

general rule as to measure of damages should be followed and the law of the state in which the action accrued applied.²⁷

Such a result would have the effect of permitting recovery against the Indiana resident in the New York court, unfettered by the limitation in the Indiana survival statute, while the statute continues to limit recovery in an action which accrues in Indiana. Since no valid purpose exists for imposing this limitation,²⁸ the Indiana legislature should remove it and permit unlimited recovery against a decedent's estate.²⁹

CRIMINAL LAW

PSYCHIATRIC AID IN EVALUATING THE CREDIBILITY OF A PROSECUTING WITNESS CHARGING RAPE

Unfortunately, in prosecutions for rape, evidence tending to corroborate the testimony of the prosecuting witness is often lacking. Where this situation exists, determination of guilt is dependent on the resolution of two contradictory statements, viz., the accusation of the prosecutrix, and disavowal by the defendant. Unlike most criminal prosecutions, where additional evidence is presented by witnesses and through physical manifestations of probability, this not infrequent situation has only these two antithetical ingredients. And while the individual temperament of each juror is an inescapable constituent of our criminal system, a lack of evidence corroborating the prosecutrix virtually erases the possibility of an objective approach in evaluating her credibility. When the morally reprehensible nature of the crime and the ease with which persons may be falsely accused of rape are considered, the

27. *No. Pacific R. R. v. Babcock*, 154 U.S. 190 (1894); *Hupp Motor Car Co. v. Wadsworth*, 113 F.2d 827 (6th Cir. 1940); *Curtiss v. Campbell*, 76 F.2d 84 (3d Cir. 1935); *La Prell v. Cessna Aircraft Co.*, 85 F. Supp. 182 (D.Kan. 1949); *Oviatt v. Garretson*, 205 Ark. 792, 171 S.W.2d 287 (1943); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 200 (1918); *RESTATEMENT, CONFLICT OF LAWS* § 412 (1934).

In *Oviatt v. Garretson*, *supra*, which is the only case to date which has allowed recovery under the provisions of the newly amended non-resident motorist statutes, the court in measuring damages followed the general conflict of laws rule in a situation analogous to that in the principal case. Suit was brought against an Ohio administrator on a wrongful death action which accrued in Arkansas. Although Ohio law allows only pecuniary damages in an action for wrongful death, the court applied Arkansas law and allowed recovery for conscious pain and suffering prior to death.

28. No evidence has been found to support the argument that the purpose of this limitation is to protect dissolution of a decedent's estate by creditors, but even conceding the desirability of such protection the proper means of accomplishing this is through statutory provisions exempting a portion of the estate, rather than a limitation in the survival statute.

29. Since adoption of the discussed amendment to the non-resident motorist statute by other states appears likely, this situation will occur with increasing frequency in the future. See note 6 *supra*.

full import of this problem becomes manifest. Certainly, every effort should be made to minimize this perplexity.¹

Under these circumstances, the majority of states adhere to the common law rule that in a trial for rape the testimony of the female alone is sufficient to support a conviction.² Contrary to the logical inference, this doctrine does not owe its origin to, nor does it have any especial significance because of, the particularly heinous nature of the crime. It is merely an example of the general absence in Anglo-American law of rules requiring a specific quantity of evidence.³

Recognizing the fact that severe injustice may ensue from a failure to require more substantial proof of guilt where rape is charged, several states insist that the prosecuting witness' accusations be substantiated.⁴ On first

1. This patent weakness in the judicial process is forcibly demonstrated by a recent Indiana case in which the defendant was convicted of rape. The only evidence to establish the crime was the testimony of the prosecuting witness, who later specifically denied that defendant had committed the offense charged. Nevertheless, the judgment of the lower court dismissing the motion for new trial was affirmed by the Indiana Supreme Court. *Yessen v. State*, 92 N.E.2d 621 (Ind. 1950) (Judges Gilkison and Emmert dissenting).

A second feature of this case (a commentary on legal method particularly correlated to Indiana practice) is presented by the summary treatment given it by the Indiana Supreme Court. The motion for new trial was supported by affidavits, one of which contained prosecutrix's denial that the crime had been committed. Arbitrarily invoking an archaic procedural requirement, the Supreme Court refused to consider these affidavits because they were not contained in a special bill of exceptions, showing that they had been introduced in evidence at the hearing on the motion. The court has long been careful to enforce the rule that affidavits filed with a motion for new trial are in the record on appeal only if incorporated into the record by a bill of exceptions. See, *e. g.*, *Butler v. State*, 223 Ind. 260, 60 N.E.2d 137 (1945); *Alexander v. State*, 203 Ind. 288, 164 N.E. 259 (1928); *Kleespies v. State*, 106 Ind. 383, 7 N.E. 186 (1886). This requirement assures the court that opposing counsel had opportunity to introduce counter-affidavits at the hearing on the motion. But meritorious questions involving a defendant's personal liberty should not be lightly ignored; and here was a situation in which defendant's conviction of a serious crime could be sustained only upon testimony expressly repudiated. Yet, this was not considered cognizable because a procedural rule had not been complied with. Certainly, the questionable wisdom of rigidly adhering to such a formalistic requirement does not offset this disastrous consequence. The best solution to this unfortunate situation would be adoption of the rule proposed by the Judicial Council of Indiana, wherein opposing counsel is given a period within which to file counter-affidavits after a motion for new trial has been filed; and which provides that affidavits filed shall be considered as evidence and shall not be introduced at the hearing on the motion. The latter provision is expressly designed to repudiate the existing Indiana rule. Report of The Judicial Council of Indiana 29 (1948).

2. *E. g.*, *People v. Murray*, 91 Cal. App.2d 253, 204 P.2d 624 (1949); *State v. Chuchelow*, 131 Conn. 82, 37 A.2d 689 (1944); *People v. Sciales*, 345 Ill. 118, 177 N.E. 689 (1931); *Abshire v. State*, 199 Ind. 474, 158 N.E. 227 (1927); *Commonwealth v. Bemis*, 242 Mass. 582, 136 N.E. 597 (1922); *Commonwealth v. Oyler*, 130 Pa. Super. 405, 197 Atl. 508 (1938). See also 7 WIGMORE, EVIDENCE § 2061 (3d ed. 1940).

3. See 7 WIGMORE, EVIDENCE § 2032 *et seq.* (3d ed. 1940).

4. Some jurisdictions have adopted this policy through legislative action. For instance, N.Y. Penal Law § 2013 recites that, "No conviction can be had for rape or defilement upon the testimony of the female defiled, unsupported by other evidence." In others, the rule is a creature of judicial invention. "A judgment of conviction . . .

impression this would seem highly desirable since the crime is usually committed under clandestine circumstances, making false accusations with appropriate detail relatively easy.⁵ Moreover, the commission of the offense is so repugnant to the mores of society that the disposition of a defendant's case is likely to be influenced more by prejudice inspired by aroused public emotion than by a considered view of the evidence.⁶ The severity of the penalty⁷ and the inevitable social ostracism further accentuate the need of adequately protecting the accused from conviction on false charges.

The serious nature of the crime makes it equally essential, however, that courts and legislatures do not require a method of proof which places an unreasonable burden upon the state. In many cases there will be circumstances surrounding the alleged commission of the offense, in a few instances even witnesses, to either verify or discredit the prosecutrix's testimony.⁸ On such occasions a rule which unequivocally requires that the complainant be corroborated serves well its laudable purpose of protecting the accused, without unduly handicapping the state's efforts to punish, or otherwise deal with, sex offenders. But the situation is reversed when there is an absence of such corroboration and the prosecutor must ground his case solely on the recital

based upon the testimony of the prosecutrix alone cannot be sustained . . . unless the circumstances surrounding the commission of the offense are clearly corroborative of her statements." *State v. Hines*, 43 Idaho 713, 715, 254 Pac. 217, 218 (1927).

5. Often quoted is Lord Hale's classic statement, "It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished . . . but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party, accused, tho never so innocent." I.P.C. 633, 635 (1680). And in the eighteenth century Montesquieu, though bitterly condemning the "crime against nature," wrote, "As natural circumstance of this crime is secrecy, there are frequent instances of its having been punished by legislators upon the deposition of a child. This was opening a very wide door to calumny." 1 MONTESQUIEU, *THE SPIRIT OF LAWS* 203 (Pritchard's ed. 1906).

6. In *Roberts v. State*, 106 Neb. 362, 365, 183 N.W. 555, 557 (1921), the court recalled that, "Public sentiment seems inclined to believe a man guilty of any illicit sexual offense he may be charged with. . . ."

7. Conviction in North Carolina carries a mandatory death penalty. N.D. GEN. STAT. § 14-21 (1943). In several states death, or life imprisonment, may be imposed. See, e. g., ARK. STAT. ANN. tit. 41, § 3403 (1947); MASS. ANN. LAWS c. 265, §§ 22, 23 (1942); MICH. COMP. LAWS § 750.520 (1948).

8. In *State v. Leavitt*, 44 Idaho 739, 260 Pac. 164 (1927), the court found corroboration sufficient to sustain a conviction from evidence that prosecutrix was tearful upon complaint to her mother soon after the alleged rape; her body was bruised and scratched, her underclothing torn and stained, and her sexual organs lacerated; and her broken watch was found among trampled weeds at the location where the crime was allegedly committed. In *Cascio v. State*, 147 Neb. 1075, 25 N.W.2d 897 (1947), defendant admitted the act of intercourse, but the complaining witness was not corroborated in her denial of consent when there was no evidence of physical injury nor of torn clothing, and she admittedly made no effort to escape though she had opportunity to do so. But in *Prokop v. State*, 148 Neb. 582, 28 N.W.2d 200 (1947), where defendant admitted the intercourse and alleged consent, prosecutrix was corroborated by evidence that her back, eye, and wrists were bruised, her neck was discolored, and she was hysterical upon complaining to a doctor soon afterwards.

of the complaining witness.⁹ And while the surreptitious perpetration of the crime is significant when considering the danger of false accusation, it is of equal consequence when proving the *corpus delicti*. Thus, if the prosecuting attorney is unable to secure other evidence substantiating the complainant's testimony, the state is powerless to deal with defendants who are in fact guilty. In this area a general rule of corroboration would accordingly break down by protecting the culpable as well as the guiltless. The problem thereby evolved is that of formulating some method of proof which will not impede the state's efforts to deal with offenders, and yet be flexible enough to protect the innocent.

The need for flexibility is further accentuated by the fact that false accusations of sex offenses may be engendered by personality disturbances not discernible to a court or jury.¹⁰ This renders a courtroom appraisal of the complainant's testimony virtually impossible. For despite the mental disorder, if that is present, the individual may have a highly intelligent and extremely convincing manner.¹¹ An adequate evaluation of her credibility can be made only after a diagnosis based upon a psychiatric inquiry into the physical, mental, and social history of the prosecutrix.¹² Thus, the opportunity of the court and jury to observe the demeanor of the witness is of little consequence.

The desideratum can be attained by giving the prosecuting attorney, in all cases where rape is charged, the right to petition the court for appointment of qualified psychiatrists to examine the prosecuting witness.¹³ This examina-

9. In *People v. Romano*, 279 N.Y. 392, 18 N.E.2d 634 (1939), the court held that the other evidence necessary to corroborate the prosecutrix was lacking where she identified defendant as one of a group of men who allegedly assaulted her, and swore that he raped her when her powers of resistance had been beaten down in an effort to repulse the others. And in *People v. Pandeline*, 141 Misc. 241, 251 N.Y. Supp. 384 (1931), an indictment for rape was dismissed because corroboration of complainant's charge that she was raped by defendant in a taxi was entirely lacking.

There may be evidence other than the testimony of the prosecuting witness, but not of sufficient caliber to constitute corroboration. For instance, other evidence tending to show only that defendant had opportunity to commit the crime is generally held insufficient in those states where corroboration is required. *State v. Bowker*, 40 Idaho 74, 231 Pac. 706 (1924); *Roberts v. State*, 106 Neb. 362, 183 N.W. 555 (1921).

10. See 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940), and the discussion of case histories reprinted there. See also HEALY, *THE INDIVIDUAL DELINQUENT* 729-752 (1915); Glueck, *The Forensic Phase of Litigious Paranoia*, 5 J. CRIM. L. & CRIMINOLOGY 371 (1914).

11. *Ibid.* Most mental illnesses produce little or no outward change in demeanor. HENDERSON & GILLESPIE, *A TEXTBOOK OF PSYCHIATRY* 101 (6th ed. 1947). Aschaffenburg, in *Psychiatry and Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 3 (1941), recalls that, "For over thirty years I have found that even well educated people when shown around in my clinic asked me at the end of such a visit where the excited patients were kept. They never realized that the madman of their imagination was but a rare exception." See also OVERHOLZER & RICHMOND, *HANDBOOK OF PSYCHIATRY* 9-10, 30 (1947).

12. See 3 WIGMORE, EVIDENCE § 924a (3d ed. 1940), esp. the letters from Drs. W. F. Lorenz, Karl An Menninger, Otto Mönkemöller, and William A. White reprinted there.

13. Despite frequent attacks, the probative value of psychiatric examination is generally recognized. See notes 19, 20, and 21 *infra*.

tion would be made before trial, and a report of the findings presented in evidence. Presumably, this psychiatric inquiry would be requested only on those occasions where strong corroborative evidence is not available.¹⁴ As a means of insuring the prosecuting attorney's compliance with this procedure, the court would determine whether there is any evidence tending to substantially verify the complainant's testimony. And in those cases where the state introduces no evidence of corroborative rank, the court would be disposed to find the defendant not guilty.¹⁵ This exercise of judicial discretion is justifiable when two decisive factors are recalled: False accusations of sex offenses *are* made by persons affected with personality disturbances, and these disorders usually are *not* discernible to laymen.¹⁶ Hence, when the state offers no corroborating evidence, and no psychiatric report, it would not be assumed that the witness is a normal individual, notwithstanding the persuasiveness of her testimony.¹⁷ By this method the responsibility and the means of verifying the statements of the complaining witness are placed squarely upon the state.¹⁸

14. It is likewise presumed that where there is no corroborating evidence, and the psychiatric inquiry reveals that the complaint has no merit, the state would decline to press charges.

15. If the cause were being heard before a jury, presumably the court would direct a verdict of acquittal. See note 16 *infra*.

16. The tremendous significance of these two facts cannot be overemphasized, for they comprise the fundamental reason why a wholly subjective appraisal of prosecutrix's credibility by the court or jury is so likely to result in severe injustice, and why a substitute method of evaluation must be found in the realm of psychiatric investigation. Normally it is said to be an invasion of the province of the jury for the court to direct a verdict where the determination of an issue involves the weight of evidence or the credibility of witnesses. See, *e. g.*, *State v. Torphy*, 217 Ind. 383, 28 N.E.2d 70 (1940). Obviously, such a doctrine can have no application in the situation envisaged here.

17. It is recognized that not every false accusation of rape has its inception in a disordered mind, that motivation may be supplied by a desire to gain revenge, to blackmail, to escape public disapprobation, or by other exigencies. Admittedly, the proposed reform suggests no panacea for this type of situation.

18. The circumstances in *Yessen v. State*, 92 N.E.2d 621 (Ind. 1950), see note 1 *supra*, present a situation ideally suited to the application of the procedure suggested here. Prosecutrix was a twelve year old child, apparently possessing delinquent tendencies, who had been deserted by her natural parents and placed by the County Welfare Department in a strange home with a couple employed by the department to give her room and board and to send her to school. That she was from two to three years behind in school is indicated by the fact that she was in grade 4-B. At the trial, which resulted in defendant's conviction of rape, the state introduced no evidence tending to support her testimony that the crime had been committed. After the trial she retracted her statements. Under the recommended procedure the state would not have been permitted to rely so heavily on the testimony of prosecutrix, and the absence of corroborating evidence would have necessitated a request for psychiatric aid in evaluating her credibility. Certainly, the background of this girl and her behavior subsequent to the trial suggest the strong possibility that had such a course been followed, the doubtful conviction would never have occurred.

Courts have long admitted psychiatric evidence where sanity is an issue,¹⁹ and although they have not always been so willing to receive evidence of lesser mental illness, the value of psychiatric diagnosis in the latter respect is by no means unrecognized.²⁰ Indeed, it is in dealing with sex offenses that the courts have been most liberal.²¹ But a serious difficulty in effectively administering the recommended procedure is presented by the dearth of qualified psychiatrists available to conduct the examinations. A similar problem is currently being encountered in effectuating sexual psychopath statutes,²² which require specialized examinations.²³ To cope with this situation, it has been suggested that official court clinics, staffed with specialists, be established in the larger cities and utilized by the surrounding areas.²⁴ Besides alleviating the difficulty experienced in administering those statutes, adoption of the proposal would provide immediate access to trained specialists when the prosecuting attorney requests a psychiatric inquiry into the background of a complaining witness charging rape. Furthermore, the facility with which an examination could be instituted would encourage the use of the clinic in all cases where the prosecutor doubts the strength of his corroborative evidence.

19. 3 WIGMORE, EVIDENCE § 932 (3d ed. 1940). Many state statutes and the Federal Rules of Criminal Procedure expressly authorize appointment of experts to examine a defendant whose sanity is questioned. Indiana, for instance, has made such appointments mandatory when the issue is raised. IND. STAT. ANN. § 9-1702 (Burns 1933).

20. For example, during World War II the United States government discharged more than 500,000 soldiers for lesser psychiatric disorders. MENNINGER, PSYCHIATRY IN A TROUBLED WORLD 343 (1948). The Massachusetts Briggs Law requires routine psychiatric examination in all cases of capital offenses and of persons indicted for any other offense who are known to have been previously indicted more than once or to have been convicted of felony. MASS. ANN. LAWS c. 123, § 100A (1942). See also *United States v. Hiss*, 88 F. Supp. 559 (S.D. N.Y. 1950) (a psychiatrist was allowed to testify that one of the prosecution's witnesses was a psychopathic personality); *Coffin v. Reichard*, 148 F.2d 278 (6th Cir. 1945) (hospital records were admitted to show that appellant was a psychopathic personality); *People v. Hudson*, 341 Ill. 187, 173 N.E. 278 (1930) (expert testimony indicated that witness was a moron).

21. Several courts have been willing to admit psychiatric evidence of mental disorders in sex complaints. *Miller v. State*, 49 Okla. Cr. 133, 295 Pac. 403 (1930) (evidence that complainant was a nymphomaniac and that the diseased condition of her mind would make her testimony unreliable); *Rice v. State*, 195 Wis. 181, 217 N.W. 697 (1928) (expert testimony indicating that prosecutrix was depraved mentally, and imagined things entirely beyond reality); *People v. Cowles*, 246 Mich. 429, 224 N.W. 387 (1929) (evidence that prosecutrix was a pathological liar, a nymphomaniac, and a sexual pervert); *State v. Pryor*, 74 Wash. 121, 132 Pac. 874 (1913) (evidence that prosecutrix was suffering from hysteria); *Mell v. State*, 133 Ark. 197, 202 S.W. 33 (1918) (evidence of a prosecuting witness' insanity); *Jeffers v. State*, 145 Ga. 74 88 S.E. 571 (1916) (expert testimony that prosecutrix was "considerably below the average" in mental development).

22. Indiana has recently enacted such a statute. IND. ACTS 1949, c. 124, p. 328, Note, 25 IND. L. J. 186 (1950).

23. See Note, 25 IND. L. J. 186 n. 31 (1950).

24. *Ibid.* 40 J. CRIM. L. & CRIMINOLOGY 186 (1949).