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Physical Examination of the Body of the Complaining Woman in Seduction Cases

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POWER OF COURTS TO ORDER PHYSICAL EXAMINATION

A. *In the United States.*

The authorities on the power of courts to order the physical examination in criminal cases are abundant but conflicting. What may be termed the conservative courts emphasize greatly the humanitarianism of the constitutional provision (that no person shall be compelled in any criminal case to be a witness against himself) and are pleased to extend the privilege in order that its mantle may cover any fact by which the accused is compelled to make evidence against himself. (Villaflor vs. Summers, 41 Phil. 62.) Thus, it has been held by the Supreme Court of Iowa through Justice McClain in a well elaborated opinion that a compulsory physical examination of a person accused of rape, for the purpose of ascertaining if he is affected with venereal disease alleged to have been communicated to prosecutrex is in violation of the constitutional provision (Art. 1, Sec. 9) which provides that no person shall be deprived of life, liberty or property without due process of law; and all evidence with reference to information secured by such examination is inadmissible. (Iowa vs. Height, 117 Iowa 650). Another case concordant with this view and which deals principally with the examination of a woman is People vs. McCoy (1873), 45 How. Pr. 216. A woman was charged with the crime of infanticide. The coroner directed two physicians to go to jail and examine her private parts to determine whether she had recently delivered a child. She objected to the examination but being threatened with force, yielded and the examination was had. The evidence of these physicians was offered at the trial and ruled out. The court said that the proceeding was in violation of the spirit and meaning of the Constitution which declares that no person shall be compelled

* LL.B.

in any criminal case to be a witness against himself. Continuing the court said:

> "They might as well have sworn the prisoner, and compelled her, by threats, to testify that she had been pregnant and delivered of a child, as to have compelled her, by threats to allow them to look into her person with the aid of speculum to ascertain whether she had been pregnant and delivered of a child. * * * Has this court the right to compel the prisoner now to submit to an examination of her private parts and breast by physicians and then have them testify that from such examination they are of the opinion she is not a virgin and had had a child? It is not possible that this court has that right; and it is too clear to admit of argument that evidence thus obtained would be inadmissible against the prisoner."

The Supreme Court of the United States, however, is not in consonance with the foregoing view. In the case of Holt vs. U. S., 218 U. S. 245 the court, reaffirming the case of Adams vs. N. Y., 192 U. S. 585, through Justice Holmes said:

> "But the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence if material is competent."

Satisfying ourselves with the rule enunciated by the Supreme Court of the United States that a trial court possesses inherent power to compel an accused to submit himself to physical examination as being "progressive in nature" (Villaflor vs. Summers, 41 P*62) and in consonance with the "tendency of modern thoughts and of modern adjudications," (Atchison vs. Thul, 29 Kan. 466) the question for us to determine is whether the same rule holds true whenever it is the complaining witness, specially a woman, that is desired to submit to physical examination upon proper request on the part of the defendant. There

* This refers to Philippine Reports (Phil.).

has been no instance in which this question was passed upon by the Federal Court and I could find no case decided by any of the states which meets this question, except those of McGuff vs. State, 88 Ala. 147 and Kern vs. Dridwell, 119 Ind. 226; 21 N. E. 664.

In McGuff vs. State, the indictment charged that the defendant, John McGuff, did carnally know, or abuse in the attempt to carnally know, Cora Bishop, a girl under the age of ten years. The defendant asked the court to appoint a committee of competent physicians to examine the person of said Cora in order that they might testify as to the evidence of injury, if any, received by her. (Refused). Defendant requested the court further to instruct that unless the jury believed from the evidence, outside of any confession they may believe the defendant made (if they believed the defendant made any) beyond reasonable doubt, either that the defendant had carnal knowledge of said Cora Bishop, or that he injured her sexual organs in the attempt to have a carnal knowledge of her, they can not find him guilty. (Refused).

The court through Judge Tally said:

> "We do not doubt the correctness of the court's ruling in refusing to compel the infant to submit to an examination of her person by medical experts on motion of the defendant made at the trial. Such a practice has never prevailed in this state, and if adopted as a matter of right in cases of prosecution for rape, the temptation to its abuse would be so great that it might be perverted into an engine of oppression, to deter many modest and virtuous females from testifying in open court, against the perpetration of the most barbarous and detestable of all crimes."
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> "In this case the witness is no party to any civil suit but has been summoned at the instance of the state to testify in a criminal prosecution against an alleged violator of the law. It may be well be doubted in case of rape and cognate offenses whether the court has the power to make an order compelling the inspection of the private person of a prosecutrex in the event of her refusal to submit to examination. If such right exists at all, we should hold it to be a matter of judicial discretion with the trial court to be exercised only in cases of extreme necessity and not a subject of review on appeal to this court."

In Kern vs. Bridwell, the defendant was accused of slander for having called one Adie M. Bridwell an unmarried female

under 21 years of age, that she was a whore, that she had slept with one McCain; and that he had sexual intercourse with her and she had become pregnant and then procured or suffered an abortion to be procured upon her. Defendant asked the court to order Plaintiff to submit to physical examination of medical experts. (Refused)

The court held:

> "One should not publish and circulate slanderous charges against a young unmarried female without being able to substantiate them when called upon to do so, without calling upon the court to aid in the search of evidence in his behalf by ordering and subjecting her to an indelicate examination of her person, with the hope of obtaining information advantageous to the defense and call to his aid the power of the court as a means of humiliating her still more. When one voluntarily asserts a slanderous charge against another, and defends by alleging the truth of his assertion he must be able to substantiate the truth of the charge without invading the privacy of the person about whom the charge is made."

As may be seen from each of the foregoing two cases the petition of the accused for an order to require the complaining woman to submit to physical examination was denied. But both of them can not be understood as having decided the question as to whether a trial court possesses inherent power to compel or require a complaining woman in a case of seduction and other cognate offenses to submit to physical examination upon proper request of the defendant. In the first case, although the court denied the petition, it impliedly accepted the propriety of giving the power to the trial court by saying that the physical examination was not very essential in the disposition of the case and by having the exercise of the power dependent upon the discretion of the trial court without subject to review on appeal. The second case can not also be held as authority on the inherent power of a court to order physical examination of the complaining witness for the question related to collateral matter, and not to the subject matter of the suit,—to a source of an evidence not shown to be reliable or useful to the defendant in his answer of justification. (City etc. vs. Turner, 156 Ind. 418. 60 N. E. 271.)

As to how the Supreme Court of the United States will dispose of the question when opportunity arises, cannot be very well ascertained although certain indications point that it will not

go as far as to require a complaining woman to submit to physical examination. Thus, in Union Pac. etc. vs. Botsford, 141 U. S. 250 and reaffirmed in Camden etc. vs. Stetson, 177 U. S. 172, upon the question whether the trial court possesses inherent power upon proper request of defendant to require a woman suing for damages for injuries to submit to physical examination by medical experts, the court speaking through Justice Gray said:

> "No right is more sacred or more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraints and interference of others unless by clear and unquestioned authority of law; that the inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow, that to compel any one specially a woman to lay bare the body or to submit to the touch of the stranger without lawful authority is an indignity and assault and a trespass; that no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between the individuals except in a very small number of cases based on special reasons and upon ancient practice coming down from the ruder ages now mostly obsolete in England and never introduced into this country; and that no order to inspect the body of a party in a personal action appears to have been made or even moved for in any of the English courts of law at any period of their history and that it is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence and never attempted to be exercised in America until within a recent period, never in fact had any existence."

If the Supreme Court of the United States would follow the same ruling whenever it is the complaining witness in a case of seduction or in other cognate offenses that is desired to submit to physical examination, then we could only share the protest of Justice Brewer in the same case when he said:

> "It would be strange that if the power to order such examination was conceded in proceedings adverse to the party ordered to submit thereto, it should be denied where the suit is by the party whose examination is sought."

With respect to the different states, we are quite certain that the majority of them will maintain the inherent power of the

trial court to require the complaining woman to submit to physical examination upon proper demand of the defendant. That this is so, may be reasonably deduced from the fact that the majority of them have disregarded the ruling of the Supreme Court in Pac. etc. vs. Botsford (Supra) and have followed the dissenting opinion of Justice Brewer affirming the inherent power of a trial court to order the physical examination of the plaintiff, City vs. Turner, 60 N. E. 271; and in some of those states where the courts have denied themselves of the inherent power to require the plaintiff to submit to physical examination, statutes are enacted empowering said courts to do so whenever the exigencies of justice render such examination expedient and necessary. The constitutionality of these statutes as well as the competency of the states' legislatures to enact them have been judicially affirmed in respect of both the state and the Federal constitutions. (Camden vs. Stetson, 177 U. S. 172; Stack vs. N. Y., 177 Mass. 155.) In all of these states where there are existing laws conferring the power to the courts as well as in those states where the inherent power is recognized, no exception is made in favor of women even though the examination may involve the examination of the organs peculiar to female functions, (Alabama vs. Hill, 90 Ala. 71) or may shock a woman's modesty or offend her sense of delicacy. (Love vs. Spokane, 21 Wash. 119.)

It may be argued, however, that the inherent power of a trial court to require a woman in a civil case to submit to physical examination by experts does not hold true in a criminal case. But, we believe that if the plaintiff (woman) in a civil case who is only required to establish her case by preponderance of evidence can be required to submit to physical examination of her private organs, then there are far greater reasons to require one who has got to prove her case beyond reasonable doubt specially in cases where sexual intercourse is an essential requisite. If a trial court possesses that inherent power when the liability is only pecuniary, then why does it not, when the liability is penal which may include pecuniary? Moreover, the tendency of modern adjudications and of modern thought is to open the door as wide as possible for the introduction of all evidence that may throw light upon the particular subject undergoing investigation (Atchison vs. Thul, 29 Kan. 466; City etc. vs. Turner, 156 Ind. 418) in order that full justice may be done to the parties; (Western Glass vs. Max, 15 L. R. A. (N. S.) 663) and to which end, therefore, no court will permit a litigant to present so much of the truth as he desires and as he thinks to his

interests and withhold the remainder. (Ottawa vs. Gilliland, 63 Kan. 165.)

B. *In the Philippine Islands.*

The power of the trial courts of the Philippine Islands to order the physical examination of an accused woman is fully discussed in the case of Villaflor vs. Summers, 41 Phil. 62.

> *Facts:* In a criminal case pending before the court of First Instance of Manila, Emeteria Villaflor and Florentino Sovingco are charged with the crime of adultery. On this case coming on for trial before the Hon. Pedro Concepcion, Judge of the First Instance, upon the petition of the assistant fiscal for the City of Manila, the court ordered the defendant Emeteria Villaflor, who is now the petitioner herein, to submit her body to the examination of one or two competent doctors to determine if she was pregnant or not. The accused refused to obey the order on the ground that such examination of her person was a violation of the constitutional provision relating to self-incrimination. Thereupon she was found in contempt of court and was ordered to be committed to Bilibid Prison until she should permit the medical examination required by the court.
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> The sole legal issue arising from the admitted facts is whether the compelling of a woman to permit her body to be examined by physicians to determine if she was pregnant violates that portion of the Philippine Bill of Rights and that portion of our Code of Criminal Procedure which find their origin in the Constitution of the United States and practically all state constitutions and in the common law rule of evidence providing that no person shall be compelled in any criminal case to be a witness against himself.
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> The Supreme Court speaking through Justice Malcolm said:
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> "While the United States Supreme Court could nonchalantly decree that testimony that an accused person put on a blouse and it fitted him is not a violation of the constitutional provision, while the Supreme Court of Nevada could go as far as to require the defendant to roll up his sleeve in order to disclose tattoo marks, and while the Supreme Court of the Philippine Islands could permit substances taken from the person of an accused to be offered in evidence, none of these even approach in apparent harshness an order to make a woman, possibly innocent, to disclose her body in

all its sanctity to the gaze of strangers. We can only consistently consent to the retention of a principle which would permit of such a result by adhering steadfastly to the proposition that the purpose of the constitutional provision was and is merely to prohibit testimonial compulsion."

"The maxim of the common law 'Nemo tenetur seipsum accusare' was recognized in England in early days but not in the other legal system of the world, in a revolt against the thumbscrew and the rack. A legal shield was raised against obvious inquisitorial methods of interrogating an accused person by which to extort unwilling confessions with the ever present temptation to commit the crime of perjury. The kernel of the privilege as disclosed by the text writers was testimonial compulsion. As forcing a man to be a witness against himself was deemed contrary to the fundamentals of republican government, the principle was taken into the American Constitution, and from the United States was brought to the Philippine Islands in exactly as wide but no wider a scope as it existed in old English days. The provision should here be approached in no blindly worshipful spirit but with a judicious and judicial appreciation of both its benefits and its abuses."

"The protection of accused persons has been carried to such an unwarranted extent that criminal trials have sometimes seemed to be like a game of shuttlecocks, with the judge as referee, the lawyers as players, the criminal as guest of honor, and the public as fascinated spectators. Against such a loose extension of constitutional guaranty, we are here prepared to voice our protest.

"Fully conscious that we are resolving a most extreme case in a sense, which on first impression is a shock to one's sensibilities, we must nevertheless enforce the constitutional provision in this jurisdiction in accord with the policy and reason thereof, undeterred by merely sentimental influences. Once again we lay down the rule that the constitutional guaranty that no person shall be compelled in a criminal case to be a witness against himself, is limited to a prohibition against compulsory testimonial self-incrimination. The corollary to the proposition is that on a proper showing and under an order of the trial court, an ocular inspection of the body of the accused is permissible."

From the foregoing ruling of the Supreme Court, it is clear that the power of our trial courts, like that of the majority of the state courts in the United States, is inherent. Having a settled rule that a trial court possesses inherent power to order the physical examination of a defendant woman upon a proper showing by the prosecution that such an examination is necessary and to commit said defendant in prison until she consents thereto, a question may be asked, "Does this inherent power of our trial courts extend as far as to compel or to require a complaining woman to have her private organs physically examined? In other words, do our trial courts possess also the inherent power to compel or require a complaining woman to submit to physical examination of her private organs upon a proper showing on the part of the defendant that such examination is necessary? So far, our Supreme Court has not had an opportunity to decide a case involving this question."

Considering the fact that cases in which sexual relation constitutes an essential ingredient, can not generally be justly decided by judicial tribunals without resorting to the light of medical science, (State vs. Johnson, 91 Mo. 439; People vs. Oscar, 48 Phil. 527; U. S. vs. Mamintud, 6 Phil. 374), and the fact that a great number of the crimes against chastity that are being brought to the attention of our courts, such as seduction, rape, and abduction, ordinarily involved the question as to whether sexual intercourse has taken place (Ballesteros vs. Legaspi, 5 Phil. 722; P. P. I. vs. Julian, 50 Phil. 998; P. P. I. vs. Hernandez, 48 Phil. 980) and the further fact, that unfortunately these crimes appear still to be rampant (Record, Department of Legal Medicine) despite our boasted pride as being the only Christian country in the Orient, and added to this, the idiosyncrasies of our women and the brutal desire of men to humiliate as much as possible their women victims who try to secure justice in the courts, and the last but not the least the desire of most ingenious lawyers to use every legal means to weaken the case of their adversary, the question as to how far our trial courts shall go in requiring or compelling a woman to submit to physical examination of her private organs, whether they shall go as far as to punish a complaining woman for contempt or only dismiss her case upon her refusal, is of great importance as well as interesting questions for a legal study. Our Supreme Court in the case of Villaflor vs. Summers, 41 Phil. 62, quoting the words of Justice Holmes said:

"We need not consider how far a court would go in compelling a man to exhibit himself."

Continuing the Court said:

"Other courts have likewise avoided any attempt to determine the exact location of the dividing line between what is proper and what is improper in this very broad constitutional field. But here before us is presented what would seem to be the most extreme case which could be imagined."

In view of the quite great number of offenses in which physical examination might be demanded by the defense, I have confined my discussion on a case of seduction which I believe will surely arise in our trial courts involving, therefore, the power of trial courts to require a complaining woman, possibly virtuous and modest, to submit to examination of her private organs by medical experts.

THE EXAMINATION

In order to have a practical illustration of how the physical examination of the complaining woman in a case of seduction may be demanded by the accused, let us consider the following hypothetical case:

"In the trial of a case for seduction the defendant offers as a defense that he has never had any sexual intercourse with the girl whom he states is a virgin. Wherefore he asks the court to order an examination of the girl's body by a physician to ascertain this fact. May the court grant the petition?"

At the outset it must be noticed that it is the defense who is seeking to invade the privacy of the prosecutrex. Of course, if the complaining woman willingly submits herself, there is no question. But I believe, however, that very few women, specially the Filipino women who even disdain with impunity the idea of athletics because they have to expose the unexposed portion of their legs, would without any degree of resistance, willingly submit to withstand the torture of physical examination. For it is not only the question of submitting themselves to the gaze of medical experts, but also of having the unexposed portion of their bodies (the very subject of inquiry) photographed and be the subject of judicial debate between the medical experts of both sides. Added to this, as we shall see later, the request for

re-examination may arise when the investigation conducted by the first set of experts is shown by either party to be wholly unreliable. This is specially true in the provinces where there are so many quack doctors and where the prosecutions of this class of crimes ar · often conducted by lazy politico-fiscals or deputy fiscals.

Necessity and Importance of Physical Examination.

In the consideration of the hypothetical case given above the first question to be considered is whether there is an absolute necessity of physical examination of the girl.

Art. 443, Penal Code, as amended by Sec. 2, Act No. 2298, provides:

> "The seduction of a virgin over twelve and under eighteen years of age committed by any person in public authority, priest, servant, domestic, guardian, teacher or any person who in any capacity shall have charge of the woman seduced or shall have under his care, shall be punished * * *."
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> "The same penalty shall be imposed upon any person who shall have carnal knowledge of his sister or descendant, even though she be over eighteen years of age."
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> "Any other person who by means of deceit shall accomplish the seduction of a woman over twelve and under eighteen years of age."

Whether the seduction is qualified or ordinary as provided for by the foregoing article of the Penal Code, sexual intercourse between the accused and the complaining woman is an indispensable requisite. (U. S. vs. Suan, 27 P 12; U. S. vs. Santiago, 41 P 793). It is a well settled rule of evidence that the prosecution to convict the accused, must prove every essential element of the crime charged with the best evidence of which the case is susceptible. (U. S. vs. Boquilon, 10 P 4). The reason is that not only is every presumption in favor of the innocence of the accused but also the burden of overcoming this presumption rests upon the prosecution. It is not sufficient for the proof to establish a probability even though strong, that the fact charged in the complaint is more likely to be true than to be false; it must establish the truth of the fact to a reasonable certainty—a certainty that convinces and satisfies the reason and conscience of those who are to act upon it. (U. S. vs. Reyes,

3 P 3; U. S. vs. Balboa, 2 P 165). As wisely stated in Partidas, Law 12, Title 14, "it is but just that a charge brought against the person of a man, or against his reputation should be proved and established by evidence as clear as light, evidence not having room for any doubt." (Albert, C. C. P. 339).

The prosecution must therefore prove beyond reasonable doubt that the accused has had sexual intercourse with the complaining woman. In the hypothetical case, we are considering, the accused denies having sexual intercourse with the complaining woman whom he asserts is a virgin. How could the prosecution prove that the alleged seduced woman is no longer "virgo intacta?" Will it be sufficient to depend upon her testimony corroborated by other witnesses? But, the Supreme Court has held that amatory relations do not in any way show that the accused had carnally known the complaining woman. (Ballesteros vs. Legaspi, 5 P 722). The question, therefore, is, what constitutes the best evidence in this case to prove that the girl is no longer a virgin? Shall the court content itself with the mere fact that the girl has made a prima facie case? The following quotation furnishes our answer:

> "The sages of old from the data at hand proved that the flood of the Nile is caused by the tears of Isis shed for Osiris until the eye of the explorer rested upon the melting snows of the mountain peaks of Central Africa. The ancient methods of establishing facts yet dominate some mind, but the modern scientific experts will content with nothing short of a view of the facts when they can be seen. Therefore, he has invented the ophthalmoscope for the exploration of the interior of the eye, the rhinoscope for the exploration of the nasal cavities and other appropriate instruments for the explorations of other hollow organs of the body and will not attempt to bridge the chasm between ignorance and knowledge in any case where they may be of assistance until he has availed himself of their use. The question, therefore, arises whether or not the law as a means of justice will tolerate any other than the surest method of ascertaining truth, whether or not, with all the marvels of scientific achievement placed at its command the rule of thumb shall be sufficient for its purpose." (Atchison vs. Palmore, 75 Pac. 507.)

One practical reason why the physical examination of the girl is absolutely essential not only in cases of seduction but

also in any other cognate offense where sexual intercourse constitutes an essential element is to prevent the prosecution of false charges. There are cases on record wherein some of our women have divested themselves of that purity and sanctity which characterize a Filipina. Just an instance, a certain woman filed a complaint in the City Fiscal's Office charging a certain student of having seduced her. She appeared to be virtuous and chaste alleging that previous to the alleged act of the student she never experienced sexual relations. But upon being examined in the Medico-Legal Department of the College of Medicine, she was found to be suffering from an old-standing gonorrhea. Later she confessed that she wanted to marry the student and that she had been practicing prostitution in her house for quite a long time.[1]

Another important reason why the physical examination of the girl should always be insisted upon, is to secure an important evidence without which the accused although in fact guilty may be acquitted. The Supreme Court has so recognized this fact that it has even reprimanded the Fiscal in the case of U. S. vs Mamintud, 6 P 334 for having failed to have the woman alleged to have been raped physically examined before prosecuting the case. Women, therefore, should not feel offended in having them examined for it would help them much in their attempt to avenge the wrong they received from evil-doers.

Power of the Court to Require the Complainant to Submit to Physical Examination.

Having considered the importance and necessity of the physical examination of the girl in a case of seduction wherein the alleged sexual intercourse is denied as in the hypothetical case, the next question to be considered is whether a trial court in the Philippines possesses inherent power to require or compel the girl to submit to physical examination of her private organs. The case of Villaflor vs. Summers (supra) has vested in them the inherent power to compel an accused woman to submit to examination by medical experts of her private organs. Shall it make any difference simply because it is the complaining woman and not the accused that is desired to submit to physical examination? We believe that when the phys-

[1] Name omitted on the advice of Dr. Angeles, Head of the Medico Legal Department. There are abundant cases on record in said office wherein women have brought charges based on evil motives against men.

ical examination of a party is essential in the determination of the case, there are more reasons to require the complainant than to require the defendant. It will be strange that if the power to order such an examination is conceded in proceedings adverse to the party ordered to submit thereto, it shall be denied when the suit is by the party whose examination is sought. (Justice Brewer dissenting opinion in Pac. vs. Botsford, 141 U. S. 250). Impartial justice can not be attained in all cases, if an important source of evidence is open to one and closed to the other. (Brown vs. Chicago, 12 N. Dak. 61).

If we concede that a trial court possesses inherent power to require the complaining woman to submit to physical examination, another question arises: Supposing the woman refuses to submit, shall the court imprison her for contempt until she consents to submit thereto as was done in the case of Villaflor vs. Summers? We believe that the inherent power of the court does not extend as far as that, for otherwise it will be tantamount to penalizing a Christian who is unwilling to avenge a wrong done to him. But can the complainant insist in the prosecution of her case in the event of her refusal? The answer is that, she can not.

Courts are instituted by the state to administer so far as possible impartial justice to contending parties. The complainant of her own motion enters the court, seeking justice for an alleged wrong inflicted or to prevent a wrong threatened. In such contest it is the duty of the court to bestow upon the litigants full and exact justice. This can not be done until the court obtains the full and exact truth touching all matters in issue so far as the same can be obtained by exhausting all methods available to the full attainment of that end. Complainant is a voluntary actor appealing to the sovereign power of the state for justice impliedly asserting to do justice to the other party and impliedly agreeing in advance to make any disclosure which is necessary to be made, in order that justice may be done. Approximate justice as the best the court can do in the administration of the law must often be accepted; but while the law is satisfied with the approximate justice where exact justice can not be obtained, the court would recognize no rules which stop at the first when the second is within reach. In actions of this character, a complainant has under her control evidence which will reveal the truth more clearly than any other which could be introduced. (Western etc. vs. Max, 15 L. R. A., N. S.

663; Ottawa vs. Gilliland, 63 Kan. 165; City vs. Turner, 156 Ind. 418; Brown vs. Chicago, 12 N. Dak. 61.)

Obviously, a stirring plea can be made showing that under due process of law clause of the constitution every person has a natural and inherent right to the possession and control of his own body. It is extremely abhorrent to one's sense of decency and propriety to have to decide that such inviolability of the person, particularly a woman, can be invaded by exposure to another gaze. As Mr. Gray in Union vs. Botsford (supra) said: "To compel any one and specially a woman, to lay bare the body or to submit to the touch of a stranger, without lawful authority is an indignity, an assault, and a tresspass. (Villaflor vs. Summers, supra). But should the litigant be permitted to withold the truth or the means of ascertaining what the truth is, simply because in the ascertainment of the truth, she may conceive the idea that an indignity is being offered? That is not an indignity which is not so intended. May she be permitted to present so much of the truth as she desires and as she thinks to her interests and withhold the remainder? (Ottawa vs. Gilliland, 63 Kan. 165). Unfortunately all too frequently the modesty of witnesses is shocked by forcing them to answer without any mental evasion questions which are put and such a tendency to degrade the witness in public estimation does not exempt her from the duty of disclosure. Between a sacrifice of the ascertainment of truth to personal considerations, between a disregard of the public welfare for refined notions of delicacy, law and justice can not hesitate. (Villaflor vs. Summers; Brown vs. Chicago, supra). Truth and justice are more sacred than any personal consideration. (Justice Brewer, Pac. vs. Botsford, 141 U. S. 250). It is essential to the ends of justice that complainant submits to the examination. (Brown vs. Chicago, supra).

Scope of the Examination.

In making the order, the court must always bear in mind the peculiar sensibilities of a refined woman to the touch of a stranger upon her body and her extreme reluctance to submit to examination even by her chosen physician. *It must see to it,* therefore, that the examination must be performed with every just consideration of her modesty (Ottawa vs. Gilliland, 63 Kan. 165) and due care should be taken not to use violence and not to embarrass her any more than is absolutely necessary. (Villaflor vs. Summers, 41 P 62). It must not be

carried beyond a mere ocular inspection wherein the use of instruments or physical force upon her body should be prohibited. (Justice Carson, Villaflor vs. Summer). An examination as will inflict serious pain should not be allowed. (Alabama vs. Hill, 90 Ala. 71). However it must not be forgotten that any enforced examination is vexatious and embarrassing and very frequently must involve a slight degree of that discomfort which is denominated pain. (Atchison vs. Thul, 29 Kan. 466).

The examination must be done by reputable and disinterested physicians preferrably family doctors (Villaflor vs. Summers) ; and inasmuch as in modern times the medical profession has the benefit of skillful women physicians, and ordinarily other things being equal, such physicians ought to be preferred when reasonably practicable if desired by the woman to be examined (State vs. Troup, 98 Neb. 333) ; and only such number of competent experts as are actually necessary for the purposes of justice should be selected. (Atchison vs. Thul; 29 Kan. 466.)

Right to Demand the Physical Examination of the Complainant.

The defendant has no absolute right to demand the physical examination of the complainant. It must be made upon a proper application and a proper showing, (Villaflor vs. Summers) before trial, addressed to the sound discretion of the court, the exercise of which is reviewable on appeal and correctible in case of abuse. (City vs. Turner, 156 Ind. 418). The examination should not be ordered needlessly when there might be a shock to one's modesty or feelings of delicacy (Ottawa vs. Gilliland, 63 Kan. 165) or unless it clearly appears that a condition exists that can be definitely determined by such examination and can not be satisfactorily determined without it. It is always safer to trust the court to protect the sensibilities of the parties (Ottawa vs. Gilliland) otherwise if adopted as a matter of right in all cases of prosecutions for this class of offenses, the temptation to its abuse would be so great that it might be perverted into an engine of oppression to deter many modest and virtuous females from testifying in open court against the perpetration of one of the most barbarous and detestable class of offenses. (McGuff vs. State, 7 So. 35).

The selection of the experts is also within the exclusive discretion of the court. There is an obvious propriety in the experts being selected by the court rather than by one or both

of the parties. (Richmond vs. Chidress, 82 Ga. 719). The defendant is entitled to have a physical examination of the complainant's person by disinterested and competent experts to be appointed by the court. The selection of such experts is a matter entirely within the discretion of the trial judge. Neither party has any right by suggestion, motion or otherwise to control his discretion in any degree. The court in making the order for physical examination and designating the experts to execute it is conserving the interest of neither the defendant nor the plaintiff but the end of justice; and when a competent and impartial commission is named, it is a matter of no consequence whatever the parties or either of them preferred or demanded the appointment of other persons. (Alabama vs. Hill, 93 Ala. 514).

Re-Examination: Right to Demand.

Ordinarily re-examination may not be granted (Note 15, L. R. A. (N. S.) 664) specially when physicians of both parties have examined the complainant and their testimony shown that there is no real dispute which can be settled by further examination. (Belt etc. vs. Electric etc., 102 Ky. 551). But when their testimony and opinions differ upon the matters seemingly capable of positive ascertainment, the court upon proper request may appoint disinterested and unbiased physicians to make re-examination. (Fullerton vs. Fardyce, 121 Mo. 1). The complainant may be required to submit to re-examination upon a proper showing on the part of the defense. The fact that she was previously examined by her or other physician is not an answer specially if the conclusion and opinions from the premises said physician testifies to are not approved by several other reputable physicians who are examined as to their conclusions from the fact stated by him. (Alabama vs. Hill, 90 Ala. 71). Physicians of equal learning and honesty may differ in their opinions on the subject matter. They may not be equally strong in perception or equally accurate in observation or in measurements and thus form different judgements of the existing conditions, which of necessity must constitute the basis of their scientific opinions. If a defendant must make his defense against the expert opinions of the plaintiff's chosen physicians without the opportunity of testing the verity of the basis of such opinion, he may be placed at a disastrous disadvantage such as the law can not and does not sanction. (City vs. Turner, 60 N. E. 275). Defendant's right was through an exam-

ination to test the effect and reduce the weight of the evidence introduced by the complainant. (Haynes vs. Tunton, 123 Mo. 326). Moreover, the sympathies of the family physicians or the first physicians who examined her are naturally with her, operating bias in her favor even without consciousness of it on his part. (Alabama vs. Hill, 90 Ala. 71). Physicians and surgeons, however, honest and learned are fallible and equally with other honest and honorable persons, subject to the unconscious influence of friendship and personal interests. (City vs. Turner, supra). The re-examination is necessary to prevent the complainant from malingering and bolstering up a fictitious case by the unreliable speculations of so-called medical experts. (Wanek vs. Winona, 98 N. W. 851.) But the court may or may not grant the reexamination. There is a limit to everything and unless this power which is vested in the sound discretion of a trial court, is so reposed, we can see where prejudicial errors could happen to complainant by the evidence of a defendant, if it could and had the power to compel limitless examinations in the hope of securing some medical experts who might agree with some theory, character of disease or injury contended for by defendant, and where this power which is for the purpose solely of ascertaining the truth could be so distorted as to prove an engine of destruction to complainant's rights in the hands of unscrupulous and dishonest defendants. (Murphy vs. Southern, 101 Pac. 322.)

EVIDENTIARY EFFECT

In Case of Refusal.

The unreasonable refusal of the complainant to submit to physical examination upon an order of the court is an evidence of bad faith on her part and therefore the court will be justified in refusing to aid her in the prosecution of her case. (Chicago vs. Hill, 129 Pac. 13; Brown vs. Chicago, 12 N. Dak. 61.) The reason is that her refusal amounts to suppression of evidence essential in the determination of the case in accordance with the settled rule that if a party suppresses evidence which he has been called upon to produce the reasonable presumption is that his opponent's claim upon such evidence is true and that his claim is false. (Patch vs. Protection, 77 Vt. 294; Sec. 5, C. C. P.; U. S. vs. Gonzales, 22 P 325). But as to whether or not the court will proceed with the trial despite this refusal of the complainant is a matter within the discretion of the court reviewable on appeal and correctible in case of abuse. (City vs.

Turner, 156 Ind. 418.) As instance of what is a proper exercise of discretion, the following may be considered as a good example; A certain woman in a complaint seeks to annul her marriage with the defendant. To prove that the defendant never had access of her, she had herself previously examined in the Medico Legal Department of the College of Medicine. After a thorough examination by the medical expert she was found to be still a virgin. But by ingenious questioning by the attorneys for the defense, certain doubt was created in the mind of the trial judge on the findings of the expert. The defense requested for re-examination which request was granted but the woman refused. The trial court only said that her refusal would be taken into consideration in the final disposition of the case.[2]

In Case of Submission.

There are two important points which should be considered in case the complainant submits to examination in order to determine whether she is or not a virgin. The first case is when she is not found to be a virgin—that is, she had had sexual intercourse. Is the result of the examination in this case conclusive proof that the accused has had sexual intercourse with her? Opinions are unanimous that it is not for the simple reason that there are many ways in which a woman may destroy her virginity other than carnal knowledge with the accused. It is possible that she might have had intercourse with another other than the accused or that the loss of her virginity might have been due to self-manipulation. The next case is, supposing that the complainant is found to be a virgin by the medical expert, should it be conclusive to the innocence of the accused? Some people believe that it is, so that there is no more necessity of going over the trial of the case. But, I believe, however, that it is not although the finding of the expert is entitled to great respect and consideration.

Physicians are not so omniscient that whatever they say is always right. It is a well known fact that physicians rarely agree on their diagnosis of a certain disease, nature, character and extent of an injury and in many other cases. Medical authorities tell us that in the determination of whether or not a woman has had sexual intercourse, the opinion of a physician is affected by several factors the most important of which are

[2] Name of parties omitted for the case was still pending in the trial court for decision when this note was taken.

the prolonged delay in conducting the examination, and failure of penetration. The remoteness of the examination to the alleged sexual intercourse greatly lessens the probative value of the findings of the expert. (Angeles Leg. Med. 113; People vs. Butler, 66 N. Y. (Supp.) 851; People vs. Kearney, 110 N. Y. 188; McGuff vs. State, 7 So. 35; 3 Whar. & S. Med. Jur. 212.)

The most reliable sign of virginity according to medical authorities is a strong unyielding and intact hymen when present, and whenever its destruction has not taken place by another motive distinct from sexual intercourse. But the absence of defloration of the hymen does not however prove non-intercourse for there are many recorded cases in which females have been known to become pregnant with the hymen uninjured, and operation for the opening of this membrane have not infrequently been performed before delivery could take place. On the other hand the hymen may be destroyed by ulceration as a result of inflammation or other causes. Hence to solve this question, a medical opinion must necessarily be more or less conjectural specially by taking into account the fact that a single intercourse could hardly affect the virginal conditions of the vulva and vagina as to render no traces of defloration evident through life. With these exceptions in mind, the hymen, on account of its position and structure, is the only and the best evidence of virginity or defloration, for there is no doubt that an intact, strong and unyielding hymen, with a small orifice would be the most decisive proof that complete penetration had not taken place. Moreover, it is possible that sexual intercourse can be accomplished with complete penetration without evidence of laceration in the hymen. (Angeles, Legal Medicine, p. 118. State vs. Johnson, 91 Mo. 439; People vs. Rivers, 147 Mich. 643.)

The most important reason, perhaps, why the findings of the experts can not be taken as conclusive evidence to the effect that the complainant never had sexual intercourse is the fact that sexual intercourse as understood in law, does not mean at all that the virginity of the girl should be affected or that penetration took place. It is sufficient that there is vulval penetration with or without seminal emission. (P. P. I. vs. Eriñia, 50 P 998; State vs. Johnson, 91 Mo. 439; People vs Oscar, 48 P 527.) This is the legal meaning of sexual intercourse as applied in cases of rape. But, I believe there is no reason for making any distinction in the meaning of sexual intercourse as applied in cases of rape and as applied in seduction, other-

wise, it will only cause ambiguity and confusion in the application of the law. Moreover, according to a learned physician [3] penetration in intercourse does not depend upon the degree of consent nor upon the degree of intention. The necessary elements that determine penetration of the male's organ into the female's organ are: (1) Sufficient degree of stiffness of the male organ or the proportional size of the same. (2) The proportional degree of opening of the female organ. (3) Individual's habit or design is a voluntary self-limitation of the degree of penetration, either because he finds it more pleasurable for him or because his voluntary design is to limit the act both for preventing conception or concealing the crime.

CONCLUSION

From the foregoing consideration we see that the inherent power of a trial court to compel an accused woman to submit her body to examination by medical experts in order to obtain evidence against herself empowers also the trial court to require the complainant in a case of seduction and other cognate offenses to submit to the same examination upon a proper demand and showing of the accused; that the refusal of the complainant to submit to said examination may amount to a suppression of material evidence and that therefore the trial court will be justified in dismissing her case; that said complainant in certain instances may be required to submit to another examination by another set of medical experts; that the result of the examination is not conclusive of the commission or non-commission of the crime; and that the demand for the examination or re-examination of the complainant is addressed to the sound discretion of the court, which discretion is reviewable on appeal and correctible in case of abuse.

It is gratifying to note that in the history of the administration of justice in this jurisdiction there has never been an incident in which this power of a trial court to require a woman to submit to physical examination before her case is entertained was involved. But, it is not revealing a secret to state that many a woman instead of having a criminal condemned, prefers to hear the tyrany of cruel death by commiting suicide, simply because she can not withstand in open court, the rigorous questions that are offending to her modesty and shocking to her sense of delicacy. What more of a lamentable effect then

[3] Dr. Angeles of the Medico Legal Department, U. P. Manila.

to a woman to know that she may not only be subjected to indecent questions but also may be required to submit her bare body in all of its sanctity to the gaze and touch of medical experts, and that her photograph taken and exhibited in open court. It is, therefore, to be expected that women, in this era in which they in parity with men are now availing themselves of all the marvels of scientific achievements, the legal and medical professions are not unusual careers for them, should rise and vigorously protest against this inherent power of the court to require them to submit to physical examination before their complaints are entertained, inasmuch as the result of the examination is not always availing for the accused as shown in this article. It is with this expectancy that this discussion is submitted so that the weight of modern authority supporting the inherent power of the court can be well presented to the fair sex.