and magistrate Richard Burn, in the following form "If any person shall unlawfully and carnally know and abuse any woman child, under the age of 10 years, whether with her consent or against it; he shall be guilty of felony"⁹. Burn had added the rider implying that her consent might be thought to be a consideration. It is of note that East used the term "deflowering" to equate with rape *and* carnal knowledge, technically two different things. Deflowering implies a first penetration and rupturing of the hymen, while carnal knowledge was a first or subsequent act of vaginal intercourse. East was commenting on the state of affairs over several centuries, up to and including his own time. Until 1576 only the crime of rape was one where the participation, whether compelled or not, of a child in any type of sexual activity, *could* be considered, but from the later 17th century, when sexual offences perceived to be of lesser social disruption had stopped being prosecuted in ecclesiastical courts, a new charge found its way into courts of assize and quarter sessions. The crime of Assault with Intent to Rape (or "have Carnal Knowledge", where the girl's age was under twelve) became seen, though infrequently until the later 18th century, as an alternative attempt to prosecute a male whose alleged offence fell short of the actual commission of rape. Prosecutions in English courts for sexual offences against young girls under 12 years of age appeared on a fairly regular, though numerically low basis in the assizes, until cessation of the Napoleonic Wars in 1816, when they began to increase substantially in number and frequency, particularly in courts of quarter sessions. This was facilitated by an Act passed in 1826 which made expenses payable to all those who appeared as witnesses in crimes of sexual misdemeanour, rather than the more restrictive expenses payments allowed previously only to those who gave up a day or two from often

badly-needed work to appear in court in cases of felony. Rape and carnal knowledge of a girl under 10 was a felony, and anything else on the statute-books except buggery was a misdemeanour. It was enacted in 1827 (9 Geo.IV, c.31, s.1) for the first time, and to clarify the law, that vaginal intercourse with a girl aged between 10 and 12 was a misdemeanour, but again without reference to any matter of her consent as an issue. This enactment repealed the earlier ones.

Perhaps surprisingly, the main issues for legal consideration regarding intergenerational sexual contact with any under-age girl, meaning here one aged under 12, were until the late 1830s, whether she was physically grown and old enough to accommodate a man's penis in her vagina, and secondly, whether her evidence could be received at all by the court. In general, cases of carnal knowledge where the girl was aged under 9 years would be thrown out by the grand jury and the accused set free without trial, although there were exceptions to this procedure depending upon the quality of evidence and the attitude of the judges; but the issue of her *competence*, or her understanding of the nature of the oath she had to make before giving evidence, gave the courts far more anxiety than did any other topic. With more and more cases of alleged sexual abuse of children being tried as the 19th century wore on, cases began to appear where the evidence of children as young as five and six was taken on oath¹⁰, but this problem was not properly addressed until comparatively recently¹¹, and very many cases folded upon exactly that point - that the children were thought to be too young to understand the 'real' difference between right and wrong, and the nature of an oath. This concept has more recently been allied to the one that young children cannot make 'informed' consent, yet paradoxically, there has been allowance made recently of their ability at a very young age to give evidence, and to be considered old enough and responsible enough at 10 to be tried for criminal offences in England. The fact of males aged over 14 being able themselves to physically have vaginal intercourse with girls aged under 9 seems to have become acceptable to most of the judiciary by the early years of the 1800s, as prosecutions began to accumulate throughout England for carnal knowledge of girls as young as 5 years old by teenaged males¹².

Consent as a major issue in cases of alleged sexual abuse of under-age girls started to become important in the late 1830s, and a chronological examination of the case-law will follow. But it should be mentioned in the interim, that up to 1861 no new statutory sexual offence was created which related to sexual offences against children. In that year the *Offences Against the Person Act* (24 & 25 Victoria, c.100), which took effect on 1st November 1861, provided in section 52 for a new offence of Indecent Assault on a female of any age. The constituents of "indecent" were not given in the Act, nor has any statutory definition ever been attempted in English law, leaving the field wide open for the application of purely subjective views on individual cases and prosecutions.

Not until 1865 were the English law reports dating from the 1500s published as a series, which continues today. Prior to that date reports were published as private enterprises by their authors or agents. One or two court reporters, often judicially appointed, would note the proceedings, and those cases which appeared in print were published for the purpose of illustrating precedent. Particularly in the 18th century, but also repeatedly in the next one, judges referred to the authority of the 17th century jurists, Lords Coke and Hale¹³ when sexual crime was discussed. Even the later commentators, Hawkins, Blackstone¹⁴ and East, used these two as their main sources of information.

The following case-law which relates to examinations of the subject of consent is important, but not voluminous. The whole or greater part of the text of the report is given here, as it is assists in following the court's reasoning. Italics are the author's own commentary.

At the Midsummer Sessions for Suffolk, 1827. John Paxman, aged 50, was charged with an attempt to rape Sarah Cooper, aged between 10 and 12. The "*apparent consent* of the child was sufficient to exonerate the miscreant from the punishment."¹⁵

*Regina v Thomas Banks*¹⁶, July 18th, 1838. Before Mr. Justice Patteson. Banks was charged with having made a felonious assault on Matilda Henshaw, aged nine, and having feloniously carnally known and abused her. From her evidence it appeared that the crime was completed. F.V. Lee for the prisoner, submitted that the capital offence was not sufficiently made out, as the child might be mistaken as to whether her body was penetrated or not, and that the jury ought only to find the prisoner guilty of an assault, under the statute, 1 Vict. c.85, s.11(a). [i.e. the year 1838]

Patteson, J. - I doubt whether this is a case within the 11th section of that statute. *I have great difficulty in saying there was any assault, as there was consent*; I have a very strong opinion on the subject.....you must either find the prisoner guilty of the whole charge, or acquit him.

Verdict - Guilty of the capital offence.

Regina v Meredith,¹⁷ 1838, before Lord Abinger. An attempt to commit the misdemeanour of having carnal knowledge of a girl between the ages of 10 and 12 is not an assault, as the consent of the girl puts an end to the charge of assault.

*Regina v Wyles*¹⁸, 19th March 1839, before Mr Justice Vaughan. Wyles had been charged with carnally knowing and abusing his 9-year-old sister, Catherine Wyles. Mr Byles, for the prisoner, contended that the evidence was not enough to prove that any perfect penetration had taken place. If then, there was no penetration, then the prisoner might be convicted under the statute 1 Vict., c.85, s.11, of a common assault. Vaughan, J., in summing up the whole case to the jury, said that (regardless of whether there had been penetration, as the child had no hymen and there were no signs of blood having been spilled), with regard to the point urged by the defence, he was well aware that it had been doubted by a very learned judge (Patteson) whether the 11th section of the 1 Vict. c.85 could bear such a construction, or was applicable to this offence, which was rendered independent of all power of consent on the part of the infant. In the case of *R. v Banks* this point did not come before the judges, as the prisoner was convicted of the capital offence. A child under 10 years of age could not consent by law to the embraces of a man, and though *it might be shown that in fact she did consent*, it was difficult to say that in the same transaction the prisoner could not be convicted of a common assault because there had been a consent. If the jury should be of an opinion favourable to the prisoner as to the penetration, and should acquit him of the capital part of the offence, then he should direct them that they might find him guilty of a common assault upon the evidence of the girl.

The jury then acquitted Wyles of the capital charge, and found him guilty of a common assault.

*Regina v Thomas Martin*¹⁹, July 16th, 1839, before Mr Baron Alderson. (and before Mr Justice Patteson, March 7th, 1840). Martin was charged with three counts: the first for having carnally known and abused Esther Ricketts, a girl over 10 and under 12 years of age; the second for an assault on her, with intent carnally to know and abuse her; the third for a common assault.

Emission was proved, but there was no proof of penetration, thus negating the first charge. From the cross-examination of the girl, it appeared that the prisoner had been with her in this way *by her own consent*, five times before, and that little boys had likewise done something of this kind, also by her own consent.

Godson, for the prisoner - I submit that if the fact occurred by the consent of the prosecutrix, there can be no conviction either on the 2nd or the 3rd count.

Alderson, B. - I will take the opinion of the jury as to whether that which was done, was, in fact, by the consent of the prosecutrix, and if they find that it was so, I will reserve the case for the consideration of the fifteen judges.

The jury found that she consented to all that the prisoner did.

Alderson, B. - I shall direct a verdict of Guilty to be entered on the 2nd and 3rd counts, and I shall reserve the point.

In Hilary term 1840, the case was considered by the Judges, and at the Spring Assizes at Worcester that year, Patteson, J., delivered the judgement, and directed another trial to take place for the attempt to commit a misdemeanour. He stated - "The ground on which the Judges went in the former case was, that although a child between 10 and 12 cannot by law consent to have connexion, so as to make that connexion no offence, yet where the essence of the offence charged is an assault (and there can be in law no assault unless it be against consent): this attempt, though a criminal offence, is not an assault."

*Regina v Day*²⁰, March 1841, before Mr Justice Coleridge. The indictment contained two counts, the first of which charged the prisoner with having attempted to carnally know and abuse Eliza Massey, a girl under 10 years old. The second count was for a common assault. There was not sufficient evidence to show that she was in fact aged under 10 at the time the offence was committed. This was accepted. The prisoner had accompanied the girl with her apparent consent, up a dark lane towards her home on a winter evening, and there made an attempt on her, without any violence on his part, or resistance on hers.

J.J. Williams, for the defendant, addressed the jury on the last count of the indictment, and contended, that the count being for a common assault only, consent or non-consent upon the part of the girl became material, and that as it was proved she offered no resistance, but submitted quietly, it must be taken that she was consenting to the act, and therefore the prisoner must be acquitted.

Coleridge, J. (in summing up) - Indeed consent or non-consent becomes material; but then we must look at the nature of the circumstances from which consent is to be inferred. *There is a difference between consent and submission*: every consent involves a submission; but it by no means follows, that a mere submission involves consent. The mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law. You will therefore say whether the submission of the girl was voluntary on her part, or the result of fear. If you are of the latter opinion, you will find the prisoner guilty on the 2nd count.

Verdict - Guilty on the 2nd count only.

*Regina v Stevens*²¹. June 18th, 1845 before Baron Platt and Mr Justice Patteson. The prisoner was indicted for having raped a child under 10 years of age, and from the evidence it was clear that no resistance was made by her to the perpetration of the offence.

Mr Parry, for the prisoner, in his address to the jury, told them they might convict of a common assault.

Platt, B. - I do not agree to that. I think the jury cannot do so in this case.

Patteson, J. - I find that some misapprehension exists with regard to a decision I gave in the case of *R v Banks*. There I am reported to have said there could not be a verdict for the assault under the 17th section of 9 Geo.4, c.31. What I did say is this, that *there could not be a verdict for the assault, where the child consented*. Under such circumstances the proper course would be to indict the prisoner for the attempt to have connection with the child: but it would be indeed, a strange thing, that where a charge of rape committed upon a woman of 40, failed for want of proof of penetration, a verdict for a common assault could be returned, and the same could not be done where the offence was assaulting a child of tender years. The 11th sec. of the 1 Vict. c.85, is only applicable to a charge of felony.

*Regina v Hughes*²², October 30, 1845, before Mr Justice Coleridge and Mr Justice Maule. The prisoner was indicted for committing a rape upon a child under 10 years of age, but from the evidence of the surgeon it was doubtful whether there had been penetration. The child appeared to have made no resistance, and from certain expressions she used at the time, consent on her part might be assumed.

Mr Clarkson, for the prisoner, submitted, that if acquitted of the principal charge, he could not be convicted of an assault under 1 Vict. c.85, s.11. He was aware of the distinction that had been taken by Mr Justice Coleridge in the case of *Regina v Day*, between consent and submission, and that the mere fact of a child making no resistance when in the embraces of a man would be no sufficient proof of consent; *but here there was an actual consent*. He also cited *Regina v Banks*.

Coleridge, J. - We are of opinion that an indictment framed upon the statute for criminally abusing a child under the age of 10 years is not within the 11th section of the 1st Vict. c.85; that section is only applicable where the offence charged includes an assault upon the person. Now, this indictment, although it does in terms allege the commission of an assault, does not charge it as material and necessary to the issue; since consent, or non-consent, is immaterial.

Maule, J. - The 11th section of the 1st Vict. c.85, which introduces a new and very peculiar law, applies by its terms to cases where the crime charged includes an assault on the person. It is true that this indictment alleges in so many words that the prisoner made an assault; but the question as to whether or not there was an assault, which depends upon whether or not there was consent, is rendered immaterial by the terms of the Act upon which the indictment is framed. The case of *Regina v Day* was for a misdemeanour, and the indictment would have contained a count for a common assault, and it is in cases where the assault is substantially charged, that the distinction between submission and consent becomes material.

*Regina v George Read*²³, January 20th, 1849, before Lord Denman (Chief Justice), Baron Barke, Barons Alderson, Justice Coltman and Justice Coleridge.

George Read, aged 13, Ralph Read, 12, and John Barlow, 11, were charged in the same indictment with a common assault on Elizabeth Ellen Searle, aged 9. It was proved at the trial that the four parties went into a hayloft, where each boy had connexion with the girl, and penetration effected in each case. When the boys first began to take liberties the girl showed some unwillingness, but eventually she ceased to offer any opposition, and apparently assented. The verdict of the jury was "Guilty, the child being an assenting party, but that from her tender years she did not know what she was about."

The question reserved for the opinion of this Court is, whether under the peculiar circumstances of the case, the girl being only 9, actually did give, or was competent to give such assent to the act in question, as to invalidate the conviction of a common assault.

B.C. Robinson, for the prosecution - I submit the verdict here is Guilty, as there is a presumption of law that a child so young cannot consent.

Parke, B. - The case of *Regina v Martin* decided that consent makes an end of the charge of assault.

Alderson, B. - This question has been determined several times. On the finding in *Regina v Martin* there cannot be a conviction.

B.C. Robinson - It might have been a child of only 2 years old, who might not resist, and there might in that case have been such a consent as is found here.

Coleridge, J. - The jury say that the girl was an assenting party to a connexion. No jury would find the consent of a child of 2 years old.

B.C. Robinson - I must contend, that an assent, to justify an assault, must be an actual assent given by a mind capable of giving an assent.

Parke, B. - It has been decided directly the contrary, in the cases of *Banks*, *Meredith* and *Martin*.

Lord Denman - If it had been found that the girl had shown unwillingness at first, then that might have been different:-

1. The verdict is a verdict of guilty.

2. The words which are appended to that verdict do not alter its effect; they merely mean that the girl gave that mere mechanical assent which is denoted by non-resistance; but which in a child of such tender age cannot be taken to imply any mental assent to the acts charged - mental assent is expressly negatived.

Alderson, B. - The jury mean that she was an actual consenting party, but that she could not by law consent, because of her tender years.

Coleridge, J. - Here it is stated there was a connexion, and that the girl consented. They say that she gave all the consent to it that so young a person could give.

Parke, B. - The first thing to consider is, what point is submitted to us? If we are asked whether a girl of such tender years can consent in law, that is settled in *Regina v Martin*.

Lord Denman, C.J. - The jury have found that the girl gave her assent: we cannot tell whether this were really so or no; but we must take the verdict as we find it. It has been solemnly decided that if the girl consents, the act is not an assault. How can we determine whether the girl actually did give such assent as to invalidate the conviction? This court are unanimously of opinion that the conviction was wrong: a verdict of Not Guilty must be entered on the record.²⁴

This was the legal summation of the period. Let us see how its results applied to cases prosecuted in courts of assize and session over the next few years.

*Regina v Cockburn*²⁵, at Durham Assizes, 1849 before Mr Justice Patteson. The prisoner was indicted for carnally knowing and abusing Jane Pattrey, a child aged 4. She could not be cross-examined, as she knew nothing of the nature of an oath. A surgeon deposed to evidence of her private parts having been penetrated, but by what he could not say. Any foreign substance, or a finger, could have done it. The charge of rape could not therefore, be sustained. The counsel for the prosecution suggested that the prisoner could be convicted of an assault.

Patteson, J. - "No, that is a mistake. My experience has shown me that children of a very tender age may have vicious propensities. A child aged under 10 cannot give consent, so as to deprive the intercourse of criminality, but she can give such consent as to render the attempt no assault. We know that a child can consent to that." The prisoner was acquitted.

*Regina v Atkins*²⁶, at Middlesex Sessions, February 11th, 1857. The witness, Eliza Smith, in her examination said: "the prisoner lives in the same house as the girl, on the first floor. Last Monday, about seven o'clock in the evening, I saw him in bed in his room with the child on him, doing what a man and wife do, and moving as if having connexion with him. His clothes were down and hers up. I saw his person. I looked through a hole in the door. I heard her come. She went up with a candle and he came up after, very gently, and I watched them for half an hour. I was afraid to speak. The child did not call out at all. I mentioned it next morning to her mother."

The child in question, Amelia Reed, aged 8, of Brick Lane, Spitalfields, said "the prisoner made me go up to his bed, and put himself right into me. He did not hurt me. He said I was not to make a noise, or the person would hear."

The prisoner was found Not Guilty of the charge of Indecent Assault.

[The Times newspaper of February 12th stated: "the evidence clearly showed the prisoner had been guilty of an assault of a most scandalous description, but as it appeared the child did not resist, he was acquitted on a point of law as to consent. Mr. Sleigh, prosecuting, said it was quite clear the prisoner was guilty, but the verdict had been given under what was unfortunately the present state of the law with respect to such a case. The assistant judge quite agreed, and allowed costs of the prosecution."]

The point of law regarding consent was again discussed in June 1865, in the case of *Regina v Edwin Johnson*²⁷ at Surrey Sessions in May of that year. The prisoner was charged with carnal knowledge of Emily Eliza Aslett, aged 10, and with indecent assault and common assault on her. The jury at the original trial had found Johnson guilty of indecent assault, but stated that Aslett had consented. The judge refused to acquit him however, and reserved the point for legal consideration.

Oppenheim, for the defendant - Surely, this conviction is bad. At common-law it was not a criminal offence to have carnal knowledge of a girl aged 10 or 11. That was made an offence by statute, although she was a consenting party: but this statute left untouched the case of an assault on a girl aged under 10 (he then referred to *Regina v Read*).

There was no counsel for the prosecution.

Cockburn, Chief Justice - However much we may regret it, this conviction must be quashed.

The rest of the Judges concurred.

The final case to be examined which relates to girls is that of *Regina v Holland*²⁸, tried at Middlesex Sessions in June 1867. The witness Charlotte Bennett, aged 8, of Stanmore, said - "I got to the top of the lane and saw the prisoner who is my cousin (John Holland, aged 23). he said "Come up here" and I said "No, John, my mother wants me to make haste." he said "Come on, we shan't be long." So I went up Benn's lane and got over the gate into a field, where there is a rick. He got over also and laid down on his back on the ground. I laid down on top of him and pulled up my petticoats, as his breeches were down. He put his into mine. After a little while he said "Get off, let us go." I got off and went for the beer, and when I got home my mother saw I was still hot. I told her I had run for the beer, and had been with John, looking for his pipe. He has done the same thing with me many times before."

The girl's mother stated "About five past eight o'clock in the evening I sent Charlotte for a supper beer. She did not return with it until nearly nine o'clock, and I would take only a quarter of an hour to get it. I questioned her, and in consequence of what she said, I examined her private parts, which were swollen and much inflamed."

He was convicted of attempting to carnally know a child under 10.

Before the judges on June 8th, it was found that there was no resistance or complaint, until the mother noticed stains on her daughter. The prisoner's counsel stated that there was no case to answer, the girl being a consenting party. A jury at the trial acquitted the prisoner on counts of indecent assault and common assault, but here, the original conviction of attempting to carnally know Charlotte was upheld.

A little later, a case came up before the judges concerning an alleged indecent assault on two young boys, singular in that it was the only one of its kind to take place during this period

which did relate to the consent of boys. The case of *Regina v Lock*²⁹, from Middlesex Sessions on June 4th, 1872 was directed thus by E.W.Cox -

"I directed the jury to recognise the distinction between mere submission and positive consent. The jury said they were of the opinion that the boys submitted, not knowing the nature of the act. This question being of frequent recurrence, and the law appearing to be unsettled, I reserved the case."

This is the case-law surrounding the issue of consent in under-age girls and boys for the years of Queen Victoria's reign. It was summarised by Sir William Russell³⁰ in 1865 thus - (a) where there is consent, a prisoner cannot be convicted of an assault, on an indictment for an Assault with Intent to Carnally Know a girl between 10 and 12 years of age, and (b) if a girl under 10 years of age consents to sexual intercourse with a man, he is not guilty of an assault. He made the point that there is a great difference between consent and submission, following the comments of Justice Coleridge above in *Regina v Day*, and quoted the remarks of Chief Justice Wilde in regard to a girl who was the prosecutrix in a rape case: "the girl is 14 years old, and she might at that age be ignorant of the nature of the act, morally as well as physically, and of its possible consequences (a dentist having had vaginal intercourse with her in his surgery). It is said that, as she made no resistance she must be viewed as a consenting party. That is a fallacy. Children who go to a dentist make no resistance, but they are not consenting parties." Perhaps Wilde, C.J., was exercising his sense of humour. If sex was more pleasant than dentistry, then perhaps more children might have consented? By the 1870s there was in contrast to this judicial respect for a child's ability to consent to sexual advances a growing opposition amongst child-protection societies. The strongest prosecuting agency, the Associated London Institute for Improving and Enforcing the Law for the Protection of Females, had been set up with a strong religious base in 1844, and had an avowed intent of stopping young females from going into prostitution. The bulk of its efforts turned towards instituting legal proceedings against males for a variety of alleged sexual offences against girls aged under 12. In 1875 the 'age of consent' for females was raised to 13, following the Attorney General's refusing his assent to the proposal to raise the age from 12, because, as he said, the law of European nations fixed the age of consent at 12 for women, and 14 for men.³¹

In a Parliamentary question at the end of July 1880, the Assistant Secretary for State for the Home Office was asked if "his attention has been called to another case of indecent assault on a little girl aged 6 at Stockport Magistrates Court recently: no conviction could be obtained" because the child was believed to have consented, and the defendant was discharged. Sir William Harcourt replied that he believed the state of the law was unsatisfactory, and he would be talking to the Lord Chancellor on how to make it more effective in this manner. A fortnight later the same official was asked "if he can see his way to pass a short Act declaring that in cases of indecent assault on young children, consent should not be a defence." At the beginning of 1881 a Select Committee on the Law relating to Young Girls met in Parliament, and its Minutes relate that the Marquis of Salisbury asked "are these little girls consenting parties?", and William Hardman, the chair of Surrey Sessions replied "Yes, they are. But the power of consent ought to be taken away from 13-year-old girls up to 16 years; but not up to 18 years."³²

The committee met again in June 1882, and by the end of May in the following year, Lord Rosebery presented the Criminal Law Amendment Bill. It included the clause "It shall be no defence on a charge of indecent assault on a young girl or boy under 16, to prove that she or he consented to the act of indecency. Any court may cause the public to be excluded." But after all these outraged remarks and proposals to exclude a child's consent as a defence, the

clause was eventually dropped. Ultimately, having been passed once by the House of Lords but dropped twice in the Commons, the Bill was talked out in May 1885 by Cavendish Bentinck, and there were no plans to resurrect it again. Almost simultaneously, there was a public outcry against the imagined level of child-prostitution, engendered by articles appearing in the Pall Mall Gazette, and the Home Secretary somewhat hastily proposed to resume the interrupted debate, with the result that the Bill was passed in a panic with numerous amendments thrown in and not properly considered. However, the consent given, or believed by judge or jury to have been given by a child to any sexual behaviour carried out with an adult partner remained a sound defence in English law until the third decade of the 20th century, when Clause 1 of the *Criminal Law Amendment Act* passed in 1922 stated "It shall be no defence to a charge or indictment for an indecent assault on a child or young person under 16 to prove that he or she consented to the act of indecency." In 1918 two Bills respecting this issue had been referred to a Joint Select Committee, which failed to reach the Report stage. Two years later the Committee was again constituted under its chairman, Lord Muir Mackenzie, and in 1921 the Bill was introduced into the House of Lords, passing its second reading by a considerable majority. The debate in general was around the second clause³³, which affected an adult male's "reasonable belief" defence, i.e., that his sexual partner was aged over 16.

A discussion of the question "Can Children Consent to Indecent Assault?" was given in 1996 by barrister Jonathan Hall³⁴, in which he shows that a number of cases since the *Sexual Offences Act 1956* was passed (which repealed and restated the 1922 Act's provisions) have appeared to ignore the statutory rule whereby consent of the child cannot be used as a defence, and have rather considered whether the assault is inherently indecent, or potentially indecent. He considers this to be highly problematic on two grounds: first, that in many if not most, cases of indecent assaults on children the circumstances of indecency will not be known or suspected by the child; and secondly, because children are less articulate and more inscrutable than adults, a defendant may be more successful in establishing that he believed the child was consenting to his assault.

Hall concludes that modern case-law is wrong, and that the doctrine that a child can consent to certain types of indecent assault creates an undesirable defence. He suggests that an alternative charge is one under the *Indecency with Children Act 1960*, which is said to be appropriate where there has been no assault as such, or where there has been one but it has been consented to. In 1955, and at a rather inopportune moment, as the final stages of the Sexual Offences Act were being considered and it was too late to include new proposals, Sir Theobald Mathew, Director of Public prosecutions, commenced writing to the Home Office on the subject of adult sexual contacts with children not then amounting to indecent assaults (and therefore not prosecutable).³⁵ He used as a basis for his arguments for a new law the comments of Chief Justice Goddard on two recent cases where no objection was made at any time by the child, and he recommended that "any indecency in the presence of the child or in relation to it" should be punishable. The upshot of this pressure came five years later, with the introduction of the new Act. Somewhat typically in English sexual law, no adequate definition of "indecency" has ever been made, and some prosecutions have been carried out under this Act which have seemingly defied its intentions and the terms of very limited relative case-law.³⁶

To conclude, consensual sexual intercourse with a girl of any age was not punishable within English common law until 1576. Because of the uncertain state of the law, both consensual and non-consensual anal intercourse with a girl, but not with a boy, was hardly, if ever punished until the 19th century. After 1576 and until 1922, mutually consensual sexual acts

between a girl or boy and an adult male or female, short of genital penetration, or attempts at it, were prosecutable but adequately defensible, on the grounds of a belief held in the child's consent. Certainly, judges during the 19th century are seen to have believed that a child could consent to all kinds of sexual activities with older persons, including penetration, although this in itself with a girl aged under 10 was a felony which was severely punished, regardless of the child's consent being given, and in essence remained so in England until 1967, when the classifications "misdemeanour" and "felony" were abolished (if not the gradations of the offence) if the girl is aged under 13. A distinction between submission and pure consent was made in 1841 by Justice Coleridge, and this argument recurs thereafter, evolving into one now known as 'informed consent'.

Despite the 1922 provisions, which were restated in 1956, consent is still a living issue where the charge is one of indecent assault, and it is of interest to note that the Law Commission proposes in a new Criminal Code to dispose altogether of any provision which prevents children under 16 consenting to indecent assault³⁷. The effects of this may simply be to increase the numbers of prosecutions under the *Indecency with Children Act 1960*, which has no provision for consent as a defence, although the punitive provisions of the two Acts differ substantially.

¹ The author has compiled from court records, witness-examinations and newspaper reports of trials and committals, a database of sexual crimes in 20 southern English counties between 1550-1850 (with an additional focus on the county of Kent up to the present time). From this source, containing some 10,000 entries, it can be ascertained that until the 20th century, and more specifically until after World War 2, prosecutions for sexual offences against under-age boys were numerically very low at all times when compared with those for offences against under-age girls.

² In a footnote to the case *Regina v George Read* (1 DEN 379) it is stated that "If a prisoner be indicted under the statute 9 Geo. IV, c.31, s.17, of carnally knowing and abusing a girl under ten years of age, and owing to want of proof of penetration he be acquitted of the felony, he cannot be convicted of the assault if the girl be proved to be above the age of seven years, and to have consented; the statute clearly only provides against carnal knowledge of children under ten or twelve, with their consent. That act without their consent is rape at common law."

³ See 'Wanton Wenches and Wayward Wives' (G.R.Quaife; London 1979) pp.43, 59, 173, 177, which gives Somerset examples. Also 'Elizabethan Life: Morals, the Church Courts' (F.G.Emmison) for Essex cases.

⁴ Discussed in 'Vulnerability and the Age of Female Consent' (Antony Simpson), in 'Sexual Underworlds of the Enlightenment' (G.S.Rousseau and Roy Porter; Manchester 1987)

⁵ Analysis of Surrey Assizes in Calendar of Assizes, Home Circuit (J.S.Cockburn; HMSO 1975)

⁶ 'The Civil Law' (S.P.Scott; Cincinnati 1932)

⁷ 'Dyer's Reports' (Selden Society, vol.109; [1993], p.65)

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- ⁸ 'Pleas of the Crown' (E.H.East: London 1803)
- ⁹ 'Justice of the Peace and Parish Officer' (R.Burn; London 1797 & 1837)
- ¹⁰ Some cases where a child below the age of 9 was allowed to give evidence upon oath were: *Warner* (Kent Assizes Summer 1823), where the girl was 7; *Ansell* (Staffordshire Assizes Lent 1846), where the girl was 5; *Stubbings* (Cambridge Borough Sessions Michaelmas 1845), where she was 6 [and the trial was postponed, for her to receive instruction in the oath]; and *Whipps* (Essex Assizes Summer 1828), where she was 6. The information comes from author's database.
- ¹¹ Provisions of the *Criminal Justice Act* 1988, s. 33A, whereby the evidence of a child under 14 years must be given unsworn, supplemented by the *Criminal Justice Act* 1991, ss.52-55, whereby the presumption of incompetence which applied to young children was removed.
- ¹² See for example the cases of *Edward Barton* (aged 15) at Kent Summer Assizes 1826; *Samuel Young* (15) at Somerset Lent Assizes 1833; and *William Lee* (15) at Berkshire Summer Assizes 1844. At Devon Assizes in Lent 1808, William Tucker aged 17, was sentenced to death for having had penetrative sex with 5-year-old Marian Forrest. He was pardoned a few weeks later, the judges thinking her account should not have been permitted to go before the jury, as she had not been allowed to give sworn evidence on account of her age and apparent lack of competence. Several 14 and 15-year-olds were prosecuted on charges of assaults with intent to have carnal knowledge of girls aged between 5 and 9. [Author's database]
- ¹³ Sir Edward Coke (1552-1634) and Sir Matthew Hale (1609-1676), judges, were the principal law-writers of the 17th century.
- ¹⁴ William Hawkins (1673-1746) and Sir William Blackstone (1723-1780) were the 18th century's leading legal commentators.
- ¹⁵ Reported in 'Ipswich Journal' & 'Suffolk Chronicle', July 1827.
- ¹⁶ 8 C & P. (Carrington & Payne) 574
- ¹⁷ 8 C & P. 589
- ¹⁸ 13 J.P. (Justice of the Peace) 196
- ¹⁹ 9 C & P. 213
- ²⁰ 9 C & P. 722
- ²¹ 1 Cox CC. 225 (Cox's Criminal Cases)
- ²² 2 M.C.C.(Moody's Crown Cases) 190
- ²³ 1 Den. 377
- ²⁴ See for example Lord Coleridge's remarks in *Waite* (2 Q.B. [1892] p.600) which explain the reason why George Read (note 23) was not charged with carnal knowledge of a girl aged under ten., but rather with common assault. A boy aged under 14 was always deemed physically incapable of rape or carnal knowledge in English law until only a few years ago.
- ²⁵ 3 Cox CC. 543
- ²⁶ Middlesex Sessions Papers (London Metropolitan Archives); 11th February 1857
- ²⁷ Cox CC (3rd June 1865)

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- ²⁸ Middlesex Sessions Papers: June 1867
- ²⁹ Cox CC (June 1872)
- ³⁰ 'A Treatise on Crimes and Misdemeanours' (Sir W.O.Russell: London 1865)pp.932-935
- ³¹ The 1875 Act made carnal knowledge (i.e. vaginally penetrative sex with an under-aged girl with her consent) of a girl aged under 12 a felony, and with girls aged between 12 and 13 a misdemeanour. Refer to *Offences Against the Person Act 1875*, c.100
- ³² Minutes of Evidence taken before the Select Committee on the Law relating to Prostitution of Young Girls (House of Lords, 5th March 1881)
- ³³ Parliamentary Debates (Official report) 1922; vol. 156.,pp. 403-458; vol.157, pp.357-365.
- ³⁴ 'Can Children Consent to Indecent Assault?' (Jonathan Hall in *Criminal Law Review* [1996] p.184)
- ³⁵ Public Record Office (DPP/6/84)
- ³⁶ For example, see *Goslin* (unreported, Feb.1989,Tower Bridge Magistrates Court)where the constituents of the offence were that the defendant simply let two children view a single picture taken from an adult pornographic magazinefor a few seconds. There were no other circumstances of indecency, and the defendant received the full summary maximum sentence of 6 months imprisonment on a first offence. For case-law see *Francis*(1988)88 Cr App R 127.
- ³⁷ Hall (above) p.187.