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Writ.

NEW JERSEY, ss.:

THE STATE OF NEW JERSEY to the
Chief Justice and other Justices of our
Supreme Court of Judicature.

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(Seal)

Greeting

BECAUSE in the record and proceedings
and also in the giving of judgment in a
certain plaint which was in our said Supreme Court of Judi-
cature before you, between the State of New Jersey, Prosecu-
tor, and defendant-in-error, and Andrew Calabrese, plaintiff-
in-error, in error to the Essex County Quarter Sessions Court,
manifest error hath intervened to the great damage of the said
Andrew Calabrese, as by his complaint we are informed; we
being willing that the error, if any there be, should, in due
manner, be corrected, and full and speedy justice be done to
the party aforesaid, DO COMMAND YOU, that if judgment
be thereupon given, then you distinctly and openly send, under
your seal, the record and proceedings and plaint aforesaid;
with all things touching and concerning the same, to our Court
of Errors and Appeals in the last resort in all causes, at Tren-
ton, on the 18th day of April next, together with this writ,
that the record and proceedings aforesaid being inspected, we
may cause to be done thereupon for correcting that error
what of right and according to the law and custom of the
State of New Jersey ought to be done. Witness our Chancel-
lor and President Judge of our said Court of Errors and Ap-
peals, at Trenton, aforesaid, the 27th day of March, Nineteen
Hundred and Twenty-four.

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THOMAS F. MARTIN,
Clerk.

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JAMES MANGO,
Attorney.

- 10 The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

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THOMAS F. MARTIN
Clerk

JAMES MANGO
Attorney

Order of Affirmance.

New Jersey Supreme Court

February Term, 1924.

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STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

ANDREW CALABRESE,

Plaintiff-in-Error.

In Error.
On Writ of Error
Order of Affirmance
of Judgment.

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This cause having been submitted at the November term, 1923, of this Court by John O. Bigelow, Esq., attorney for the defendant-in-error, and James Mango, Esq., attorney for the plaintiff-in-error, and the Court having considered the same, and finding no error in the record and proceedings in the Essex County Court of Quarter Sessions:

It is thereupon ordered and adjudged that the judgment of the Essex County Court of Quarter Sessions recovered by Writ of Error in this cause, be affirmed with costs and the record be remitted to the Essex County Court of Quarter Sessions, to be proceeded with in accordance with this judgment, and the practice of said court.

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Entered March 25th, 1924.

On motion of

JOHN O. BIGELOW,

Prosecutor of the Pleas
Atty. of Defendant-in-Error.

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Assignment of Errors.

New Jersey Court of Errors and Appeals

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STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

ANDREW CALABRESE,

Plaintiff-in-Error.

In Error.
Assignment of
Errors.

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AFTERWARDS in the Court of Errors and Appeals in the last resort in all cases, comes Andrew Calabrese, by James Mango, his attorney, and says that in the record and proceedings aforesaid and also in the giving judgment aforesaid, there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment in form aforesaid was given for the said State of New Jersey against Andrew Calabrese, whereas, by the law of the land, judgment ought to have been given for the said Andrew Calabrese and against the said State of New Jersey.

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There is also error in this to wit: That, by the record aforesaid, it appears that the said Judge before whom the trial of the issue joined between the parties was had, erroneously denied the motion of the plaintiff-in-error to direct a verdict in his favor on the ground that no proof was offered by the State of New Jersey, to show the offense alleged in the indictment was committed on October 1st, 1922, which is the date alleged in the indictment, nor was there any testimony as to the commission of the offense on any other specific day and no other specific date was suggested, or mentioned, nor was there any attempt to amend the indictment to cover any other day, but the proof was allowed to remain that at some time this alleged offense was committed, and no date having been fixed when the crime is alleged to have been committed, consequently, such date may have been at a time beyond the statute of limitations, and therefor in law could not sustain

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the indictment; the Supreme Court decided that the rights of the defendant had not been prejudiced by such failure of proof.

And the said Andrew Calabrese prays that the judgment aforesaid of the Supreme Court may be reversed and annulled and altogether held for nothing, and that the said Andrew Calabrese, may be restored to all things which he hath lost by occasion of the said judgment, etc.

JAMES MANGO,
Attorney for Plaintiff-in-Error.

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Opinion.

New Jersey Supreme Court

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November Term, 1923.

STATE OF NEW JERSEY,

vs.

ANDREW CALABRESE,

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On error to Essex Quarter Sessions.

Argued before Gummere, Chief Justice and Justices Minturn and Black.

For the plaintiff-in-error, James Mango.

For the state, John O. Bigelow, Prosecutor of the Pleas.

The opinion of the Court was delivered by

GUMMERE, C. J.

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The plaintiff in error, Calabrese, was convicted in the Essex Quarter Sessions upon an indictment charging him with the crime of assault and carnal abuse committed upon one Mary Nixon, a girl over the age of twelve and under the age of sixteen years, on the 1st day of October, 1922. The present writ of error is sued out to test the validity of the conviction.

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The first ground upon which it is contended the conviction before us should be reversed is directed at the admission of testimony given by the complaining witness showing that the plaintiff-in-error had had sexual intercourse with her on several occasions prior to the assault alleged in the indictment to have been committed by him upon her. The contention is that evidence of the commission of earlier criminal acts, like those laid in the indictment, between the same parties is inadmissible, and the decision of this court in the case of *State vs. Lantro*, 121, Atl. Rep. 139, is cited as authority of this proposition. But this doctrine was repudiated by the Court of Errors and Appeals at the June Term 1923, on a review of that

decision, that court holding that on a prosecution for an offense involving a sexual crime evidence of prior offenses of like character between the same parties is admissible, notwithstanding that the prior offenses are extraneous.

The next ground of reversal is directed at the admission of testimony showing the payment by the plaintiff-in-error to this girl of a sum of money some three months after the commission of the offense charged against him in the indictment. The argument, as we understand it, is that this payment of money constituted no part of the criminal transaction; that, therefore, it was incompetent; and that its admission tended to create prejudice in the minds of the jurors. We would agree that proof of the payment of money so long after the commission of the offense charged in the indictment, without more, would probably have been incompetent, as the plaintiff-in-error contends; but in the present case the proofs showed that at the time of the payment of this money the girl was pregnant as the result of her intercourse with him, and that, in this situation, she had called upon him to acquaint him with her condition and to inform him that he would have to take care of her; and that, in response to this statement, he had made the contribution of \$5, saying at the same time that, if she (the girl) would not tell anybody, he would take care of her and pay all her expenses. It is hardly necessary to point out that these facts, taken together, if true, constituted material and cogent evidence of the truth of the charge laid against him in the indictment.

The next ground of reversal is that the court erroneously refused a motion to direct a verdict in favor of the plaintiff-in-error based upon the alleged failure of the State to prove that at the time of the commission of the offense charged against him the girl was under the age of sixteen years. The girl herself had testified that she was not quite fifteen years old at that time; but there was no corroboration of this fact by the testimony of other witnesses, and it is contended that she was not a competent witness to prove the fact. But this contention is in the face of our own decisions. In the case of *State vs. Huggins*, 83 N. J. L. 43, it was held that, in a case like that now under consideration, the complaining witness may testify to her own age when it is essential to prove that she is under the age of consent; and the rule there laid down was affirmed

on appeal in 84 N. J. L. 261. This rule was later enforced in the case of *State vs. Girone*, 91 N. J. L. 498, where this court in a similar case, held that the complainant is competent to testify to her own age, irrespective of the consideration that the fact of age is one of the essentials necessary to be established in order to constitute the crime charged; and that the probative value of such testimony is for the jury to pass upon.

It is further contended that there should have been a verdict directed in favor of the plaintiff-in-error because of the failure of the State to prove with any certainty the fact that there had been sexual relations between him and this girl on the very day charged in the indictment. But the averment of time is altogether formal, unless the time itself be a legal constituent of the offense (*Ketline vs. State*, 59 N. J. L. 468, 470; *State vs. Unsworth*, 85 N. J. L. 241); and time is not of the essence of the offense except in cases where an act may be innocent if done at one time but criminal if done at another. It is argued that the decision of the Court of Errors and Appeals in the late case of *State vs. Sing Lee*, 94 N. J. L. 266, had repudiated this doctrine; but an examination of the opinion itself shows that the argument is without merit. In the cited case the indictment charged that the defendant, on the 10th day of June, 1918, did unlawfully and carnally abuse a young girl, under the age of sixteen. The proof failed to show the commission of the offense on the date stated, but did show the occurrence of sexual intercourse between the parties on the 1st and on the 3d of June. Thereupon the Prosecutor of the Pleas asked to amend the indictment by inserting these two dates in the place of that averred in the indictment, and this was permitted. A conviction being had on the indictment as amended, the court of review reversed it, on the ground that the judicial action complained of was without legal justification because the allowance of the amendment altered the indictment in substance by charging the defendant with the commission of two separate crimes of like character, whereas the presentment of the grand jury was predicated only upon the commission of a single offense. There is nothing in this decision which even suggests a repudiation of the doctrine laid down in the earlier cases to which we have referred.

The only other ground of reversal is directed at the alleged erroneous exclusion of a conversation had by a Mrs. Maffucci with the girl's aunt, in the presence of the girl herself, and which was offered to be proved by the plaintiff-in-error. The purpose to be accomplished by the introduction of this testimony was not indicated to the trial court, nor are we told by counsel in his brief why its exclusion was erroneous. It certainly was not competent for the purpose of impeaching her credibility, so far as the record shows, for her attention had not been directed on her examination to any such conversation. Nor was it competent to prove the conversation as an implied admission by her of the facts stated in it; for admissions made before trial by the victim of a criminal act are not competent evidence in behalf of the party charged with the commission of the crime, the reason being that there is no such privity between the victim and the State as to render her admissions binding upon the latter. *State vs. Brady*, 71 N. J. L. 360; *State vs. Hummer*, 72 N. J. L. 328.

Finding nothing of merit in any of the assignments of error or grounds of reversal, the conviction under review will be affirmed.

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WRIT OF ERROR.

Filed April 3rd, 1923.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

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(SEAL) The State of New Jersey to DALLAS
FLANNAGAN, Esq., Judge of the Court of
Common Pleas of the County of Essex, con-
stituting the Court of Quarter Sessions
holden at Newark, in and for the County of
Essex, of the term of December, in the year
of our Lord Nineteen Hundred and Twenty-
two.

Because in the record and process and also in giving of
judgment upon a certain indictment against Andrew Cala-
brese, late of the Town of Montclair, and County of Essex,
wherein the said Andrew Calabrese was charged that he in
the County of Essex aforesaid, on the first day of October, in
the year of our Lord, One Thousand Nine Hundred and
Twenty-two, one Marie Loungo a woman child over the age
of twelve years and under the age of sixteen years, did car-
nally know and abuse; the said Andrew Calabrese being over
the age of sixteen years.

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Pro ut the said indictment, whereof, before you, he hath
been indicted, and is therefore convicted by a certain jury of
the county, taken between the State of New Jersey and the
said Andrew Calabrese, and it is said, manifest error hath
intervened to the great damage of the said Andrew Calabrese,
as from his complaint, we have received information, we being
willing, in his behalf, to correct the error in due manner, if
any there shall be, and that speedy justice be done to him, the
said Andrew Calabrese, command you that if judgment be
thereon given, then that you distinctly and openly send, under
your seal, the record and proceedings aforesaid, with all
things touching the same to our justices of our Supreme
Court of the State of New Jersey on the 4th day of April
next, and this writ, that the record and proceedings aforesaid,

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Writ of Error.

being inspected, we may further cause to be done thereupon for correcting that error, what right and according to the laws and customs of New Jersey, ought to be done.

- 10 WITNESS, William S. Gummere, Esquire, Chief Justice of our Supreme Court, at Trenton aforesaid, this 15th day of March, A. D., Nineteen Hundred and Twenty-three.

EDWARD J. KELLEHER,
Acting Clerk.

JAMES MANGO,
Attorney for
Andrew Calabrese.

20 ALLOWANCE

The within writ having been served in open Court, March 19th, 1923.

DALLAS FLANNAGAN,
Judge.

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Return.

RETURN.

Filed April 3rd, 1923.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.

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I, DALLAS FLANNAGAN, Judge of the Court of Quarter Sessions in and for Essex County, New Jersey, do hereby certify and return to the Supreme Court of Judicature of the State of New Jersey, the Indictment, Judgment record, and Proceedings together with the entire record of the proceedings had at the trial and all things touching and concerning the same as by the within Writ to me directed, I am commanded.

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(SEAL) In witness whereof, I have hereunto set my hand and official seal of said Court at Newark, N. J., this twenty-eighth day of March, A. D., 1923.

DALLAS FLANNAGAN,

*Judge of the Court of Quarter
Sessions Essex County, N. J.*

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Indictment.

INDICTMENT.

STATE OF NEW JERSEY, ,
COUNTY OF ESSEX,) ss.

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Be it remembered, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex on the second Tuesday of December, in the year of Our Lord, one thousand nine hundred and twenty-two, by the Honorable William S. Gummere, Chief Justice of the Supreme Court of Judicature, of the State of New Jersey, and holding the cais Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of Roscoe S. Strickland, Arthur D. Conlon, George C. Ward, Joseph B. Klausman, David Oakes, William S. Walters, Elbert R. Tillinghast, Edmond C. Stout, Thomas McLaughlin, Eugene G. Cuff, Bernard W. Terlinde,

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Joseph Leonardis, Harbourne S. Baldwin, Thomas H. Hickey, Jr., W. Halsey Smith, Henry Liversey, Henry G. Atha, James O. Bettele, William W. Van Nalts, William P. Barter, Richard Denbigh, Joseph C. Fisher, Howard F. McConnell, good and lawful men of the said County of Essex, duly commissioned and then and there duly sworn and charged to enquire in behalf of the State of New Jersey, in and for the said County of Essex, it is presented in manner and form following, to wit:

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The Grand Inquest for the State of New Jersey, and for the body of the County of Essex, upon their oath Present, That Andrew Calabrese, late of the Town of Montclair, in the said County of Essex on the first day of October, in the year of our Lord one thousand nine hundred and twenty-two, with force and arms, at the Town aforesaid, in the County aforesaid, and within the jurisdiction of this Court, in and upon one Mary Nixon in the peace of God and of this State then and there being, an assault did make, and her the said Mary, then and there did beat, wound and ill treat, and other wrongs to said Mary contrary to the form of the Statute in such case made and provided and against the peace of this State, the

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government and dignity of the same. And the Grand Inquest, upon their oath aforesaid, do further Present, That the said Andrew Calabrese, being then and there above the age of six-

Indictment.

teen years on the first day of October, in the year of our Lord, one thousand nine hundred and twenty-two, at the Town aforesaid, in the County of Essex aforesaid, and within the jurisdiction of this Court, in and upon one Mary Nixon, in the peace of God and of this State then and there being, an assault did make, and her the said Mary, then and there unlawfully and carnally abuse, the said Mary, being then and there a woman child over the age of twelve years and under the age of sixteen years to the great damage of the said Mary contrary to the form of the statute in such case made and provided, and against the peace of this state, the government and dignity of the same.

J. O. BIGELOW,
Prosecutor of the Pleas.

Judgment Record.

POSTEA

On the sixth day of February, A. D., 1923, on which day the said Indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer and the said Justice did then and there order the said indictment to be handed down to the Court of Quarter Sessions, and to be delivered to the Clerk of the Court of Quarter Sessions, in and for said County of Essex, and then and there the said indictment was duly delivered and duly filed by the Clerk of said Court and an entry of such order and delivery and filing was then and there made in the minutes of said Court at the same time pursuant to the statute in such case made and provided.

And afterwards, that is to say, on the eighth day of February, A. D., 1923, at a Quarter Sessions, holden at Newark, in and for the County of Essex, before the Hon. Dallas Flannagan, presiding Judge of the Court of Common Pleas, Andrew Calabrese in the custody of Samuel F. Wilson, Sheriff of the County of Essex aforesaid, and the said Andrew Calabrese being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, says that he is Not Guilty thereof, and therefore for good and evil puts himself upon the contrary, &c. and John O. Bigelow, Prosecutor of the Pleas of said State, for said County of Essex in this behalf doth the like.

Therefore, let a Jury thereupon come before the Court of Quarter Sessions to be holden at Newark, in and for the County of Essex, on the twentieth day of February, A. D., 1923, then next ensuing twelve free and lawful men, each of whom shall be a citizen of this State and resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said Andrew Calabrese to recognize upon their oath whether the said Andrew Calabrese is Guilty of the premises in the said indictment specified or Not Guilty because the said John O. Bigelow, Prosecutor, &c. as the said Andrew Calabrese puts himself upon the jury and the same time is given to the parties aforesaid at the same place.

Judgment Record.

And afterwards, that is to say, the sixth day of March, A. D., 1923, to which day the trial of aforesaid indictment was postponed, at the same Court of Quarter Sessions, holden before the Hon. Dallas Flannagan, Judge of the Court of Common Pleas, comes the said John O. Bigelow, who prosecutes as aforesaid, and the said Andrew Calabrese, and the jury of whom mention is before made, and by Samuel F. Wilson, Sheriff of the County of Essex, for this purpose empanelled and return to wit: after the following challenges for the Defendant, one, Albert F. Wurth, Michael J. McGovern, Harry Lichtman, Joseph A. Harris, Arthur E. Osmun, John J. Merrey, John C. Roll, William V. Martin, Fred C. Kugelman, Charles F. Hart, Leopold Stearn and Arthur B. Brown, being called were sworn upon that jury who to speak the truth of and concerning the premises and thereupon the trial of said issue was commended and continued until the seventh day of March, A. D., 1923, when the jury returned into Court in charge of the officer sworn to attend them, and then and there in the presence of the Prosecutor, defendant and Court do say upon their oath, they find the defendant Guilty in the manner and form as is set forth in the indictment and recommend him to the Mercy of the Court and so they say all.

Whereupon all and singular, the premises being seen and by the Court now here fully understood, it is, on this nineteenth day of March, A. D., 1923, Ordered and adjudged that the said Andrew Calabrese be committed to the penitentiary of this County for a term of eighteen months at hard labor upon this conviction and from then until the costs are paid, which said costs are taxed by the Clerk at the sum of fifty-two dollars and eighty-six cents and the defendant be in Mercy, etc.

Judgment signed March 19th, 1923.

DALLAS FLANNAGAN,
Judge.

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Continuance

CONTINUANCE.

Filed May 24th, 1923.

SUPREME COURT OF NEW JERSEY.

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STATE OF NEW JERSEY,

vs.

ANDREW CALABRESE,

Defendant.

On Writ of Error

CONTINUANCE.

It is consented on behalf of the defendant-in-error, that the above entitled matter and all proceedings thereon be extended and continued from the June term of said Court to the November term, 1923. 20

J. O. BIGELOW,
Attorney for defendant-in-error.

JAMES MANGO,
Attorney for plaintiff-in-error.

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Opening.

Essex County Court of General Quarter Sessions

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Tuesday, March 6, 1923.

STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

ANDREW CALABRESE,

Plaintiff-in-Error.

*Indictment No. 341
For Assault and
Battery and Abuse,*

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Before Hon. Dallas Flannagan, Judge, and a Jury.

William A. Wachenfeld, Second Assistant Prosecutor of the
Pleas, for the State.

James Mango for Defendant.

Mr. Wachenfeld opens for the State.

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Mary J. Nixon, Direct.

MARY J. NIXON sworn in behalf of the State..

Direct Examination by Mr. Wachenfeld.

Q How old are you? A Fifteen.

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Q Fifteen years? A Yes, sir.

Q Where do you live? A 176 Forest avenue.

Q At Montclair, Mary? Where? A Montclair.

Q You say you are fifteen years old, is that right? A Yes.

Q When is your birthday? A October.

Q So you were fifteen last October, is that it? A Yes.

Q What day in the month is your birthday, Mary? A The 7th.

Q The 7th of October? Who did you live in Montclair with? A My aunt.

20

Q Talk louder, will you? A My aunt.

Q Do you work or do you go to school in Montclair? A I went to school. After I came from school I went to the place where my aunt works to help her.

Q Where did your aunt work, Mary? A 35 Hillside avenue.

Q Do you know a man by the name of Andrew Calabrese? A Yes.

Q Do you see him here? A Yes.

Q Where is he? A He is the fourth man in that row [indicating].

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Q How long have you known him? A Over a year.

Q Where did you first meet him, Mary? A When I moved to Forest street, he had a store.

Q (By the Court) Where did you first meet him? A At the store.

Q What kind of a store did he have? A A grocery store.

Q What street is the grocery store on? A It was on Forest street.

Q On what? A It was on Forest street.

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Q (By Mr. Wachenfeld.) How did you come to meet him there, Mary? Did you used to go in his store? A I used to go to the store. When I lived on 191 Forest street I used to go to the store. Then he moved down to 64 Chestnut street.

Mary J. Nixon, Direct.

The Court. She wants to correct something.

Q (By the Court.) What did you say? A When I lived on 191 Forest street.

Q (By Mr. Wachenfeld.) Where is the store, Mary? A
10 It was across the street from his house.

Q On what street is that? A Forest street.

Q Did you say he moved to Chestnut street? A Yes, corner of Forest.

Q What kind of a store did he have on Chestnut street?

A A grocery store.

Q When did he move to Chestnut street, do you know? A No.

Q Did you ever go in his store, on Chestnut street? A Yes.

Q Did you go in there on or about the 1st of October, of
20 last year? A Yes.

Q You mean you remember it was on or about the 1st of October, Mary? A It was after I came from New York.

Q What time of day was it, Mary, that you went to his grocery store? A It was in the noon.

Q In the noon? Is that what you said? A Yes.

Q About what time was it? A I was going to school.

Q You were going to school? A Yes.

Q When was this? After you had gone to school or before? A It was in the noon time.

Q It was in the noon hour for lunch, when you were going to school? A Yes.

Q How long a time did you have for lunch, Mary, when you were going to school? A We had from a quarter after twelve until half past one.

Q Were you going to school or were you coming from school when you stopped in at his store? A I was going to school.

Q Was he in the store when you stopped in on October 1st? A Yes.

Q Was there anybody else in there? A No.

Q What did you do when you got in there? Did you talk
40 to him? A I went to buy some candy.

Q You went to buy some candy? A Yes.

Q Did you buy the candy? A Yes.

Q Did anything else happen? A Yes.

Mary J. Nixon, Direct.

Q Tell us, now, just what happened, will you please? And talk loud. A When I went to get the candy he told me to go in the room where the telephone was, he said, and he would tell me to wait there.

Mr. Wachenfeld. I suggest you have the stenographer read it. 10

Mr. Mango. I would like to give the jury a chance to hear. What I object to, is this: That the jury has a right to hear the words from the witness's mouth.

The Court. Undoubtedly they have.

Mr. Mango. So they can judge of her demeanor in telling the story.

The Court. All right, gentlemen, if you cannot hear, say so, kindly, and I will have the witness repeat it.

Witness. When I went in there he told me to go into the room where the telephone was. He waited. So I went in and he came inside and come downstairs, and I went downstairs. 20

Q Did you say he told you to go in the room where the telephone was? A Yes.

Q What room was that? A It was just—it wasn't a room, it was just where the stairs leads down to the cellar.

Q Where the stairs lead down to the cellar? A Yes.

Q What did he tell you to do when you got there? A Told me to wait there. Then I was waiting. 30

Q What? A I was standing there and he told me to go on downstairs.

Q "Told me to go on?" A Downstairs. He scraped the bags down on the floor and told me to lie down.

Q Told you to lie down, Mary? A Yes.

Q What did he do? A Then pulled my bloomers down.

Q Did he do anything else? A Yes.

Q What else did he do? A Unfastened his pants.

Q What else did he do? A Then he had intercourse with me.

Q He had intercourse with you? A Yes.

Q Mary, had he ever done that before, the day you told us about— 40

Mr. Mango. I object.

A. Yes.

Mr. Mango. I object.

The Court. Which date is this?

Mary J. Nixon, Direct.

Mr. Wachenfeld. October 1st.

The Court. Is that the date alleged in the indictment?

Mr. Wachenfeld. Yes.

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The Court. I will allow it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Q Had he done that before, to you, Mary? A Yes.

Q When did he first do that to you?

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Mr. Mango. I ask that it be noted, your Honor, that all these answers will be over my objection, that the crime in question, on the first of October, cannot be proved by the commission of other crimes.

The Court. You object to the other occasions?

Mr. Mango. Other than the 1st of October.

The Court. Prior to the date alleged in the indictment. I understand it exactly.

(Question read.)

A It was in the spring, before school closed.

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Q It was in the what? A In the spring, before school closed.

Q Before school closed? Do you know what month it was in, Mary? A No.

Q Was it before summer? A Yes.

Q Can you tell us what month it was? A I don't know what month.

Q Where was it, before this day, that he did it to you?

A It was in the store.

Q In the same store, on Chestnut street, or in any other store? A It was in that same.

Q Had you been in the store before he did these things to you? A Yes.

40

Q How many times—how often would you go into this store, Mary? What would you go in for? A I used to go there every day to buy things.

Q What kind of things did you buy? A I used to buy

Mary J. Nixon, Direct.

groceries; I used to buy bread, and other things, like crocheting-ings there, and stockings and candy, and different things like that.

Q Tell us what he said, Mary, before he did it to you the first time? How he came to do it. 10

Mr. Mango. I object to that as too remote.

The Court. She testified when he first did it to her.

Objection overruled.

Q Do you know what the question is, Mary? How did he come to do it the first time? What did he say to you? How did he do it? A He told me to give him a little bit.

Q Did he say anything else, Mary? A Yes.

Q What did he say? Tell us. A He told me he wanted me to give him a little bit.

Q You will have to talk louder. A He told me he wanted me to give him a little bit. I told him I was afraid, and he said he wouldn't hurt me. 20

Q What did he do after that, Mary, after he said he wouldn't hurt you? Did he do anything? A Yes.

Q What did he do? Tell the Court. A He took me downstairs in the cellar.

Q Is that the first time that he took you downstairs in the cellar? A Yes, sir. Then he told me to sit down there until he called me, and he took up some bottles of soda.

Q He took bottles of soda upstairs? A Yes.

Q You were still down in the cellar? A Yes. Then he called me because he said he don't want nobody—wanted to see if anybody was in the store. 30

Q Well, he had not done anything to you before he wanted to see if anybody was in the store? A Yes.

Q Before he did it to you, then, did he go upstairs, then? A No.

Q Which is it? Tell us. A He did it first.

Q Was it then that he went upstairs with the bottles? A Yes.

Q Then did he call to you? A Yes.

Q What did you do when he called to you? A I went upstairs. 40

Q Did he do the same thing that time that you told us about, that happened October 1st? A Yes.

Q How often did you see him after that, Mary? A I saw him all the time.

Mary J. Nixon, Direct.

Q What do you mean? Once a week, once a month, or what? A I saw him every day.

Q Did you go in the store every day? Is that what you mean? A No; most every day, anyway.

10 Q Did he ever do anything to you, other than this first time? A No, not before that.

Q After that, did he ever do these things to you again? A Yes.

Q How many times did he do that to you, Mary? A I don't know.

Q Did he do that every day, every week, every month or what? A No; he didn't do that every day.

Q About how often did he do that? A It was only once in a while.

Q How often, Mary? How many times a month? A I didn't count them.

20 Q Would you say it was as many as five times a month?

Mr. Mango. I object to that as leading.

The Court. I will have to allow some leading, I see, under the conditions.

Q Will you tell us about how many times a week, or a month, he did this to you, after he started? A I don't know how many times; I cannot count them.

Q Was it a hundred times a month? A No.

Q How many times was it? Can you not give us some idea? A Just once in a while.

30 Q Now, when these things happened, as you say, once in a while, did they always happen in the same place or did they happen in different places? A In the same place.

Q In the same place? By that you mean down in the cellar? A Yes.

Q Now, did he ever tell you anything about what you were to say about what he did to you? A He told me not to tell anybody.

Q Did he say anything else to you about it? A He told me he would give me money to buy shoes with.

40 Q When did he tell you that, that he would give you money to buy shoes with? Was that the first time or some other time? A That was the first time.

Q Did he ever give you money to buy shoes with? A No.

Q Did he ever give you anything after that? A He gave me five dollars.

Mary J. Nixon, Direct.

Q He gave you five dollars? A Yes.

Q When did he give you the five dollars? A It was in January.

Q In January? A Yes.

Q That is, a month or two ago? A Yes.

Q How long did you continue to do these things with him, Mary? A It was——

Q What? A It was in December.

Q December? A In December.

The Court. When was this indictment?

Mr. Wachenfeld. The indictment alleges October 1st.

The Court. You cannot prove anything after that date.

Mr. Wachenfeld. Not to show the relationship between the defendant and the complaining witness?

The Court. I do not think so. I will strike out the testimony about anything happening in December.

Q How did he happen to give you the five dollars that you told us about, Mary?

Mr. Mango. If your Honor has stricken out what happened in December, I think you ought to strike out what happened in January also.

The Court. Also in January, but I will not strike out the receipt of the five dollars. But anything about any getting intercourse after the date of this indictment.

Mr. Mango. I ask you to strike out about the five dollars as being too remote and not part of the *res gestae*.

The Court. Motion denied.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,

Judge.

Q (Question read.) A When my aunt sent me to the doctor, on January 4, to tell the doctor—she sent me to the doctor.

Mary J. Nixon, Direct.

Q Who sent you to the doctor? A My aunt.

Q Did you say anything about that to Mr. Calabrese? A Yes.

Q What did you say to Mr. Calabrese? What did he say to you? A I told him the doctor said that I was in the family way and my aunt sent me over to him one Sunday and told me to tell him that the doctor——

Mr. Mango. I object. I ask that be stricken out, what the aunt told her.

Q Tell us what you said to Mr. Calabrese, and what Mr. Calabrese said to you? Did you tell him what your aunt told you? A Yes.

Q Tell us just exactly what you told him. That is all right. A I told him what my aunt told me.

Q (By the Court.) Just tell us what you said to him. A I told him that the doctor said that I was in the family way, that I was four months, and that my aunt told me to tell him that if I was this way he would have to take care of me.

Q Did you tell him that? A Yes.

Q What did he say? A He told me, well, if I wouldn't tell anybody, if I wouldn't say anything, he would take care of me, he would send me to the hospital, and pay all my expenses, and he didn't want me to say anything; to be careful and wash myself, because he didn't want his wife to know it.

Q Did he give you any money? A Yes; that Sunday he told me the next time I went to the doctor to come by that he would give me some more money. I went to the doctor that Monday and he gave me five dollars.

Q Did he say anything more when he gave you the five dollars, Mary? A No.

Q Who was the doctor you went to? A Dr. Thompson.

Q Is he a colored doctor in Montclair? A Yes.

Q Do you know where his office is? A Yes.

Q Did you go to his office? A Yes.

Q What street is his office on? (No response.)

Q What was there down in the cellar, Mary? Was it light or dark? A It was light.

Q Are there any windows down in the cellar? A Yes.

Q Or was there an electric light? How was it lighted?

A It was lighted from the window.

Mary J. Nixon, Cross.

Q Where was the window? A Up on top where the sidewalk was, coming from the sidewalk.

Q Was there any electric or gas light in the cellar? A There was an electric light in there.

Q Did he light the electric light when he did these things to you? A No. 10

Q He did not? A No.

Cross Examination by Mr. Mango.

Q How old are you? A Fifteen.

Q Who is your mother? A I don't know her name.

Q You don't know her name? Who is your father? A Jim Nixon.

Q Where is he? A In the corridor.

Q Where is your mother? A Dead.

Q Who is Mary Nixon? Is Mary Nixon your aunt? A Yes. 20

Q Where does she live? A I don't know where she lives.

Q Did you live with her? A No.

Q Where did you live? A In the House of Detention.

Q Where did your aunt live when you were not in the House of Detention? A 176 Forest Street.

Q With your aunt? A Yes.

Q How long were you living there? A I guess it was about two years.

Q Two years you lived there? A In that house.

Q In the same house? A No, not in that same house. We were living up on Forest street about two years. 30

Q Before you were sent to the House of Detention where were you living? A 176 Forest street.

Q Who was your landlord? A Mrs. Mafucci.

Q How long did you live with Mrs. Mafucci? A I think it was in July we moved there.

Q How many years were you living with Mrs. Mafucci? A I don't know.

Q About two years? A No.

Q Three? A No; I don't know whether we were living there more than a year or not. 40

Q You lived there more than a year?

The Court. She said, "I don't know whether I lived there more than a year or not."

Q When were you born? A 1907.

Q What month? A October.

Mary J. Nixon, Cross.

Q What day? A The 7th.

Q Are you sure it was the 7th? How do you know it was the 7th? A Because I was told it was the 7th.

Q Who told you? A My uncle and my grandmother told me.

Q When? A When they told me?

Q When did they tell you you were born on the 7th of October? A They told me when I used to live with them.

Q Was it last year? A No.

Q How long ago did they tell you you were born on the 7th of October? A I don't know how long ago.

Q You don't know, as a matter of fact, how old you are, anyway? A Yes.

Q How do you know?

20 *Mr. Wachenfeld.* I object to confusing the witness. She says she is fifteen years of age. All of us only know how old we are from what we are told.

Mr. Mango. It is only one of the exceptions to the rule that it is inadmissible when it is brought in as one of the customs of the family. I am trying to show the creditability of this witness, but I will bring it out in a few words.

The Court. She told you all she knew.

Q You were positive from what your uncle and aunt told you that you were born on the 7th of October? A Yes.

30 Q Why did you tell the Police Magistrate that you were born on the 22nd of October? A I didn't tell him that.

Q Do you know what intercourse means? A Yes.

Q Do you know what the word carnal abuse means? A No.

Q Are you sure you know what the word intercourse means? A Yes.

Q When did you find out what that means? A When I went to court.

Q Where. In Montclair? A Yes.

Q Do you remember seeing me in Montclair on the 23rd of January of this year? A I don't know.

40 Q Do you remember a question that you were asked, whether you knew what the word intercourse meant and you said you didn't know? Do you remember that? You don't remember that? Are you sure? A No.

Mary J. Nixon, Cross.

Q Who told you what the word intercourse meant? A The Judge said it.

Q What Judge? A The one that was up in Montclair.

Q When did he tell you? In my presence? A No; because he asked me before me, to have intercourse with me, and he said yes. 10

Q You said yes? A He said yes.

Q Don't you remember I asked you if you knew what the word intercourse meant and you said no? A No.

Q You don't remember that, do you? A No.

Q You went to New York on the 22nd of August, didn't you? A Yes.

Q Of last year? A Yes.

Q How long did you go away? A I was away until the 23rd of September.

Q Where did you go? A To my sister. 20

Q (By the Court.) When did you come back? A The 23rd of September.

Q (By Mr. Mango.) Who did you go with? A Went all by myself.

Q Do you know a man by the name of Logan, in Montclair? A Yes.

Q A colored chauffeur? A I don't know what he is.

Q Didn't you go away to New York with a colored man by the name of Logan? A No; I went by myself. 30

Q Are you sure you didn't go with Logan? A No.

Q What school do you go to? A I went to Montclair High School.

Q Are you sure that this happened on the 1st day of October? A It was about a week after I came back.

(A boy is called up to the stand.)

Q Did you ever see this boy? A Yes.

Q He goes to school with you, doesn't he? A He goes to the same school I go to, but I don't go to school with him.

Q Did you ever see him about a week after New Year's of this year at your school? A At the school?

Q Yes. A I seen him at the school all the time. 40

Q Do you remember seeing him about the first week after New Year's in school? A It was the first year that he started in, or the last of the old year that he started; I don't know when.

Mary J. Nixon, Cross.

Q I mean January of this year. Do you remember seeing this boy in school? A I don't know exactly what month he came in, but I know I saw him in there; he was in there; I saw him! I don't know what month or what day he came in school.

10 Q Do you know whether it was around Christmas time? A I wouldn't say; I am not sure.

Q Do you know whether it was around New Year's time, New Year's holiday? A I don't know.

Q Isn't it a fact, Mary, that you saw this boy in school right after the holidays, and you were crying when you saw him, and he asked you what was the matter? Don't you remember that? A No.

Q You don't remember that? A No.

Q And he asked you what was the matter and you said you had a belly ache? Do you remember that? A No.

20 Q And he said, "That is funny, I haven't got a belly ache." Do you remember that? A No.

Q And didn't he ask you, then, "Why have you got a belly ache?" and you said that somebody did it to you? A No.

Q You don't remember that, do you? A No.

Q And didn't you say that it was a man named Logan who did it to you? A No.

Q You are positive this happened on the 1st day of October? A It was around the first.

30 Q You are certain it was around the first, but it was not on the 1st? A I didn't say what date it was.

Q I thought you said it was on the 1st day of October? A No, I didn't give any date.

Mr. Wachenfeld. She said she came back on the 23rd of September and it happened about a week after she came back. If you count from the 23rd, seven days, it will make it the first of October.

Q Did you mention the first of October, a few minutes ago? A No, I didn't say any date; I said it was about a week after.

40 Q You now say it was about a week after. Do you remember saying it was the first of October, about ten minutes ago? A No. Somebody asked me was it around about the first of October, and I said it may have been around the first of October—the man that came to see me——

Q Never mind what they said.

Mr. Wachenfeld. I object.

Mary J. Nixon, Cross.

Q Do you remember what day of the week this happened, that you went down in the cellar? A No.

Q Do you know what day of the week the 1st of October is? A No.

Q Do you know that the 1st of October is on Sunday? 10

The Court. Well, if she does not know what day of the week it is, she does not know this either.

Q Do you know Calabrese's wife? A Yes, sir.

Q Is she here in court? A Yes.

Q Did you ever see her in the store when you went downstairs with Calabrese? A No.

Q At any time? A No.

Q You always went down in the cellar, at the same spot? A Yes.

Q How many times in all, did you say that you went down in the cellar with him? A I don't know; I didn't say. 20

Q Was he the only man that you had intercourse with? A No.

Q You had intercourse with a man by the name of Joseph Gant, didn't you? A Yes.

Q When?

The Court. What are you doing?

Mr. Wachenfeld. We are not trying the Gant case at this time. I have no objection to counsel showing the creditibility of this witness. I object to going into details of time.

Mr. Mango. I propose to show that this girl had intercourse with other people at the time she had with Calabrese. 30

The Court. The Prosecutor says he does not object to that. She says she did have intercourse with this man mentioned.

Mr. Mango. I only want to test her.

The Court. Go ahead.

Q Do you remember when you had intercourse with Joseph Gant? A It was in November.

Q Do you remember the day in November?

Mr. Wachenfeld. What difference does it make to specify whether it be the first or second day of November? I cannot see the materiality of it. 40

Q Joseph Gant is a colored man, isn't he? A Yes.

Q Do you know who John Nixon is? A Yes, sir.

Mary J. Nixon, Cross.

Q Who is he? A A colored man.

Q Your uncle? A Yes.

Q You had intercourse with John Nixon, too, didn't you?

A Yes.

10 Q In what month? A December.

Q You say he is your uncle? A Yes.

Q He is the husband of the aunt with whom you are living? A Yes.

Q He is the man with whom you are living? A Yes.

Q Why did you go to New York on the 22nd day of August? A I went over to my sister because my aunt was mean to me and I ran away.

Q Why was your aunt mean to you? A She used to beat me all the time.

Q Isn't it a fact that she chased you out of the house?

20 A She used to run me out of the house; then she would tell me to come back in, afterwards.

Q Wouldn't she run you out of the house because you used to run around with other men? A No, sir.

Q Are you sure about that? A She used to beat me all the time, for anything I did. When I was working for Elliott's she used to beat me because I was late coming home. Times she used to bring me into court.

Q Isn't it true that your aunt used to beat you because you went around with other men? A I didn't run around.

30 *Mr. Wachenfeld.* I object. He has already asked that question and it has been answered.

Q When did you make a complaint against Calabrese? A January.

Q What day? A I don't know.

Q It was the day that you appeared before the Montclair police court, wasn't it? A No.

Q When? A It was before it.

Q How long before? A I don't know what day it was.

Q Did you say you had intercourse with Calabrese in the spring, or before last summer? Did you tell your aunt anything about it? A No.

40 Q Did you tell anybody anything about it? A No.

Q At any time? A No.

Q Did you tell the police anything about it? A No, I didn't tell anybody.

Q You never told anybody? A No; not until January.

Frank F. Thompson, Direct.

Q Do you know anybody by the name of Dunn in Montclair? A Yes.

Q 85 Hillside avenue? A Yes.

Q She conducts a boarding house there? A Yes.

Q You were employed there as assistant, or some employee of some sort, to help around, Mary, weren't you? A yes. 10

Q Washing dishes and so on? A Yes.

Q They had a lot of boarders there, didn't they? A They didn't have a lot of boarders.

Q How many did they have? A There was a man and his wife and then there was another man; that was all that was there when I left.

Q How many men were there? A There was a Mr. Craig, and there was another man, I don't know his name.

Q Colored or white man? A White man.

20

FRANK F. THOMPSON sworn in behalf of the State.

Direct Examination by Mr. Wachenfeld.

Q Doctor, you are a practicing physician here in the State of New Jersey? A Yes, sir.

Q Your office is where? In Montclair? A Montclair.

Q How long have you been practicing medicine? A About ten years.

Q Did you, sometime in the month of January, or thereabouts, of the present year, examine this little girl, Mary Nixon? A Yes; she came to my office. 30

Q Did she come alone or did someone come with her? A I think her aunt called up, first, then she came alone.

Q What day was that, doctor? A I think it was the 3rd of January.

Q Did you make an examination of her at that time? A I questioned her and examined her breasts.

Q What did you discover, first, as to her physical condition? A Well, I told her what I thought. I told her and told her aunt to call me up.

Q Did you tell her anything about what you discovered about her physical condition? A Yes, I did. 40

Q Don't tell us what you told her, but tell us what you ascertained her physical condition to be? A I thought that she was pregnant.

James J. Murray, Direct.

Q From your examination could you tell anything as to the duration of that pregnancy? A I thought it was about three months.

Cross Examination by Mr. Mango.

10 Q Was the examination had at your office? A Yes.

Q Do you know at whose instance the examination was made? A No; I think her aunt called me up.

Q No. Do you know at whose instance the examination was made? You started to say no. A I don't believe I catch the question.

Q Do you know at whose instance the examination was made of this Mary Nixon? A Well, I think it was her aunt.

Q Are you sure about that? A Well, she called me up, before, and said that she was sending her over.

20 Q Can you tell, doctor, whether a young girl of her age, and her build, is pregnant, in three months? A You mean, positively?

Q Yes. A Not positively.

Q So that when you made the examination you were not positive that she was pregnant only three months? A Only reasonably certain.

Q But not a positive fact? A Not a positive fact.

JAMES T. MURRAY sworn in behalf of the State.

Direct Examination by Mr. Wachenfeld.

30 Q Where do you live, Mr. Murray? A 36 Cumberland avenue, Verona.

Q What is your business? A Sub-agent, Children's Welfare Committee, Montclair.

Q How long have you been with the Children's Welfare Committee of Montclair? A Seven years with that organization.

Q Did your organization have any interest in this Mary Nixon, the girl? A We did.

Q Did that lead you to come in contact with Calabrese? A It did.

40 Q When did you see the defendant, Calabrese? A On the 19th day of January the girl was at the Altruist Society of Montclair, and she said that——

Mr. Mango. I object.

James J. Murray, Direct.

Q You cannot tell us what the girl said, but after the girl told you her story what did you do? A The girl told me—

Mr. Mango. I object to what the girl told him.

Q Assuming you have told us what the girl told you. After that, you did something, didn't you? A Yes; I went down there to see Mr. Calabrese. 10

Q Was that the same day you saw Mr. Calabrese? A The same day.

Q Where did you see him? A At his store, Chestnut street and Forest street.

Q Did you have a conversation with him? A Yes.

Q What did you say and what did he say? A I told Mr. Calabrese Mary Nixon had charged him with having intercourse with her over a period of eight months.

Q What did he say? A He said, "I don't want to talk about it, now, can I not come to see you?" I said, "Yes, you can." 20

Q Where did you tell him he could see you? A At my home in Verona.

Q What happened after that? A He came up to my home that night. He said—well, he didn't know what to say. I told him it was a very serious charge, and my object in going to him was to let him approach his wife about it and tell her the charge that was against him. He said, "Well, I don't want to let my wife know if I can keep it away from her." 30

Q Did you tell him what the charge was? A I told him what the charge was he would have to meet himself. He said, "I don't know what to say. She did go down in my cellar once. That is what we did." He said, "But I shot off before I completed the job."

Q Did he tell you anything else? A That is all. He said he didn't want it to go any further, if he could—

Q Did he say anything about giving her any money? A I told him about the five dollars that Mary said he had given her and he said she had gone there to borrow five dollars.

Q Did he say, however, she did get five dollars from him? A Five dollars from his wife, he said his wife gave it to her. 40

James J. Murray, Cross.

Cross examination by Mr. Mango.

Q How long have you been connected with the society?

A Twelve years.

10 Q You have been handling a lot of this kind of work, so that when you go to a man's house and tell him the exact nature of the crime, it does not surprise you to tell you he does not want to talk about it there? A No.

Q Because he is not in the presence of counsel? A Not at all.

STATE RESTS

Mr. Wachenfeld. Will you admit that the defendant is above the age of sixteen?

20 *Mr. Mango.* I will not. I have been disputing it ever since.

Mr. Wachenfeld. I ask you to admit that the defendant is over the age of sixteen?

Mr. Mango. Yes; I misunderstood you; I thought you said the complainant.

30 *Mr. Mango.* I move for the direction of a verdict on the ground that the burden is on the state to prove that the complaining witness, the girl in question, is positively under the age of sixteen years at the time of the commission of the alleged offense; that the mere statement of the girl herself that she is under fifteen is not sufficient to warrant a finding of fact in order to have the case go to the jury, that the girl is conclusively under sixteen.

The Court. Motion denied.

Defendant's counsel prays an exception to this ruling of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Andrew Calabrese, Direct.

Mr. Mango opens for the Defendant.

ANDREW CALABRESE, defendant, sworn in his own behalf.

Direct examination by Mr. Mango.

Q You live where, Mr. Calabrese? Where do you live? 10

A I live at 64 Chestnut street.

Q With whom? A My wife.

Q How many children have you? A Five.

Q How many years have you been married? A About fourteen years.

Q What kind of a business do you conduct? A Grocery.

Q Whose grocery store is it? A Mine and my wife, both together.

Q Who are the people who conduct the grocery store? A I want someone to explain it to me, see?

Q Who runs the grocery store? A Me and my wife. 20

Q You don't work any place else? A No; only in the grocery store, me and my wife.

Q How many rooms have you beside the grocery store?

A Only one room, two, kitchen and bed.

Q How many other rooms have you? A One back of the store.

Q Have you no rooms upstairs? A The rooms upstairs are rented.

Q Do you occupy the entire first floor, including the store? 30

A Yes, on the first floor.

Q What kind of a business do you do there? A Grocery store.

Q I mean, is it slow all day or are you busy? A I am busy every day.

Q How many days a week are you open? A Seven days.

Q Open all day Sundays? A Yes, sir.

Q Now, Mary Nixon says that on or about the 1st day of October you had intercourse with her. Is that so? A No, sir.

Q She says that in the summer, or before the summer, for a period of six or seven months, you had intercourse with her. 40

A No, sir. Can I have an interpreter?

Mr. Mango. Well, we will try and get along without an interpreter.

The Court. An interpreter? Why, yes, certainly you can.

Andrew Calabrese, Direct.

(Witness proceeds to testify through the interpreter.

Q (Last question read.) A No, sir.

Q He says that you gave her five dollars. Is that so? A No, sir. What do you think, that she was my sister?

10 Q She says that she told you that the doctor told her that she was in the family way, and that you would have to take care of her, and you told her, "Come around the next time and I will give you five dollars." Is that so? A I never seen her.

Q She says that you took her downstairs and you put a bag on the floor in the cellar. A No, sir.

Q She says that you told her to lie down there and that you took down her bloomers and that you had intercourse with her. Is that so? A No, sir.

20 Q Did you ever see this Mr. Murray? A Yes, sir; he came in my store.

Q Did you ever tell him that you had given this girl, Mary Nixon, five dollars? A No, sir.

The Court. Did Mr. Murray say that?

Mr. Mango. I think so. I want to withdraw it if he did not.

Mr. Wachenfeld. Mr. Murray testified, if your Honor please, that this man said that she had borrowed five dollars from him, that she had gotten it from his wife, not him.

30 *Mr. Mango.* Then I will withdraw the question.

Q Did you tell Mr. Murray that your wife had given Mary Nixon five dollars? A No.

Q (By the Court.) You didn't tell Mr. Murray that? A I didn't tell Mr. Murray that.

Q (By Mr. Mango.) Did you mention any five dollars at all to Mr. Murray? A Never, never.

Q How have you lived with your wife, in your place of residence, since your marriage, friendly or unfriendly? A Always friendly.

40 Q Will you tell me whether there is any door leading from the floor of the store to the cellar? A In back of the counter is a door leading down to the cellar.

Q How does this counter run? A It is closed; it is private; nobody can go in.

Q You mean nobody can go behind it? A No, sir.

Andrew Calabrese, Cross.

Q Is there anything to fasten the door that leads to the cellar in the back of the counter, such as a lock? A We have a lock and key. My wife keeps the key because we have a lot of stock down there in the cellar.

Q She is the only person who holds the key? A She is the only one. 10

Q Did Mary Nixon, at any time, go down in your cellar?

A Never.

Q Mary Nixon says in January you gave her five dollars. Is that so? A No, sir.

Cross examination by Mr. Wachenfeld.

Q How old are you, Mr. Calabrese? A (Without the interpreter) 35 years.

Q How long have you been living at 64 Chestnut street? A (Through the interpreter) Seven months. 20

Q When did you start to live there? A July 1st.

Q That is, of last year? A Last year.

Q You told me that you had a living room in back of the store? A Yes, sir.

Q Have you only one room in back of the store or more than one? A There is a room in the back of the store, yes, a kitchen, and then another room.

Q So that there are three rooms in back of the store, is that right? A Three rooms.

Q The middle room is the kitchen? A In the middle room is the kitchen, yes. 30

Q What is the first room in back of the store, the bedroom, the living room, or what? A The bed room.

Q And the one in the back, the last one, is that a bedroom, or what? A Three rooms this way (indicating) a bedroom, a kitchen, and then another bedroom.

Q Now, in this grocery store of yours, you have a telephone in it, haven't you? A Yes, I have a telephone in my business.

Q Where is the telephone located? A The telephone is near the door that leads into the bedroom, the door that goes into the cellar. 40

Q In other words, the telephone in your grocery store is near to the door that leads into the cellar, isn't it? A Yes, the two doors are near each other.

Andrew Calabrese, Cross.

Q When did you first know this little colored girl, Mary Nixon? A In the month of August her aunt came into the store.

Q When her aunt came into the store was Mary with her aunt? A Yes.

Q After that time did you see Mary frequently? A I didn't see her.

Q (By the Court.) This was in August? A August, yes.

Q (By Mr. Wachenfeld.) Did her aunt deal with you, buy groceries from you? A Oh, yes, sure.

Q Did this little girl buy groceries from you for her aunt? A Her aunt came in and said, "Give her anything she wants on my account."

Q After her aunt gave you these instructions, as I understand it, this little girl came into your store quite frequently, as I understand it, for the purpose of buying things, is that right? A Sometimes she came, sometimes her aunt came.

Q How frequently would she come into your store? A About once a week or twice a week.

Q When she came into your store you used to speak to her didn't you? A I used to ask her what she wanted, what kind of groceries she wanted. I am in the grocery business.

Q You have a cellar in that store, haven't you? A Yes, we have a cellar, but the door is locked and my wife has the key.

Q What kind of lights do you have in the store, gas or electric light? A Oh, electric.

Q What kind of lights do you have in the cellar? A One electric light.

Q Is there any window in the cellar? A Two windows.

Q Near where are they? A Right near the corner of Chestnut street.

Q Near the sidewalk? A Yes, sir; right near the sidewalk, when you go upstairs, when you go into the store.

Q Now, this little girl, Mary, when she came into your store to buy groceries, did you ever allow her to go down into the cellar by herself? A No. What? No.

Q You never allowed Mary Nixon to go down into your store, at 64 Chestnut street, did you? A How could she go in there when my wife had the key?

Andrew Calabrese, Cross.

Q Will you please answer the question? Did you ever let her go down into your cellar, or didn't you? A No, no, no.

Q Will you say that she never was in that cellar? A Never.

10

Q Look at Mr. Murray. You saw him at your store, didn't you? A Yes, I seen him.

Q When did you see him? A In January.

Q What part of January? A The 17th or 18th, I don't remember exactly.

Q What time of day was it that you saw him? A In the afternoon.

Q What did he say to you? A He said there was some trouble with Mary Nixon. I told him I don't know anything about it.

Q Did he tell you what the trouble was with Mary Nixon? A He told me that there was some trouble with Mary Nixon. I told him I would come up to see him, because I am so busy, now, to find out what was his trouble.

20

Q Did he tell you what the trouble was with Mary Nixon? A Yes.

Q What did he tell? A Because he said that I had connection with her.

Q He told you, then, did he, that you were accused of having connections with Mary Nixon? A Yes; he told me that.

30

Q (By the Court). Did Mr. Murray tell you that in your store, or in Mr. Murray's house? A Yes, in the store. My wife was just coming in the store.

Q Was anybody else in the store where you and Mr. Murray had this conversation? A There was two persons there. Mr. Murray came in there. Mr. Murray came in and waited until the persons went out, and then spoke to me.

Q So that, at the time Mr. Murray spoke to you in the store, there was nobody in the store except you and Mr. Murray? A Me and him; but at the same time people was coming in, customers coming in. I told him, "I am busy now."

Q (By Mr. Wachenfeld.) When he told you that you were accused of having intercourse with Mary Nixon, did you deny that that was true? A I told him, "I don't know anything about it."

40

Q Did you deny that you had anything to do with Mary Nixon?

Andrew Calabrese, Cross.

Mr. Mango. I object. The question is answered. He told her he had nothing to do with her and that is a denial.

The Court. Well, let us see. Ask him if he said anything else.

10 *Witness.* I told him, "I don't know anything about it."

Q Did you tell him anything else? A What else could I tell him?

Q Did you tell him anything else? A Nothing.

Q Did you say anything else to him about seeing him again about the Mary Nixon matter? A No, sir.

Q Did you ask Mr. Murray if you could see him at Mr. Murray's home or residence? A No.

20 Q Did anybody say anything about your seeing Mr. Murray again at his home in Verona? A No, sir.

Q Then how did you come to go to Verona to see him several days after this? A When he come in the store I was busy and I asked him where he lived, and he gave me his address, 36 Columbus street. Then I went up to see him.

Q In other words, you asked Mr. Murray where he lived before he told you what he had come to see you about? A Mr. Murray told me about the trouble with Miss Nixon. I told him, "Give me your address and I will come up and see you and find out what this trouble is about Mary Nixon."

30 Q Did you ask him for the address and tell him you would come up and see him before or after you told him you did not know anything about it? A I told him first I did not know anything about it. Then I told him, "I will come up and see you." I want to find out what this trouble is."

Q Then why did you tell me a minute ago that you did not ask him where he lived? A I told you that.

Q You told me what? A That when he came in the store I asked him where he lived.

40 Q Did you tell Mr. Murray that you wanted to go up and see him at his home in Verona? A The same day when he came there and spoke to me about Miss Nixon I told him I was so busy today, "Give me the address and I will come up and see you."

Q Did you ask him if you could come up and see him at his home? A He told me he worked there until six or seven o'clock.

Andrew Calabrese, Cross.

Q Answer the question. You asked him if you could come up and see him at his home? A I asked him if I could come up and see him at his house or give me the address and I went up to see him.

Q Now, you had not done anything wrong to Mary Nixon, had you? A No, sir; because I was busy; that is why I told him, "I want to go up and find out what this trouble was." 10

Q That is why you wanted to go up and see Mr. Murray and find out what the trouble was? A Yes; because he had told me that there was trouble with Mary.

Q You knew what the trouble was? A I didn't know anything about it.

Q Why, he told you that you were accused of having, as you say, connection with Mary Nixon. Isn't that so? A Yes, sir.

Q So that you knew. A That she had accused me. 20

Q So that you knew what the trouble was when Mr. Murray saw you at your store, didn't you? A I didn't know anything about it until I heard it from Mr. Murray's mouth.

Q But before Mr. Murray left your store you knew what the accusation was against you so far as Mary Nixon was concerned, didn't you? A I didn't know anything about it.

The Interpreter. I don't believe he understood the question.

Q Before Mr. Murray left your store you knew what the accusation was, didn't you? A Mr. Murray told me, yes; but I didn't know anything about it. 30

Q When did you go up to see Mr. Murray at his house in Verona? A I don't remember. January, I told you.

Q Was that the same night that you went up to see him? A The same night.

Q You saw Mr. Murray, didn't you? A Sure.

Q Did you tell Mr. Murray, at that time, that you did not know what to do about it? A No, sir; I told him I did not know anything about it.

Q Did you tell Mr. Murray, "I don't know what to say?" A No; I didn't say that. 40

Q Did you tell Mr. Murray that you didn't want your wife to hear anything about it? A I told him that I didn't know anything about it.

Q Did you tell Mr. Murray that Mary Nixon had gotten five dollars that she had borrowed from you, or that she had

Andrew Calabrese, Re-direct.

gotten five dollars from your wife? A He asked me if I gave her five dollars and I told him that I didn't know anything about the five dollars.

10 Q What did you reply when he asked you if you had given Mary Nixon five dollars? A I told him I never gave her anything; I didn't know anything about it.

Q Did you ever say that she had borrowed five dollars from your wife? A No, sir.

Q Did you tell Mr. Murray that she had been down in your cellar on one occasion? A No, sir.

Redirect examination by Mr. Mango.

Q How many customers have you there in a day? A It is a continuation from half-past seven in the morning until eleven or twelve o'clock at night.

Q Do you run a trust account for Mrs. Nixon, the aunt of Mary Nixon here? A Yes, sir.

20 Q When would she pay you the trust account you ran there?

Mr. Wachenfeld. I have no intention of excluding anything that might possibly become material. I fail to see how this can possible become material.

Mr. Mango. What I meant to show in my direct examination was the animosity that existed between this guardian of this girl and this defendant.

30 *The Court.* You propose to show this aunt had an account with the defendant and that there was some trouble over the account?

Mr. Mango. Yes, sir.

The Court. All right; go ahead.

Q (Question read.) A Yes sir.

Q When would she pay you the account? A She began to get credit from July.

Q How often would she pay you? A Every week she would always leave a balance of six or seven dollars.

Q What happened in the Christmas or New Year holidays in the account? A During the holidays she bought a lot of groceries, and the bill was up—

40 *Mr. Wachenfeld.* I object to the oral testimony of the amount of this bill, because it is apparent that this man keeps books, from his testimony, and if he wants to show the amount due from the mother or relative of this child I think the best evidence is his own books.

Andrew Calabrese, Re-direct.

Mr. Mango. This man has personal knowledge of what appears on the books. I think the best evidence is the man's own knowledge, because the books do not give the information unless it is from the man's knowledge.

10

The Court. The question is not what the books show.

Q What is the amount that was due?

The Court. If he knows, if he can recall, he can state it.

Mr. Wachenfeld. Then I suggest that the witness stop testifying about what the books show.

The Court. Certainly.

Q Tell us how much was owing by Mrs. Nixon to you right after Christmas or New Year's. A \$29.

Q Did you have any trouble getting it, the \$29? A Yes, sir. 20

Q Did anybody come to your store with reference to the \$29? A She came there for some more groceries. I did not want to give them to her.

Q Did you tell her so? A I told her that her aunt owed me \$29 and that unless \$29 was paid I would not give her any more groceries.

Q After that did the aunt again see you? A About ten minutes after back returned she and her aunt.

Q You mean, Mary Nixon and her aunt? A Yes.

30

Q What was told you? What did you tell the aunt? A She came there all excited to me. She said, "Why don't you want to sell me any groceries?"

Q What did you say? A I told her, "Unless you pay me \$29 that you owe me you cannot get any more groceries, because I have to pay my bills."

Q Did she say anything after that? A Then she called me some names, and I called her some names. My wife was present at the time.

Q Did she pay the bill? A She went out and ten minutes after she came back again.

Q Did she pay the bill? A After she paid the bill she said, "I will fix you some day," and she shut the door and walked out. 40

Q Who said this? A Both of them.

Andrew Calabrese, Re-direct.

Q (By Mr. Wachenfeld.) Do you mean both of them said this and both of them walked out? A Both said the same way.

10 Q (By the Court.) What is that she said, "Some day I will come and fix you?" A "I will fix you."

Q (By Mr. Mango.) When did this happen? A Two days after New Years.

Q (By the Court.) Let me get this straight and see if I understand it. Was it Mary who came for groceries twice? A Yes.

Q Then he told Mary that she could not get any groceries and then the aunt came? A Yes, sir.

ADJOURNED to Wednesday, March 7th, 1923 at 10 A. M.

20

Wednesday, March 7th, 1923.

SECOND DAY.

STATE OF NEW JERSEY

vs.

ANDREW CALABRESE,

} Indictment No. 341
} For Assault and
} Battery and Abuse,

30

(Continued pursuant to adjournment.)

(Counsel present as before stated.)

ANDREW CALABRESE, defendant, resumes the stand in his own behalf.

Re-cross examination by Mr. Wachenfeld.

40 Q Mr. Calabrese, at the time that Mr. Murray came to your store and spoke to you about this case, that was before you were arrested and before you had engaged counsel, was it not? A He came there before I was arrested.

Q Before you had engaged counsel? A Yes, sir.

Q This door that leads to the cellar, you say, is locked all the time? A Locked all the time.

Andrew Calabrese, Re-cross.

Q And by that you mean that during the business hours of the day it is locked, and your wife has the key? A We have a lot of groceries upstairs and we have a lot downstairs; and anytime I run short upstairs I call her and she opens the door and she goes down there and gets it.

10

Q Isn't it a fact that at the time Mr. Murray called upon you, in the store, in the month of January, that the door leading from your store into the cellar was open and was not locked? A No, sir; it was shut.

Q Isn't it a fact that the time Mr. Murray called there you were alone in the store and that your wife was not with you?

A There were two or three persons in the place, and Mr. Murray waited for a while.

Q Was your wife one of the two or three persons? A My wife? While we were talking she came in the store.

Q Did she stay in the store while you were talking? A No, sir; she was coming in the store.

20

Q Where did she come in from? A From the room.

Q (By the Court.) From what? A From the rooms.

Q To the rooms? A From the room.

Q (By Mr. Wachenfeld.) Now, you say you had been in the habit of running a charge account against the aunt of Mary Nixon? A Yes, sir.

Q And you say that that charge account averaged about \$7 a week? A Seven or eight dollars.

Q And when did they usually pay you that account? A Sometimes she would pay every week, a little, a little balance, and sometimes she would pay every two weeks, pay a little balance. Sometimes the husband was not working; then I would not get any.

30

Q Who used to pay this, the husband of Mrs. Nixon? A Sometimes she would pay and sometimes he paid.

Q Well, now, you say that during the two holiday weeks she accumulated a debt of \$29? A Yes, sir.

Q Was that for stuff which had been bought during those two weeks? A Yes; bought groceries during the holidays; they asked for it and I gave it.

Q Now, of course, when you keep a charge account against the customer, you keep books, don't you? A Yes, sir.

40

Q And as stuff is bought on credit you make a notation of it in the book? A Yes, sir.

Andrew Calabrese, Re-cross.

Q And you have an account against who, in this case? A Mary Nixon.

Q That is, the aunt of the little girl? A Yes.

10 Q Have you got these books with you? A I have not got them here, but they are in the store.

Q Those books show, do they, that during the two holiday weeks, that Mary Nixon purchased from you, on credit, merchandise to the extent of \$29? A Yes, sure.

Q Why didn't you bring those books with you? A Well. I didn't know that I had to bring the books down here, but if you want to send for the books in an automobile, we will send and get them.

Q You heard me object, yesterday, to the question about the account, because I contended that the books were the best evidence, didn't you? A I don't understand you.

20 Q Now, when was this \$29 paid by Mrs. Nixon? A Two days after New Year's.

Q Who came into the store to make the payment? A Mrs. Nixon and the niece.

Q What did Mrs. Nixon say? A She came in and said, "Why don't you want to trust my niece any more?"

Q Well, now, had you said something to the niece before Mrs. Nixon came in? A She came there to get some more groceries. I said to her to tell her aunt that if she did not come in and pay that bill she would get no more trust.

30 Q Was that the same day that the aunt came in? A The same day.

Q How did the aunt pay you? By check or in cash? A In cash.

Q What did she say at the time she paid you that \$29? A Before, when she came in, she got mad. Then she went out, and ten minutes after she returned. When she came back she came there with her niece, and she slammed the money on the counter, and she opened the door, and while she opened the door she said, "I will fix you some day." She slammed the door and went away.

40 Q Now, she did not open the door at the same time that she slammed the money on the counter, did she? A She opened the door, and when she came in then she slammed the money on the counter. then she opened the door, and went out again, and that was the time that she passed that remark.

Andrew Calabrese, Re-cross.

Q So she said, "I will fix you some day," did she? A Yes.

Q Did Mary, the little girl say anything? A Both of them said something.

Q Both of them said the same thing? A Both of them, while they went out, said, "Some day I will fix you up." 10

Q Both of them said it? A Both of them.

Q At the same time? A At the same time.

Q Had you had any argument or controversy with the little girl before that? A No, sir.

Mr. Mango. I make an application, now, to recall the complainant, and ask her two questions. Will you say it was on the 1st of October?

The Court. As I understand it, you are uncertain as to whether the little girl testified to the exact date, is that right? 20

Mr. Mango. Yes, sir.

The Court. I do not absolutely recall it.

Mr. Mango. I would suggest that the defense be first finished and then I will make application to recall the complaining witness.

The Court. Mr. Mango says that he does not recall whether the little girl here testified to a definite date, and if she did not he wants to recall her and ask her something about it.

Mr. Wachenfeld. I do not want to object to the application, but I think that this little girl is to be recalled she ought to be recalled before any more of the defense is put in. As I recall her testimony it is distinct, nothing vague about it; it was on or about the 1st of October. She does not testify it was the 1st of October. She fixes the date from the fact that it was a short time after she came back from New York, which was the 23rd of September, and she testified it was either that date or about that date. The question has been answered. 30

The Court. (Addressing the jury.) I want to say to you, gentlemen of the jury, that you are the judges of the facts, and you must rely on your own recollection as to what these facts are or what the testimony is, and not upon anything you hear said by counsel or the 40

Carmella Calabrese, Direct.

judge, as to what may be their recollection. You are the judges of the facts and it is your recollection that must control.

10 *The Court.* (Addressing Mr. Mango.) You want to make a point that it does not definitely appear that these alleged facts occurred on the 1st day of October, and that all the Prosecutor can do is to fix the day and say it was about the 1st of October, and you say that that is not sufficient, under the indictment?

Mr. Mango......Yes. I want to fix the time. If it was not on the 1st of October, I want to know it.

The Court. (After further argument.) Go ahead with the case. I will deny your application.

Defendant's counsel prays an exception to this ruling of the Court.

20 Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

CARMELLA CALABRESE sworn in behalf of defendant.

Direct examination by Mr. Mango.

Q Mrs. Calabrese, you are the wife of the defendant in this case? A Yes, sir.

30 Q You live with your husband? A Yes.

Q Where? A At Chestnut street, 64 and 1/2.

Q How many children have you? A Five.

Q How old is the eldest? A Three years old, the baby.

Q No, the oldest one. A Fourteen years old.

Q And the youngest is how old? A Eight.

Q All living with you, all the children living with you? A Yes, every one of them.

Q You have a grocery store where you live? A Yes, sir.

40 Q What part of the house do you occupy with your family? A Why, the grocery store is in the front, then there is three rooms. First comes the bedroom and then kitchen and then another bedroom.

Q Do you have any rooms upstairs? A No, sir.

Q So that you and your husband and family live on the first floor? A On the first floor.

Carmella Calabrese, Direct.

Q Who conducts the grocery store? A Me and my husband.

Q Anybody else? A No, sir. When I go out I leave my sister-in-law, but always somebody in the place.

Q Do you have any stock in the cellar? A Yes, sir. 10

Q How do you get to the cellar? A There is a counter like this (illustrating); and then there is a door; there is some sodas on that stand and you have got to move that stand and you have got to go down in the cellar.

Q How would a man get from the front of the store, coming in from the street, to go back of the counter- A They got to ask my permission; they cannot go because the counter is right in the way.

Q What is there to prevent anybody going behind the counter? A There is a stand; there is some soda boxes on that stand. 20

Q What is there on the door leading down to the cellar? A There is a lock; it is always closed.

Q Is it an upright door or a trap door? A No, it is a straight door.

Q Who has the key to the door? A I have.

Q If anyone wants to go down to the cellar how can a person go down without asking you? A They cannot go down because the door is locked.

Q Did you ever run an account for Mrs. Nixon, the aunt of Mary Nixon? A Yes, sir. 30

Q Trust account? A Yes, sir.

Q Do you remember any account that was run during the holidays, Christmas or New Year's of this last year? A Yes, sir.

Q Do you remember how much the account was, of your own knowledge? A It is—really, I don't know, because my husband takes care of the books. I just tell him what to mark down, whenever they trust, and it is a pretty big account they owed us.

Q How much? Do you know? A Might be \$29, maybe \$19. I don't know, it is something pretty good. 40

Q You remember—were you there when Mrs. Nixon paid the account? A Yes.

Q Do you remember what preceeded the payment of the account? A I think it was about \$19.

Carmella Calabrese, Direct.

Q No. What happened when she paid the account? Was there any disturbance? A This little girl was coming in the store for trust all the time.

10 Q Whom do you mean? A Mary Nixon. She used to come in the name of the aunt and I used to trust her; I always gave her groceries whenever she came in. One day she came in and had a dollar bill, and took some candies, and I said, "Mary, why don't you pay for this soap?"

Q I mean, with reference to the account paid by the aunt? A It was about \$19.

Q No, I don't mean the amount, I mean what happened. Before Mrs. Nixon paid the amount was there any disturbance? A Yes, I don't want to trust any more, because the bill was too high.

20 Q Whom did you tell it to? A I told the little girl that I didn't want to trust her any more.

Q What happened? A She said, "I will go back and tell my aunt." The aunt came back and said, "Why don't you want to trust Mary Nixon?" I said, "Her account is too big." I said, "We don't want to trust people like that," I said, "Because my husband don't work." She said, "You don't want to trust me, don't you. Then I will pay you." I said, like that to her, "You can pay or not." I said, "The bill is pretty high. I don't want to trust unless the bill is settled." "All right," she said, and she opened the door and went right out. She came back, maybe half an hour or fifteen minutes, I don't know exactly, what it was. She said, "How much do I owe you?" Well, my husband was there. I called my husband and I said, "Look at her bill, and see what it is." He said, "It is about nineteen or twenty dollars." I don't know just exactly what it was. So she said, "All right," and she walked right out.

30 Q Did she pay you the bill? A She came back about ten minutes after and her little girl paid the bill. She opened the door. As soon as she opened it, slammed closed, and she said, "It is all right, Mr. Calabrese, I will fix you." She said to me, "You are all right, but your husband is cross." I said, "All right, I am running the place, me and my husband." I said to her.

40 Q Did you ever see Mary Nixon down in the cellar with your husband? A No, sir. How could she, when I got the key?

Carmella Calabrese, Cross.

Q How many customers have you got there? A Customers come in from eight o'clock to ten o'clock; there is always a rush; noon hour it is busy; school children, everybody.

Q Did you see your husband go down in the cellar with Mary Nixon? A No.

10

Q If anybody wanted permission to go down in the cellar you would know of it? A They got to ask me because I keep that place locked all the time, because I got stock down there.

Cross examination by Mr. Wachenfeld.

Q Now, Mrs. Calabrese, your husband runs this business, doesn't he? A Me and my husband.

Q In addition to your running the business, as you termed it, you attend to usual household duties, don't you? A I run the business.

Q Listen to the question. You take care of the usual household duties, don't you? A No, I take care of the business.

20

Q Who takes care of the household duties? A My sister-in-law.

Q What is her name? A Farmella Calabrese.

Q Does she live on the first floor with you? A She lives with me.

Q How long has she lived there? A Three years—no, it is not three years she lived there.

Q Then she has not been living there three years? A Yes, she lived there two years over on Chestnut street; she is always with us three years.

30

Q What room did you occupy for sleeping quarters at 64 Chestnut street? A I slept in a room by the kitchen.

Q Did you and Mr. Calabrese occupy that room? A Yes, sir.

Q Anybody else? A No, sir.

Q Where do your children sleep? A Right by the store.

Q In the bedroom next to the store? A Here (indicating) is the store, and here (indicating) is the bedroom.

Q Where does the sister-in-law sleep? A Right by my children, in the same room.

40

Q Six in one room? A Seven.

Q You have five children? A Yes, five children, and her is six—yes, that is right.

Carmella Calabrese, Cross.

Q Now, your husband is in the store all day, isn't he? A Yes, he is in the store until he has got to go out, down to some shop.

Q You go out sometimes while he is there, don't you? A No, I don't go out.

Q You never go out? A I cannot go out because I have a big business; I got to stay there.

Q You are there all the time? A Yes.

Q Then what is the idea of keeping this door locked, as you say, if you are there all the time and can see who goes down? A Because I got stock there. I cannot keep it open.

Q You are there all the time? A Yes.

Q You trust your husband, don't you? A I trust him, but sometimes he goes out in the yard or he goes out, and a salesman comes, and I got to take care of the store.

20 Q When you take care of the store what is the idea of keeping the cellar door locked? A I got that stock down there. I cannot keep it open. Maybe somebody might go down and I didn't see them.

Q When your husband has got to get some stock up, to sell it, he has got to ask you for the key? A Yes.

Q What is the object of having all this security of keeping the door locked? A To have safety.

Q For the stock? A Yes.

30 Q Don't you think it would be safe for your husband to have the key for that door? A He cannot have it on hand all the time in there. Some salesman comes in and I got to go out and attend to the salesman, too.

Q When you are there and he is there you have no objection to his having the key to that door, have you? A What do you mean?

Q Sometimes when he is there he has the key to that cellar door, hasn't he? A If he asks me there I give it to him.

Q When he asks you and you have the key of that door, do you stand around there until he goes down and gets what he wants and brings it up? A Yes.

40 Q Then do you lock the door and take it away from him? A I don't have to take it away from him. He locks the door and hands it to me.

Q He locks the door? A Maybe he locks it; sometimes I lock it.

Carmella Calabrese, Cross.

Q What is the object of keeping it locked? A I got lots of stock.

Q It is his stock, isn't it? A He is not in there all the time.

Q Is there any other reason, other than what you have given us, why your husband could not have the key that leads to that cellar? A Because I don't want anybody to go down there. I have children coming in and out, and I don't want them to go down there. 10

Q Don't you want your husband to go down in the cellar? A Sure, he has to go down when he wants something; but it is not necessary to go down because I got my stuff upstairs.

Q He has access to the stuff that is in the store, hasn't he? You don't keep that under lock and key for safety, do you? A No; that is right on the shelf.

Q You say this account that Mrs. Nixon owed is \$19? A Yes. 20

Q As shown by your books? A Yes.

Q You looked at that book before you came down? A No; didn't pay any attention to it.

Q You don't know whether it is \$19 or \$29, do you? A I think it is nineteen or twenty-nine. I don't know what it was, because I didn't look at it.

Q Did you hear any conversation about how much she owed? A Yes; I found out she had a big bill.

Q You are the party who stopped her credit, are you? A Me and my husband. 30

Q He just suggested that this woman had too much credit and it ought to be stopped? A My husband told me.

Q He told you? A Yes.

Q Well, in determining whether to stop this woman's credit—— A I said then——

Q ——just a minute, please. In determining whether you were to stop this woman's credit didn't you take into consideration the account she owed? A Yes.

Q What was the amount? Was it \$19 or \$29? A I don't know whether it was \$19 or \$29; I cannot remember very well. 40

Q It didn't make any difference whether it was \$19 or \$29, you would have stopped her credit anyhow, wouldn't you? A Yes.

Q (By the Court.) Were you here yesterday? A Yes.

Carmella Calabrese, Cross.

Q Did you hear the question asked yesterday about the amount of this bill? A Yes.

Q About it being on the books? A Yes.

Q It being shown on the books? A Yes.

10 Q Didn't you look, when you went home, to see what it was? A No, I didn't.

Q (By Mr. Wachenfeld.) Now, when Mary Nixon came in, this little girl, your husband told the little girl that she could not have any more groceries, credit, didn't he? A Yes.

Q And you told the little girl the same thing? A Yes.

Q What was the object of each one of you telling this little fifteen-year-old girl that she couldn't have any more credit? Wasn't one enough? A Because we were both running the place.

20 Q First your husband told her she could not have any more stuff, credit. When he got through you told her exactly the same thing, did you? A Yes, I stood right there and told her the same thing.

Q She must have known what the situation was when you got through. Now, she went out, did she? A Yes.

Q Then her aunt came back? A Yes.

Q Did the little girl come with her aunt? A Yes.

Q Both of them were there? A Yes.

30 Q Then Mr. Calabrese told her aunt that she could not have any more credit, is that right? A Yes.

Q You told her aunt the same thing, did you? A Yes.

Q Both of you told the aunt? A Yes.

Q Then what did the aunt say? A She said, "All right." She said, "I will go home and see. How much is the bill I owe you?" My husband told her what it is and she said, "Why don't you give it to her? What do you think, I won't pay you?" I said, "It is enough now you owe; I don't want to trust you any more."

Q What then did you say? A She went home and came back in ten minutes and she said, "Here is your money, and that will be all right, I will fix you."

40 Q Whom did she say that to? A My husband. not to me.

Q What did the little girl say? A She said the same thing as her aunt did.

Q Both said it at the same time? A Both said it at the same time.

Nicholas Ferando, Direct.

Q Where were they standing when they said it? A They had the door open when they were going out.

Q (By Mr. Mango.) Pardon me for asking the question—it is a very personal one—but have you ever refused your husband whenever he has asked you, since you have been married, any intercourse? A No, sir. 10

NICHOLAS FERANDO sworn in behalf of defendant.

Direct examination by Mr. Mango.

Q Do you know, Mr. Ferando, where Mr. Calabrese runs a grocery store? A Yes, sir.

Q Do you know Mrs. Nixon, the aunt of this little girl here? A I do. She lives next door to me.

Q Do you remember being in the grocery store of Calabrese a little after the first of this year? A Two days after New Year's.

Q Do you remember what happened in the store? A Why I don't know what happened in the store, because my wife was not feeling good and I went to the store to buy some groceries for my children and me. The Nixons' little girl came there. I saw her slam some money on the counter and she said, "All right, Mr. Calabrese, I will fix it." 20

Q Do you know what you said? You used the word "it." What did you hear?

Mr. Wachenfeld. I object. Never mind telling him.

Mr. Mango. I do not want to lead the witness. I think the witness ought to tell us just exactly what he heard. 30

Q Do you remember what Mrs. Nixon said as she went out the store? A She went out the store and she slammed the door, and she said, "All right, Mr. Calabrese, I will fix it."

Q What is your last word, "it"? A She opened the door.

Q No—the last word that was said, I cannot hear it. Go ahead and tell it again. A I was in the store to buy some groceries. Mrs. Nixon came in the store. At that time I was buying a piece of soap and a few things for myself. Mrs. Nixon came in and opened the door, slammed the money on the counter and went out. As she was going out she said, "All right, Calabrese, I will fix it." 40

Cross examination waived.

Filomena Maffucci, Direct.

FILOMENA MAFFUCCI sworn in behalf of defendant, testifies through the interpreter.

Direct examination by Mr. Mango.

Q You live where, Mrs. Maffucci? A 176 Forest street,
10 Montclair.

Q With whom do you live there? A With my husband.

Q Who owns the house? A Me and my husband.

Q Do you know Mrs. Nixon? A Yes, she lived in my house.

Q She was one of your tenants? A Yes, sir.

Q On what floor did she live when she lived there? A Upstairs.

Q When did she move out? A October 1st.

Q Do you remember the occasion of Mr. Nixon calling you to get a doctor? A Yes.

Q When was it? A Sunday after New Year's.

Q What did she say to you?

Mr. Wachenfeld. I object.

The Court. Objection sustained.

Q After she told you something did you go upstairs? A Yes, sir.

Q Whom did you see upstairs? A Mary and Mrs. Nixon.

Q Whom do you mean by "Mary?" A (Witness indicates the complaining witness.)

Q What did Mrs. Nixon tell you then?

Mr. Wachenfeld. I object.

The Court. Objection sustained.

Mr. Mango. This witness has a right to tell us what she heard upstairs in the presence of her aunt.

Mr. Wachenfeld. I object because it is immaterial, incompetent and irrelevant and because there has been absolutely no foundation laid for it.

The Court. I think that is a good objection.

Mr. Mango. I ask for an exception and I will withdraw the witness.

Exception allowed, let it be sealed and it is signed and sealed accordingly.

Cross examination waived.

DALLAS FLANNAGAN,
Judge.

Tony Mondsini, Direct.

TONY MONDSINI sworn in behalf of defendant.

Direct examination by Mr. Mango.

Q Where do you live? A 66 Chestnut street.

Q What city? A Montclair.

Q Do you know Mary Nixon? A Yes.

10

Q Did you go to school with her? A Yes.

Q Do you remember seeing her about Christmas time, at school? A Yes.

Q What was she doing when you saw her? A Crying.

Q What did you ask her? A "What is the matter?"

Q What did she say? A Stomach hurt her.

Q What did you say? A "My own don't hurt, yours does."

Q What did she say? A She said somebody did it to her.

Q Did she tell you who did it to her? A Logan.

Cross examination by Mr. Wachenfeld.

20

Q Do you know Mr. Calabrese? A Yes, sir.

Q How long have you known him? A About a couple of years.

Q Your father and mother know him quite well? A My father is dead.

Q Your mother knows him quite well? A Just a little.

Q You have known him for two years? A Yes.

Q Do you trade at the store, there, or don't you live in the neighborhood? A What.

Q Trade at Mr. Calabrese's store? A Once in a while.

30

Q (By the Court.) Who is this he said did it to her? A Logan.

DEFENDANT RESTS.

MARY NIXON sworn in behalf of the state in rebuttal.

Direct examination by Mr. Wachenfeld.

Q You are the aunt of this little girl here, Mrs. Nixon?
A Yes.

Q Did you, two days after New Year's, this year, go into the store of Mr. Calabrese, 64 Chestnut street, in Montclair, and pay him some twenty-nine dollars for merchandise which you had bought there, that he had credited you, trusted you for at that time, and say, "I will fix you some day?" A No, sir.

40

Q Did you pay him the sum of \$29? A I never pay any debts; my husband always pays.

*Mary Nixon, Rebuttal.**Cross examination by Mr. Mango.*

Q You did run a trust account? A I did not, but my husband did. I never run any account.

10 Q You did run it? A I didn't have to run it, my husband ran it.

Q Did you live with your husband? A Sure I did.

Q Now, wait a minute. You lived with your husband when your husband ran a trust account with Calabrese, didn't you?

A I did.

Q How long have you had Mary Nixon in your control?

Mr. Wachenfeld. I object to that as not cross examination.

The Court. It certainly is not cross examination. What is the object of it?

(Question withdrawn.)

20 Q Do you know where Mary Nixon was born? A Sure.

Mr. Wachenfeld. I object to that as not cross examination. Counsel knows if he wants her to testify for him he can recall her as his own witness.

The Court. You can recall her as your own witness.

Mr. Mango. I will use her as my own witness.

Q Where was Mary Nixon born? A She was born in Wilmington, North Carolina.

Q What is the name of the city or town? A Wilmington, North Carolina.

30 Q Is that anywhere near Topsail, North Carolina? A Yes.

Q How do you spell it? A (No response.)

Q (By the Court.) Where did you say she was born? A Topsail.

JAMES F. MURRAY recalled in behalf of the State, in rebuttal.

Direct examination by Mr. Wachenfeld.

40 Q At the time you had your conversation with Mr. Calabrese, in his store, did you notice the door which leads to the cellar? A I noticed two doors. At the time I was in there I had occasion to wait about ten minutes while he was talking to a drummer.

Q Where were these two doors? Where did they lead to?

A The store is on the corner of Chestnut and Forest. The counter runs the same way as Forest street, but as you enter

James F. Murray, Rebuttal.

the door you enter it from the corner, and the counter runs down to within about two feet of the wall. As I saw one of the doors open I could see the bedroom or could see the bed.

Q Where did the other lead to? A Right beside it.

Q Was that door locked? A No, it was open.

10

Q At the time you were in the store was Mrs. Calabrese there? A No, she was not.

Q Was anyone else there besides Mr. Calabrese? A Only the drummer. He was in there when I went in there and she went out.

Q You mean a salesman? A Yes.

Q He went out? A Yes.

Q During the time you talked to him did other people come in? A Nobody came in.

Cross examination by Mr. Mango.

Q You don't know where the wife was when the door was open? A I didn't see her.

20

Q You don't know whether she was downstairs in the cellar or not, do you? A I don't know, no.

STATE RESTS.

Mr. Mango. I wish to renew the application at this time to have the privilege of calling the complaining witness to fix the date, which I asked for a few minutes ago..

30

The Court. No, I think that the thing has been gone into thoroughly and the jury will remember.

Mr. Mango. I move for the direction of a verdict in favor of the defendant on the ground that the indictment on which this trial was had alleges, in the first count, on the 1st of October, 1922, and in the second count, on the 1st day of October, 1922, and that the proof offered by the state is at variance with the indictment, and does not sustain the indictment.

The Court. In what respect?

Mr. Mango. In that the proof does not show that the act alleged in the indictment occurred on the 1st day of October, 1922, but the proof tends to show that it did occur on other dates than the 1st day of October.

40

The Court. I will deny your motion.

James F. Murray, Cross.

Defendant's counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

10

DALLAS FLANNAGAN,
Judge.

Mr. Mango sums up for the defendant.
Mr. Wachenfeld sums up for the State.

20

30

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Judge's Charge.

The Court charges the jury, as follows:

FLANNAGAN, J.

Gentlemen of the Jury: I have been requested by defendant's counsel to charge you as follows: 10

"No. 3. You must bear in mind that there are two counts to this indictment, one charging an assault and battery and the other charging an assault and battery and abuse. You may find the defendant guilty if the evidence warrants it of the charge alleged in the first count and of the charge alleged in the second count, and you may acquit the defendant of the charge of the first count or of the charge in the second count or both, if you feel that the State has not proven the defendant guilty beyond a reasonable doubt." I so charge you gentlemen. 20

Another request by defendant's counsel:

"No. 4. You may take into consideration in analyzing the evidence, the character of the complaining witness who admits she had intercourse with John Nixon and another man named Joseph Gant, both of whom are colored, and you may also take into consideration the social position and reputation of the defendant and the fact that he has a wife and five children." I so charge you, gentlemen. 30

Another request by defendant's counsel:

"No. 5. The defendant is entitled to the benefit of a reasonable doubt, and if you feel after examining the evidence under the charge of the Court that the defendant has not been proven to be guilty beyond a reasonable doubt, you must acquit him." I so charge you, gentlemen.

There are several paramount instructions, gentlemen, to each and all of which my charge is subject, and I have divided them into two parts. 40

First, the Court is the judge of the law and the jury of the facts. The Judge has the right to comment on the evidence and to express his opinion on the facts, but as the jury are the exclusive judges of the facts, they must disregard any

Judge's Charge.

statements by the Judge as to what is present in or absent from the evidence, unless such statements coincide with their own recollection, and the jury are at liberty to disregard any opinions expressed by the Judge on the evidence, or the facts, or on what is controlling in determining the facts and must decide the case not only on the evidence referred to by the Judge but on all the evidence.

Second. The defendant is presumed to be innocent, and unless the crime charged, and each of its elements, is proved against him beyond a reasonable doubt, is entitled to an acquittal. The burden of so proving the defendant guilty rests upon the state and never shifts.

"Reasonable doubt" is not a mere possible doubt; it is that state of the case, which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

The defendant, gentlemen, comes before you on an indictment which has been found by the Grand Inquest of our county. This indictment contains two counts. The first count of the indictment is for what is commonly known as assault and battery. An assault is an attempt or offer, wilfully, without his consent and without lawful right, to beat or obstruct or molest physically the person or body of another without actually touching him. Battery is the beating or least touching of another's person, without his consent, wilfully and without lawful right. A battery violates the right of every individual to immunity of his person from bodily molestation except under lawful authority or with his consent.

The second count of this indictment, gentlemen, is a count for what is commonly known as carnal abuse. Carnal abuse is the act of debauchery of the female sexual organ by the genital organ of the male, which does not necessarily amount to penetration, committed by a male of sixteen years or over upon a female under the age of sixteen years. The elements of the crime are these: (1) Unlawfully debauching the female sexual organ, (2) by the sexual organ of the male.

Judge's Charge.

- (3) The age of the male must be sixteen years or over. (4)
The age of the female must be under sixteen years.

There is a difference in the penalty for the offense depending upon the age of the female. If the age of the female is as much as twelve and under the age of sixteen the penalty is one thing, under the statute. If the age of the female is under twelve years the punishment is more severe. It is not necessary that force be used, and on the other hand it is not necessary that the female consent; it is the same whether she consent or not. In extent debauchery need not necessarily go as far as penetration. 10

The crime of carnal abuse does not necessarily go as far as the crime of rape; in the case of rape there must be penetration; but if the ages of the parties bring them within the statute and the other elements of the crime of carnal abuse are present the abuse of the female organ must necessarily have occurred before penetration is accomplished. In other words, if penetration is accomplished, abuse must of necessity have preceded it. 20

Now, gentlemen, there was admitted in evidence, during the trial, the testimony of acts of intercourse by this girl, Mary, with the defendant, prior to the date alleged in the indictment. In other words, several acts of intercourse were admitted in evidence.. Now, a man cannot be tried for two crimes at once, or any more than one distinct crime at once, of this character. He cannot be tried for carnal abuse occurring at different times, at one trial. He can only be tried for the particular crime alleged in the indictment. This man cannot be convicted of any other crime here, now, in this trial. If he has been guilty of carnal abuse, upon this girl, at some other time, other than the time referred to in this indictment, he may be indicted for that and tried for that, and if he is guilty he can be convicted for that. But he cannot be now convicted of the crime of carnal abuse occurring at some other time, besides the time set forth in this indictment. 30 40

What was the purpose, then, of permitting this evidence of other crimes anteceding in date the crime alleged in this indictment? That was admitted, gentlemen, for a limited pur-

Judge's Charge.

pose, and it must be considered by you for a limited purpose. It is admitted only for the one purpose of tending to show, if you believe the testimony, to show or evince a state of mind in the defendant culminating in the criminal act for which he is indicted, and that is all.

Now, with regard to the date specified in this indictment. A definite date is specified in this indictment as to when the act for which he is being tried occurred. It does not follow, under the law, that because the Grand Jury is unable to ascertain the exact date, if there is an exact date, that a crime did occur, according to the evidence, which may be produced at a trial—it does not follow that **because** they are unable to fix that date, that a man **may go scot free**. In other words, it does not follow that because of the frailties of human nature, and because of the weakness of the memory of a little girl, and because of the inability of the Prosecution to get corroboration in fixing any particular date when the thing occurred—it does not follow that a man may go free and escape, if he is guilty of carnal abuse in relation to the girl.

In this case, as I recall this testimony—and as I have said to you before, gentlemen, your recollection is to control in this case; my recollection about the evidence must be absolutely disregarded by you unless it coincides with your own recollection; I am only the judge of the law—this girl said that this occurred about the 1st of October, the date specified in the indictment. As I recall it she said she got back from New York around the 23rd of September, and that it occurred some time after that.

It is not necessary to sustain a conviction that it must have occurred exactly on the 1st day of October; if it occurred within a reasonable time, a short time, of that period. He is being tried here, as I said to you, for the particular crime to which the Grand Jury refers in this indictment, and for no other. But that particular crime, need not have occurred on this exact first day of October, that he is being tried for, but it must have occurred within a short or reasonable period of that time, under the circumstances in this particular case.

Judge's Charge.

Gentlemen, you have heard the testimony and you have heard the various contentions and versions of this proposition. This girl states her story, states that he took her down into this cellar, put down bags and had intercourse with her, and she describes the surroundings. The State also produces the testimony of Mr. Murray, who says that he went to this man's place, when he was told some such thing had occurred, that he went to this man's place and he told him what was said to have happened, and the man asked him if he could come to his house and talk to him about it, in Verona, and subsequently he did go to his house, and in that conversation Mr. Murray says that he said he did have the little girl down in the cellar, but he did not actually have intercourse with her, because he had an emission before the intercourse actually occurred. Testimony is produced by the defendant, as I recall it, of somebody else being present or coming into the store, at the time Mr. Murray was there. Mr. Murray says that that did not occur that way.

10

20

The defendant's witnesses say that this was absolutely impossible; that they could not have gotten into the cellar, because the wife of the defendant carried the key, and the defendant, who was running this grocery store, in conjunction with his wife, says he could not get down into the cellar unless he got the key from her, and she did not give him the key. Moreover, it is argued, rather, that it is impossible for it to have occurred because she, the wife, says that she was there all the time, that she never went away, and so it never happened.

30

Now, gentlemen, you are the judges of the facts and the evidence is in your hands, and bearing in mind the paramount charges which I gave you, and my entire charge, and taking into consideration not only these circumstances and facts, and considerations to which I have referred, but all of the evidence and all of the circumstances and all of the facts, you will decide the case upon all the evidence and all of the charge.

40

The case is in your hands.

(The jury retires.)

Exceptions to Judge's Charge.

The Court. Numbers one and two of the defendant's request to charge I declined to charge, and the defendant has an exception to each request separately.

10 *Mr. Mango.* I also ask for an exception to that part of the charge which stated the previous acts of abuse were admitted for the purpose of tending to show that the defendant could have conceived a state of mind culminating in the act with which he is charged in the indictment, or words to that effect.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

20 *Mr. Mango.* Also that part of the charge which says that it does not follow that the inability of the Prosecution to fix a date allows a man to go scot free.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

30 *Mr. Mango.* I ask an exception to that part of the charge which states that it is not necessary, to sustain a conviction, that it must have occurred on the 1st of October.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Mr. Mango. That it might have occurred within a short or reasonable period of time, and if so the indictment is sustained.

40 Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Exceptions to Judge's Charge.

Mr. Mango. I ask for a general exception to the charge.

Defendant's counsel prays a general exception to the charge of the Court.

Exception allowed; let it be sealed, and it is signed and sealed accordingly. 10

DALLAS FLANNAGAN,
Judge.

DEFENDANT'S REQUESTS TO CHARGE.

1. The offense of carnal abuse is not a constituting one which is open and notorious lewdness and therefore if you find the defendant committed the offense of carnal abuse on Mary Nixon on any day other than October 1st, 1922, which is the day alleged in the indictment, then the defendant is entitled to an acquittal. 20

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN, 30
Judge.

2. You can only convict the defendant when you are satisfied that the offense charged in the indictment was committed on the day alleged in said indictment, so that, if the proof shows the commission of the offense on a day not mentioned in the indictment then, the defendant is entitled to an acquittal.

(Denied.)

Defendant's counsel prays an exception to the refusal of the Court to charge as requested. 40

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

DALLAS FLANNAGAN,
Judge.

Exceptions to Judge's Charge.

3. You must bear in mind that there are two counts to this indictment, one charging an assault and battery and the other charging an assault and battery and abuse, you may find the defendant guilty if the evidence warrants it of the charge alleged in the first count and of the charge alleged in the second count, and you may acquit the defendant of the charge of the first count or of the charge in the second count or both, if you feel the State has not proven the defendant guilty beyond a reasonable doubt.

(Charged.)

4 You may take into consideration in analyzing the evidence, the character of the complaining witness who admits she had intercourse with John Nixon and another man named Joseph Gant, both of whom are colored and you may also take into consideration the social position and reputation of the defendant and the fact that he has a wife and five children.

(Charged.)

5. The defendant is entitled to the benefit of a reasonable doubt, and if you feel after examining the evidence under the charge of the Court that the defendant has not been proven guilty beyond a reasonable doubt, you must acquit him.

(Charged.)

30

40

Certificate of Stenographer.

ESSEX COUNTY COURT OF QUARTER SESSIONS.

STATE OF NEW JERSEY

vs.

ANDREW CALABRESE.

10

I, Alan G. Kennish, one of the stenographers of the Essex County Courts do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by me at the trial of the case of the State of New Jersey vs. Andrew Calabrese, on indictment No. 351, for assault and battery and abuse, which said trial was held before Honorable Dallas Flannagan, presiding judge of the Essex County Court of General Quarter Sessions and a jury, on March 6th, 1923, at Newark, N. J.

ALAN G. KENNISH.

20

30

40

Certificate of Judge.

ESSEX COUNTY COURT OF QUARTER SESSIONS.

STATE OF NEW JERSEY

vs.

10

ANDREW CALABRESE,

STATE OF NEW JERSEY
COUNTY OF ESSEX

} ss.

20

I, Dallas Flannagan, presiding judge of the Essex County Court of General Quarter Sessions and the judge who presided over the aforesaid cause, certify that the foregoing printed book contains the entire record of the proceedings had upon the trial of the said cause, and the same is returned by the plaintiff in error therein with the writ of error bringing up the bill of exception signed and sealed in this cause.

Dated: September 1, 1923.

DALLAS FLANNAGAN,

Presiding Judge of the Essex County
Court of General Quarter Sessions.

30

40

Assignment of Errors.

SUPREME COURT OF NEW JERSEY.

ASSIGNMENTS OF ERRORS.

Filed September 12, 1923.

10

STATE OF NEW JERSEY,

*Defendant in Error,**vs.*

ANDREW CALABRESE.

*Plaintiff in Error.**On Error to Essex**County Quarter Sessions.**Assignments of Error.*

Afterwards, to wit, on the return day of the writ of error issued in this cause comes the said Andrew Calabrese by James Mango, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in said bill of exceptions and also in giving the judgment aforesaid, there is manifest error in this, to wit:

20

I. That the said Court before whom, &c., at and upon the trial of the said issue so joined, between the State of New Jersey and the said Andrew Calabrese aforesaid, erroneously permitted the witness Mary Nixon on behalf of the State to be asked and to answer the following questions:

Q He had intercourse with? A Yes.

30

Q Mary, had he ever done that before, the day you told us about——

Objection made.

The Court. I will allow it. Objection and exception noted.

2. That the said Court before whom &c., &c., erroneously permitted the witness Mary Nixon on behalf of the State to be asked and to answer the following question:

Q When did he first do that to you?

Objection noted.

A It was in the Spring, before school closed.

40

3. That the said Court before whom &c., &c., erroneously permitted the witness Mary Nixon on behalf of the State to be asked and to answer against the objection of the plaintiff in error the following question and answer:

Assignment of Errors.

Q How did he happen to give you the five dollars that you told us about, Mary? A When my aunt sent me to the doctor, on January 4, to tell the doctor—she sent me to the doctor.

10 4. The said Court before whom &c., &c., erroneously denied the motion of the plaintiff in error to a direction of verdict in his favor at the close of the State's case and before the defense opened its case.

5. The said Court before whom &c., &c., erroneously denied the application to have the complaining witness, Mary Nixon, recalled to the witness stand to state with definiteness whether the alleged facts occurred on the 1st day of October, the day alleged in the indictment.

20 6. The said Court before whom &c., &c., erroneously denied the right of the plaintiff in error to have answered of Filomena Maffucci, sworn in behalf of the plaintiff in error, the following question:

Q Do you remember the occasion of Mr. Nixon calling you to get a doctor? A Yes.

Q When was it? A Sunday after New Year's.

Q What did she say to you?

Mr. Wachenfeld. I object.

The Court. Objection sustained.

30 7. The said Court before whom &c., &c., erroneously denied the right of the plaintiff-in-error to have answered of Filomena Maffucci, sworn in behalf of the plaintiff in error, the following question:

Q Whom did you see upstairs? A Mary and Mrs. Nixon.

Q Whom do you mean by "Mary? A (Witness indicated the complaining witness.)

Q What did Mrs. Nixon tell you then?

Mr. Wachenfeld. I object.

The Court. Objection sustained.

Objection and exception noted.

40 8. The said Court before whom &c., &c., erroneously denied the right of plaintiff in error to have the complaining witness, Mary Nixon,, recalled to the witness stand to state with definiteness whether the alleged facts occurred on the 1st day of October, the day alleged in the indictment, then application for that purpose was renewed when the entire case was closed.

Assignment of Errors.

9. The said Court before whom &c., &c., erroneously denied the application of plaintiff in error at the close of the entire case for a direction of verdict in favor of said plaintiff in error.

10. The said Court before whom &c., &c., committed error in refusing to charge the first request to charge of the plaintiff in error, specifically as follows: "The offense of carnal abuse is not a continuing one which is open and notorious lewdness and therefor if you find that the defendant committed the offense of carnal abuse on Mary Nixon on any day other than October 1st, 1922, which is the day alleged in the indictment, then the defendant is entitled to an acquittal." 10

11. The said Court before whom &c., &c., committed error in refusing to charge the second request to charge of the plaintiff in error, specifically as follows: "You can only convict the defendant when you are satisfied that the offense charged in the indictment was committed on the day alleged in said indictment, so that, if the proof shows the commission of the offense on a day not mentioned in the indictment then, the defendant is entitled to an acquittal." 20

12. The said Court before whom &c., &c., committed error by charging the jury as follows: "What was the purpose, then, of permitting this evidence of other crimes anteceding in date the crime alleged in this indictment? That was admitted, gentlemen, for a limited purpose, and it must be considered by you for a limited purpose. It is admitted only for the one purpose of tending to show, if you believe the testimony, to show or evince a state of mind in the defendant culminating in the criminal act for which he is indicted, and that is all." 30

13. The said Court before whom &c., &c., erroneously charged and instructed the jury as follows:

"Now, with regard to the date specified in this indictment. A definite date is specified in this indictment as to when the act for which he is being tried occurred. It does not follow, under the law, that because the Grand Jury is unable to ascertain the exact date, if there is an exact date, that a crime did occur, according to the evidence, which may be produced at a trial—it does not follow that because they are unable to fix that exact date, that a man may go scot free. In other words, it does not follow that because of the frailties of human nature, and because of the weakness of the memory of a little 40

Assignments of Errors.

girl, and because of the inability of the Prosecution to get corroboration in fixing any particular exact date when the thing occurred—it does not follow that a man may go free and escape, if he is guilty of carnal abuse in relation to the girl.”

- 10 14 and 15. “It is not necessary to sustain a conviction that it must have occurred exactly on the 1st day of October; if it occurred within a reasonable time, a short time, of that period. He is being tried here, as I said to you, for the particular crime to which the Grand Jury refers in this indictment, and for no other. But that particular crime, need not have occurred on this exact first day of October, that he is being tried for, but it must have occurred within a short or reasonable period of that time, under the circumstances in this particular case.”

- 20 16. The verdict rendered in this case was against the weight of evidence.

There are divers other errors in the record and proceedings aforesaid, in the charge and instruction to the jury and in the giving of judgment and opposing sentence aforesaid, by reason of which the said judgment and sentence should be reversed and set aside.

Wherefore, the said Andrew Calabrese, prays that the said judgment and sentence may be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof.

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JAMES MANGO,
Of Counsel with Defendant.

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Specification of Causes for Reversal.

NEW JERSEY SUPREME COURT.

SPECIFICATION OF CAUSES FOR REVERSAL.

Filed September 12, 1923.

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STATE OF NEW JERSEY, <i>Defendant in Error,</i> <i>vs.</i> ANDREW CALABRESE. <i>Plaintiff in Error.</i>	}	<i>On Error to Essex .</i> <i>County Quarter Sessions.</i> <i>Specification of Causes</i> <i>for Reversal.</i>
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And now comes the said Andrew Calabrese, by James Mango, of counsel with plaintiff-in-error, and says that in the record and proceedings aforesaid and also in the matter recited and contained in the said writ of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error, and the said Andrew Calabrese says that said judgment should be reversed and assigns the following reasons or causes:

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1. Because the Trial Court, permitted the witness Mary Nixon on behalf of the State to be asked and to answer the following questions:

Q He had intercourse with you? A Yes.

30

Q Mary, had he ever done that before, the day you told us about——

Objection made.

The Court. I will allow it. Objection and exception noted.

This testimony was improper, incompetent and irrelevant and should not have been allowed.

2. Because the Trial Court, permitted the witness Mary Nixon on behalf of the State to be asked and to answer the following question:

Q When did he first do that to you?

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Objection noted.

A It was in the Spring, before school closed.

This testimony was improper, incompetent and irrelevant and should not have been allowed.

Specification of Causes for Reversal.

3. Because the Trial Court, permitted the witness Mary Nixon on behalf of the State to be asked and to answer against the objection of the plaintiff in error the following question and answer:

10 Q How did he happen to give you the five dollars that you told us about, Mary? A When my aunt sent me to the doctor, on January 4, to tell the doctor— she sent me to the doctor.

This testimony was improper, incompetent, irrelevant and too remote, and should not have been allowed.

4. Because the Trial Court erroneously denied the motion of the plaintiff in error to direct a verdict in his favor at the close of the State's case and before the defense opened its case, the application being based on the failure of the State to prove the age of the complaining witness.

20 Under the statute the age of prosecutrix is an essential element of the crime and must be proven beyond a reasonable doubt.

5. Because the Trial Court erroneously denied the application of plaintiff in error to have the prosecutrix, Mary Nixon, recalled to the witness stand, to state with definiteness whether the alleged facts occurred on the 1st day of October, the date alleged in the indictment.

The Court's refusal in this respect, left the date of the alleged commission of the offense in doubt and consequently did not support the allegation in the indictment.

30 6. Because the Trial Court erroneously denied the right of the plaintiff in error to have answered of Filomena Mafucci, sworn in behalf of the plaintiff in error, the following question:

Q Do you remember the occasion of Mr. Nixon calling you to get a doctor? A Yes.

Q When was it? A Sunday after New Year's.

Q What did she say to you?

Mr. Wachenfeld. I object.

The Court. Objection sustained.

40 Said questions were proper and the Court should have allowed the witness to answer them, as it assisted plaintiff in error in establishing the fact of prosecutrix's frame of mind and knowledge of other persons claimed by plaintiff in error to be responsible for the physical condition of the prosecutrix.

Specification of Causes for Reversal.

7. Because the Trial Court erroneously denied the right of the plaintiff-in-error to have answered of Filomena Maffucci, sworn in behalf of the plaintiff-in-error, the following questions:

Q Whom did you see upstairs? A Mary and Mrs. Nixon. 10

Q Whom do you mean by "Mary?" A (Witness indicated the complaining witness.)

Q What did Mrs. Nixon tell you then?

Mr. Wachenfeld. I object.

The Court. Objection sustained.

Objection and exception noted.

Said questions were proper and the Court should have allowed the witness to answer them, as it assisted plaintiff-in-error in establishing the fact of prosecutrix's frame of mind and knowledge of other persons claimed by plaintiff-in-error to be responsible for the physical condition of the prosecutrix. 20

8. Because the Trial Court erroneously denied the application of plaintiff-in-error at the close of the entire case for a direction of verdict in favor of said plaintiff-in-error.

The Court's refusal in this respect, left the date of the alleged commission of the offense in doubt and consequently did not support the allegation in the indictment.

9. Because the Trial Court denied the application of plaintiff-in-error at the close of the entire case for a direction of verdict in favor of said plaintiff-in-error.

There was a variance between the proof and the allegations of the indictment. 30

10. Because the Trial Court committed error in refusing to charge the first request to charge of the plaintiff-in-error, specifically as follows:

"The offense of carnal abuse is not a continuing one which is open and notorious lewdness and therefor if you find that the defendant committed the offense of carnal abuse on Mary Nixon on any day other than October 1st, 1922, which is the day alleged in the indictment, then the defendant is entitled to an acquittal."

It was prejudicial to the rights of plaintiff-in-error in so refusing. 40

11. Because the Trial Court committed error in refusing to charge the second request to charge of the plaintiff-in-error, specifically as follows: "You can only convict the defend-

Specification of Causes for Reversal.

ant when you are satisfied that the offense charged in the indictment was committed on the day alleged in said indictment, so that, if the proof shows the commission of the offense on a day not mentioned in the indictment, then, the defendant is entitled to an acquittal."

10 It was prejudicial to the rights of plaintiff-in-error in so refusing.

12. Because the Trial Court committed error by charging the jury as follows: "What was the purpose, then, of permitting this evidence of other crimes anteceding in date the crime alleged in this indictment? That was admitted, gentlemen, for a limited purpose, and it must be considered by you for a limited purpose. It is admitted only for the one purpose of tending to show, if you believe the testimony, to show or evince a state of mind in the defendant culminating in the criminal act for which he is indicted, and that is all."

20 This was prejudicial in that the evidence referred to, was evidence of the commission of acts of the same nature, each of which constitutes a separate defense.

13. Because the Trial Court erroneously charged and instructed the jury as follows: "Now, with regard to the date specified in this indictment as to when the act for which he is being tried occurred. It does not follow, under the law, that because the Grand Jury is unable to ascertain the exact date, if there is an exact date, that a crime did occur, according to the evidence which may be produced at a trial—it does not follow that because they are unable to fix that exact date, that a man may go scot free. In other words, it does not follow that because of the frailties of human nature, and because of the weakness of the memory of a little girl, and because of the inability of the Prosecution to get corroboration in fixing any particular exact date when the thing occurred—it does not follow that a man may go free and escape, if he is guilty of carnal abuse in relation to the girl."

30 This error was prejudicial of the right of the plaintiff-in-error, in that it permitted the jury to find him guilty upon illegal testimony, testimony of an offense committed on a day other than the day specified in the indictment.

40 14 and 15. "It is not necessary to sustain a conviction that it must have occurred exactly on the 1st day of October if it

Specification of Causes for Reversal.

occurred within a reasonable time, a short time, of that period. He is being tried here, as I said to you, for the particular crime to which the Grand Jury refers in this indictment, and for no other. But that particular crime, need not have occurred on this exact first day of October, that he is being tried for, but it must have occurred within a short or reasonable period of that time, under the circumstances in this particular case." 19

This error was prejudicial of the right of plaintiff-in-error, in that it permitted the jury to find him guilty upon illegal testimony, testimony of an offense committed on a day other than the day specified in the indictment.

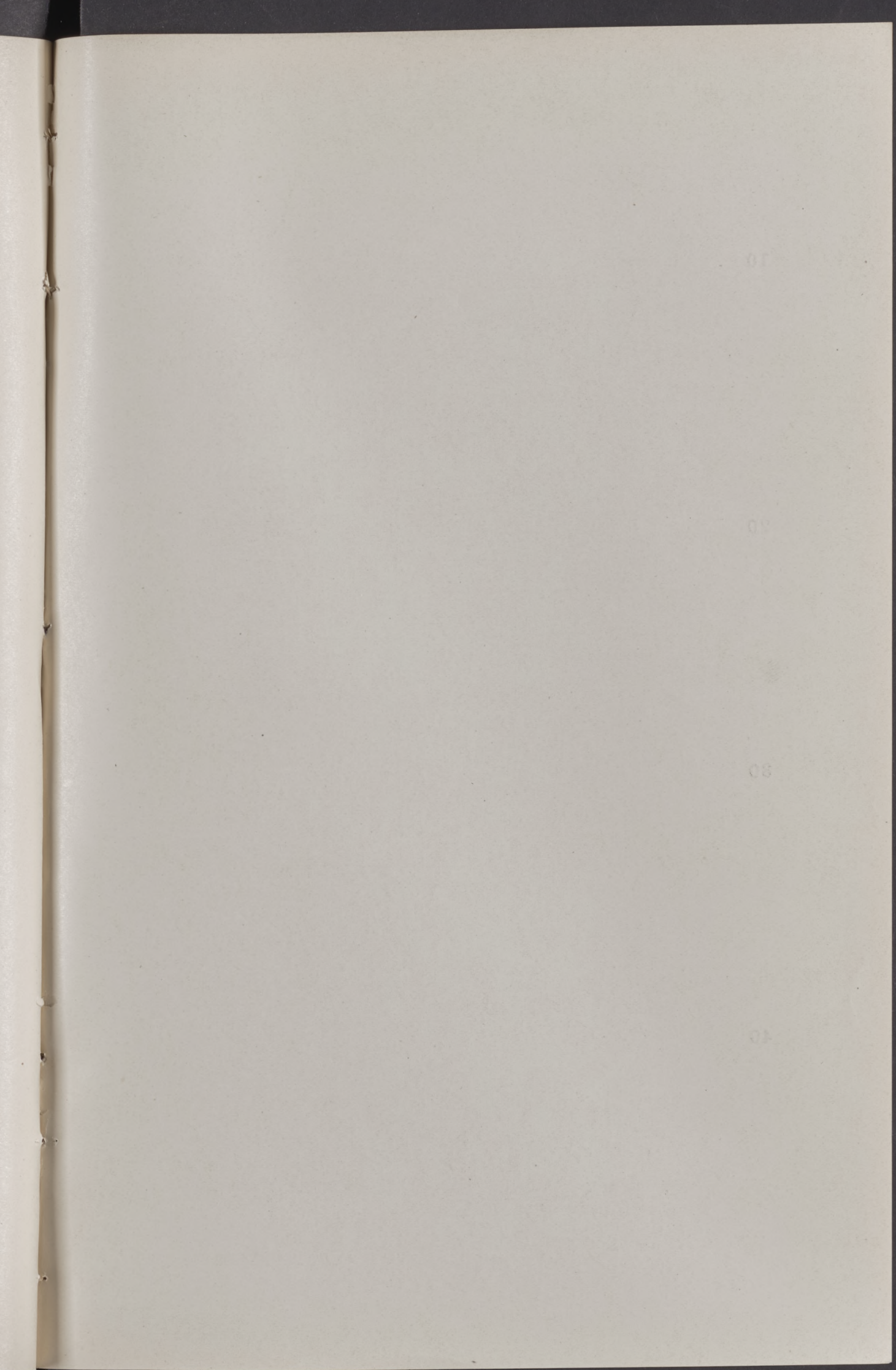
16. The verdict rendered in this cause was against the weight of evidence because the proof offered by the State, did not sustain the indictment.

Wherefore, because the aforesaid reasons or some of them constitute error prejudicial to the plaintiff-in-error, he, the said Andrew Calabrese prays that the said judgment and sentence be reversed and annulled and altogether held for nothing, and that he may be restored to all things which he has lost by occasion thereof. 20

JAMES MANGO,
Of Counsel with Defendant.

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New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

ANDREW CALABRESE,

Plaintiff-in-Error.

On Error.

BRIEF OF JOHN O. BIGELOW FOR THE STATE.

Calabrese was convicted in the Essex Quarter Sessions of carnally abusing Mary Nixon. The Supreme Court affirmed the conviction and the defendant sued out this writ of error.

The opinion of the Chief Justice rendered in the Supreme Court deals fully with all the contentions of the defendant. I believe that no further argument on the law would be helpful to this Court and that no discussion of the facts is necessary, except in one respect.

The fourth and sixth points of the defendant's brief relate to a failure of the State to prove that the crime was committed on the exact day laid in the indictment.

The prosecutrix testified that the offense was committed, "on or about the first of October of last year" (Case, p. 12, l. 19).

She also testified that she went to New York on August 22, 1922, and came back September 23rd and that the assault took place about one week later (Case, p. 21, ll. 15 to 35).

There was no offer to prove an alibi, or any other offer which made the exact date of importance to the defendant.

The prosecutrix did not, according to her testimony, reach the age of sixteen until October 7, 1923. The defendant testified that he was thirty-five years old (Case, p. 31, l. 18); so the exact date of the occurrence was not made material by the ages of the parties.

The prior offenses appear to have been committed before the prosecutrix went to New York on August 22nd, so there was no confusion between these offenses and the crime laid in the indictment.

In the absence of facts making time material it was unnecessary, in order to convict, for the jury to find that the crime was committed upon the day stated in the indictment. The law relating to this point is fully set forth in the opinion of the Chief Justice.

The judgment below should be affirmed.

Respectfully submitted,

J. O. BIGELOW,
Prosecutor of the Pleas.

New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY,

Defendant-in-Error,

vs.

ANDREW CALABRESE,

Plaintiff-in-Error.

In Error,

Brief of

Plaintiff-in-Error.

STATEMENT OF FACTS.

Andrew Calabrese, plaintiff-in-error, defendant below, was convicted of the crime of assault, battery and carnal abuse of Mary Nixon, a woman child over the age of twelve years and under the age of sixteen years at the Essex County Court of Quarter Sessions on the 8th day of February, 1923, and sentenced to the Penitentiary of Essex County, for a term of eighteen months, and to pay costs.

Defendant below was presented upon an indictment found by the Essex County Grand Jury, December Term, 1922, which charged Andrew Calabrese, late of the Town of Montclair, on the 1st day of October 1922, with force and arms at the Town aforesaid in the County aforesaid and within the jurisdiction of this Court and upon one Mary Nixon in the peace of God, then and there being, an assault did make and her the said Mary, then and there did beat, wound and ill-treat against the peace of this State, etc.

Said indictment did further charge that Andrew Calabrese being then and there above the age of sixteen years on the 1st day of October 1922, at the Town aforesaid, in the County aforesaid within the jurisdiction of this Court in and upon Mary Nixon in the peace of God and this State then and there did unlawfully carnally abuse the said Mary Nixon.

The Supreme Court affirmed the conviction on the ground that no merit was found in any of the assignments of error or grounds for reversal. This cause is now before this court on a writ of error granted to the plaintiff-in-error.

POINT 1.

Assignment 1 & 2. Specification of Causes
1 & 2.

The testimony which is the subject of these Assignments and Specification of Causes are found on pages 13, line 40 to page 14 line 29. State of the case.

Q Mary, had he ever done that before, the day you told us about—

Mr. Mango. I object.

A Yes.

Mr. Mango. I object.

The Court. Which date is this?

Mr. Wachenfeld. October 1st.

The Court. Is that the date alleged in the indictment?

Mr. Wachenfeld. Yes.

The Court. I will allow it.

Q Had he done that before, to you, Mary? A Yes.

Q When did he first do that to you?

Mr. Mango. I ask that it be noted, your Honor, that all these answers will be over my objection, that the crime in question, on the first of October, cannot be proved by the commission of other crimes.

The Court. You object to the other occasions?

Mr. Mango. Other than the 1st of October.

The Court. Prior to the date alleged in the indictment. I understand it exactly.

(Question read). A It was in the spring, before school closed.

The accused was presented upon an indictment alleging the commission upon October 1st, 1922. The State proved several distinct offenses, occurring on separate days.

"It is obvious that such testimony could have had no other tendency than to create prejudice in the minds of the jurors and to influence their passions against the accused, when passing upon the issue" presented by the indictment as to whether or not he was guilty of the crime alleged to have been committed on the 1st day of October 1922.

State vs. Lanto, Vol. 1 No. 16 N. J. Adv. Rep. page 519.

"It must not be supposed that the defendant's propensity to commit crime, or even to commit crimes of the same sort as that charged, can be put in evidence to prove his guilt."

Id.

POINT II.

Assignment 3. Specification of Causes 3.

This testimony will be found on page 17 lines 22 to 42.

Q How did he happen to give you the five dollars that you told us about, Mary?

Mr. Mango. If your Honor has stricken out what happened in December, I think you ought to strike out what happened in January also.

The Court. Also in January, but I will not strike out the receipt of the five dollars. But anything about any getting intercourse after the date of this indictment.

Mr. Mango. I ask you to strike out about the five dollars as being too remote and not part of the *res gestae*.

The Court. Motion denied.

Q (Question read.) A When my aunt sent me to the doctor, on January 4, to tell the doctor—she sent me to the doctor.

Proof of what occurred between the prosecutrix and the accused three months subsequent to the day alleged in the indictment to have been committed, is too remote; it is not so closely connected with the time or place of the crime as to form part of the complete criminal transaction, viz: the res gestae. It tended to create prejudice in the minds of the jurors.

POINT III.

Assignment 4. Specification of Causes 4.

The motion forming the basis of this assignment and specification of causes can be found at page 28 of the state of the case, at the close of the State's case.

The age of the prosecutrix constituted an element of the offense. Her statement of her age stood unsupported. No corroboration was offered by the State although her father stood in the corridor of the court-room while she was on the stand. (Page 19 State of the Case, lines 12 to 20). And the age of the prosecutrix as every other element of the crime is to be proven beyond a reasonable doubt. By refusing to direct a verdict in favor of the accused, the Trial Judge led the jury to assume that by denying the motion the State had proven that element of the crime beyond a reasonable doubt. This was prejudicial to the rights of the defense.

POINT IV.

Assignments 5, 8, 9, 13, 14, 15 and 16.

Specifications of Causes 5, 8, 9, 13, 14, 15 and 16.

These assignments can be taken together. The plaintiff-in-error was charged with having committed the crime of assault, battery and carnal abuse etc. on October 1st, 1922. The State proved (as stated in Point One Supra) several distinct offenses occurring on separate days, but no evidence was introduced establishing an offense had been committed on October 1st, 1922, nor is there any testimony as to its commission on any other specific day. No other specific date is mentioned, nor is there any attempt to amend the indictment to cover any other day, but the proof was allowed to remain in this fashion—no proof of offense on October 1st, 1922, but proof of separate distinct TIMES—no dates fixed. This prejudicially embarrassed the plaintiff-in-error in his defense in that the proof left the jury in doubt as to which of the TIMES was intended by the State to bind the accused (for all of which offenses he was not indicted) but to the commission of which testimony was improperly directed by refusing to permit prosecutrix to retake the stand and by not having her fix one date to prove the indictment under which he was being tried. Such a state of affairs eliminated from the consideration of the jury the entire testimony produced on behalf of the accused because that testimony was directed to October 1st, 1922 and to no other date. The jury having no offense to consider as having been committed on October 1st.—they neither considered the merits of the accused which were directed to that date.

A reference to her testimony shows that the prosecutrix emphatically denied it was on October 1st and yet she wasn't at all positive when it did happen.

Page 12 lines 19 to 45 are as follows:

Q Did you go in there on or about the 1st of October, of last year? A Yes.

Q You mean you remember it was on or about the 1st of October, Mary? A It was after I came from New York.

Q What time of day was it, Mary, that you went to his grocery store? A It was in the noon.

Q In the noon? Is that what you said? A Yes.

Q When was this? After you had gone to school or before? A It was in the noon time.

Q It was in the noon hour for lunch, when you were going to school? A Yes.

Q How long a time did you have for lunch, when you were going to school? A We had from a quarter after twelve until half past one.

Q Were you going to school or were you coming from school when you stopped in at his store? A I was going to school.

Q Was he in the store when you stopped in on October 1st? A Yes.

Q Was there anybody else in there? A No.

Q What did you do when you got in there? Did you talk to him? A I went to buy some candy.

Q You went to buy some candy? A Yes.

Q Did anything else happen? A Yes.

Page 22 lines 28 to 45 continued on page 23 lines 1 to 12.

Q You are positive this happened on the 1st day of October? A It was around the first.

Q You are certain it was around the first, but it was not on the 1st? A I didn't say what date it was.

Q I thought you said it was on the 1st day of October? A No, I didn't give any date.

Mr. Wachenfeld. She said she came back on the 23rd of September. If you count from the 23rd, seven days, it will make it the first of October.

Q Did you mention the first of October, a few minutes ago? A No, I didn't say any date; I said it was about a week after.

Q You now say it was about a week after. Do you remember saying it was the first of October, about ten minutes ago? A No. Somebody asked me was it around about the first of October, and I said it may have been around the first of October—the man that came to see me——

Q Never mind what they said.

Mr. Wachenfeld. I object.

Q Do you remember what day of the week this happened, that you went down in the cellar? A No.

Q Do you know what day of the week the 1st of October is? A No.

Q Do you know that the 1st of October is on Sunday?

The Court. Well, if she does not know

what day of the week it is, she does not know this either.

“The effect of the judicial acts of the Trial Judge was to include within the scope of the indictment offenses and commission of offenses by the defendant of which he was not indicted by the Grand Jury.”

State vs. Sing Lee 110 Atl. Rep. page 113.

POINT V.

Assignments 6 and 7. Specification of Causes 6 and 7.

This testimony being in the presence of the prosecutrix was binding against her and tended to show her frame of mind at the time when her aunt, with whom she was living and who acted in loco parentis, made requests for a doctor to examine prosecutrix.

This testimony can be found on page 50 state of case lines 20 to 40.

Q Do you remember the occasion of Mr. Nixon calling you to get a doctor? A Yes.

Q When was it? A Sunday after New Year's.

Q What did she say to you?

Mr. Wachenfeld. I object.

The Court. Objection sustained.

Q After she told you something did you go upstairs? A Yes, sir.

Q Whom did you see upstairs? A Mary and Mrs. Nixon.

Q Whom do you mean by “Mary?” A (Witness indicates the complaining witness.)

Q What did Mrs. Nixon tell you then?

Mr. Wachenfeld. I object.

The Court. Objection sustained.

Mr. Mango. This witness has a right to tell us what she heard upstairs in the presence of her aunt.

Mr. Wachenfeld. I object because it is immaterial, incompetent and irrelevant and because there has been absolutely no foundation laid for it.

The Court. I think that is a good objection.

Mr. Mango. I ask for an exception and I will withdraw the witness.

POINT VI.

Assignments 10 and 11. Specification of Causes 10 and 11.

The remarks in support of point four can be applied to these assignments and specification of causes. The effect of the charge was to inform the jury that the State had the burden of sustaining the allegations of the indictment to a proof beyond a reasonable doubt and that there having been created a certainty that the day alleged in the indictment was never fixed or proven as the day of the alleged offense—offenses on any other day or days were inadmissible. Consequently it was error for the Trial Judge to refuse to charge these requests to charge of the plaintiff-in-error.

“Where the proof can go no further than to show a propensity to commit the offense in question it is not relevant. The general presumption of innocence cannot be broken down by this showing the likelihood of the defendant’s guilt of the particular offense.”

Meyer vs. State 59 N. J. L. 310 at 311.
Involving the practicing of medicine.

“The State, for the purpose of showing that the defendant would be likely to commit the crime charged, cannot prove that he committed other crimes although of a like nature.”

Clark vs. State 47 N. J. L. 556.
Involving lottery.

Leonard vs. State 60 N. J. L. 8.
Involving possession of burglary tools.

Ryan vs. State 60 N. J. L. 552.

Maintaining house for passing of counterfeit money.

State vs. Raymond 24 Vroom 260.
Involving setting fire to buildings.

State vs. Pitman 119 Atl. 438.

State vs. Sing Lee 110 Atl. 113.

State vs. Lanto Vol. 1 No. 16 N. J. Adv. Rep.
page 519.

It is respectfully submitted for the reasons argued that the judgment rendered herein be reversed.

JAMES MANGO,
Of Counsel for Plaintiff-in-Error.

