constituted by section 95 of the *Police Offences Act* of obtaining any money or valuable thing by fraud " in wagering on the event of any game sport or pastime or exercise."

Whether this section covers all betting transactions depends on the construction of the phrase " game, sport or pastime or exercise,"[6] a question which is beyond the scope of this note.

A. L. T.

6. *ibid.*
7 It was assumed without argument in *R. v. Leon* that horse-racing came within the phrase, and it has been held that tossing with coins for wagers is " a pastime or exercise if not a game, within the meaning of the Statute"—*per* Lord Coleridge C.J. in *R. v. O'Connor and Brown*, (1881) 45 L.T. 512.
The Act (16 *Car.* 2 *c.* 7) from which this section was originally derived was much more explicit. It referred to fraud " in playing at or with cards, dice, tables, tennis, bowles, kettles, shovel board, or in or by cockfighting, horse races, dog-matches, foot races, or other pastime, game or games whatsoever."

CRIMINAL LAW: RAPE BY HUSBAND ON WIFE.

R. v. Clarke.[1]

Most textbooks on criminal law when dealing with the felony of rape, state categorically that a husband cannot be guilty as principal in the first degree of a rape on his wife. According to Hale this rule was inevitable since absence of consent was a necessary element in the crime of rape, and by entering into the marriage the wife was regarded as having given a general consent extending for the term of the marriage, and which she was powerless to revoke—" . . . by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[2]

This explanation cannot be regarded as entirely satisfactory. There are cases in which the law recognises that a wife is warranted in refusing her husband's advances, as where the husband is suffering from some contagious disease.[3] Certainly the wife who refuses consent to intercourse under these circumstances is in no sense guilty of any matrimonial offence.

Perhaps a better basis for the rule is public policy, the undesirability of a court's entering on this delicate question of consent or non-consent as between husband and wife. Judges, when dealing with applications for decrees of nullity on the ground of non-consummation, have recognised that a husband under some circumstances, may legitimately use some slight persuasion in overcoming the wife's reluctance; and there are obvious reasons why a husband should not be placed in jeopardy of a charge of rape arising from such an incident. If, of course, a husband uses actual violence, he will be guilty of an unlawful assault and will not receive any protection from the normal consequences inflicted in such cases by the criminal law.

Whatever be the true basis for the rule, however, the instant case shews that one exception to it must be recognised. Here the husband

1. [1949] 2 All E.R. 448.
2. Hale, *Pleas of the Crown*, Vol. 1, p. 629.
3. *R. v. Clarence*, (1888) 22 Q.B.D. 23.

was charged with raping his wife, who, prior to the act complained of, had obtained a separation order which was still in force. Byrne J. held that under these circumstances the marriage did not constitute any formal bar to the indictment. However, though it is not impossible for a husband to be charged with rape under these circumstances, the jury will regard the fact of the marriage as making more probable, either actual consent by the wife, or a belief on the part[4] of the husband that the wife was a consenting party. In the instant case the accused husband was in fact acquitted.

A. L. T.

4. See *R. v. Burles*, [1947] A.L.R. 460.

DIVORCE: MATRIMONIAL CAUSES ACT 1945.

Tavcar v. Tavcar.[1]

In this case, a petition for dissolution of marriage was presented under Part II. of the Commonwealth *Matrimonial Causes Act* 1945 on the ground of desertion of the petitioner by the respondent for a period of three years or upwards. The petition bore an endorsement in accordance with the Divorce Rules of 1949 stating that relief was sought according to the law of New South Wales.

From the evidence, it appeared that the parties were married on the 14th January 1943. At the time, the respondent was a merchant seaman serving aboard a ship trading on the Australian coast. He was domiciled in Yugo-Slavia and the petitioner was domiciled in Victoria. The only matrimonial home which the parties ever established was in Newcastle, New South Wales.

The respondent left Australia in 1945, apparently to return to Yugo-Slavia. Although the petitioner had written to him at addresses which he gave to her, she had not heard from him. On these facts, the trial judge, Mr. Justice Sholl, found desertion without just cause for three years and upwards.

It was submitted for the petitioner that she fell within Part II. of the Commonwealth Act. Part II. of the Act is headed " Institution of Matrimonial Causes against Members of Overseas Forces, and certain other persons, not domiciled in Australia." By section 4 of this Act it is provided that Part II. " shall apply in relation to marriage celebrated in Australia on or after the 3rd day of September 1939, and before the appointed day[2] where the husband (whether a member of an overseas Naval, Military, or Air Force, or not) was, at the time of the marriage not domiciled in Australia and the wife was immediately before the marriage, domiciled in a State or Territory." His Honour held that the marriage in this case fell within section 4 of the Act. It was further held that the Supreme Court of Victoria here was invested with Federal jurisdiction by section 5 (2) because, as prescribed by section 5 (1), the

1. Unreported. Supreme Court of Victoria. Judgment delivered on 7th March, 1950.
2. Not yet proclaimed.