CHARLES *vs.* THE STATE.

The provision in the constitution, (sec. 25, Art. III,) which declares that "any slave who shall be convicted of a capital offence, shall suffer the same degree

of punishment as would be inflicted on a free white person, and no other," has reference to the mode of inflicting capital punishment, and does not prohibit the General Assembly from punishing a crime capitally when committed by a slave, and otherwise when committed by a white person.

Where by the law the slave and the white man are both punished capitally, they must be executed in the same manner.

The 9th sec. of Art. 4, of Part 4, of ch. 51, Digest, which declares that a negro shall be punished with death for an attempt to commit rape on a white woman, is not unconstitutional because a white man for the same offence is only punished by imprisonment in the Penitentiary.

An attempt by a negro to commit rape upon a white female under the age of puberty, is within the purview of the statute referred to.

The 4th sec. of Art. 4, of Part 4, of ch. 51, Digest, contemplates cases of carnal knowledge of females below the age of puberty, without force, and not forcible rapes; such females nevertheless are subjecs of rape as well as females above that age.

Rape is the carnal knowledge of a female forcibly and against her will. In order to convict a negro of an attempt to commit rape upon a white female, it is essential to prove such intention as, if carried into execution, would constitute rape.

In this case the prisoner entered a room where a school girl was sleeping, turned her over (having partly undressed himself,) and attempted to get on her: she awoke, screamed, and he fled. He was convicted by a jury for an assault with intent to commit rape: HELD, that a new trial should be granted because it did not appear from all the circumstances in proof, that the prisoner intended to accomplish his purpose by force.

HELD (on the authority of *Commonwealth vs. Feild,* 4 *Leigh R.* 648,) that if the prisoner designed to accomplish his purpose whilst the girl was asleep, he was not guilty of attempt to commit rape.

11/390. Ovrld. in Harvey v. State, 53/427, 14 S. W. 645.

Appeal from the Hempstead Circuit Court.

Charles, a negro man, slave, was indicted in the Hempstead circuit court, in May, 1850.

The first count charged that Charles, a negro man, on the 24th day of January, A.D. 1850, with force and arms, at &c., did then and there one Almyra Combs, a white girl of the age of fourteen years, &c., feloniously and wickedly assault with intent her the said Almyra Combs, a white girl &c., then and there feloniously to ravish and carnally know forcibly and against the will of said Almyra &c.

The 2d count: That the said negro man Charles, a slave, the property of one Jacob Standly, on the 24th January, 1850, with force and arms, at &c., did then and there the said Almyra Combs, a white female of about the age of fourteen years, &c., feloniously and wickedly assault, with the intent her the said Almyra Combs, a white female &c., then and feloniously to ravish and carnally know forcibly and against the will of her the said Almyra &c.

The 3d count: That the said negro man Charles, a slave, the property of &c., on the 24th January, 1850, with force and arms, at &c., did then and there the said Almyra Combs, a white woman of the age of fourteen years &c., feloniously and wickedly assault, with the intent her the said Almyra Combs, a white woman &c., then and there feloniously to ravish and carnally know forcibly and against the will of the said Almyra &c.

Defendant was tried by a jury, on the plea of not guilty, convicted, and sentenced to be hung.

Defendant's counsel moved for a new trial, on the following grounds:

1. The verdict was contrary to law and evidence.
2. Contrary to the instructions of the court.
3. The court admitted illegal testimony on behalf of the State.
4. The court refused to give certain instructions moved by the counsel for prisoner.
5. The court gave the jury illegal and improper instructions.

Defendant's counsel also moved in arrest of judgment on the following grounds:

1. The indictment is not sufficient in law to sustain the verdict or judgment.
2. The verdict is guilty, generally, whereas the first and second counts in the indictment are insufficient to sustain the verdict or judgment.
3. The prisoner cannot be punished capitally for the offence charged in either count of the indictment.
4. Misjoinder of counts.

5. The statute prescribing the degree of punishment is unconstitutional and void.

The court overruled both motions, defendant's counsel excepted, and took a bill of exceptions setting out the evidence &c.

Almyra Combs testified as follows:

"On the 23d day of January, 1850, in company with four other school girls, I went to Mr. Sumerron's to stay all night. Myself and four other little girls, and Mr. Summerron's daughter were lying upon a bed in a row, on the floor, I lay on the outside. There were two doors to the room. About four o'clock next morning, I was awakened by some one who took hold of my shoulder and tried to turn me over. I was lying with my face to my bed mates. The person made an effort to get over me; I threw my hand against the person, and found him to be a man partly undressed. I found the portion of the undressed person to be that portion of which I cannot decently speak. I then raised the alarm, and called for help; the moment I spoke, he sprung to his feet, and I caught him by the pantaloons, and attempted to hold him until Mr. Summerron could get there; he seized my hand and wrung it loose, and I saw nothing more of him, but heard some person leave the room by going out of the door. I do not know who, or what person it was. After I raised the alarm, I suppose about a minute, or a very short time, Mr. and Mrs. Summerron came into the room where I was sleeping. When the person took hold of my person it was not in a rough but rude manner. In attempting to turn me over, the person took hold of my knee—when he attempted to get over me and do violence."

The court (QUILLIN, Judge) directed the witness to state what acts were done by the person to whom she referred; to which the witness replied, that she had already stated all she knew about the matter. Not cross examined.

Michael Summerron, testified as follows, in substance:

The prisoner, *Charles,* is the property of Jacob Standly. The school girls, who had come to my house on the evening of the

23d January, 1850, were sleeping in a bed on the floor, in the room next to mine. About 4 o'clock on the morning of the 24th an alarm was given by Almyra Combs—I knew her voice. The first I heard was, "Lord have mercy there is some body in here." I thought it was the voice of Miss Combs. She said "Mr. Summerron come here"—she continued to scream and call for me to "come quick, come quick." I told them not to be alarmed—got out of bed and went into their room as soon as possible—they kept on screaming, "Yes there is some body in here who has had hold of me." Miss Combs said, "I know there was some person in here, because I had hold of him." It was very dark. I could not see any thing, and ascertained that the person had escaped out of the room. Rained very hard the day before, the yard was muddy, and night cloudy and dark. Took a candle and lighted up the room. When I went into the room, the door was half open. The window near which Miss Combs was lying was hoisted. I took the candle, and passed along the out-side of the house, supposing the person had escaped by the window—found tracks softly made with bare or sock feet near the window—there was a trough under the window, upon which there was wet and mud, and appeared like some person had slipped up on it; and there was wet and mud on the window cill, which appeared like it was made by the feet of a person crawling in. Finding the person had not escaped by the window, on further examination, I found he had escaped by the door opening to the yard. He sprang from the door into the yard in mud two inches deep. About three or four feet from the door I found a foot track without shoes—followed the track, and on the second or third track found a handkerchief which I recognized as belonging to prisoner, which was perfectly dry, not being wet from dew or otherwise. The negro cabin was about twenty paces from the door of the room where the girls were sleeping. For about fifteen paces of the distance from the door it was very muddy, the balance of the way was not so muddy, but the track was distinct and plain to the prisoner's bed side in the cabin, and there

lay the socks perfectly wet and muddy with the toes worn out. I found him all covered up with his bed-clothes, snoring and pretending to sleep—he made a noise as though he was snoring. I picked up the socks, fastened the cabin door with a chain on the outside; returned to the house, waked up Parson Kelly, who stayed with me that night, and my son Milton, and asked them to assist me to arrest the boy. We returned to the cabin, opened the door, and called the prisoner out of his bed; and found his toes filled with mud of the same kind of that between the room and the cabin—the balance of his feet was perfectly clean and dry. We then fastened the boy Charles, and sent for his master—then took him and tied him to a post on the porch. I said nothing to him on the subject for an hour, then I told him to tell me about some money which had been stolen from the same room a few nights before. He said he had only taken two $5 gold pieces. He told me a falsehood about it at first, and afterwards told me where it was. He said he got it by stepping on the trough, and reaching through the window, and taking it out of the pantaloons pocket. He also then told me that he was in the room on the night before, but had gone there to awake me, as he had seen some body slipping about between the cabin and the potatoe house, or little houses. All this took place at my house in Hempstead county, Arkansas. Charles was hired by me from Standly, and was at my house as a hireling.

Cross examined. There were seven young ladies sleeping in the same room at the time the alarm was given. The room in which I slept, was immediately adjoining the room the girls were in. Myself, wife, and youngest child occupied one room. Parson Kelly was in a room adjoining the one occupied by the girls, and my son Milton and other boys were in a room up-stairs. There were two other negro boys, smaller than Charles, on the place, who slept in the same cabin and bed with him. I examined for other tracks, but found no other fresh ones. Did not try the foot of Charles in the track.

Mrs. Electra Summerron, testified substantially to the same

facts stated by her husband. She also stated that Miss Combs was about 13 or 14 years old.

Dr. Conway testified, that on the morning of the 24th January, 1850, he went to Summerron's house, and found the boy Charles chained—his hands were tied with a rope, and his legs were chained. He saw the marks in the window of some one having entered, and examined the tracks from the door of the room where the young ladies were sleeping to the negro cabin. They were recently made, by some one "in his stocking feet." He spoke to the boy Charles, and asked him what he was tied up there for? Charles replied that "they had tied him up."

Here the counsel objected to the introduction of the confessions of the prisoner, made whilst he was chained as above, but the court overruled the objection.

Witness then said he asked Charles "if he was in the room the night before?" And he said "yes, that he had gone in there to wake master, as there was some person at the barn stealing something." The room referred to was the same in which the young ladies slept. Witness brought him to town, and held the rope with which he was tied. He admitted he was in the room but for the sole purpose above stated. Several times he admitted being in the room, but always gave the same reason for going there—to wake up Mr. Summerron. All these confessions were made in presence of, and when interrogated by white men, and when bound.

Cross examined. Miss Combs was about 14 years old, was not a woman. Witness was the physician of the family of which she was a member, and knew that she had not attained the age of puberty. Would call her a girl and not a woman. She was not very small of her age—weighed about one hundred pounds.

The counsel of prisoner moved to exclude from the jury the confessions made by prisoner to Dr. Conway, but the court overruled the motion.

The counsel for the prisoner moved the court to instruct the jury as follows:

"1. That in the crime of rape force is of the very essence of the offence; and that in this case they are bound to find the prisoner not guilty unless they believe from the evidence that he made the assault with the intention and design of having carnal knowledge of Miss Combs forcibly and against her will.

"2. That if they believe that the prisoner made the assault with the intention of having carnal knowledge of Miss Combs with her consent, and that he did not intend to do so without her consent, or by using force, they are bound by law to acquit.

"3. That if they believe an assault was made by the prisoner, they are then to determine as to his intention and design in making the assault, from all the circumstances attending the transaction as proven in evidence, and that unless they believe from the evidence that he made the assault with the intention and design of having carnal knowledge of Miss Combs forcibly and against her will, they are bound to acquit.

"4. That unless it has been proven by the evidence that Almyra Combs is, and was at the time of the assault a white *woman* they are bound to acquit the prisoner.

"5. That a *woman* within the meaning of the statute upon which this indictment is found, and a conviction sought in this case, is a female who has attained the age of puberty; and that if they believe that Miss Combs had not attained that age at the time of the commission of the supposed offence, they are bound by law to acquit the prisoner.

"6. That, no matter what degree of force was used by the prisoner, he is not guilty as charged, unless he made the assault with the intention of having connection with Miss Combs, whether she was willing or not.

"7. That they cannot find the prisoner guilty, unless they believe that, at the time of the supposed assault, he was a reasonable being, capable of distinguishing right from wrong.

"8. That, unless it has been proved by the witnesses who have testified before the jury, that Miss Combs is a white woman, and the prisoner is a negro, they are bound by law to acquit, notwithstanding the members of the jury may know of

their own knowledge, or may be fully satisfied of those facts from having seen the parties in court during the trial of the cause.

"9. That, in considering the confessions of the prisoner, the jury should take the whole together, as well that in his favor as that against him.

"10. That, by law, the prisoner has the same rights on this trial as if he were a white man, and that it requires the same evidence to convict him that it would to convict a white man.

"11. That if the jury entertain a reasonable doubt as to what were the intentions of the prisoner, they must acquit, or if they entertain a reasonable doubt of the prisoner's guilt, they are bound to acquit.

"12. That it is a crime for a white man to commit such an offence as that charged in the indictment, and that it requires the same proof to convict this prisoner as if he were a white man."

The court gave the 1st, 2d, 3d, 6th, 7th, 8th, 9th, 10th, 11th and 12th of said instructions, and refused to give the 4th and 5th; but, in lieu thereof, gave the following:

"That it was sufficient if the person assaulted was a white female, whether she was a girl or a woman."

WATKINS & CURRAN, for appellant. 1. The statute upon which the conviction is predicated is unconstitutional. The 25th section of the 4th article of the constitution provides that a slave convicted of a capital offence, shall suffer the *same degree* of punishment as would be inflicted on a free white person, *and no other*. To talk of *degrees* in capital punishment, seems to us absurd. There cannot, in the very nature of things, be any *degrees* in capital punishment. There may be differences in the *mode* of execution, but the penalty and, as a consequence, the *degree* is the same, whether a party is hung, burned, beheaded or shot. The argument in opposition is, that this constitutional provision merely means that capital punishment shall be executed upon

both classes in the same *mode:* i. e. if capital punishment is inflicted upon a white man by *hanging,* a slave cannot be burned, beheaded, or drawn and quartered. But if that is the proper construction, it seems remarkable that so trivial a matter should have been deemed of such importance as to require that it should be incorporated in the constitution. If a party has to die ignominiously, there can be but little choice as to the *mode,* or even if there was the difference between hanging, beheading or shooting.

2. A negro can only be punished capitally for an attempt on a *white woman.* If we are correct in this position, the 1st and 2d counts are insufficient, and the proof fails to sustain the 3d court. The evidence shows that the party assaulted had not attained the age of puberty, and was a girl, and not a *woman.*

There is, perhaps, greater reason for protecting girls than women; but the question for determination is not, whether girls or females, other than women, ought to be, but whether they *are,* within the statute. Construing the whole law *in pari materia,* the statute makes a marked distinction between females under the age of puberty, and women, and refers to them as distinct classes of persons. The 4th section makes puberty the test of consent. The meaning of the distinction is, that, under puberty, the offence may be committed with or without the consent of the female. In the English statutes, and those of other States, this age of consent is fixed at 10 years, but the distinction, in effect the same as ours, is uniformly adhered to. Among many other cases that might be cited to this effect, we refer the court to *The Queen vs. Banks,* (34 *Eng. Com. Law R.* 531,) *Rex vs. Wedge,* (24 *ib.* 329,) *Queen vs. Meredith,* (34 *ib.* 539,) *Queen vs. Morton,* (38 *ib.* 85,) *Queen vs. Day,* (*Ib.* 306.) Now, if the last clause of the 9th section refers as well to girls as to women, a negro would be punished with death for the mere *attempt* to commit the offence specified and defined in the 4th section, when he would not be so punished for the actual *commission* of the offence. *This* offence, if "before enumerated," must come under the 4th and 8th sections, and those offences are *not punished with death.* In view

of the distinctions taken by the statute, and the well-settled strictness of the rules of construing such statutes, we earnestly ask, where is the law to punish with death for an attempt to commit a rape upon a female child who has not attained to puberty?

This is not only a penal, but—when we notice the distinction taken by it between the two races—a most sanguinary law, and must therefore be strictly construed. Penal statutes are to be construed strictly and literally, and cannot be extended beyond the letter. (*Smith's Com.* 854. 1 *Black. Com.* 88.) Thus the statute of 1 Edw. 4 c. 12, having enacted that those who are convicted of stealing *horses,* should not have benefit of clergy, the judges conceived that this should not apply to him who should steal *one* horse. So by stat. 14 Geo. II, c. 6, stealing sheep, *or other cattle,* was made felony without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep.

The only case we have found militating against our position is *Watt's case,* (4 *Leigh* 672,) and that is more apparent than real. That case turned upon the peculiar phraseology of the Virginia statute, by which females over 10 and under 12 were the subjects of *rape,* as may be seen by reference to the case of *Comm. vs. Bennett,* (2 *Virg. Cases* 235.) It further appears, from the report of *Watt's case,* that the Virginia statute, as applicable to a negro, used the terms, "*white woman, maid or other.*" On the other hand, there is the case of *Snyder vs. State,* (3 *Hump. R.* 478,) in which it was decided by the supreme court of Tennessee that the statute subjecting a slave to punishment of death for an assault with intent to commit rape on a "free white *woman,*" does not embrace the case of a female under ten years of age. It seems from the Tennessee statute that the age of consent to constitute rape is fixed at ten years—under that age, the offence is for carnally knowing and abusing. See *Caruthers & Nicholson, Dig. page* 318, 683.

3. The court erred in permitting the confessions of the prisoner to be given in evidence to the jury. Confessions must be

free and voluntary, and not under promises or threats. (*Roscoe Ev.* 39.) A confession forced from the mind by the flattery of hope or the torture of fear, comes in so questionable a shape when it is to be considered the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected. (1 *Leach* 263.) As to the limitations under which confessions are received, see *Roscoe's Ev.* 41. A confession made to *one having authority* over the prisoner, is not admissible. (*Roscoe Ev.* 46.) Such evidence should always be received *with great caution. Roscoe's Ev.* 29, *et seq.*

Confessions obtained by the flattery of hope, or the impression of fear, *however slight* the emotion may be, are not admissible, for the law will not permit a prisoner to be made the deluded instrument of his own conviction. 2 *Phil. Ev.* 242, *et seq.*

All the confessions in this case were made by the prisoner whilst he was bound and held in custody without warrant of law, in response to interrogatories propounded to him by *white men.* We insist that, upon principle, no confession made by a negro *alone* to *white* men, under such circumstances, should be received. Such confessions certainly come within the reason of the rule of exclusion. The inquiry always is as to the state of the prisoner's mind—his condition and the circumstances by which he is surrounded, must be taken into consideration; that which would alarm or influence one person, might have no effect upon another. The condition of slaves, and the relation existing between them and white men, is such that no confession made by a slave to a white man—particularly when he is chained to a post—can be said to be "free and voluntary and uninfluenced by terror." The presence of a white man, to overawe and extort from the slave—knowing, as the slave must, that, if he displeases or refuses to do his behests, he can inflict summary punishment upon him with impunity. Practically, a slave is no more within the protection of the law than a horse, or any other piece of property. Who ever heard of a white man being indicted for an assault upon a slave? If life is not taken, no offence

is committed against the criminal law. Even if a slave knew that his person was protected *by law* against violence, of what practical effect is it when he sees *that law* daily violated with impunity? When a slave is *suspected* of an offence, he is generally lynched until a confession is extorted. What else could this prisoner have expected than that he was doomed to share the usual fate?

When it is considered what caution is used in admitting confessions, and for what slight causes they are excluded, it must be evident that these confessions are not admissible.

If the confessions of a white man, made to a baliff having him in custody, are not admissible *a fortiori,* the confessions of a slave to his master should not be received.

It is altogether unreasonable to conclude that this negro was not terrified, or in some manner influenced by the presence of the white men, when he knew that he was completely in their power, and that they could hang him upon the first tree, without being held amenable to the law.

4. Taking the whole confession together, the prisoner, though he had entered the house, and was in there at the time the alarm was given by the prosecutrix, was not the person who made the assault.

5. But, waiving the other objections, and conceding every fact and inference therefrom that could be contended for on the part of the prosecution, there was certainly nothing in the conduct of the prisoner manifesting an intention to accomplish his purpose by *force,* against the will of the woman, and at all events. The publicity of the place, the number of persons in the same bed, and sleeping in the adjoining rooms—and the fact that he did not attempt to strangle or prevent her from giving the alarm, but desisted, and fled "the moment" she resisted, all go to negative conclusively the idea of such an intent.

In *Loyd's case,* (7 *C. & P.* 318. *S. C. Roscoe's Ev.* 866,) it was held, that, in order to convict on a charge of assault with intent to commit a rape, the jury must be satisfied not only that the prisoner intended to gratify his passions on the person of the

prosecutrix, *but that he intended to do so* AT ALL EVENTS, *and notwithstanding any resistance on her part.*

The case of *Joe vs. The State,* (3 *Eng. R.* 4,) was much stronger than this. In that case, there was no other person in or near the house, and the prisoner might have forced the prosecutrix if he had been so disposed. So the evidence in this case is much more inconclusive than in that, in respect of the *corpus delicti.*

Connected with the idea of force, is that of fraud or deception used to accomplish the object. Even supposing, what is highly improbable in this case, that the accused intended to have connection with her while she was asleep, (because his acts were calculated to awaken her,) or that he intended to impose himself upon her for another person, with whom she would have consented, still the authorities go conclusively to show that such an act, *though consummated,* is not rape, because the ingredient of force is wanting, and the woman yields her consent, albeit through a mistake. The only exception is, where an unnatural insensibility has been caused in the female, by the man, to deprive her of the power of resistance, and so enable him to accomplish his purpose, as where he administers to her some potion or drug; to this effect, is the case of *The Queen vs. Champlin,* 47 *Eng. Comm. Law Rep.* 746.

In all the cases we find of fraud or imposition, and the woman is not deprived of her natural faculties, whether asleep or awake, the act is not rape. To constitute the crime, the force must be actual and not constructive. With far better reason might it be said that the confiding girl who yields to the gentle force of her seducer, under the promise of marriage, was ravished by him. So Eve was the willing agent of the serpent, though he beguiled her.

The case of *The Comm. vs. Fields,* (4 *Leigh Va. R.* 648,) the jury found that the prisoner made the assault with intent to have carnal knowledge of the female while she was asleep, but that he used no force, except such as was incident to getting into bed to her and stripping up her night-garment, which awoke her, and he then desisted. The judges of the court of appeals of

Virginia were unanimous that the prisoner should be acquitted. That case was upon a statute similar to ours, and is directly in point.

The case cited is much stronger than the one at bar, because, in this case, the prisoner took hold of the prosecutrix and turned her over, thus showing that he intended to awake her.

In *Jackson's case,* (*Russ & Ry* 48,) eight of the twelve judges held, that where a man had connection with a woman by inducing her to believe that he was her husband, it was not rape. But even if a party who accomplished his object by *stratagem,* was as guilty as him who succeeded by force—there can be no pretence that this prisoner intended to use any such stratagem, for the prosecutrix had never been married, and it is not to be supposed that she would have yielded to *any* one.

Upon both of the points as to the extent of force necessary to constitute rape, or to demonstrate an intent to commit rape, and as to fraud or deception practiced upon the woman, we refer the court to *People vs. Barton,* 1 *Wheel Cr. Cases* 378. *People vs. Croucher,* 2 *Wheel Cr. Cas.* 46. *Rex vs. Loyd,* 32 *Eng. Com. Law Rep.* 523. *Queen vs. Sanders,* 34 *Eng. Com. Law R.* 384. *Same vs. Williams, Ib.* 392. *Same vs. Hallett,* 38 *Eng. Com. Law Rep.* 318. *Same vs. Stanton,* 47 *Eng. Com. Law Rep.* 414.

The court must arrive at the conclusion that the accused here, if he made the assault, designed to have connection with the girl with her consent—for, to presume that he intended to do so at all events and notwithstanding her resistance, the court must stultify him against his will, and deprive him of the benefit of that legal intendment, without which he is not amenable to the law.

We do not pretend to justify or applaud the conduct of the prisoner, but, if this is a country *of laws,* we do most solemnly protest against convicting any person—bond or free, white or black—except *by the law of the land.*

The framers of our constitution took the precaution to provide that a slave should not be deprived of an impartial trial by jury

—but that is all *sound.* If this prisoner had been a *white* man, the jury would have acquitted him without retiring the box; but the feelings of a white man revolt at the idea of a negro even compassing a design of having sexual intercourse with a *white* woman. Any advance made by a negro *should* be highly penal, but questions of mere *policy* have nothing to do with the question presented.

CLENDENIN, Att. Gen., contra.

Mr. Chief Justice JOHNSON delivered the opinion of the Court.

The first position, taken upon the motion in arrest, is, that the act, upon which the indictment was founded, is unconstitutional and void. The constitution provides that any slave who shall be convicted of a capital offence, shall suffer the same degree of punishment as would be inflicted on a free white person, and no other. It is contended that the proper construction of this constitutional provision is, that the legislature cannot declare that a negro shall be hung for an offence, when a white man, for the same offence, is only punished by imprisonment. It is conceded, by the counsel for the accused, that the legislature possesses the power to make an act criminal in a slave, which would not be so in a white man; but then he insists that, as to acts or offences, which are common to both and made criminal in both, a slave cannot be hung, when for the same offence, a white man would only be imprisoned. We cannot concur in the construction claimed for the constitutional provision referred to; but, on the contrary, are fully persuaded that it is not in accordance with the spirit and intention of that instrument. If the offence charged against the appellant had been declared capital, whether committed by a white man or a negro, but that, in the case of the former, the mode of execution should be by hanging by the neck, whereas the latter should be first scourged, and then burned, and finally destroyed by hanging, there can be no doubt but that such act would be unconstitutional and consequently void. The provision was doubtless inserted in the constitution

from a feeling of humanity towards the unfortunate African race, and in order to secure them against that barbarous treatment and excessive cruelty which was practiced upon them in the earlier period of our colonial history. It was not thought fit, in these enlightened times, to continue the practice of those barbarities which were superadded to actual destruction of life by our less enlightened and more unfeeling ancestors. It is true, as contended, that the law-making power is not restricted to any particular mode of inflicting capital punishment, and it is equally undeniable that, in case they should see proper to declare that a white man guilty of a capital offence should be burned or beheaded, they could direct that a negro, who should be found guilty of any crime made capital, should be executed in the same manner, and no other. It is urged that capital punishment does not admit of degrees, and that therefore the constitution did not intend to use the term "degree" as synonymous with "mode" or "manner." We think that, in view of the great evil that the proviso under discussion was designed to remedy, the term "degree" was properly adopted, and that no word in the English language could more forcibly convey the idea intended. Capital punishment is not necessarily instantaneous, but may be effected by a system of steps or degrees rising by regular gradations from the mildest possible infliction to the very point of death itself. We think it clear, therefore, that all that was designed to be understood by the provision in the constitution was that, in case a negro should be convicted of a capital crime, he should not undergo other or greater punishment than that which should be inflicted upon a white man for an offence which would subject him to capital punishment.

The second point made upon the motion in arrest is, that, inasmuch as a negro is only punishable capitally for an attempt upon a white woman, the two first counts in the indictment are insufficient in law. The section of the statute upon which the indictment was framed, first defines rape to be the carnal knowledge of a female forcibly and against her will, and then declares that any person convicted of the crime of rape shall suffer the

punishment of death; and the 3d section also declares that "Every person, who shall, with the intent to commit rape, administer to any female any potion, substance or liquid, with intent to produce such sleep or imbecility of mind or weakness of body as to prevent effectual resistance, shall, upon conviction, be punished with death;" and the 6th further provides that "Every person who shall take unlawfully, and against her will, any woman, and, by force, duress, or menace, compel her to marry him, or to marry any other person, or to be defiled, such offender shall suffer death." These sections contain all the capital offences enumerated by the statute. The 9th section then declares that "If any negro or mulatto shall commit any of the before enumerated offences which are punished with death, or shall commit the infamous crime against nature, either with man or beast, he shall be punished with death; and if such negro or mulatto shall attempt any of such offences, although he may not succeed, on a white woman, he shall suffer death on conviction thereof." The argument upon this branch of the case is, that, since the 4th section has made provision for the punishment of the carnal knowledge or unlawful abuse of female children under the age of puberty by imprisonment, and that as the 9th sec. only punishes the attempt upon a white woman, that a girl is not within the protection of the latter statute. We cannot admit the correctness of this doctrine. So far from there being any conflict between the 4th and 9th sections, we consider that they both stand upon an entirely separate and independent basis, and that they have not the slightest connection with each other. It would be a little remarkable that a female child should not be the subject of rape merely because the law has seen fit to protect her from personal injuries, which do not rise to the grade of that offence. The 4th section was doubtless designed alone to protect young females under the age of puberty against the effects of their own indiscretion arising from their tender years and inexperience in the affairs of the world. The terms "carnally knowing" and "abusing unlawfully," do not contemplate actual force or the absence of the will, but that although no force be used

and she yield her consent, yet, she being under the age of puberty, she is incapable of consenting. The law under such circumstances, though it will not visit upon the offender all the terrible consequences incident to the crime of forcible rape; yet, inasmuch as the female is not regarded as capable of consenting, the act is made criminal, and the guilty party consigned to the penitentiary. By the statute of 18 *Elibabeth,* (*sec.* 7,) the offence of carnally knowing and abusing any woman child under the age of ten years, was made felony without benefit of clergy; in which case, the consent or non-consent was held to be immaterial, as by reason of her tender years she was supposed to be incapable of judgment and discretion. (See 4 *Bl. Com. p.* 260.) Our statute has not, like that of Elizabeth, fixed a particular period as the precise time when a female is supposed capable of consenting: but on the contrary, for some reason, placed it at the age or time of puberty. It never was supposed, that the statute of Elizabeth was designed to diminish the protection of the law over infants under ten years: but that, on the contrary, it was intended to enlarge that protection by furnishing additional safeguards to their chastity and virtue. Our statute cannot, with propriety, receive any other construction. The evil against which it was intended to provide was, that corrupt and designing men would practice upon their ignorance and indiscretion to obtain their consent, and then, when charged with the crime of rape, plead such consent in their defence, and thereby succeed in their nefarious purposes without subjecting themselves to the penalty denounced against the crime of rape. This extension of the remedy was, therefore, absolutely necessary in order to protect the persons of young females against the fatal consequences of their own indiscretion, and also to discourage the commission of such abominable and detestable crimes. The 4th section of our statute was, therefore, aimed exclusively against such offences as should be perpetrated upon females under the age of puberty or consent, and which do not arise to the enormity of forcible rape, for the want of one of the essential ingredients necessary to constitute that crime. This construction is amply

sustained by the context, and indeed every other section of the statute. Under this view of the statute, we are clear that a white girl, or white female, or white woman, are equally the subject of rape, and consequently of the attempt to commit that crime, and that therefore either description in an indictment would be all-sufficient for the purposes of the law. The indictment, and each of the counts, are therefore believed to be fully sufficient in law to uphold a conviction, if warranted in every other respect.

This disposes of the points made upon the motion in arrest, and we will now proceed to the investigation of such as were presented upon the application for a new trial.

The first point made relates to the admission of the declarations of the prisoner. We fully recognize the rule as laid down by the counsel for the defence. Confessions, to be admissible against a party, must be free and voluntary, and not drawn forth either by the flattery of hope or by the impression of fear. It is true that the accused was confined at the time he was interrogated, but it does not appear that any promises were made in case he confessed his guilt or that any threats were uttered against him in case of his refusal. The witness, who had no manner of control over him, and did not assume any, merely approached him and interrogated him, as it would seem, from sheer curiosity, and that, too, without any hope of favor on the one hand or any threat of punishment on the other. The confessions, under this state of case, cannot be said to be so much affected by any undue influence having been exerted upon his mind as to render them wholly incompetent. We conceive it to be a matter of little moment whether the confessions were admitted or not, as they tended to identify the defendant as the individual who entered the room where Miss Combs was sleeping, and who made the attempt upon her. This fact, we consider amply established by other testimony, and that as such his confessions are wholly immaterial to the merits of the case.

The next question, and the one upon which the whole must turn, involves the sufficiency of the testimony to sustain the find-

ing. Rape is defined to be the carnal knowledge of a female forcibly and against her will. In order to convict a party of the offence charged against the accused, it is essential to find the existence of the same intention, which, if carried out, and manifested by overt acts, would render him guilty of the crime of rape. The question here is, did his acts, on that occasion, manifest such intention or did they not? In the solution of this question, we think that much light may be drawn not only from his own conduct, but also from the surrounding circumstances. There can be no doubt but that the time, place, and the attendant circumstances, are all material, as tending to fix and determine the real intention of the party. The substance of the testimony, as detailed by Miss Combs herself is, that, about 4 o'clock, in the morning, as she was lying asleep with four other little girls, she was awoke by some one who took hold of her by the shoulders and tried to turn her over, that she was lying with her face towards the other girls, that he made an effort to get over her, that she threw out her hand and discovered the person to be a man and partly undressed, that she then raised the alarm and called for help, that the instant she spoke he sprang to his feet, that she then caught him by his pantaloons and tried to hold him, but that he seized her hand and wrung it loose, that she saw nothing more of him, but heard some person leave the room by going out at the door, that when the person took hold of her it was not in a rough but rude manner, that in attempting to turn her over he took hold of her knee. There was other testimony amply sufficient to identify the accused with the transaction.

The question now to be determined, is, whether admitting all of these facts to be fully proven, he is guilty of the offence charged against him. In the case of *Rex vs. Williams,* (32 *English Com. Law R.* 524,) it was held that, in order to find a prisoner guilty of an assault with intent to commit a rape, the jury must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any

resistance on her part. In the case of *The Comm. vs. Fields, a free negro,* (4 *Leigh* 648,) which was an indictment for an attempt to ravish a white woman, the jury found a special verdict to the following effect, to wit: That the prisoner did not intend to have carnal knowledge of the female, as charged in the indictment, by force, but that he intended to have such carnal knowledge of her while she was asleep, that he made the attempt to have such carnal knowledge of her when she was asleep, but used no force except such as was incident to getting to bed with her and stripping up her night garment in which she was sleeping, and which caused her to awake. Upon that state of facts, the general court of Virginia was of opinion that he ought to have been acquitted. These cases are strongly in point.

It is certain that the accused in this case used no force, nor is it probable, from all the surrounding circumstances, that the idea of force entered into his original design, and in case his intention was to effect his purpose while she was asleep, the authority cited shows that he is not guilty of the offence charged against him. We do not think that the testimony evinced that settled purpose to use force, and to act in disregard of the will of the prosecutrix, which the law contemplates as essential to constitute the crime.

In respect to the instructions, the court ruled correctly in refusing to give the fourth and fifth. It was not necesssary that the jury should have found the prosecutrix to have been a white woman, technically speaking, as proof that she was a white girl or a white female, would have been all-sufficient to satisfy the law. Under this construction of the term "woman," the 6th instruction was a mere abstraction, and consequently should have been excluded. We are satisfied, from a full view of the whole case, that the judgment of the circuit court was erroneous and ought to be reversed.

The judgment of the circuit court of Hempstead county, herein rendered, is therefore reversed, and the cause remanded, with instructions to be proceeded in according to law, and not inconsistent with this opinion herein delivered.