1810.

RAPE—IMPOSITION OF SENTENCE.

SYLLABUS:

A person convicted of rape, by force and violence, committed upon a female person under the age of sixteen years, other than a daughter or sister of the accused or a female person under twelve years of age, should be sentenced to imprisonment in the penitentiary (or the Ohio State Reformatory in proper cases) not less than three years nor more than twenty years, as provided in Section 12413, *General Code.*

COLUMBUS, OHIO, March 5, 1928.

HON. C. O. TURNER, *Prosecuting Attorney, Coshocton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, which reads as follows:

> "I am enclosing to you a copy of indictment and desire your opinion and for the purpose of same it is admitted that there is sufficient proof to prove every averment in the indictment beyond a reasonable doubt.
>
> 1. Under which statute should the defendant be sentenced, that is 12414 or under the latter part of Section 12413 of the General Code."

The pertinent part of the indictment to which you refer charges that the defendant, one J. B.,

> "in and upon one, E. L. C., unlawfully and violently did make an assault, and her, the said E. L. C. then and there, did unlawfully, forcibly, and against her will, unlawfully ravish and carnally know, she, the said E. L. C., then and there being a female person other than the daughter or sister of him, the said J. B. and being a female person under the age of sixteen (16) years, to-wit, of the age of fifteen (15) years."

Section 12413, General Code, to which you refer in your letter, reads:

> "Whoever has carnal knowledge of his daughter, sister, or a female person under twelve years of age, forcibly and against her will, shall be imprisoned in the penitentiary during life; and whoever has carnal knowledge of any other female person forcibly and against her will shall be imprisoned in the penitentiary not less than three years nor more than twenty years."

It is manifest from the above indictment that E. L. C. is not the daughter or sister of the accused and that she is not a female person under twelve years of age. Therefore, the offense charged is not either of the two crimes first defined in the above section. Nor is the crime charged the offense denounced by Section 12414, General Code, to which you refer, and which reads:

> "Whoever, being eighteen years of age, carnally knows and abuses a female person under the age of sixteen years with her consent shall be imprisoned in the penitentiary not less than one year nor more than twenty years, or six months in the county jail or workhouse. The court is authorized to hear testimony in mitigation or aggravation of such sentence."

the indictment alleging that the act was committed "forcibly and against the will" of the female named. The crime charged in the indictment against the accused is rape with force and violence upon E. L. C., a person under the age of sixteen years, to-wit, fifteen years, and is not a charge of rape with consent.

The Supreme Court of Ohio in the case of *State* vs. *Driscoll*, 106 O. S. 33, commenting on the provisions of Section 12413, at page 36, recognized that Section 12413, General Code, includes three separate and distinct crimes, as follows: "(1) rape of a daughter or sister (2) rape of a child under twelve years of age (3) rape of any other female." With reference to these crimes, the writer of the opinion, Chief Justice Marshall, on page 37, observed:

> "For the first two offenses the penalty is imprisonment for life, and for the third offense imprisonment for not less than three nor more than twenty years. The indictment, however, makes it very clear that the defendant was charged only with having committed the third offense above named, and that the other two offenses were by the express terms of the indictment excluded. The evidence was equally clear that neither of the first two offenses had been committed and there was evidence tending to prove all the material ingredients of the third offense, and the jury, the court of common pleas and the court of appeals so found. Upon this feature of the case the charge of the court was above criticism, except for the omission to instruct the jury that it must find that the prosecuting witness was a female person other than the daughter or sister of the accused and that she was not a female person under twelve years of age."

It is clear from the language of the indictment under consideration, that the accused is indicted for the third crime embraced in Section 12413, General Code.

It is frequently advisable for the state, through its Prosecuting Attorney, to anticipate a possible variation of proof at the trial and to fortify such variation of proof by incorporating more than one count in the indictment, such as rape with force and violence in one count, and rape with consent in a separate count. As pointed out by Judge Wanamaker in the case of *State* vs. *Corwin*, 106 O. S. 638, at page 640:

> "It very often would be advisable for the state through its prosecuting attorney to have several counts in the indictment, anticipating possible variations of proof, such as rape with force and violence in one count, and rape with consent in another, or larceny in one and embezzlement in another, where there may be any question as to the manner and method in which the defendant obtained possession of the money."

However, in the indictment under consideration such method was not pursued.

Specifically answering your question, I am of the opinion that if the accused is lawfully found guilty at the trial on the indictment under consideration, he should be sentenced under the provisions of Section 12413, General Code, and not under the provisions of Section 12414, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.