

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

GEORGE HILL,
Plaintiff-in-Error.

On Error to the
Supreme Court.

Brief of Henry Young for Defendant- in-Error.

The Fifty-third Section of the Crimes' Act of 1898 (p. 808), provides that "any person who, without just cause, shall utter or expose to the view of another, or have in his possession with intent so to utter or expose to view, or to sell the same, any obscene or indecent book, pamphlet, picture, or other representation, however made * * * shall be guilty of a misdemeanor."

This statute creates no new offense. At common law, uttering obscene language in public, printing and publishing obscene matter, or exhibiting obscene pictures, was an indictable offense (Am. & Eng. Enc. of Law, Vol. 21, p. 759, and cases).

The statute operates only to define it more specifically; and, in order to restrict, as far as possible, the immoral influences of such representations, it makes the unlawful exhibition of a single obscene picture to one individual a misdemeanor.

The plaintiff-in-error was convicted in the Essex Quarter Sessions upon an indictment which charged that he "did, without just cause, utter and expose to the view of John I. Deering and Byram P. Johnson, two certain obscene pictures, one of which represented two men and one woman in a scene of lewdness and obscenity, so obscene, lewd, lascivious, filthy and indecent, that a minute description of the same would be offensive to the Court and improper to be placed upon the records thereof; wherefore, a fuller description of the same is not set forth herein; and the other of which represented a negro with his private parts exposed" (pp. 3 and 4).

The testimony in the case shows that the pictures thus referred to were contained in a book of pictures and photographs, which had been in the possession and under the control of Hill for some time previous to the date laid in the indictment (pp. 15 and 26). Of the character of these pictures, the jury were the sole judges.

In his charge, the trial judge very properly said (p. 55): "Whether these pictures are obscene, is a question of fact for your determination. *That* you tell by an inspection of the pictures, and applying to it your own standard of decency, or, at least, the standard of decency which you know prevails among decent people."

The conviction of plaintiff-in-error, as charged in the indictment, sufficiently proves that the pictures in question were grossly indecent, and that they were exhibited by Hill "without just cause."

First.

The plaintiff-in-error has brought up with his writ the entire record of the proceedings at his trial. His first specification of ground for reversal is that "the indictment and the matters therein contained are not sufficient in law to jus-

tify a criminal proceeding against the plaintiff-in-error." This assignment of error is most vague; it is not based on any exception taken at the trial, nor does it *specify* (as the 137th Section of the Criminal Procedure Act requires) the ground on which a reversal is sought.

At the trial, the defendant moved to quash the indictment upon two grounds: (1) because it did not allege that the pictures in question were obscene in "the estimation of the defendant," and, therefore, failed to show the necessary criminal intent (pp. 11 and 12), and (2) because the indictment charged the defendant with exhibiting *two* obscene pictures, and, therefore, with having committed two separate offences (pp. 12 and 13).

With reference to these criticisms, only this need be said: The indictment charged the plaintiff-in-error with having exhibited two indecent pictures at a specified time and place. It described a single transaction and charged but one offence. In exact conformity with the language of the statute, it alleged that the plaintiff-in-error "*without just cause*, uttered and exposed to view" the pictures therein mentioned; and this allegation, with proper averment of time, place and circumstance, was sufficient. It was unnecessary to allege that the act was done with any other intention than that involved in the use of the statutory words "without just cause." *State vs. Reynolds*, 36 Vr., 424.

In *State vs. Muller*, 96 N. Y., 413, the Court, discussing a similar statute, said: "The defendant's counsel at the conclusion of the evidence made several requests to charge, which were denied by the trial judge. The leading purpose of those requests was to induce the Court to lay down the rule that the intent of a defendant in selling a picture claimed to be indecent and obscene is an important element in de-

termining his guilt. The statute makes the selling of an obscene and indecent picture a misdemeanor. There is no exception by reason of any special intent in making the sale. The object of the statute was to suppress the traffic in obscene publications, and to protect the community against the contamination and pollution arising from their exhibition and distribution."

In his argument in the Supreme Court, counsel for plaintiff-in-error abandoned these criticisms of the indictment. In that Court, his argument was that the indictment was defective because it charged the offence of uttering, and also the offence of exposing to view, two indecent pictures, and that it was, therefore, bad for duplicity.

To this proposition there are two answers:

(1) If it had legal merit, the objection should have been taken by demurrer or motion to quash before the jury was sworn. After verdict, it was too late to raise the question. The Forty-fourth section of the Criminal Procedure Act of 1898 (p. 881), declares that "Every objection to any indictment, for any defect of form or substance apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment, *before the jury shall be sworn, and not afterwards*; and every Court before which any such objection shall be taken for any such defect, may, if it be thought necessary, cause the indictment to be forthwith amended in any particular by some officer of the Court or other person, and thereupon the trial shall proceed as if no such defect had appeared." In *Larison vs. State*, 20 Vr., 258, the Supreme Court, in deciding a precisely similar question, said: "The objection was not taken in this instance until after verdict was rendered. Under these circumstances, the Court would not reverse on this ground."

But (2) the objection has no legal substance.

The rule is entirely settled that if a criminal statute condemn the doing of several acts (mentioning them disjunctively), an indictment based upon it may, as a general rule, embrace all of them in a single count, but it must use the conjunctive "and" where the disjunctive "or" occurs in the statute.

State vs. Price, 6 Hals., 203, 215.

Bish. Cr. Pro., Sec. 581.

Whart. Cr. Pl. & Pr., Sec. 251.

People vs. Davis, 56 N. Y., 95-101.

Com. vs. Grey, 2 Gray, 501.

Arch. Cr. Pl., 25-343.

The exception to the rule is that offences which are incongruous or repugnant should not be joined in one count (*Larisen vs. State*, *supra*). But the offences of uttering and exposing to view indecent pictures are not dissimilar in substance, they are not incongruous or repugnant. The offence condemned by the statute is the exhibition of indecent pictures, by exposing to view, uttering, or sale. These several acts represent phases or gradation of the same offence. In *State vs. Bartholomew*, 40 Vr., 162, the Supreme Court said that "where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offence, it has, in many cases, been ruled that they may be coupled in one count. To state the successive gradations of statutory offences conjunctively, when they are not repugnant, is allowable."

Second.

The second ground alleged for reversal is that the plaintiff-in-error was convicted of an offence not charged against him in the indictment (p. 66). The record shows the contrary: it says (p. 6), that the jury "found the said George Hill guilty in manner

and form as charged in the indictment." It appears, however, that counsel's insistment, under this assignment, is that there was no evidence produced at the trial sufficient to support a verdict for either uttering or exposing to view; and further, that if an exposure to view was proved, and not an uttering also, the offence charged was unproved and the judgment should be reversed.

The testimony supporting the charges was this: Hill was one of the proprietors of the hotel in which the pictures were shown; he was, also, the bartender. He had, on several previous occasions, promised to show the pictures to Deering, the principal witness for the State. On the day named in the indictment he had directed one Johnson "to take him (Deering) upstairs to room 7," on the third floor of the hotel. Deering testifies that "when he and Johnson got into this room they found Hill there. The light was burning—gas was burning bright, and Hill said, 'There they are,' (pointing to this book I have in my hand). 'There they are—there are the pictures on the bureau; when you get through, turn the gas down low.' So, I went over to the table, and picked up this book and looked at the pictures, also some photographs that are there, and after I looked through it, started to go out. Hill, in the meantime, had gone into the front room, and, as we started to go out, Hill came back into the room, and I asked him what he wanted—what he would charge me—for one particular picture in there, showing him the picture; he says, 'I wouldn't sell that—that and three others'" (pp. 14, 15 and 26).

Counsel contends that Hill did not expose these pictures to the view of Deering, because he did not himself open the book in which they were contained and show them to Deering. But he had gone to the room where they were kept, for the sole purpose of exhibiting them; he had lighted the gas in this room

and produced the pictures; he had placed them where they could be seen, and *then he invited Deering to inspect them*. He thus exposed these pictures to Deering's view as certainly as he would have done if he had himself opened the book in Deering's presence, because it was through his agency alone that Deering was able to see them. The principle is elementary, that, under such conditions, the presence of the plaintiff-in-error was not necessary to convict. It is so in the gravest crimes. "If one lay poison purposely for another, who takes it and is killed, he who lays the poison, though absent when it is taken, is guilty of murder" (*Wh. Cr. L.*, Sec. 207).

It is apparent, then, that there was evidence from which the jury might draw the conclusion that Hill exposed the pictures to the view of Deering, within the meaning of the statute. But did he "utter" these pictures? The evidence shows that they were not put in circulation; indeed, it appears that Hill refused to part with one of them, and there is no proof that he was willing to dispose of any.

In his charge, the trial judge instructed the jury that "offering obscene pictures to be seen" was an uttering within the statute (p. 56). Was this instruction correct? If it was, the testimony, already referred to, justified the conclusion that Hill not only exposed the pictures to view, but "uttered" them also;—for the latter offence includes the former. If it was not correct, Hill suffered no wrong, because the proof shows that he unlawfully exhibited them. In either event his guilt was established.

The word "utter" in criminal law, means *to offer by some overt act*. It does not necessarily import delivery of the thing of which it is predicated, nor even its tender. Indeed, it has been held that *offering for inspection only* is uttering, if the pur-

pose be unlawful. And it seems that this is the general meaning of the term, and that it is not limited to any particular class of cases.

Mr. Bishop on Statutory Crimes (Sec. 306 and notes) says: "The word 'utter' means to offer by some overt act * * *. *The offer need not proceed to a tender.* Hence the word 'utter' is far from being the equivalent of 'pass,' but there must be a complete attempt to do the specific forbidden thing."

In *Regina vs. Ion*, 14 Eng. L. & Eg., 556, it appeared that "the defendant had placed a forged receipt for poor rates in the hands of the prosecutor for the purpose of inspection only, in order, by representing himself as a person who had paid his rates, to induce the prosecutor to advance money to a third person for whom defendant proposed to become surety"; and this was held to be an uttering. It is said, also, that "reading out a forged document, although the party refuses to show it, is a sufficient uttering." *Jeff. Cr. Cas.*, 282.

In these cases, the false papers offered were represented as genuine for the purpose of accomplishing a cheat. Indeed, in all cases of uttering forged paper or counterfeit money, there is involved the assertion, by word or act, that the thing offered is genuine, when in fact it is false. Thus, in *Commonwealth vs. Searle*, 2 Binn., 332, it was said that "to utter a counterfeit note is to assert or declare, directly or indirectly, by words or actions, that the note offered is good. It is not necessary that it should be passed in order to complete the offence of uttering." And in *Perkins vs. People*, 27 Mich., 386, COOLEY, J., said "that a receipt of money and endorsement thereof upon a forged paper is making use of it in a way implying an assertion of its genuineness," and was, therefore, an uttering of the paper.

It is obvious, of course, that the legislature in

using the word "utter" in the statute under consideration, did not intend that the pictures exhibited should be offered as "good"; nor that they should be *falsely* represented as "genuine." The legislative purpose was to prevent the exhibition of pictures which were *in fact* obscene; and this purpose would be as certainly frustrated by offering such representations for inspection as by their sale. Indeed, the statute, in plain language, discriminates between *uttering and exposing* such pictures to view, and *their sale*; for it forbids their possession "with intent to utter or expose to view, or to sell the same." And this seems to indicate that the legislature did not intend that the forbidden pictures should pass permanently out of the possession of the owner in order to complete the offence of uttering them.

The Supreme Court, in its opinion in this case, said, that as "there was no delivery of the pictures or offer to transfer them, the charge of uttering them was not proven" (p. 63). It seems to have reached this conclusion upon the theory that there can be no "uttering" unless the thing offered be "put out or passed off," except in the case of forged paper or counterfeit money. But other authorities do not thus limit the term. Thus, it is said that "the words 'pay or put off,' in a statute, are not satisfied by a mere uttering or a tender; there must be an acceptance." Also that "'passing' a thing of real or assumed value is putting it off in payment or exchange; more than an offer is meant, it must be received" *Bishop Stat. Cr. Secs. 307 and 308*, and cases.

In *Regina vs. Jones*, 5 Cox. C. C., 226, it was held that "one utters a threatening letter who puts it where the person addressed will be likely to see it and read it." And this authority is significant in view of the proof in this case, for the testimony shows that Hill placed these pictures where Deer-

ing would certainly see and examine them. He did more than expose them to view. He offered them by an overt act. Pointing to the pictures he said: "there they are; there are the pictures on the bureau." He thus placed them absolutely in Deering's possession and then left the room. *Temporarily at least, he parted with their possession.* And this seems to have been an uttering.

Third.

If the Court conclude that the charge of "uttering" the indecent pictures was not proved but that there was evidence to support a verdict of exposure to view only, there should not be a reversal of the judgment entered on the general verdict of guilty.

In *Larison vs. State, supra*—the indictment charged the defendant with sending and conveying an insulting letter to one Henrietta Conover. The Supreme Court held that the words "send" and "convey" imported a different mode of transmission, and that the indictment was technically defective, but refused to reverse the judgment on a general verdict of guilty, although the evidence showed that the communication was "sent"—though not "conveyed"—to the woman's husband.

In *Bork vs. People*, 91 N. Y., 13, it was determined that "where an offence may be committed by doing any one of several acts, the indictment may, in a single count, group them together, and charge the defendant to have committed them all, and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the others."

In *Commonwealth vs. Morgan*, 107 Mass. 205, it was said: "The verdict of the jury was equivalent to a general verdict of guilty. And although the charge is that the defendant composed, wrote,

printed and published the alleged libel, yet it is well settled that it is supported by proof of publication alone"

See

4 *Elliot on Ev., Sec.*, 2714; 3 *Green on Ev., Sec.* 169;
Rese vs. Middlehurst, 1 Burrow, 399; *People vs. Harris*, 64 N. Y., 148;
People vs. Rynders, 12 Wend., 430; *Com. vs. Gray*, 2 Gray, 503; *State vs. Terry*.
 43 Vr., 375;
Stephens vs. State, 24 Vr., 245;
State vs. Dugan, 36 Vr., 65;
Crim. Proc. Act (P. L., 1898, Sec. 136, p. 915).

Fourth.

A third error is alleged in the mis-statement of the evidence by the trial judge in his charge to the jury. This error consisted in the statement that the State's witness had sworn that the defendant, Hill, opened the book and showed the pictures to Deering (pp. 14, 15 and 56).

This error is not specified among the causes for reversal, although the whole record was certified. In *State vs. Lyons*, 41 Vr., 639, this Court said that "causes for relief or reversal not specified as required by Section 137 of the Criminal Procedure Act, and not otherwise the subject of review upon exceptions and assignments, are not required to be considered by the reviewing court."

But this mis-statement was not injurious to the defendant. In *New Jersey Traction Company vs. Brabban*, 28 Vr., 692, this Court said: "Inaccurate statements which appear clearly to have been incapable of producing any injury to the party who

complains of them ought not to be ground for reversal." The question was: Whether Hill showed the pictures; and in deciding this question, it was immaterial whether Hill himself opened the book or invited Deering to do so.

And this view was stated by the Judge in a subsequent part of his charge, when he said (pp. 56 and 57): "If this defendant took the complaining witness there or had him taken there or directed him to the room, and said 'I will show you the pictures' and then, getting him there said 'there are the pictures, look at them,' did he not offer them to be seen by this witness, *whether or not he actually opened the covers of the book and pointed to any particular picture?*"

The judgment of the Supreme Court should be affirmed.

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vs.

GEORGE HILL,
Plaintiff-in-Error.

In Error to Supreme
Court.

BRIEF FOR PLAINTIFF IN ERROR.

Facts.

George Hill was convicted in the Essex Sessions on an indictment, framed on Section 53 of the Crimes Act, (P. L., 1898, p. 808) charging that he did, without just cause, "utter and expose to view of John J. Deering and Byram P. Johnson, two certain obscene pictures * * * *." The proof for the State was as follows:

Hill and one Bowers had been partners in a hotel. When they moved into the place a book, containing, among others, the pictures in question, was found among a lot of old junk (Case, p. 41). It remained about the hotel. Bowers and Hill quarrelled, and Bowers told Deering—a detective employed by The Society for the Suppression of Vice, of which Anthony Comstock is President—about the quarrel, and of his ill-feeling toward Hill, and informed him of the existence of this

book of pictures (Case, p. 29) evidently with the hope that Deering would induce Hill to break the law as to exposing obscene pictures. Deering began to frequent the place, and, having formed Hill's acquaintance spoke to him about the pictures and asked to see them. Hill told Johnson, who was in the bar-room, to take Deering to room No. 7 and show him the pictures (Case, pp. 14, 26); but, after so doing, preceded the two men to that room, indicated a book on the bureau, saying that the pictures were there, told Deering when he was through to turn down the gas, and then left the room. Deering opened the book, looked at the pictures, and as he was about leaving Hill came back into the room. Deering then showed Hill the two pictures and asked to buy one of them, but Hill declined to sell (Case, p. 15).

On defense, Hill admitted, in testimony, the existence of the book of pictures, which had been in the bar-room, and which, when the detectives came to arrest him, was found in the woodshed. He said that he did not know that it was ever in room No 7—which admittedly was not his room. He admitted that Deering frequented the place and he testified that on one occasion Deering and Johnson went up to a drinking-room on the second floor, where he served them with drinks and drank with them, returning downstairs. He testified that he did not go up to the third floor on which room No. 7 is situated. He denied exhibiting the pictures to either Deering or Johnson, of having had any conversation about them.

Johnson was not called as a witness. Hill testified that he was a boarder at the hotel who was turned out for non-payment of board, and of whose whereabouts he was ignorant (Case, p. 48).

The Trial Judge gained a wrong impression of the testimony for the State; and put the case to the jury on a recital of Deering's testimony as

being to the effect that Hill had opened the book and shown the witness the pictures (Case, p. 53, l. 34; p. 54, l. 4; p. 55, l. 31; p. 56, l. 5).

Upon a general verdict of guilty the Court imposed a sentence of six months' confinement in the Penitentiary, and the defendant brought writ of error. The present writ reviews the Supreme Court's affirmance of the conviction.

Of the positions taken by Mr. Justice REED in the opinion read for the Supreme Court, we challenge only two, viz., (1) that the Trial Judge's misstatement of the evidence to the jury was not injurious error, and (2) that a permission, availed of, given by the defendant to Deering, to open the book and look at the pictures therein, constituted in law an exposure by the defendant of the pictures. The present argument will be confined to these points, and to one other not specifically discussed in the opinion, viz., the refusal of the Trial Judge to charge respectively the second, third and fourth requests submitted on the part of the defendant. The entire record of the proceedings had at the trial was certified (Case, p. 58), and while no separate "causes for reversal" were specified, the assignments of error are to be considered as such causes.

State vs. Terry, 43 Vr., 375, 377.

I.

The trial judge's misstatement of the evidence was manifestly injurious to the defendant.

Such misstatement is unquestionable and was frankly conceded in the Supreme Court. That a misstatement of evidence by Trial Judge is reversible error is, of course, well settled where the

misstatement is of a substantial part of the testimony and likely to mislead the jury.

11 Encycl. of Pl. & Pr., 198.

Smith & Bennett vs. The State, 12 Vr., 370.

It will doubtless be argued that, inasmuch as the defendant denied altogether any visit to room No. 7, the jury must have disbelieved him, therefore it is immaterial whether Deering's testimony was, as erroneously assumed by the Judge, that the defendant opened the book and showed the pictures, or, as in fact was the case, that the defendant permitted Deering to look at them for himself—provided that such permission, when availed of, constituted in law and exposure of the pictures. This is specious reasoning. The case was not submitted to the jury on any theory of passive exposure. *Non constat* that the Trial Judge would have adopted the view taken by the Supreme Court if he had correctly understood the testimony. Defendant's counsel was not heard on any such theory, and he had right to rely on the facts being correctly stated by the Judge. The case does not show that there was any discussion of the evidence before the jury; but if we may assume the usual summing up we may also assume and probably must assume, from the Judge's recital of the evidence, that it was essential to conviction that the defendant should have himself shown the pictures to Deering, and not merely have permitted Deering to look at them. Inasmuch as there was no dispute on this point it became unnecessary to as fully present the subjects of credibility, corroboration, &c., &c., as would have otherwise been necessary.

The case is analogous to a Judge's withdrawal from the jury of illegal testimony inadvertently admitted. It has been held that such a with-

drawal, to cure the error, must be before the summing up of counsel.

*Bergen Neck Railway Co. vs. Point
Breeze Ferry Co., 28 Vr., 165, 193-4.
Bullock vs. The State, 36 Vr., 557, 576.*

In the opinion for affirmance Mr. Justice REED says that the causes for reversal did not present this point. If this were the case the fact that the Court considered and adjudicated the point gives us a right of review in this Court; especially as the Prosecutor did not object to this point being considered, but tried to answer it. If the Supreme Court had refused to consider the question, application could have been made and would surely have been granted to amend the causes of reversal. They should now be considered as if amended, We submit, however, that a sufficient cause of reversal was specified. It should be remembered that there was an express *exception* on the point, and, therefore, no injustice to the Trial Judge can be predicated (p. 58, l. 22). The seventh assignment of error was surely sufficient to present any error which was the subject of exception. "Causes of reversal" under Section 137 of the Criminal Procedure Act (Pamph. L. 1898, p. 915) are not technical. They are analogous to "Reasons" on rule to show cause. In such cases a general reason that the Judge "erred in his charge to the jury" has always been held sufficient.

II.

Permission to Deering to look at the pictures in question did not constitute an exposure to view by Hill, or at least whether it did or not was a jury question.

(a) It is an elementary principle of Criminal Law that an interpretation of a statute must always be favorable to the accused. For a discussion of the subject see *Lieber's Hermeneutics*, 293, *Note J*.

“Before a man can be punished his case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused.”

U. S. vs. Morris, 14 *Peters*, 464.

U. S. vs. Willtberger, 5 *Wheaton*, 76.

Ex Parte Doran, 32 *Fed. Rep.*, 76, 8.

U. S. vs. Wilson, 58 *Fed. Rep.*, 768.

The word “expose” must be interpreted in its ordinary sense; for it has “no legal meaning.” *Per Parke B.*, in *Regina vs. Webb*, 2 *Carr. & Kirwan*, 933, 940.

This being so we cannot do better than turn to the dictionary and interpret the statute in a fair way, resolving all doubts in favor of the accused.

The word “expose” is thus defined:

Webster. “To remove or take out from concealment and present to observation; to show openly, place so as to be seen.”

Standard. “To remove or take from concealment and present for observation; show openly; place so as to be seen exhibited, as to *expose* merchandise in a shop window.”

Rapalje & Lawrence. “To show publicity; to exhibit.”

In the statute *sub judice* the range of the word is narrowed. The phrase is "expose to the view of another." This surely requires direct and positive action, not mere sufferance. The statute penalizes *exposing* to view of another, not mere consent or help to that other's exposing to his own view. It is active, not passive conduct that is punishable. It is possible, though doubtful, that the offense created by this statute, may be committed through an intermediate agent. For example, if Johnson, by Hill's direction, had exposed the pictures to the view of Deering, it is arguable that Johnson's exposure would, in law, have been that of Hill; but Johnson could no more expose the pictures to his own view as Hill's agent, then he could make a contract with himself as Hill's agent. Deering's voluntary exposure of the pictures to his own view could not be criminally attributable to Hill. The purpose of this punitive legislation is to prevent the corruption of youth, and to protect public decency; and therefore the exposure by one person, to view of another, of obscene pictures, is unlawful, whether or not the person to whom they are exposed desires to see them; but possession of such pictures is not made unlawful, nor is mere consent of the possessor to their view by another who solicits it. The statute does not, as in some analogous cases, forbid to "expose or suffer to be exposed" the obnoxious thing. We challenge altogether the reasoning, in this case, of the learned Justice who spoke for the Supreme Court.

(b) The question at most was one for the jury. Mr. Justice Reed seems to recognize this, for he says, "If the jury believed this testimony *it could draw the conclusion* that Hill exposed to the view of Deering the pictures, within the meaning of the statute." But the testimony referred to was not

submitted to the jury. On the contrary they were expressly told that Hill himself opened the book and in fact exposed the pictures to the view of Deering in the narrowest sense of the word.

III.

It was error to refuse the following requests to charge presented by counsel for the defendant.

"4th. The jury may not at their pleasure without regard to the element of credibility which the evidence of the accused may possess, reject it because of his interest, or because they are not satisfied that it has been corroborated. It is the duty of the jury always to consider the evidence of the accused with all the evidence in the case."

The Trial Judge told the jury that he had charged that, when he had done nothing of the kind. On the contrary he had told the jury that they should take into consideration "the interest that this defendant has, as to the defendant to escape the consequences of such a charge as this and satisfy you of his innocence" (Case p. 55, lines 6 to 10).

It is the duty of the Trial Judge upon request to give in his charge any instruction which is correct as a proposition of law and applicable to the issues. A violation of duty by the Judge in this regard is reversible error.

11 Encycl. of Pl. & Pr., pp. 213, 4, and cases cited.

In the case in hand, therefore, it was a grave error to omit to state the effect of non-corroboration of the defendant's testimony; for it is correct as a proposition of law, that statements of defendant testifying in his own behalf are not to be dis-

regarded by the jury because they are not corroborated—in that case they are adjudged by their own inherent truthfulness.

12 Cyc. 609, and cases cited.
Johnson vs. U. S., 157 W. S., 320.

By blending with his compliance with the request a reference to his previous utterances, he confused the whole subject and left the jury at sea. An erroneous instruction is not cured by a correct one unless the former is expressly withdrawn.

Genz vs. State, 29 Vr., 482.

This error of the Trial Judge may well have cost the defendant a verdict in his favor, since it bore so materially on the credibility of important testimony in his behalf—his own. The Supreme Court failed to consider this error, although embraced in the assignments before it.

“2nd. That the evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused.”

To this the Trial Judge responded “I have stated the law of this State to you on the subject of reasonable doubt, and the effect if there remains in your minds a reasonable doubt as to the defendant’s guilt” (Case, p. 58).

(3) In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person should suffer.

This request the Trial Judge, after reading it to the jury, declined to charge.

The 2d and 3d requests (together with the 1st, which was charged) were quoted from *Best on Evidence, Morgan’s Ed., Vol. 2, page 750, 1*, where the learned author says that declare sound principles of universal application. They concern the broad

subject of the duty of the jury to acquit in a criminal cause where they have a reasonable doubt of the guilt of the accused. Had the charge in the present case contained a definition of what is meant in the law by reasonable doubt these requests might perhaps have been ignored as mere philosophical abstractions; but the charge utterly lacked such a definition. All that the Trial Judge said on the subject was as follows:

“The defendant is presumed to be innocent
 “until proved to be guilty. The burden
 “of proving his guilt is upon the state. The
 “state must meet that burden by satisfying
 “you of his guilt beyond a reasonable doubt.
 “The result of that is that if there remains in
 “your hands a reasonable doubt—not any
 “kind of doubt, but a reasonable doubt as to
 “his guilt, you give him the benefit of that
 “doubt, otherwise you convict” (Case, p. 57).

The well known definition of reasonable doubt given by Chief Justice SHAW has been accepted by the Court of last resort in this State. According to that definition “reasonable doubt is that state of the case which after the 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.”

Commonwealth vs. Webster, 5 Cush., 320,
 approved in

Donnelly vs. State, 2 Dutch., 601, 614.

See, also:

1 Wharton's *Crim. Law*, 7th Ed., Par.
 707a.

This is substantially the instruction asked for by defendant's counsel, and refused by the Court. The Trial Judge fell into an error in refusing this

explanation of reasonable doubt, and the defendant was greatly harmed thereby inasmuch as the jury were merely told they must believe the defendant guilty "beyond a reasonable doubt" without the additional element of moral certainty.

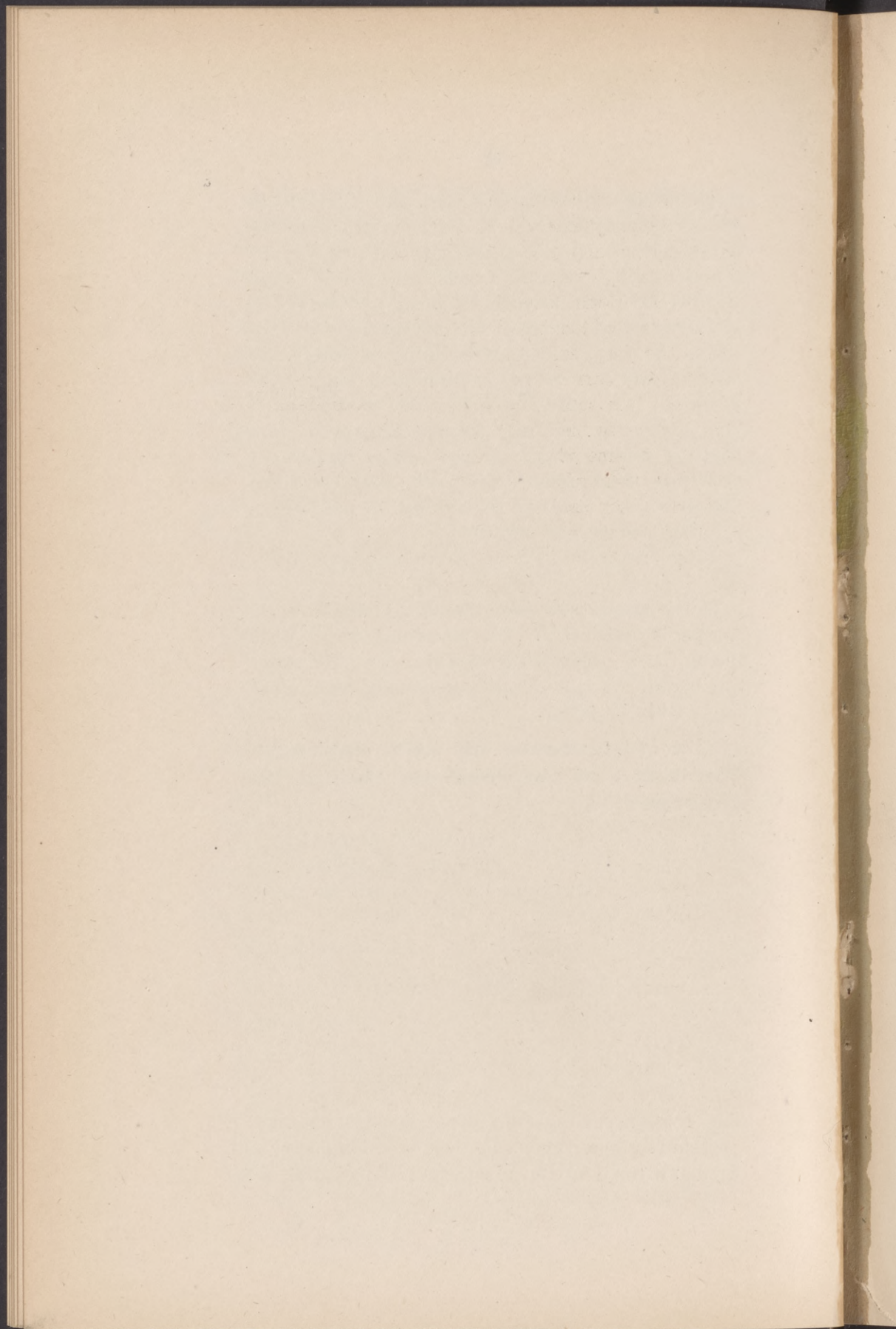
This error of omission was intensified by reading to the jury, and then declining to charge, the undoubtedly correct proposition that "in matters of doubt it is safer to acquit than to condemn." By this course the jury were at liberty to infer that the reverse of the proposition so repudiated should be their guide: or, at least, what the judge had previously said on the subject of the burden of proof was thereby nullified.

These errors the Supreme Court also ignored.

This is not a case where the Court should strain to uphold conviction. The affair was not within the spirit of the statute on which the indictment was based. It may even be questioned whether it was within its letter.

The judgments of the Supreme Court and of the Sessions should be reversed.

GILBERT COLLINS,
THOMAS S. HENRY,
Of Counsel with Plaintiff-in-Error.



(SEAL)

STATE OF NEW JERSEY, ss.:

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The State of New Jersey to our Judge of our Court of Quarter Sessions in and for the County of Essex, GREETING:—

Because in the record and proceedings, and also in giving of judgment upon a certain indictment in the name of the State of New Jersey against George Hill, for a misdemeanor in exposing to view two vile and obscene pictures in the said County of Essex, found in our Court of Quarter Sessions, in and for said County, tried heard and determined by the said Court, manifest error hath intervened to the great damage of the said George Hill, as from his complaint we have received information, we being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice be done him, the said George Hill, do command you that if judgment be thereon given that you do send the record and proceedings aforesaid, with all things touching the same, to our Justices of our Supreme Court of Judicature, under your seal and this writ, so that we may have them before our Justices of our Supreme Court of Judicature, at Trenton, on the fifteenth day of January, Nineteen hundred and four, that inspecting the records and proceedings aforesaid we may further do thereupon for correcting that error that which of right and according to law shall be fit to be done.

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WITNESS, William S. Gummere, Chief Justice of our Supreme Court of the State of New Jersey, at Trenton, the twenty-eighth day of December, in the year of our Lord, nineteen hundred and three.

WILLIAM RIKER, JR., *Clerk.*

THOMAS S. HENRY, *Attorney.*

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

The Judge of the Court of Common Pleas constituting the Court of Quarter Session of the Peace in and for said County of Essex, by virtue of the within writ to me directed, do certify and return to the Supreme Court of Judicature of the State of New Jersey, the plaint, judgment and proceedings whereof mention is made in said writ with all things touching the same and concerning the same

20 as I am therein commanded.

By order of the Court.

(SEAL) Given under the seal of the said
Court, this 23d day of January,
A. D. 1904.

ARTHUR HORTON, *Clerk.*

STATE OF NEW JERSEY, } *to wit:*
 COUNTY OF ESSEX,

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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 first Tuesday of April in the year of Our Lord nineteen hundred and three, by the Honorable William S. Gummere, Chief Justice of the Supreme Court of Judicature of the State of New Jersey, and Alfred F. Skinner, Esquire, Judge of the Court of Common Pleas, in and for said County of Essex, by the oath of William H. F. Fiedler, Richard D. Hopkins, Dr. Andrew M. Mills, Abraham Rothschild, Michael F. McLaughlin, John W. Vogel, Louis Lewis, Theodore R. Guild, Henry Aschenbach, Charles A. Keyler, Leon Stears, Charles E. Williams, Albert L. Hatfield, Henry Mills, Stephen Preen, William T. Plum, Michael A. Fitzsimmons, Joseph Samuels, Ernest C. Hinck. Samuel Myers, J. William Campbell, August J. Ehrlich, and William San Giacomo, good and lawful men of the said County of Essex duly summoned, 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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Essex County to wit, the Grand Jurors of the State of New Jersey in and for the body of the County of Essex, upon their oath.

Present that George Hill, late of the City of Newark, in the County of Essex aforesaid, on the first day of May in the year of Our Lord one thousand nine hundred and three, with force and arms at the city aforesaid, in the County aforesaid, and within

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the jurisdiction of this Court, did, without just cause, utter and expose to view of John J. Deering and Byram P. Johnson, two certain obscene pictures, one of which representing two men and one woman in a scene of lewdness and obscenity, so obscure, lewd, larconious, filthy and indecent that a minute description of the same would be offensive to the Court and improper to be placed upon the record thereof, wherefore a fuller description of the same is not set forth herein, and the other of which representing a negro with his private parts exposed, 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.

CHANDLER W. RIKER.

Prosecutor of the Pleas.

And afterwards that is to say, at the April term of 1903, of said Court on the twenty-second day of June, nineteen hundred and three, on which day the said Indictment was presented by the Grand Jury aforesaid, to the said Court of Oyer and Terminer, the said Justice aforesaid, did then and there order the said indictment to be handed down and delivered to the Clerk of the Court of Quarter Sessions Court in and for the said County of Essex, and then and there the said indictment was handed down and 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, the twenty-second day of June nineteen hundred and three at a Court of Quarter Sessions holden at Newark, in and for the County of Essex, before the Honorable Alfred F. Skinner, Judge of the Court of Quarter Sessions, George Hill, in the custody of William C. Nicoll, Sheriff of the County of Essex aforesaid,

and George Hill 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 for good and evil. He puts himself upon the country and Chandler W. Riker, Prosecutor of the Pleas for said State, for said County, in this behalf doth the like.

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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 seventeenth day of November, A. D., 1903, 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 and under the age of sixty-five by whom the truth of the matter may be better known, and who are not of kin to the said George Hill to recognize upon their oath whether the said George Hill is Guilty of the premises in the said Indictment specified, or Not Guilty because Chandler W. Riker, Prosecutor
etc. ~~for us~~, the said George Hill puts himself upon the jury, and the same is given to the parties aforesaid at the same place.

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At which day that is to say the seventeenth day of December, nineteen hundred and three, the December term of Court until which term the trial of this cause had been postponed at a Court of Quarter Sessions, holden at Newark in the county aforesaid before the Honorable Alfred F. Skinner, Judge of the Court of Quarter Sessions, comes the said Chandler W. Riker, who prosecutes as aforesaid, and the said George Hill and the Jury of whom mention is before made and by William C. Nicoll, Sheriff of the County of Essex, for this purpose empanelled and returned to wit, John Amend, Thomas Higgins, Robert Martin, Edward E. Holmes, Charles E. King, John W. Hoch, William R. Courter, William Brady, Harry Donohue, John

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Hughes, James H. Higbie and Arthur Stager, being called were sworn upon that jury, who to speak the truth of and concerning the premises, and thereupon the trial of this issue commenced before the said Court and jury, and continued when the jury returned into Court in charge of the officer sworn to attend them, and then and in the presence of the Prosecutor of the Pleas, defendant and Court do say upon their oath, that

10 they find the said George Hill Guilty in manner and form as charged in the indictment, and recommend him to the mercy of the Court.

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Judgment signed Dec. 28, 1903 } Whereupon all
 WILLIAM S. GUMMERE, *Judge.* } and singular the
 ALFRED F. SKINNER, *Judge.* } premises being
 seen by the Court now here fully understood. It
 is ordered on the twenty-eighth day of December,
 nineteen hundred and three, Ordered and adjudged 10
 that the said George Hill, be imprisoned in the
 County Penitentiary for the term of six months at
 hard labor, and stand committed until the costs of
 this prosecution are paid, which costs are taxed by
 the Clerk at the sum of Seventy-three dollars and
 ninety-seven cents.

And the said defendant, George Hill be in
 mercy,, &c.

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NEW JERSEY SUPREME COURT

10 20 30 40	THE STATE OF NEW JERSEY <i>Defendant in Error</i> —vs— GEORGE HILL, <i>Plaintiff in Error.</i>	}	<i>In Error.</i> <i>Reasons.</i>
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Afterwards, to wit, at the February term, 1904, of the New Jersey Supreme Court, comes George Hill, by Thomas S. Henry, his attorney and says, that in the record and proceedings aforesaid, and also in the matters recited and contained in the said Writ of Exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error, in this, ^{to} wit.:

1. That the indictment aforesaid and the matters therein contained are not sufficient in law to justify a criminal proceeding against the plaintiff in error.
2. That plaintiff in error was convicted of an offence not charged against him in the indictment.
3. That the judgment was given against the plaintiff in error, whereas, under the law of the land, the judgment should have been given and rendered in favor of the plaintiff in error.
4. That there was error in the verdict of the jury in rendering a verdict of guilty, whereas the verdict should have been not guilty.
5. That the evidence taken at the trial established the innocence of said plaintiff in error.
6. That the Court erred in refusing to review the evidence that was material, and also refused to charge as requested.
7. Because of the Judge's other errors during the trial.

8. Because the verdict was contrary to evidence.
9. Because under the evidence no crime was committed by plaintiff in error.

And the said plaintiff in error, George Hill, prays that judgment aforesaid be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he had lost by reason of the said judgment, etc.

THOMAS S. HENRY,

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Attorney for Plaintiff in Error.

A true copy,

WM. RIKER, JR.,

Clerk.

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NEW JERSEY SUPREME COURT.

10	THE STATE OF NEW JERSEY, <i>Defendant in Error,</i> against GEORGE HILL, <i>Plaintiff in Error.</i>	} <i>Joinder in Error.</i>
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20 And thereupon comes Henry Young, Prosecutor of the State of New Jersey in and for the County of Essex, and says that there is no error either in the record or proceedings aforesaid, or in giving the judgment aforesaid. And in behalf of the State of New Jersey, he prays that the said Supreme Court, before the justices thereof, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid ^{above} ~~have~~ assigned for error, and that the judgment aforesaid in form aforesaid may in all things be affirmed, etc.

HENRY YOUNG,
Attorney of Defendant in Error.

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ESSEX COUNTY GENERAL QUARTER
SESSIONS—DECEMBER TERM, 1903.

DECEMBER 17, 1903.

STATE,	}	10
vs.		
GEORGE HILL.		

Transcript of short hand notes of testimony taken in the above matter before his honor, Alfred F. Skinner, Judge, and a jury, at the Court House in the city of Newark, N. J., in the presence of Chandler W. Riker, Esq., Prosecutor of the Pleas, for the State, and Thomas S. Henry, Esq., for the defendant.

Mr. Henry: I desire to withdraw the plea of guilty for the purpose of making objection to the indictment.

The Court: I thought you moved the case. The Judge says he wants to withdraw the plea of guilty.

Mr. Henry: Not guilty.

The Court: You can make the objection without withdrawing the plea.

Mr. Henry: The indictment seems to be bad because it does not appear to state any offense. It sets out "did expose two certain pictures, one of which represented two men and one woman in a scene of lewdness, and something or another, so obscene, lewd, lascivious and indecent that a minute description of the same would be offensive to the Court and improper to be placed upon the records thereof, therefore, a further description of the same is not set forth herein, and the other of which representing a negro with his private parts exposed. Now it seems to me that there isn't enough

in that indictment to constitute a cause of action. There does not appear to be any crime set forth in the indictment. Whether the pictures are obscene or indecent or not it does not appear that they were indecent in the estimation of the defendant. Now, if he did not regard them as indecent then there is a lack of criminal intent on his part. Criminal intent is the essence of every crime and without that there can be no crime. There may be a difference of opinion. Some pictures may be indecent in the estimation of some people and quite decent in the estimation of other people. However, the test to be applied in this case is were those pictures indecent in the opinion of the defendant; did he so regard them.

Here is simply the averment that the pictures were lascivious, etc. Why they are lewd or what made them lewd does not appear. Now it seems to me to be a well recognized principal in criminal pleading that all averments in indictments must be in specific terms. You cannot charge any offense in generic terms. It has been held that to charge an offense in generic terms is bad the particulars of the offense must be set out.

Then the indictment also seems to be bad for this reason, there seems to be more than one offense set out in the indictment. He seems to be charged with having exhibited two pictures. Now, if the indictment is good the exhibition of one picture would be one offense, and if the indictment is good the exhibition of another picture would be another offense. There would be two separate offenses. If the jury believed that he did expose one picture and did not exhibit the other they might find him guilty of one offense, provided the two offenses were properly set forth. It seems to be one of the a, b, c's of criminal pleading that not more than one offense can be set out in one count. This indictment set out but one count

and yet there are two offenses contained in such count.

The Court: According to that there would have to be, in larceny, a separate count for each thing taken.

Mr. Henry: Why certainly.

The Court: Then we have never had an indictment for larceny that has been good. I do not think it is necessary to hear from the prosecutor. 10
The indictment charges the offense in the language of the statute and with sufficient particularity to apprise the defendant of what it is that he is charged with, and it is not necessary in my judgment to aver in the indictment that the defendant did this knowing it to be obscene and with indecent intent. He may tell the jury what intent he had in justification or defense. They are to determine whether or not it is obscene. The motive of the person charged with showing or presenting the obscene matter is not in my judgment relevant. 20
The statute intends to correct an evil which consists of an effect upon society, and that is the object of the statute, to prevent that. Anything that has that effect upon society and is within the description of the statute, then the motive of the person—

Mr. Henry: One point I want to impress upon your honor is the fact that a charge in the statutory language is defective.

The Court: This is not confined to the statutory language. There is specification as I heard your reading of the indictment. 30

On the question of two offenses in one count I think if the exposure or presentation of these two articles are part of the same offense and alleged as being part of the same offense there is no defect in the indictment because it names both. If they were shown at different times, different articles shown at different times it would constitute different offenses and ought not to be in the same count. 40

The count charges them with having been exposed at the same time.

Exception prayed, was allowed and is sealed accordingly.

ALFRED SKINNER. [SEAL.]
Judge.

10 JOHN J. DEERING, sworn on the part of the State.

Direct Examination by Mr. Riker:

Q. Where do you live? A. No. 2054 7th avenue, New York city.

Q. Do you know George Hill, the defendant in this case? A. I do, yes, sir.

Q. Where were you on the first of May last? A.
20 I was at the Globe Hotel, 353 Market street, Newark.

Q. Whom did you see there? A. I saw Mr. George Hill there.

Q. Have any conversation with him? A. I did.

Q. Where were you when you first met him? A. In the barroom.

Q. Did you see him at any other place? A. I saw him upstairs on the third floor, in room 7.

Q. How did you come to get up there with him?
30 A. He told me that he had some pictures up there and he would show them to me. He told the gentleman there to take me upstairs to room 7.

Q. You went up, did you? A. Hill went up first, and I and a man named Johnson went up afterwards.

Mr. Henry: I move that that be stricken out. Unless Johnson went up with him how does he know—

40 Witness: I say he went up with me.

The Court: He says Hill went up first and Johnson went up afterwards.

Mr. Henry: Did you see Johnson go up?

Witness: Yes, sir; he went up with me.

Q. When you got into that room whom did you find there? A. Found George Hill. The light was burning—gas was burning bright and Hill said “there they are,” pointing to this book that I have in my hand. “There they are.” “There are the pictures on the bureau,” he says, “when you get through turn the gas down low.” So I went over to the table and picked up this book and looked through the book, and looked at the pictures, also, some photographs that are there, and after I looked through it, started to go out—Hill, in the meantime, had gone into *the front room*, and as we started to go out Hill came back into the room, and I asked him what he wanted—what he would charge me for one particular picture in there, showing him that picture (indicating); he says “I wouldn’t sell that,” that and three others in that particular—

Q. Show us the picture that you referred to? A. This picture here (indicating). He says “those were made”—That is the picture.

Q. Is that the picture with two men men and one woman? A. Yes, sir.

Q. What kind of a scene is portrayed there? A. Very obscene.

Q. What was the other picture? A. The other picture was a picture of a nude colored man.

Q. Is that in the same book? A. It is among the—yes. He told me he knew this gentleman here, that he worked on the Bowery.

Q. That is a colored man with his person exposed? A. Yes, sir.

Mr. Henry: The picture will show.

Q. Now that picture is on page what of that book? It isn't numbered? A. It is not numbered. It is on the second page, I should call it, first, second, third page.

Q. It is on the first right hand page after turning the cover, is it? A. Yes, sir.

10 Q. And the other picture referred to is on the— about the 25th page, is it? A. Yes, sir.

Q. And you have marked the picture with a cross? A. With a cross, yes, sir.

Q. Just show it to the jury so that the jury will be able to identify it.

Mr. Henry: Do you want to call the attention of the jury to those two particularly?

20 The Prosecutor: Those two particularly. They are the ones named in the indictment.

Mr. Henry: But no other pictures?

The Prosecutor: Those are the ones we rely on.

Mr. Henry: Wouldn't it be just as well to detach them from the book?

The Prosecutor: I don't think so.

30 Mr. Henry: You are not going to have that book in evidence?

The Prosecutor: I think what is there and the book in which they are goes to the jury.

Mr. Henry: That is the very thing that cannot go to the jury.

The Court: There is nothing to be gained by it if they are capable of being detached.

40 The Prosecutor: The book will be destroyed.

Mr. Henry: The book is no part of the evidence in that case and cannot be under any circumstances. The effect of that would be to introduce a lot of evidence that is irrelevant and cannot have any bearing on the case.

The Court: The Court could not do anything except by some admission of ownership,—that this was the property of the defendant so that he could consent to its being mutilated. If he is willing to make that admission, or admit it was the book shown, then I can see my way clear to mutilate it.

Mr. Henry: We cannot do that because we contend that it is not our book.

The Court: Then there is nobody so far as the Court knows who can consent to the mutilation of the book. If it can be detached without mutilating it ought to be done.

Mr. Henry: I shall object to any thing going before the jury except those two particular pictures.

The Prosecutor: I don't know as we have come to the question yet. I am perfectly willing to have those other pictures bound up and the jury directed not to examine them, or the jury instructed that they are not to pay any attention to them.

Mr. Henry: That is not sufficient.

The Prosecutor: I don't see that I ought to be compelled to have this book torn?

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The Court: I do not think that anybody has a right to mutilate the book. If the detaching can be done without mutilation it ought to be done. If it cannot be done without mutilation then the only way we can do in order to keep the rest of the book from going to the jury, as it ought to be done, would be to bind it up or seal it in some way so that only the parts offered could be examined. Now the offer is simply to show to the jury the two pictures.

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Mr. Henry: My objection is as to those two pictures going to the jury unless the two pictures can be detached.

The Court: I have no hesitation about that. Is there anything, Mr. Deering, upon page 25 that has been referred to other than the picture that you have called attention to?

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Witness: There is a mark here, cross.

The Court: I mean any picture?

Witness: Any picture? Yes; this picture here.

The Court: I say any picture on the page?

Witness: There is no other picture.

The Court: Nor on the opposite page?

Witness: Nor on the opposite page?

The Court: So that at the place where the book is opened, showing that picture, there is nothing to be seen but that?

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Witness: But that.

The Court: You may show that to the jury.

Mr. Henry: You will give me the benefit of an exception?

The Court: To what?

Mr. Henry: To the pictures being shown.

The Court: To the pictures being shown I do not want it to appear that that is the fact. That is not the fact. This picture is being shown. 10

Mr. Henry: My objection is to the pictures being shown so long as the pictures are attached to the book.

The Court: All right, let the record show your objection.

Q. Now turn to the first picture, the picture in the first part of the book, of the negro. Does the book, opened at this point, show any picture except the picture of the negro showing his private parts? 20
A. No, sir.

The Prosecutor: I ask that this be shown to the jury.

Mr. Henry: I suppose this will come under the same objection, same ruling and same exception.

The Court: Yes. 30

Exception prayed, the same is allowed and sealed accordingly.

ALFRED F. SKINNER [SEAL]

Judge.

Q. Well now, after you had seen the pictures what did you do? A. I asked Mr. Hill if he would sell me that one, the one marked with the cross; he said "no, I couldn't part with that because that 40

one and three others, water colored, were made for me by a friend who was in State's prison, and the others in the book I have collected a good many years; I wouldn't part with any of them." I came downstairs—he turned out the light and I came downstairs.

Q. Who turned out the light? A. Mr. Hill.

Q. Was any one in the room with you when you were looking at these pictures beside Mr. Johnson?

10 A. Mr. Johnson.

Q. What Mr. Johnson is that? A. He lived down below—Mr. Byram P. Johnson.

Q. Who was he, friend of yours? A. No, sir; he was in the barroom—man was standing in the barroom. He lived 82 Union street.

Q. After that did you go downstairs or where did you go? A. Yes, sir; after that went downstairs.

20 Q. And from that you went where? A. Left for the train for New York.

Q. Ever come back to Newark again? A. Went back on the fourth of May with Mr. Anthony Comstock.

Q. Where did you go when you came back on the fourth of May? A. We went down to the same place, Globe Hotel; went down with Mr. Comstock and Officer Murphy.

Q. I asked you where you went? A. Where I went?

30 Q. Yes. A. I went to the Globe Hotel again.

Q. Was any of the detective force of the city of Newark with you? A. Yes, sir.

Q. Who? A. Detective Sargeant Murphy.

Q. Well, what did you find? A. And another Detective Sargeant who sits right behind him.

Q. Who else was with him? A. I forget the name now.

40 Q. Tyler? A. I forget his name; he is just immediately behind Murphy; executed the search warrant and found— When we entered the prem-

ises I saw George Hill; I said "George, here is a friend of mine, I want to show him that picture of the colored man;" "why," he says "hello," he says "I didn't recognize you at first in the dark;" "well," I said Hill, will you show my friend that picture;" he says "I cannot show it to you now because I haven't got it with me," and then he was told that we came after the pictures that he had, and he said that he didn't have them any more, that he had destroyed them. "You know better than that, you haven't destroyed them;" he says "yes, I burned them up." He was asked when, he said he burned them up the day before yesterday, he says. Mr. Comstock said "you showed them to Mr. Deering the other night;" he says "yes; I admit that, that I showed them to him, but I haven't got them now; I wouldn't lie to you, I destroyed them." Went upsairs. The detectives found that plaster paris cast in his room—

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Mr. Henry: I object to any reference—

A. (Continuing). And eventually I found the book and the other pictures in the woodshed directly—in the yard directly back of the saloon door hid under a pile of bags.

Q. Was there a search of the room made first, do I understand? A. Yes, sir.

Q. You did not discover either of those two pictures there A. Not in the room, no, sir.

Q. Where did you discover them? A. In the woodshed. 30

Q. Where was the woodshed with respect to the —
A. In the yard back of the saloon.

Q. What part of the woodshed did you discover them? A. In the corner under a pile of bags, where they had been hid.

Q. Who discovered it, you? A. I did, and Detective Sargeant Murphy was both making search.

Q. When you found that did Hill say anything?
A. Hill meantime was up to the police station or 40

up to headquarters—police headquarters. I had no conversation with him then.

Q. Did you have conversation with him at police headquarters. A. No, sir; I did not. Not after I found the pictures.

Q. Nor after he left the saloon? A. No, sir.

Q. Nor after you found the book? A. No, sir.

10 *Cross-Examination by Mr. Henry:*

Q. What is your business or occupation? A. I am assistant to Mr. Anthony Comstock, New York, Society for the Suppression of Vice.

Q. How long have you been connected with that society? A. Going on three years.

Q. You are a citizen of the city of New York. A. Yes, sir.

20 Q. Why did you visit the city of Newark on the day in question? A. I had received instructions of Mr. Comstock.

Q. Had you any communication with anybody else to visit the place? A. I don't quite catch the question.

Q. Had you received any intimation or invitation from any other person other than Mr. Comstock to visit this place? A. In the natural course—or at least Mr. Comstock had received complaint.

30 Q. I ask you if you had any invitation from anybody other than Mr. Comstock to visit this place in Market street? A. I had no invitation, no, sir.

Q. The only reason why you visited the place was because Comstock requested you to do so? A. Mr. Comstock had received complaint. I was obeying the instructions—

Q. I didn't ask you that. Please answer the question I put to you. The only reason why you visited the place was because Comstock requested you to do so? A. Yes, sir.

40 Q. When you reached the place who did you see there? Who did you first see? A. I met Mr.

Hill, Mr. Johnson; there were two colored men in the place.

Q. Did you see them all at the same time? A. Yes, sir.

Q. Did you see any of them privately? A. Not at that time; no, sir.

Q. Did you state the object of your visit? A. No, sir; I did not.

Q. Did you state why you visited the place? A. No, sir. 10

Q. Had you been drinking there? A. Yes, sir.

Q. You had been drinking a good deal? A. No, sir.

Q. How many times did you drink while there? A. I don't remember.

Q. Who did you drink with? A. I had a cigar with Mr. Hill and Mr. Johnson; we drank some small beers there.

Q. Four beers? A. Small beers; I don't know how many. 20

Q. Isn't it a fact that you drank whiskey? A. No, sir.

Q. Are you sure of that? A. I am quite sure of it, yes, sir.

Q. Didn't you have a few glasses of whiskey with Mr. Hill? A. I don't think so.

Q. You don't think so? A. No, sir.

Q. You are not positive about it? A. Didn't pay any particular attention to it, but I am quite sure it was small beers; in fact I know it was small beers. 30

Q. But you had seen Mr. Hill prior to your visit to that place? Yes, sir.

Q. Whereabouts had you seen him before? A. I had been there two or three days, the same place.

Q. The same place? A. Yes, sir.

Q. And you were a frequenter of that place? A. I visited there I think altogether four times.

Q. Four times? A. Or three times.

Q. Was it Mr. Comstock's request that you 40

visited the place before that particular time? A. Yes, sir.

Q. He requested you to go there that time? A. Yes, sir.

Q. And you hadn't any private conversation with Mr. Hill, did you? A. Well, I had a number of conversations with him.

Q. I mean private conversations? Did you have any private conversation with Mr. Hill on the visit
10 last May at the Globe Hotel? A. No, sir; had no private conversation; every conversation I had was in the presence of others.

Q. Did you have any private conversation with Mr. Bowers or Mr. Johnson? A. No, sir.

Q. Are you sure of that? A. Well, Johnson and I standing in front of the bar and Mr. Hill was away from time to time waiting on other customers; we were talking there but we were in the public
20 barroom.

Q. And you say you seen Mr. Hill about three times? A. Yes, sir.

Q. That was the extent of your acquaintance, was it? A. Yes, sir.

Q. And you had a number of drinks with him? A. We were there from probably 11 o'clock at night until about half past two in the morning.

Q. Half past two in the morning? A. Yes, sir.

Q. You made a night of it then? A. Sir?

Q. You made a night of it? A. Yes; except on
30 the last night.

Q. Now are you willing to testify—

The Court: Did I understand you to say except on the last night?

Witness: Except on the last night; I went away I think about half past one.

Q. Now, on the night of the first of May last what time was it when you entered the place? A. About
40 11 o'clock.

Q. And you staid there for how long? A. Till about half past one to two in the morning.

Q. There was nothing said about pictures until you brought the matter up yourself, was there?

A. Yes, sir, there was, on the previous visit—

Q. I mean on that particular— A. On that particular visit?

Q. Yes.

The prosecutor: Well now wait a minute. Let him answer. 10

A. He told me—

The Court: Wait a minute. He only has a right to answer the question put to him. He can tell other things some other time, some other way.

Mr. Henry: I want him to tell what took place that night.

The Prosecutor: General question. 20

The Court: He now makes it specific, as to that particular night.

A. Hill said to me that he would show me the pictures as soon as he got a chance.

Q. Did you ask to see the pictures? A. No, sir.

Q. You didn't? A. No, sir; did not.

Q. How did he come to say anything about pictures unless you asked to see them? A. Well, he had had a conversation with Mr. Johnson— 30

Q. In your presence? A. No; that was off to one side. I don't know what the conversation was.

Q. You don't know. Don't speak about the conversation you didn't hear.

The Court: Judge Henry, he isn't attempting to tell what was said, but he can testify to the fact of a conversation taking place, if that fact was within his observation, even though he didn't hear the words used. 40

Mr. Henry: Therefore he cannot testify to what was said, if he didn't hear it?

The Court: He hasn't tried to, hasn't started—he said there was a conversation off at one side.

Mr. Henry: I have no objection to his testimony to that extent.

10 A. Hill had previously stated to me,—had previously told me about this colored man's picture, and that he would show that to me some time and when Hill came to me afterwards and said "I will show you those pictures now," turning to Johnson he says "take him upstairs to room seven—

Q. Well, Hill told you that there were certain pictures in room seven, that was about it, wasn't it? A. No, sir.

20 Q. What did he say then? A. He told me—he told Johnson to take me up to room seven, and he would show me the pictures.

Q. One moment. We will have to go back a little farther. When was the first time that you and Hill had any conversation about pictures? Now, the very first time? A. The very first time was, I think, on my first night of my first visit there, he told me about this particular picture of the colored man.

Q. Then on that particular occasion, the occasion of your first visit you and Hill and some others had been drinking? A. Had been talking there—

Q. Pretty freely? A. Having refreshments from time to time.

Q. You and he had been drinking pretty freely, hadn't you? A. Not freely, no, sir.

Q. Had been drinking a good deal, first time, hadn't you? A. No, sir.

40 Q. How many drinks did you have there? A. I will say this. I pretended, on account of the character of the place,—I pretended to be rather—an inebriate when I went in there.

Q. Pretended to be what? A. I told Mr. Hill, who had been sitting in the back of the store reading a novel, that I had been off on a toot, and I was waiting there to meet a friend.

Q. You had been off on a what? A. On a toot, meaning on a spree.

Q. On a spree. That is what you told him? A. That was the reason why I was waiting there. Hill told me, he says "you know"—

Q. One minute. A. Hill said to me—

10

The Court: Just answer the questions.

Q. You told Hill that you had been on a toot? A. Yes, sir.

Q. And you meant by that you had been on a spree? A. That I had been off on a spree.

Q. That was true? A. No, sir; it was not.

Q. Then you lied to him? A. Yes sir.

Q. You lied to him. Now, what else took place? A. He told me—he says "at first I thought you were a detective." "At first" he said "I thought you were a detective," he says, "you know we fairies are very smart;" I said "Yes, I know that;" he says "I used to keep a place—I used to go down on Coney Island," mentioning the name on Coney Island,—mentioning the place down there; I said "yes, I thought I saw you down there." It was immediately after that that he stated that he had this picture of this colored man, that he was a waiter on Third avenue, New York, or on the Bowery.

20

30

Q. Now, isn't it a fact— A. That he would show it to me some time.

Q. Isn't it a fact that he said that the picture of the colored man was in room seven? A. No, sir; he did not.

Q. Are you sure of that? A. Yes, sir; positive.

Q. You didn't see the picture at that time, did you? A. No, sir; I didn't see the picture until the night of May first.

Q. Now when was the occasion of your second

40

visit? A. About a week after that, I should judge; three or four nights after.

Q. Was anything said about pictures then? A. We talked generally.

Q. Generally; and you drank generally? A. Yes, sir.

Q. Did you make any further misrepresentations the second night? A. I may have done so.

10 Q. Yes; part of your business to do so? A. It wouldn't do for me to go there and tell them I am a detective looking after them to make an investigation.

Q. You have no hesitation in telling a lie to accomplish your purpose? A. To make misrepresentation to find out whether the law is being violated or not or just to find out just what they are doing.

20 Q. You resort to lying and deception? A. No, sir; not lying and deception. If he asked me what my business was I wouldn't tell him.

Q. But at the same time isn't it a fact that in your profession that lying and deception are common practices? A. Not at all.

The Prosecutor: I object.

30 Mr. Henry: I submit when a man comes into Court and appears in the character of a complaining witness he should come into Court with clean hands. He must not attempt to smirch the character of some other man when his character is already smirched. He has admitted under oath that he lied.

The Court: On that occasion. Now isn't that sufficient?

Mr. Henry: Now I want to find out if he lied on some other occasion.

40 Q. Did you? A. I may have done so.

Q. You may have done so? A. Or give him evasive answers.

Q. You may have done so. Why don't you give me a direct answer? A. I wasn't under oath when I was talking to that man.

Q. You weren't under oath? A. No, sir.

Q. Then you do not consider it a crime to lie when you are not under oath?

The Prosecutor: Do you?

16

Mr. Henry: Yes; I consider it a very great offense. Moral guilt is just as great.

Q. Well now, was anything further said about pictures the second time? A. I don't remember any specific conversation.

Q. Don't remember that? A. About the pictures, no, sir.

Q. Now the third time. How did you come to go there the third time? A. I went there again— 20

Q. Yes. Did you ask Mr. Bowers if he knew anything about such pictures? A. No, sir; I did not.

Q. You knew Mr. Bowers was one of the proprietors of the house, didn't you? A. Yes, sir.

Q. And knew that there was some breach—an ill-feeling existing between Mr. Bowers and Mr. Hill, didn't you? A. I had so understood.

Q. You so understood? A. Yes, sir.

Q. And you never said a word to Mr. Bowers about any indecent pictures? A. Not at that place. 30

Q. At any time? A. Yes, sir; I had.

Q. You had? A. Yes, sir; I had asked him for information.

Q. And isn't it a fact that Bowers told you of this trouble between him and Hill? He told you about it, didn't he? A. Yes, sir; he did.

Q. Didn't he tell you that there was a case that Mr. Hill had brought against Mr. Bowers in the Court of Chancery? A. He told me there was some trouble between them. 40

Q. Told you about something— A. Yes, sir.

Q. And isn't it the fact that Bowers told you that he must in some way do Hill up, or words to that effect? A. No, sir.

Q. Are you sure of it? A. Yes, sir.

Q. Didn't he say words to that effect? A. No, sir; he did not.

10 Q. Now then, the third time that you were there, was there anything said about pictures then? A. I don't think so;; there may have been some casual conversation about it, but nothing specific.

Q. Now, do I understand you to say that the first time you saw these pictures which have been exhibited was the night of the first day of May? A. Yes, sir.

Q. And Hill hadn't those pictures in his possession, had he; on his person? A. Not on his person, no, sir.

20 Q. Not on his person. And isn't it a fact that the first time and the only time, until to-day, that you saw those pictures was in room No. 7 of that place? A. Was in room No. 7 of that place and in the woodshed in the yard.

Q. Oh, yes; the woodshed; I had forgotten about that? A. In the yard.

30 Q. Then previous to this trial the only times and places that you saw those pictures were in room No. 7 on the night of the first of May and in the woodshed subsequent to the first of May, is that correct? A. Yes, sir; and in the police court and here.

Q. In the police court? A. In the station house.

40 Q. Now do you know who the occupant of No. 7 was? A. It wasn't—it was—appeared to me to be a room that was kept for the purpose of being rented out; no one lived in there—that is, wasn't anybody's particular room. There was nothing in there but the bed and chairs and bureau, no fixings or anything; looked like an ordinary room in a hotel.

Q. It had the appearance of a guest's room, didn't it? A. Yes, sir.

Q. Didn't you know it wasn't Hill's room? A. No; I understood Mr. Hill said his room was in front.

Q. Mr. Hill's room was in the front? A. Yes, sir.

Q. Then it wasn't in Mr. Hill's room where you saw these? A. No, sir.

Q. Then as I understood Mr. Hill told you that this—you requested or manifested a desire to see the pictures the last time you were there, and he—you went up to the room and saw them in room seven, is that correct? A. I did manifest a desire to see the pictures. 10

Q. Yes. A. And Mr. Hill said that he would show them to me.

Q. And Mr. Hill told you where they were? A. He told me—told Johnson—

Q. Told Johnson where they were? A. To take me upstairs to room seven and he would—meaning himself—"I will show you the pictures," and Hill preceded me upstairs. 20

Q. So Hill preceded you upstairs? A. Yes, sir.

Q. And took you in room No. 7? A. He was in room No. 7 and had lit the gas, apparently; that is the gas was lit; when we came in he was just coming out of room seven, and he says "there are the pictures on the bureau, when you get through looking at them turn down the light, or turn down the light before you come downstairs. 30

Q. And that room was not Mr. Hill's room? A. No, sir.

Q. You knew who carried on the business in that place? A. I understood Bower was, Bower and Hill.

Q. Who? A. Mr. Bower and Mr. Hill.

Q. Don't you know that the business was in the name of a Mr. Clark? A. No; I didn't know it, sir. 40

Q. You didn't know it? A. No, sir.

Q. Now you say that these two pictures were attached to the book which has been produced? A. Yes, sir.

Q. And where was the book? A. The book was on the bureau.

Q. On the bureau? A. Yes, sir.

Q. In what position was the book, was it opened or closed? A. No, sir; closed.

Q. It was closed? A. Yes, sir.

Q. And did you open it? Yes, sir.

Q. You opened it and looked at the pictures? A. Yes, sir; looked at it.

Q. Yes. And you held open the book so that others could see the pictures? A. I held the book in my hand and Johnson and I looked through it; then Mr. Hill came in the room and I asked Mr. Hill about that particular picture, what he would take for it.

Q. That is the picture you wanted to buy? A. That is the picture I wanted to buy from Hill.

Q. There was a cover to this book? A. Yes, sir; same cover that is on there now.

Q. The book was in the same—lying on the bureau in the same position it is now? A. Yes, sir.

Q. Then there was nothing of an offensive character that was visible at the time you entered the room, was there? A. No, sir.

Q. And which was the one that you wanted to buy? A. The one on page 25, I believe it is; three pictures.

By the Court:

Q. I understand you to say that when you went up Hill was just coming out of the room? A. Just coming out of the room; that is meeting—just walking up toward the entrance of the room; he was inside of the room, but he was coming out of the room; he was—he hadn't crossed the threshold yet.

Q. And it was then he said "there are the pictures?" A. "There are the pictures on the

bureau, when you get through or before you come downstairs turn down the light."

Q. Then he came out? A. Then he went out of the room and went into the front room.

Q. Did he come back again? A. He came back just as we were turning down the light—Hill came back and came into the room.

Q. It was when you came back that you had this conversation? A. That I had this conversation, yes, sir.

10

Q. About buying the picture? A. About buying the picture.

Q. At the time you talked about buying the picture where was it? A. In this room seven.

Q. Where in room seven? A. In room seven between the bureau and the entrance; the bureau was about seven or ten feet away from the entrance.

Q. Was it in somebody's hand or lying down? A. It was in my hands.

20

Q. That is what I mean? A. Yes, sir; it was in my hands.

Q. And in what position? A. Opened at that particular page, when Mr. Hill came over and stood along side of me and I asked him about this particular picture. He said that that one and the other water colors, I think four altogether—

Q. You have said that? A. Yes, sir.

Further Cross:

Q. This was the picture that you said you wanted to buy? A. Yes, sir.

30

Q. What did you offer for it? A. Well, if he was selling tha—

Q. Did you offer any price? A. I didn't offer any price at all; I asked him what he wanted for it.

Q. Did you in fact want to buy it? A. If he was selling it I would have bought one.

Q. You would have bought that? A. Yes, sir.

Q. You would have purchased the picture? A. Yes, sir.

40

Q. Were you ever in room seven before that,—the first of May I think it was? A. No, sir; I never was upstairs in the building before that particular time.

Q. That was the first time you were ever in the room? A. Yes, sir.

Q. Do you know how that book got into the room? A. I do not, no, sir.

10 Q. You do not know. That is all.

DANIEL MURPHY, sworn on the part of the State.

Direct Examination by Mr. Riker:

Q. Mr. Murphy, do you remember going down to the Globe Hotel about the first of May? A. I went there on the fourth of May.

20 Q. At what time? A. In the afternoon about five o'clock.

Q. Whom did you see there? A. Well, Mr. Comstock, and Mr. Deering and Mr. Tyler, and I went upstairs and seen Mr. Hill.

Q. Where did you find Mr. Hill, upstairs? A. In the front room over the saloon.

Q. Do you know Mr. Hill for some time,—had you? A. No, sir; I didn't know him at all.

Q. This is the man, is it, you found? A. Yes, sir; that is the man we found there; yes, sir.

30 Q. You had some conversation with regard to pictures with him? A. Mr. Comstock did.

Q. What was said? A. He asked him where those obscene pictures were.

Q. Yes. A. And then Mr. Comstock made a search of the place and found this canopy that I see you have there. We found nothing else at that time.

40 Q. Did you make any further search? A. Later in the evening we received word, Mr. Deering and I, and we went down, and in the woodshed in the yard we found that book that is exhibited.

Q. (Producing book), A. Yes, sir; that is the book.

Q. Did you hear any conversation with regard to the destruction of the pictures? A. No, sir. When Mr. Deering and I went there in the evening Mr. Bowers took us out in the yard and showed us where the book was hid in the woodshed.

Mr. Henry: Mr. Bowers did?

Witness: Yes, sir.

10

Q. And you took the book? A. Mr. Deering took the book, yes, sir; took it to headquarters.

Q. Gave it up there? A. Yes, sir; and the next morning produced it in court, police court.

Q. And where has the book been since? A. Why the Court—the police court sealed the book and the canopy, and I fetched them up here and turned them over to Mr. Scales.

Q. Now are you sufficiently familiar with the book—did you look at it enough to be able to identify it now? A. Yes, sir; oh, yes.

20

Q. Look at the picture on the first page and see whether that was there, picture of a negro? A. Yes, sir; that was there.

Q. And look on page— A. My attention was called to that by Mr. Deering that night.

Q. Picture marked with a cross? A. Yes, sir.

Q. Was that there? A. Yes, sir; he called my attention to both those pictures.

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NOT CROSS EXAMINED.

EDWARD BOWERS, sworn by the uplifted hand on behalf of the State.

Direct Examination by Mr. Riker:

Q. Mr. Bowers did you keep the Globe Hotel on the first of May last? A. Yes, sir.

40

Q. How long had you been keeping it. A. It was then about a year.

Q. Do you know Mr. Hill here? A. I do sir.

Q. Was he in your employ at that time? A. Yes, sir.

Q. In what capacity; what were his duties there?

A. There was supposed to be a partnership existing between us.

10 Q. And did he assist in the barroom? A. Yes, sir.

Q. There every day, was he? A. Yes, sir.

Q. Have a room in the hotel? A. Yes, sir.

Q. Where was his room? A. Room No. 8, two flights up in front.

Q. Front, was that? A. Two flights up in front.

Q. Whose room was No. 7? A. That was a room—that was guest room.

Q. Do you see a book before you of pictures? A. Yes, sir.

20 Q. Picture book? A. Yes, sir.

Q. Did you ever see that before? A. Yes, sir.

Q. Where did you see it? A. Oh, I have seen it in several places.

Q. Did you ever see it in your hotel, down at the Globe Hotel? A. Whether I saw it there or not I wouldn't make affidavit, sir.

Q. Who had it when you saw it? A. Mr. Hill.

Q. Did you see it before you moved to the Globe Hotel? A. Yes; I saw it before that.

30 Q. And he had it at that time? A. Yes, sir.

Q. Now do you know where that book was found on the fourth of May last? A. Yes, sir.

Q. Where was it found? A. Woodshed in the rear of the house.

Q. Did you know who put it there? A. Yes, sir.

Q. Who put it there? A. One of the boys in the place.

Mr. Henry: Who?

Witness: One of the boys in the place.

Q. On the first of May did you see Mr. Hill in the place? Do you remember his being there the first of a May? A. I couldn't swear to the date; he was there pretty near every day.

Q. Do you know this gentleman? A. Yes, sir; I seen him.

Q. Did you see him there? A. Not on the first of May, no, sir.

Q. How many times have you seen him there to your knowledge? A. I seen him three times altogether. 10

Q. Were you present when Detective Sargeant Murphy was there? A. I was.

Q. And when the book was found? A. I was.

Q. Did you go out with them? A. Yes, sir.

Q. See the book found? A. Yes, sir.

Q. Where was it? A. It was under some bags in the wood shed.

Cross-Examination by Mr. Henry:

20

Q. Mr. Bowers, you and Mr. Hill have had some trouble, have you not? A. We have, sir.

Q. There is a suit pending in the Court of Chancery brought by him, is there not? A. I believe so.

Q. You haven't felt very good towards Mr. Hill in consequence of that? A. We haven't been; no, sir.

Q. Now, do you know how that book got in room seven? A. No; that I do not know; I do not know how it got there. 30

Q. Do you remember saying that an occupant of the room had left that with some junk? A. Well, I wouldn't swear to that, sir; but I know that there were some pictures left in the drawers in the store, where they were found—down in the saloon, and whom they belonged to that I didn't know; I didn't know who they belonged to.

Q. You don't know who left them? A. No, sir; I do not. 40

Q. Now, Mr. Bowers, you have had a number of conversations with me in the presence of your counsel? A. Yes, sir.

Q. In relation to the Chancery suit? A. Yes, sir.

Q. Quite a number of them? A. Quite some.

Q. Do you remember on one occasion in the presence of your counsel stating to me that you thought that that book was left in the room by a gentleman—
10 —previous occupant of the room? A. Yes; I might have said that.

Q. You did say that? A. I might have said that.

Q. And didn't you say it was with a lot of old junk that the previous occupant of the room had left? A. Well, I said that the things were found among a lot of old junk; I didn't state it was in seven or where it was, but that it was found among
20 a lot of old junk—just pictures.

Q. Didn't you say it was junk that a previous occupant of the room had left in the room? A. Well, with regard to the room I wouldn't say. I can state positively—

Q. You won't confine yourself to the room? And didn't you state then— A. I won't confine myself to the room, but I will state positively I told you it was among a lot of junk—among a lot of junk found, which was in the place when we got there.

30 Q. I will put the question in another form. Did you not state to me in the presence of your counsel that this book was found with a lot of junk that had been left there by a former occupant of the hotel? A. Yes, sir.

Q. You did say that? A. Yes, sir; that I said, but not in room seven; that I did not say.

Q. I didn't say about the room number? A. I didn't say it was room seven.

Q. It had been left in your place? A. It was

among a lot of old junk that we found when we took possession of the place.

Q. When you took possession of the place that thing was found with the junk? A. Yes, sir; I wouldn't say the book, but some of the pictures; some of the pictures. The book, of course, I don't know.

Q. And that that book and that junk was left there by a previous occupant? A. By some one who occupied the place previous to our taking the place. 10

Q. Yes; certainly? A. That was it.

De-Direct:

Q. And you don't know whether the pictures in that book—do you know whether the pictures in that book were any of the pictures that were so left? A. Well, that I couldn't make affidavit to, sir, because I paid so little attention to it that I really—I couldn't state positively. 20

Q. Were they in book form or were they in form like these when you saw them? A. It strikes me it was in that form.

Q. The form that I have in my hand? A. Yes, sir.

Q. On cardboard? A. Yes, sir.

Re-Cross:

Q. I don't want any misunderstanding about this. I want to know if you didn't state to me in the presence of your counsel that the book containing those pictures was found with a lot of junk at your hotel that had been left there by the previous occupant of the hotel? A. I wouldn't make affidavit with regard to my having said the book. That I will not say; but I said the pictures were found among a lot of junk which were left by some occupant of the place previous to our taking possession. I wouldn't say positively. 30 40

Q. You knew that Mr. Hill was charged with having exhibited two certain pictures, didn't you?

A. No, sir; I did not. I didn't know there was any two specific charges.

Q. You knew he was charged with something?

A. With exhibiting the pictures, yes, sir; exhibiting the pictures, not two; I didn't know how many.

Q. With pictures? A. Yes, sir.

10 Q. You knew what those pictures were? You had been told what they were? A. Yes, sir.

Q. And didn't you state that those pictures had been found when you went there with a lot of junk that had been left there? A. Yes, sir; I am just telling you I admit having told you that they were found there; I won't admit having said book; I won't say positively. I might have said book and not remember it.

20 Q. What I want to know is didn't you say then that the pictures that he is charged with having exhibited were found with a lot of junk that had been left there by somebody before you? A. Yes; but I didn't use the word book.

Further Re-Direct:

Q. Did you refer to any particular pictures? A. No.

30 Q. You didn't refer to any of the particular pictures that are in that book? A. No pictures; I said the picture.

Mr. Henry: The picture that he had been charged with exhibiting?

Witness: Yes; exactly so.

Q. You knew nothing about the indictment? A. No, sir.

40 Q. You did not know what pictures were referred to in the indictment? A. No, sir; I didn't state any specific pictures; I simply stated the pic-

tures; now I might have meant one, two—of course, pictures, I meant two; but I might have meant a dozen.

Further Crosss

Q. Now, Mr. Bowers, you knew that Mr. Hill was charged with having exhibited a picture of a negro exhibiting his privates? You knew that?

A. Well, I knew that was among them—I knew that was among the pictures that was charged. 10

Q. That was charged? A. That was one of them.

Q. And didn't you know that the other picture was one that related to two men and a woman? A. No.

Q. You knew he was charged with having exposed two pictures? A. I didn't know how many.

Q. How many? A. I didn't know how many.

Q. But you knew he was charged with having exhibited the pictures? A. Pictures, yes, sir; I didn't know there were any specific pictures he was indicted with having—for having exhibited; It might have been two, it might have been a hundred; I couldn't say. 20

Q. Isn't it a fact that when you moved into the place you found that book among a lot of junk?

A. I wouldn't say the book; I will say some of the pictures were.

Q. To the best of your recollection wasn't the book— A. To the best of my recollection, yes, sir. 30

Q. The book was found with a lot of junk? A. Yes, sir; to the best of my recollection.

Q. And to the best of your recollection that was brought there by somebody that took possession before you did? A. Who had possession previous to our taking possession.

The Prosecutor: We introduce the book and pictures in evidence and rest.

STATE RESTS.

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Mr. Henry: I do not see as there is any case against the defendant at all. I don't see that we have anything to deny.

The Prosecutor: Do I understand the defendant rests?

10 Mr. Henry: Why, no; if the Court thinks it is worth while for us to introduce any evidence we will do so, but it seems to me an unnecessary waste of time.

The Court: You must know the rule of law laid down in the Burnet case. If you make a motion to direct a verdict of acquittal on the ground of insufficient evidence I would have to ask you if you rested your case. I understand you to say you do not rest your case.

20 Mr. Henry: No, sir.

The Court: Under those circumstances I will not entertain a motion to direct so there is nothing to discuss.

Mr. Henry: It seems to me out of consideration for the Court and the jury that it would be better to end the thing right now.

30 The Court: It is in your power to end the case so far as testimony goes by resting the case. That is the only procedure we can take now.

RECESS.

EDWARD BOWERS, recalled on behalf of the defendant.

Direct Examination by Mr. Henry:

Q. Mr. Bowers, what was your position in the Globe Hotel; what were your duties? A. I took charge of it in the day time.

Q. You took charge of the business in the day time? A. In the day time, yes, sir.

Q. Did you attend the bar in the day time? A. I did, sir.

Q. What were Mr. Hill's duties? A. In the night.

Q. Night time? A. Yes, sir.

Q. Did he attend at the bar? A. Yes, sir.

Q. Was there anybody else to attend at the bar? A. At that time I don't think there was.

Q. Was your night trade heavy or light? A. Well, it was inclined to be good.

Q. You had customers going in and out all the time, didn't you? A. Yes, sir.

Q. And Mr. Hill was the only one that was there to attend to the bar? A. To the best of my knowledge; there was no one else employed.

Q. There was no one else employed? A. At that time.

Q. Had any one else attended the bar you would have known it, wouldn't you? A. Well, not being there I wouldn't have known it.

Q. You paid out the money, didn't you? A. Yes, sir.

Q. You didn't pay anybody but Hill? A. No.

Q. Then I say you would have been likely to have known? A. I would have been likely to have known—

Q. If anybody else was employed? A. Yes, sir.

Cross-Examination by Mr. Riker:

Q. You haven't forgot the young man that was there, about eighteen years old? Had he left at

that time? A. I don't think Hughy was working there at that time.

Q. Now how long did Hughy work for you there? A. I should judge about six months all told; six or seven months.

Q. And when did you go to that place? A. 22nd of May.

Q. So you think he was there the 22nd of May, 1902? A. 1902? No; he wasn't there then.

Q. No; I guess not? Now when did he go to work for you? A. Along about August.

Q. Along about August? A. Yes, sir.

Q. And he was with you till pretty near the first of the next July, wasn't he? A. I wouldn't say whether it was July or not.

Q. You know. Come, Bower? A. No; I think — July? I think it was long before July, because he was taken sick.

Q. When was Hughy taken sick? A. I think it was May.

Q. Eh? A. I think it was May or April; I am not sure.

Q. Were you there the day Hill was arrested? A. Yes, sir.

Q. He was there that day, wasn't he; the time he was arrested? A. Yes, sir; that is right; yes, sir; he was there. That is right, he was there; that is right.

Q. It was after the arrest that he left? A. That is right, yes, sir.

Q. I thought so? A. Come to think of it.

Re-Direct:

Q. Was he employed at that time; at the time Mr. Hill was arrested? A. Yes, sir.

Q. He was? A. Yes, sir.

Q. In what capacity was he employed? A. cleaning up.

Q. He didn't attend the bar? A. Carry drinks, cleaning up.

Q. Carry victuals? A. Carrying drinks.

Q. And carrying drinks? A. And cleaning up.

Q. Did he ever serve drinks behind the bar? A. Well, I think he has done so.

Q. Has he done so often? A. Not very frequently to my knowledge.

Q. Now where is this young man? A. He is dead.

Q. When did he die? A. Two months ago, I reckon; it may not be as long as that. 10

Re-Cross:

Q. Who was behind the bar the day that Murphy went down there to look for Hill? A. I was.

Q. You wasn't?

The Court: He says "I was."

Q. Who was behind the bar when you went out with them to show them where these things were? A. I left Hughy. 20

Q. Left him behind the bar? A. That is right.

Q. Well, he was behind the bar a good many times, wasn't he? A. Well, he might have been, yes, sir.

GEORGE HILL, sworn in his own behalf.

Direct Examination by Mr. Henry: 30

Q. Mr. Hill, what is your business and what was your business on the first day of May last? A. Liquor store business with—

Q. Mr. Bower? A. —my partner.

Q. On the first day of May last what was your business? A. Behind the bar serving.

Q. What did you run, was it a hotel, or grocery store or what was it? A. Hotel.

Q. And was there a bar attached to the hotel? A. Yes, sir. 40

Q. Now who did you run the hotel with? A. With Mr. Bowers.

Q. Now what were Mr. Bowers duties? A. Same as my own; day time; I was on night; twelve hours each.

Q. You were on duty night, and he was on duty day time? A. Yes, sir.

10 Q. Now when did your work begin? A. Six o'clock at night till six in the morning.

Q. And ended when? A. Six in the morning.

Q. Then at six in the morning you were relieved by Mr. Bowers? A. Yes, sir.

Q. Do you ever remember seeing this gentleman before? A. Yes, sir.

Q. He has been to that place a number of times? A. Several times.

Q. And did he drink every time he was at the place? A. Yes, sir.

20 Q. How did he drink, often or only a few times? A. They were coming pretty swift.

Q. Do you remember seeing him there on the night of the first day of May or third day of May?

A. I couldn't give you the dates. I know he was there. I couldn't swear to the dates. I don't remember the dates.

Q. I mean the last time he came? A. The last time he came with Comstock.

Q. Came with what? A. Comstock.

30 Q. The last time he came he came with Comstock? A. When he came to arrest me.

Q. What was his condition that night? A. He was sober the night he came the last time.

Q. The last time? A. Yes, sir.

Q. When was that, when he came with Detective Murphy? A. When he came with Comstock.

Q. That was night time or day time? A. That was afternoon, just about half past five, just before going on duty.

40 Q. What was his condition as to sobriety the last

time he was there at night? A. If he wasn't drunk he acted it good.

Q. What did he drink that night? A. Whiskey.

Q. How many do you suppose?

The Prosecutor: How many do you know.

A. They come pretty swift; I couldn't tell you. 10

Q. About how many? A. They came too swift.

Q. Now, he has said that you made certain statements about certain pictures that you had; certain pictures—or that you knew where they were; or something to that effect. Did you ever have such interviews with him or such talks with him? A. No.

Q. Never? A. No.

Q. Were you sober yourself? A. I was; I 20 looked after the barroom.

Q. Now on this night in question; what were you doing that night? A. Behind the bar.

Q. Behind the bar, and how was the trade that night, good or bad? A. It was very good; it wasn't bad.

Eh? A. It wasn't bad at all; they were very good.

Q. Did you have many customers or only a few customers come in and out that night? A. Very 20 good all the time, down at the depot you know.

Q. What? They are in and out all the time; at the depot, if not men somebody else; we keep open all night.

Q. He says you went up to room seven with him, is that true or false? A. I did not.

Q. Is that true or false? A. I did not, sir.

Q. The Prosecutor has produced a book containing some pictures, now just look at that book? A. I have seen it before.

Q. You have seen it before? A. Yes, sir. 40

Q. Was that book ever yours? A. No; not mine.

Q. Did you ever have any property or interest in that book? A. No; none whatever.

Q. Did you exhibit that book to— A. I did not.

Q. Wait a moment until I finish the question.

A. No.

10 Q. Did you ever exhibit that book to that gentleman? A. I never did.

Q. Did you ever exhibit that book to somebody else—who is Byram Johnson? A. No; I never showed it to Johnson.

Q. Did you ever exhibit the book to him? A. I did not. Byram Johnson was boarding in the house when I went there; he was boarding in the house after we went there; he knew as much about the house as we did ourselves.

20 Q. Who is Byram Johnson? A. All I know is that he boarded there; we never got any money out of him. I don't know where he works. That is what the row was over when I chased him.

Q. You and Mr. Bowers have had some unpleasantness about some business matters, haven't you? A. Yes, sir.

The Prosecutor: Do you propose to contradict Mr. Bowers?

30 Mr. Henry: I propose to re-enforce the evidence that is already in as to the animus of the whole prosecution.

The Court: Bowers has admitted that they had trouble and that there was feeling now.

Mr. Henry: Bowers I think did admit that there was a suit pending in the Court of Chancery.

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The Court: Yes.

Mr. Henry: Did I ask him who the complainant was?

The Court: You asked him if he didn't have a suit in the Court of Chancery.

Q. Who brought the suit? A. I brought the suit.

Q. Against him? A. Yes, sir. 10

Q. Now when did you first see that book? A. About four or five days after the place—when I was cleaning the place up.

Q. When you were cleaning the place up? A. Yes, sir.

The Court: "Four or five days after the —"

Witness: After we took charge of the place. 20

Q. Do you know how that book got in the place? A. I couldn't tell you that.

Q. And was it in a room that had been occupied?

A. No, sir; it was downstairs in the barroom.

When you first saw it? A. Yes, sir; that is where the photographs were.

Q. Do you know how that book got up to room seven? A. No, sir; I don't know nothing whatever about it. 30

Q. Now Detective Murphy has testified that that book was found, I think, in the yard under the woodshed? A. Woodshed?

Q. Do you know anything about the placing it there? A. No, sir; I do not; I don't know, not a thing about it at all.

Q. Did you place it there yourself? A. No, sir; I did not.

Q. Did you cause anybody to place it there? A. No; I did not.

Q. You did not? A. No, sir. 40

Q. Have you ever been convicted of crime? A. Never in my life, sir.

Q. How long have you lived here in Newark?
A. About two years now, going on two years, not quite.

Q. Then did you ever occupy room seven? A. Never in my life.

Q. What was your room in the hotel? A. No. 8, in front.

10 Q. And did you ever have that book or any of the pictures attached to that book in your possession? A. The only ones—I had some—were those pictures in my drawer.

Q. I am speaking about the book? A. No, sir; I never had nothing to do with that book at all.

Cross-Examination by Mr. Riker:

20 Q. Did you tell Judge Henry what kind of a business you ran there? A. Yes, sir.

Q. What kind of a business did you run? A. Same as any other business, sir.

Q. What? A. Same as any other business.

Q. Hotel? A. Yes, sir.

Q. Ladies and gentlemen? A. Yes, sir; transit business; close to the depot; that is what we are there for.

30 Q. And you found this book in the barroom when you went there? A. About four days after we got there.

Q. Year ago last May? A. Yes, sir; yes, sir: it was May when we went in, I think.

Q. And you were the proprietor of the saloon at that time? A. Half proprietor of the whole thing, sir, not only the saloon, upstairs and all.

Q. And you remained half proprietor of it—
A. Yes, sir.

40 Q. —until after your arrest? A. I was working days then, to get the place cleaned up—I was working days to get the place cleaned up.

Q. You were half owner of the property? A. Yes, sir.

Q. Of the business? A. Yes, sir.

Q. And continued so until after your arrest! A. Yes, sir.

Q. And you discovered this book in the bar-room? A. Yes, sir.

Q. Now what did you do with it? A. I left it where it was then. 10

Q. On the barroom table? A. No, sir; it wasn't on the barroom table, it was right underneath—

Q. Underneath the barroom table on the little ledge on the table? A. No, sir; underneath the counter.

Underneath the counter in the bar? A. Yes, sir.

Q. And you had it there all the time? A. Yes, sir.

Q. You saw it circulated through the saloon from time to time, did you? A. I did not. 20

Q. What say? A. No; I never saw it circulated.

Q. You saw it outside? A. No, sir; never saw it; it was laying under the counter, kept there from the time it was cleaned up until,—I guess—I losed the run of it altogether for months; I never saw it at all for months.

Q. You looked through it; knew what kind of pictures there were? A. Yes, sir; I have seen it.

Q. And you have seen that first picture of the colored man? A. Yes, sir; I have seen that too, sir. 30

Q. You saw the picture on page 25? A. Yes, sir; I seen that too.

Q. You saw that soon after you got the book? A. As I see it here; I saw the lot together, sir.

Q. When you first went in there? A. Yes, sir.

Q. And you were there talking to that man? A. Yes, sir; I was talking to him over the bar.

Q. You say he was drinking whiskey swift? A. Yes, sir; he couldn't walk straight. 40

Q. You saw him go upstairs then? A. If he wasn't drunk he played it off good.

Q. You saw him go upstairs? A. I certainly saw him go upstairs in the front room, with Johnson; they drank in the front room; I served them drinks in the front room.

Q. You were up with them? A. I served the drinks up in the parlor.

Q. Where is No. 7? A. Two flights up.

10 Q. And you went up as far as one flight? A. One flight up; I was drinking with them up there? A. Yes, sir; I went right down; I drank my drink up quick and went down.

Q. You went that far? A. Up to the front room I went and drank with them and went down again directly. It was—on the ground floor we charge ten cents for whiskey and in the parlor we charge fifteen cents; he had to pay forty-five cents for three drinks and there was an argument about it.

20 Q. What time of night was that? A. I guess it was around two o'clock.

Q. Around two o'clock? A. I wouldn't say for certain the time; I didn't look, but it may be around that time.

Re-Direct:

Q. Did I understand you to say you went upstairs? A. In the front room, sir; but never up to the second floor.

30 Q. What? A. I went up in the drinking parlor with them, but never the second floor; first floor I went and drank my drink and run down again, because I had nobody to attend bar for me.

Q. Didn't you say you were tending bar that night? A. Yes, sir; I was, and I went up and served the drinks and took my drink and come down again directly.

Q. Did you see any pictures while upstairs? A. Oh, no, sir.

ESSEX COUNTY GENERAL QUARTER SES-
SIONS—DECEMBER TERM, 1903.

STATE

v.

GEORGE HILL.

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PROSECUTOR RIKER, for the State.

THOMAS S. HENRY, Esq., for Defendant.

CHARGE.

SKINNER, J.

You have, gentlemen, the the story of Mr. Deering, the first witness for the prosecution. He tells you that this defendant took him into a room, or had him shown to a room in the hotel in which this defendant was a part owner and which he was engaged in running, having first told him that he had some pictures that he would show him; that he preceded the going into the room, on the very night that Deering says he saw them, by saying that he would show those pictures to him then. Somebody else was requested by this defendant to show Deering to the room. That when Deering got there Hill was there, just coming out of the room, and said to him "there they are, look at them." He says that afterwards, Hill having gone out and then having come back again, Hill opened the book and showed him the particular picture on page 25, the one marked with a cross. Deering also said, at another point in his conversation, that he showed this picture on page 25 to this defendant and asked him whether he would sell it. It is for you to determine whether he was speaking of the same time or whether Hill had

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shown him this picture at page 25 at another time and then later in the conversation, perhaps only a short time later, Deering in turn pointed to it and said "will you sell it." But he said that Hill opened the book and showed him that picture first.

Now Hill says that he did not. Of course it is for you to determine what was the fact; which one to believe. There was another man there, according to the testimony of Mr. Deering, who is not
 10 here either as a witness for the State or for the defendant. You have the testimony of those two men. Hill, however, admits that the book containing these pictures had been in his place, in his hotel, in his barroom, saying that he found it there when he and his partner took possession of the premises and in cleaning up, and that it remained there after that time, but he says he lost sight of it for several months, and he admits that he knew
 20 the character of the book,—the character of the pictures that it contained, and that these pictures that are here referred to were in it. He admits that on the night that Mr. Deering refers to Deering was there, that Deering and Johnson went upstairs, and he admits too that he went up, but he says he did not go up as far as room No. 7, he only went as far as the parlor on the first floor, he left his place at the bar and went up there to serve drinks and had a drink with them. He admits
 30 that, but he says he did not go up to room 7 and he did not show these pictures. It is for you to determine whether he did or not. The book was found in the woodshed on the premises connected with this hotel. There is no proof that this defendant personally put it there. The only evidence as to who put it there is that of Mr. Bower, who says it was put there by one of the boys in the hotel.

Now, Mr. Deering's credibility and the credibility of this defendant are matters for you to determine, not for me. Of course, in doing that, you
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take into consideration any interest that you think either of them may have; any interest that you think Mr. Deering may have as one seeking to punish this kind of offense, as one engaged in ferretting out that kind of offense, as a detective seeking to pursue and punish crime. Also the interest that this defendant has as the defendant to escape the consequences of such a charge as this and satisfy you of his innocence. Mr. Deering has admitted that when he went to this hotel, in the conversation that preceded the showing of the pictures, and in making the acquaintance of this man, that he told him untruths, that he lied to him. Of course, you will consider along with that frank admission the circumstances under which those untruths were told, the purpose with which he was there. He says he was there to try to detect crime, and he could not successfully detect crime by going in and declaring his purpose. He had to conceal it. That is frequently the necessity of the situation of a detective. Now it is for you to say whether you think that his admission that in that endeavor and under those circumstances he said something that was not true to this man is going to make you doubt the truth of the story that he tells you now under oath. That is for you to determine, not for me.

If Hill took this complaining witness into the room, or when the complaining witness was in the room, whether Hill took him in or not, if Hill showed these pictures to him, then he is guilty of the offense charged in the indictment, provided you are satisfied that the pictures are obscene. That is not for me to determine. That is a question of fact for your determination, whether these pictures are obscene. That you tell by an inspection of the pictures and applying to it your own standard of decency, or, at least, the standard of decency that you know prevails among decent men. The statute says that any person who without just

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- cause shall utter or expose to the view of another any obscene or indecent book, picture or other representation shall be guilty of a misdemeanor. Now, it is said that this defendant did not open the book. Upon that you will remember the testimony of Mr. Deering that the defendant did open the book, and then his other testimony that he pointed to the page and asked the defendant if he would sell it." But there is a word there besides
- 10 "exposed to view." The word "utter." It is an offense to utter the picture. Now, that is a peculiar, quaint, old word that perhaps would not be clear to you in its meaning. In fact it is not altogether clear to me. I think it is not an apt word to be used in this connection. It is more commonly used in connection with the crime of forgery. A man who offers forged paper as good is said to "utter" it, the offering it as good, and it is in something like that sense, no doubt, that the
- 20 Legislature has used the word here. Not that these pictures could be offered by anybody as good, but, in the sense that the word is used here, I think it means offering it to be seen, offering it to be viewed under such circumstances as would have a tendency to corrupt. The object of the Legislature and this statute is to protect the morals of the community, to prevent the degrading and corrupting influences that are exerted by obscene pictures upon the minds of those who come in contact with them, and, having that in mind, the Leg-
- 30 islature says anybody who utters an obscene picture commits a misdemeanor. That means any one who offers it to be seen—offers it to be seen under circumstances that would produce this evil that the Legislature is intending to prevent. Now, if this defendant took the complaining witness there or had him taken there or directed him to the room and said "I will show you the pictures" and then, getting him there, said "there they are, look
- 40 at them," did he not then offer them to be seen by

this witness Deering, whether or not he actually opened the covers of the book and pointed to any particular picture?

The defendant is presumed to be innocent until proven to be guilty. The burden of proving his guilt is upon the State. The State must meet that burden by satisfying you of his guilt beyond a reasonable doubt. The result of that is that if there remains in your minds a reasonable doubt, —not any kind of doubt but a reasonable doubt as to his guilt, you give him the benefit of that doubt, otherwise you convict. 10

The offense that is here prohibited by the Legislature—the offense that is said to have been committed by the language of this indictment is one that ought to be held up to the condemnation of all. It is no small matter to corrupt the morals of a single individual in a community. Every individual of a community is one in whom you and I have an interest because by the morals of the individuals do we get as a sum total the morals of the community that we have to live in and any offense against the morals of the community is one that ought to be dealt with sternly and severely. If the evidence satisfies you beyond a reasonable doubt that this defendant took Mr. Deering into that room or had him taken there, and then offered the pictures here referred to to be seen in the book or exposed the pictures to Mr. Deering's view, and if an examination of the pictures also satisfy you that they were obscene, then the offense has been committed that has been charged. 20 30

I am requested by counsel for the defendant to charge the jury, first, that the *onus* of proving everything bearing upon the charge against the defendant lies on the Prosecutor. I have already told you, gentlemen, that the burden of proof is on the State.

Second That the evidence must be such as to exclude, to a moral certainty, every reasonable 40

doubt of the guilt of the accused. I have stated the law of this State to you on the subject of reasonable doubt and the effect if there remains in your minds a reasonable doubt as to the defendant's guilt.

10 *Third*: In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person should suffer. That I decline to charge.

Fourth: The jury may not at their pleasure and without regard to the elements of credibility which the evidence of the accused may possess, reject it because of his interest, or, because they are not satisfied that it has been corroborated. It is the duty of the jury always to consider the evidence of the accused with all the evidence in the case. That I have already charged.

20 Mr. Henry: I desire to except to so much of the Court's charge as states that the defendant showed the pictures; to so much of the Court's charge as states that the defendant opened the book; to so much of the Court's charge as states that the book remained in the hotel from the time the defendant first saw it; to so much of the charge as relates to the defendant taking Deering to the room; to so much of the Court's charge as states that if they have a reasonable doubt that the defendant took Deering to the room and showed the pictures that the crime is complete, or something
30 to that effect. I also take a general exception.

ALFRED F. SKINNER [SEAL]

I do further certify that the foregoing is a true and perfect record of the trial and proceedings in the case of the State vs. George Hill, indicted for uttering and exposing to the view of John J. Deering and Byram P. Johnson, two certain obscene pictures.

ALFRED F. SKINNER [SEAL]

Judge.

NEW JERSEY SUPREME COURT.

NOVEMBER TERM, 1905.

THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

GEORGE HILL,
Plaintiff-in-Error.

In Error.

Affirmance and Re-
mittitur.

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The Court having heard the argument of counsel,
and inspected the judgment and proceedings re-
moved by the writ in this cause, and duly con-
sidered the causes assigned for error,

It is ordered that said judgment be affirmed, and 20
that the cause be remitted to the Essex County
Court of Quarter Sessions to be proceeded in ac-
cording to law.

Entered February 17, 1906.

On motion of,

HENRY YOUNG,
Prosecutor.

NEW JERSEY SUPREME COURT.

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THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

GEORGE HILL,
Plaintiff-in-Error.

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1. A defendant can be charged in the same count
of an indictment with uttering and also with ex-
posing to the view of another an indecent picture,
in violation of Par. 53 of the Act of 1898, p. §08.

2. Evidence of either uttering or of exposing to the view of another of indecent pictures, will support a general verdict of guilty upon such a count.

3. Where it appears that the defendant took a person into a room in which there was a book containing indecent pictures, and pointing to the book said, there they are, whereupon the person
 10 opened the book and inspected the pictures: *Held*, that the evidence was sufficient to support the charge of exposing the pictures to the view of another;

Held, that the evidence did not support the charge of uttering the pictures.

Argued at June Term, 1905.

Before the Chief Justice and Justices, Fort,
 20 Pitney and Reed.

THOMAS S. HENRY, for plaintiff in error.

HENRY YOUNG, for defendant in error.

The opinion of the Court was delivered by Reed, J. This writ of error brings up a judgment entered upon a conviction of the plaintiff in error for a violation of Sec. 53 of the Crimes Act of 1898, Ph. L., 1898, p. 808.

30 This section provides that any person who, without just cause, shall utter or expose to the view of another, or have in his possession with intent so to utter or expose to view or to sell the same any obscene or indecent book, pamphlet picture, et cet., shall be guilty of misdemeanor.

The indictment charged that George Hill did without just cause, utter and expose to the view of two persons two obscene pictures.

40 The counsel for the plaintiff in error asserts that the indictment is defective in charging two distinct offences; namely, the offence of uttering and also the offence of exposing to view two indecent pictures.

If this insistence possessed any substance, it is urged at a stage of the case too late to be cognizable by this Court.

State v. Lawson, 20 Vr. 258.

But this objection is entirely without substance.

The offence of uttering and that of exposing to view could each have been charged in a distinct count.

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But it is not essential to the validity of the indictment that they should have been so charged.

The rule is entirely settled that if a statute makes it a crime to do this or that, mentioning several things disjunctively, the indictment may, as a general rule, embrace the whole in a single count; but it must use the conjunctive "and" where "or" occurs in the statute, else it will be defective as being uncertain.

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Bish. Cr. Pro. Sec. 581.

People v. Davis, 56 N. Y., 95-101.

Comm. v. Grey, 2 Gray, 501.

State v. Price, 6 Hals. 203-215.

There are doubtless instances where the offences disjunctively set out in a statute are so dissimilar in substance, that a separate count for each may be necessary.

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But the offences created by the Statute now under consideration are not of this kind. The acts mentioned in *Sec. 53, supra*, all belong to the same transaction, each one of which may be considered as representing a phase of the same offense.

They could, therefore, with entire propriety be included in one count.

State v. Bartholemew, 40 Vr., 162.

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Our attention is next directed to the fact that there was a general verdict of guilty.

It is insisted that there was no evidence sufficient to support a verdict for either uttering or exposing to view; and it is further pressed that if only

an exposure to view is proven and not an uttering also, the offence charged is unproven and judgment should be reversed.

10 The testimony supporting the charges was this, namely: The defendant, Hill, was in a room where there was a book lying upon a bureau. In the book were the indecent pictures. Hill, pointed to this book and said to Deering, whom Hill had previously
20 promised to show some pictures—there they are—there are the pictures on the bureau. When you get through with them turn the gas down low. Derring went over to the bureau, or table, picked up the book and looked at the pictures. In the meantime, Hill had gone into another room but returned just as Deering, after examining the pictures, started to leave the room. Deering then asked Hill what he would charge for one of the
20 pictures. Hill said that he would not sell it.

If the jury believed this testimony it could draw the conclusion that Hill exposed to the view of Deering, the pictures, within the meaning of the statute. It is true that Hill, did not himself open the book in which the pictures were concealed. But he directed Deering to where the pictures were, and invited him by his words and conduct to inspect them. Hill was the exhibitor on this occa-
30 sion.

If he had taken Deering into a gallery of lewd pictures each covered by a veil, and had told Deering that there were the pictures for his inspection; it would matter nothing that Deering himself pulled aside the veils in making his examination. Hill, would still be the showman. He would be the one who, in the language of the statute, exposed the pictures to view.

40 So, in the present case, he exposed the pictures in the book as obviously as if he himself had opened the book and thus exhibited the pictures to the visitor.

While there was thus evidence of an exposure to

view, we are of the opinion that there was not evidence of an uttering of the pictures within the meaning of the statutory language. The word "utter" means to put out, to pass off. There was no attempt by Hill to do this with these pictures; to the contrary he refused to part with one of them.

It is true that there may be an uttering of forged paper or counterfeit money without an actual tradition of the paper or the money. Such an uttering rests upon a fact which cannot exist in connection with the subject matter of the present statute. The fact upon which an uttering without delivery may exist respecting spurious money or paper is that the money or paper may be asserted to be genuine when in fact false. When the assertion is made for the purpose of deception and to gain something by leading another to believe in the genuineness of the paper or money it amounts to an uttering. In the language of Mr. Bishop "An attempt to cheat by such an instrument (forged instrument) is an indictable attempt. This attempt is called in law an uttering."

2 Bish. Cr. Law, Sec. 605.

It is at once perceived that there was nothing in the exhibition of the pictures by Hill which was of the nature of a cheat.

There was no assertion that the pictures were not what they appeared to be. Indeed, the statute was not dealing with cheats. Those utterings which consist,—not in passing away—but in an attempt to use paper or money as a means of deceit, have no analogy with the utterings of indecent pictures. There being no delivery of the pictures or offer to transfer them, the charge of uttering them was not proved.

But it cannot be conceded that because there was evidence to support a conviction for exposure to view only, it follows that there must be a reversal of the judgment entered on the general verdict of guilty.

The general rule is that when an offence may be committed by doing one of several things, the indictment may in a single count group them together and charge the defendant with having committed them all, and a conviction may be had on proof of any one of these things without proof of the commission of the others.

- 10 *4 Elliot on Ev. Sec. 2714.*
 Roscoes Cr. Ev. 763.
 3 Russ on Cr. 105.
 Rese v. Middlehurst, 1 Burrow 399.
 Rese v. Hunt, et al., 3 Camp. 583-4.
 People v. Rynders, 12 Wend. 430.
 People v. Harris, 64 N. Y., 148.
 People v. Book, 91 N. Y., 5-13.
 Comm. v. Grey, 2 Gray, 50 3.
 20 *Comm. v. Morgan, 107 Mass. 199.*

The verdict was good although supported only by evidence of the exposure of the pictures to the view of Deering.

It is objected in the brief of the counsel for the plaintiff in error that the trial judge mis-stated the evidence in his charge to the Jury.

- 30 The error consisted in the statement to the jury that the State's witnesses had sworn that the defendant, Hill, opened the book and showed the pictures to Deering.

This error is not specified among the causes for reversal, the whole record being certified.

But it was not an injurious error.

The question was whether Hill showed the pictures.

In deciding this, it was immaterial whether Hill opened the book or invited Deering to do so.

- 40 Deering's testimony was equally credible whether he swore to the one or the other of these facts.

There is no other specification requiring remark.

The judgment should be affirmed.

A true copy.

WM. RIKER, JR.,
 Clerk.

The State of New Jersey, to our Judges
[SEAL.] of the Supreme Court.

Greeting: Because in the record and proceedings, and also in giving of judgment upon a certain indictment in the name of George Hill, plaintiff-in-error, and in the State of New Jersey, defendant-in-error, heard and determined by the said Supreme Court of the State of New Jersey, manifest in error hath intervened to the great damage of the said George Hill as from his complaint we have received information, we being willing in this behalf to correct the error in due manner if any there shall be, and that speedy justice be done to him, the said George Hill, do command you that if judgment be thereupon given, then that you do send the record and proceedings aforesaid, with all things touching the same to our Justices of our Court of Errors and Appeals, under your seal of the said Supreme Court, distinctly and openly this writ, so that we may have them before our Justices of our Court of Errors and Appeals at Trenton, on the tenth day of March next, that inspecting the records and proceedings aforesaid, we may further do thereupon, for correcting that error, that which of right and according to law shall be fit to be done.

Witness, William J. Magie, Esquire, our Chancellor and Presiding Judge of our said Court of Errors and Appeals, at Trenton, this twentieth day of February, in the year of our Lord, nineteen hundred and six.

THOMAS S. HENRY,
Attorney of Plaintiff-in-Error.

S. D. Dickinson,
Clerk.

The answer of the Justices of the Supreme Court, of the State of New Jersey, within named. The record and proceedings whereof mentioned 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.

WM. S. GUMMERE,
C. J.

[L. S.]

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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THE STATE OF NEW JERSEY,
Defendant-in-Error,

vs.

GEORGE HILL,
Plaintiff-in-Error.

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Afterwards, to wit, at the March Term, 1906, of the New Jersey Court of Errors and Appeals, comes George Hill, by Thomas S. Henry, his attorney and says, that in the record and proceedings aforesaid, and also in the matter recited and contained in the said bill of exceptions, and also in giving the verdict and judgment aforesaid, and in the judgment of affirmance by the Supreme Court, there is manifest error, in this, to wit:

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1. That the indictment aforesaid and the matters therein contained are not sufficient in law to justify a criminal proceeding against the plaintiff-in-error.

2. That plaintiff-in-error was convicted of an offence not charged against him in the indictment.

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3. That the judgment was given against the plaintiff-in-error, whereas, under the law of the land, the judgment should have been given and rendered in favor of the plaintiff-in-error.

4. That there was error in the verdict of the jury in rendering a verdict of guilty, whereas the verdict should have been not guilty.

5. That the evidence taken at the trial established the innocence of said plaintiff-in-error.

6. That the Court erred in refusing to review the evidence that was material, and also refused to charge as requested.

7. Because of the Judge's other errors during the trial.

8. Because the verdict was contrary to evidence. 10

9. Because under the evidence no crime was committed by plaintiff-in-error.

10. Because the Supreme Court affirmed the judgment of the Court of General Court of Sessions of the County of Essex on conviction of said plaintiff-in-error, whereas by the law of the land the said Supreme Court should, for the reasons assigned in said Court, or some, or one of them, have reversed the judgment of the Sessions and should have set aside the conviction of the said plaintiff-in-error. 20

And the said plaintiff-in-error, George Hill, prays that judgment aforesaid be reversed, annulled and altogether held for nothing, and that he may be restored to all things which he had lost by reason of the said judgment, etc.

THOMAS S. HENRY, 30
Attorney for Plaintiff-in-Error.

