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Writ of Error to Supreme Court.

WRIT OF ERROR.

Filed June 21, 1921.

New Jersey Court of Errors and Appeals

NEW JERSEY, ss.

The State of New Jersey, to our Justices of our
Supreme Court of Judicature, Greeting:

(SEAL)

Because in the record and proceedings, and also
in the giving of the judgment upon a certain in-
dictment which was in our said Supreme Court of
Judicature, before you between the State of New Jersey, defend-
ant-in-error, and George Claymonst, plaintiff-in-error, on a writ
of error issued out of our Supreme Court of Judicature to the
Judges holding the Court of Oyer and Terminer, constituting the
Court of General Quarter Sessions in and for said County of
Essex, as is said, manifest error hath intervened to the great
damage of him, the said George Claymonst, 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 Claymonst, do
command you, that if judgment be thereupon given, then you send
distinctly and openly under your seal the entire record, proceed-
ings and indictment aforesaid, with all things touching and con-
cerning the same, to our Court of Errors and Appeals, before
the Judges thereof, on the 5th day of July, next, and this writ,
that the records and proceedings aforesaid being inspected we
may cause to be done thereupon what of right and according to
law ought to be done.

WITNESS, Edwin Robert Walker, our Chancellor and President
Judge of our said Court of Errors and Appeals, at Trenton,
aforesaid, this 17th day of June, A. D. 1921.

THOMAS F. MARTIN,

Clerk.

JAMES R. McDERMIT,

Attorney.

CHAS. E. S. THORNE,

Of Counsel.

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Return to Writ.

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

WM. S. GUMMERE,
C. J.

Filed June 21, 1921.

THOMAS F. MARTIN,
Clerk.

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Writ of Error.

WRIT OF ERROR.

New Jersey Supreme Court

NEW JERSEY, ss.

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(SEAL) The State of New Jersey, to our Judges of our Court of Oyer and Terminer of the County of Essex, constituting the Court of General Quarter Sessions, in and for said County, GREETING:

Because in the record and proceedings and also in the giving of judgment upon a certain indictment in the name of the State of New Jersey, against one George Claymonst, for assault and battery and abuse, in the City of Newark, in the County of Essex, found in our Court of Oyer and Terminer and in and for said county heard and determined, manifest error hath intervened to the great damage of him, the said George Claymonst, as from his complaint we have received information, we being willing in that behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said George Claymonst, do command you that if judgment be thereupon given that then you do send the record and proceedings aforesaid together with all things touching and concerning the same, to us, under your seal, distinctly and openly, and this writ, so that we may have them before our Supreme Court of Judicature, at Trenton, on the 20th day of November inst., that inspecting the records and proceedings aforesaid, we may further do thereupon for correcting the 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 said Supreme Court, at Trenton, the 1st day of November, A. D. nineteen hundred and twenty.

ENOCH L. JOHNSON,

Clerk.

40

McDERMIT & McDERMIT,
Attorneys.

Return.

Presented in open court this third day of November, 1920.

WM. P. MARTIN,
Judge.

Bail fixed in the sum of \$25,000.

10

W. P. M.

RETURN.

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

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

(SEAL) IN WITNESS WHEREOF, I have hereunto set my hand and the official seal of said Court at Newark, N. J., this sixth day of January, A. D. 1921.

30

WM. P. MARTIN,
*President Judge of the Court
of Quarter Sessions.*

40

Indictment.

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

Be it remembered, that at a Court of Oyer and Terminer, holden at Newark, in and for the County of Essex, on the third Tuesday in September, in the year of our Lord one thousand nine hundred and twenty, by the Honorable William S. Gum- 10
 mere, Chief Justice of the Supreme Court of Judicature, of the State of New Jersey, and holding the said Court of Oyer and Terminer, in and for the County of Essex, New Jersey, by the oath of Joseph Van Vleck, Joseph H. Lucking, Mason Young, Jr., Edgar E. Van Cleve, Frederick Ehrlich, Anson B. Hildebrant, Joel L. Schlesinger, Fred Castle, Louis Pfeifer, Frank B. Heller, F. G. H. Fayen, Hesser G. McBride, M. D., William A. Jones, Jr., Felix A. Lunney, George F. Arthur, Albert R. Crabb, Charles F. Vogel, J. C. Conover, Willard P. Borden, Michael 20
 Fagan, Harry B. O'Connell, Nicholas G. Mariconda, George A. Naulty, good and lawful men of the said County of Essex, duly commissioned and then and there duly sworn and charged to enquire in behalf of the State of New Jersey, in and for the said County of Essex, it is presented in manner and form following, to wit:

Essex County, to wit:

The Grand Inquest for the State of New Jersey, and for the body of the County of Essex, upon their oath present, That 30
 George Claymonst, late of the City of Newark, in the said County of Essex, on the thirtieth day of June, in the year of our Lord one thousand nine hundred and twenty, with force and arms, at the City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, in and upon one Mary Jacieko in the peace of God and of this State then and there being, an assault did make, and her the said Mary then and there did beat, wound and ill-treat, and other wrongs to said Mary then and there did, to the great damage of the said Mary contrary to the form of the statute in such case made and provided and against the peace of 40
 this State, the government and dignity of the same.

And the Grand Inquest, upon their oath aforesaid, do further present, That the said George Claymonst, being then and there above the age of sixteen years on the thirtieth day of June, in

Plea.

the year of our Lord one thousand nine hundred and twenty, at the City aforesaid, in the County of Essex aforesaid, and within the jurisdiction of this Court, in and upon one Mary Jacieko in the peace of God and of this State then and there being, an assault did make, and her the said Mary then and there did unlawfully and carnally abuse, the said Mary, being then and there a woman under the age of twelve years, to the great damage of the said Mary contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

J. H. HARRISON,
Prosecutor of the Pleas.

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

And afterwards, that is to say on the thirtieth day of September, A. D. nineteen hundred and twenty, at a Court of Quarter Sessions, holden at Newark, in and for the County of Essex, before the Honorable William P. Martin, presiding Judge of the Court of Common Pleas, George Claymonst, in the custody of John R. Flavell, Sheriff of the County of Essex aforesaid, and the said George Claymonst being brought before the bar in his own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon him, how he would acquit himself thereof, says that he is Not Guilty thereof, and therefore for good and evil he puts himself upon the country, &c., and J. Henry Harrison, Prosecutor of the Pleas of said State, for said County of Essex, in this behalf doth the like.

Judgment.

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 eighteenth day of October, A. D. nineteen hundred and twenty, then next ensuing twelve free and lawful men, each of whom shall be a citizen of this State and resident within the County of Essex aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said George Claymonst, to recognize upon their oath whether the said George Claymonst is Guilty of the premises in the said indictment specified or Not Guilty because the said J. Henry Harrison, Esquire, Prosecutor, &c., as the said George Claymonst puts himself upon the jury and the same time is given to the parties aforesaid at the same place. 10

And afterwards, that is to say, the twentieth day of October, A. D. nineteen hundred and twenty, to which day the trial of aforesaid indictment was postponed, at the same Court of Quarter Sessions, holden before the Honorable William P. Martin, Judge of the Court of Common Pleas, comes the said J. Henry Harrison, who prosecutes as aforesaid, and the said George Claymonst, and the jury of whom mention is before made, and by John R. Flavell, Sheriff of the County of Essex, for this purpose empanelled and return to wit: after the following number were exhausted by the State 2, by the defendant 1, Christian M. Doerer, Albert B. Bingham, Harry W. Green, Frederick A. Williams, Robert Hegarty, Charles Merz, Hugo Tiller, Herold D. Starr, Edward M. Dolan, Ralph T. Ryan, James Green, Thomas F. Brown being called, were sworn upon that jury who to speak the truth of and concerning the premises and thereupon the trial of said issue was commenced and continued until the twenty-second day of October, A. D. nineteen hundred and twenty, when the jury returned into Court in charge of the officer sworn to attend them, and then and there in the presence of the Prosecutor, defendant and Court do say upon their oath they find the said defendant, George Claymonst, Guilty in manner and form as charged in the indictment, and so they say all. 30 40

Judgment.

Judgment Signed. Whereupon all and singular, the premises being seen and by the Court now
 November 1st, 1920. Wm. P. MARTIN, here fully understood, it is, on this first

Judge. day of November, A. D. nineteen hundred and twenty, ordered and adjudged that the said George
 10 Claymonst be committed to the State Prison for a term of not
 less than Twenty and not more than Thirty years at hard labor
 upon this conviction and from thence until the costs are paid
 which costs are taxed by the Clerk at the sum of Ninety dollars
 and sixty-seven cents, and the said defendant be in Mercy, &c.

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Edward Frank Kastner, direct.

ESSEX COUNTY COURT OF GENERAL QUARTER
SESSIONS.

Thursday, October 21, 1920.

STATE	}	<i>Indictment</i>	10
<i>vs.</i>		<i>No. 60.</i>	
GEORGE CLAYMONST.		<i>September</i> <i>Term, 1920.</i>	
		<i>Assault and</i> <i>Battery and</i> <i>Abuse.</i>	

Before Hon. William P. Martin, *J.*, and a jury.

For the State appears Wilbur A. Mott, Esq.

For the defendant appears Frank McDermit, Esq.

(A jury is drawn and sworn.)

Mr. Mott opens for the State.

EDWARD FRANK KASTNER, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Where do you live? A 154 Delancey street, Newark.

Q Are you single or married? A Married.

Q Have you children? A Yes, sir; three.

Q How long have you lived in Newark? A All my life; born in Newark.

Q And how long have you lived in Delancey street? A Thirty-three years.

Q Where do you work? A I work at the Mountain Ice Company, Murray street and New Jersey Railroad avenue.

Q Is that what we know as the Krueger Ice Company? A Yes, sir.

Q On the 30th day of June last, nine o'clock in the evening, where were you? A Why, we were down at Bound Creek at that time, along the Central Railroad.

Q What were you doing down there? A We went there to go swimming.

Edward Frank Kastner, direct.

Q Who was with you? A Myself and Salvatore Vella.

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

Q Where does he work? A He works for Henry Steers.

10 Q What time was it when you were down there, as near as you can fix it? A Well, we had left the pool room around about twenty minutes to eight; we left the pool room to go down there.

Q Twenty minutes to eight in the evening? A Yes, sir.

Q How long did it take you to go down? A That is about a thirty-five-minute walk.

Q Did you walk? A Yes, sir.

Q Well, was your attention directed to anything that night when you were down there? A No, not at the present time.

Q Well, later on? A Yes, later on.

20 Q Where was it; where were you when your attention was directed to something? A Why, east of the Pennsylvania Railroad.

Q On what street? A Bay avenue.

Q And had you had your swim at that time? A No, sir; we did not.

Q About what time was it when you were on the east side of the Pennsylvania Railroad on Bay avenue? A It must have been about ten minutes to ten.

30 Q And what happened? A Why, we heard a moaning; this here Salvatore Vella called my attention to a moaning in back of the billboard and he said, "Listen, don't you hear somebody moaning?"

Mr. McDermit. I object and ask to have it struck out.

Mr. Mott. Yes.

The Court. Your motion is too broad, I think. You move to strike out what Salvatore Vella said to him?

Mr. McDermit. Yes, sir.

The Court. Granted.

40 Q Then what did you do? A I put my hand up to my head here and I said—

Q Do not give us any conversation. You put your hand up to your ear and listened? A Yes, sir.

Q What did you hear? A I heard a moaning back of the billboards.

Edward Frank Kastner, direct.

Q Then what did you do? A Then Salvatore, he rushed to the billboard, to the end of the billboard, and this man had jumped out in front of him.

Q What man? A This George Claymonst.

Q Do you see him here? A Yes, sir.

Q Where is he? A The man sitting right there (indicating). 10

Q You are sure that is the man? A Yes, sir; positively sure.

Q Well, tell us what you did.

The Court. Pointing at the defendant, is he?

Mr. McDermitt. He is pointing at the defendant.

Q Tell us what you did. A This here man jumped out in front of Vella with a gun in his hand; Vella had uppercut him; he had punched him; he ran over towards me, within three feet away from me— 20

Q Who? A Claymonst.

Q Then what did you do? A He pulled the gun at me, right in front of my face.

Q Well? A Then I had picked up a stone and I had thrown it at him after he got past me.

Q Did you hit him? A No, sir; I did not.

Q What did he do? A He kept on running.

Q Then what did you do? A I says to Vella— 30

Q No, not what you said; just tell us what you and Vella did. A Well, we chased him.

Q How far did you chase him? A About two blocks in the freight cars.

Q He got away? A Yes, sir.

Q Then what did you do; did you go back? A Yes, sir.

Q Tell us what you found. A We went back and got to the billboard; this little girl had just walked out; she walked out within about three or four feet away from the billboard; the little girl was staggering just as though she was going to keel over. 40

Q Is this the little girl (pointing)? A Yes, sir; that is the girl.

Edward Frank Kastner, direct.

The Court. When the prosecutor asked the question, "Is this the girl?" and pointed to a little girl in front of the railing, to whom did he point, can you agree?

Mr. Mott. Mary Jacieko.

Mr. McDermit. Yes.

10 Q Well, then, what did you do? A Well, the little girl was staggering and she was going to fall when we grabbed her by her little dress; I held her up.

Q Did you notice anything about her clothing? A Yes, sir.

Mr. McDermit. Just tell him what you did; let him describe what he did.

The Court. Sustained. He should state first what he noticed about her.

20 Q Well, what did you notice about her? A We had noticed that the girl was in an awful state; she was misused something terrible.

Q How did you notice that? A Why, by the girl staggering and she was like in a faint that she could not stand up on her feet; I had to take her in my arms and put her in an army officer's car there to get her to the hospital or the station house as quick as we could; she was in an awful bad state.

Mr. McDermit. Will you try to keep your voice up?

Witness. I cannot talk any louder.

30 Q What did you notice about her? A Why, I had noticed the little girl was misused and her face was bleeding and her eye was all blackened and her mouth was all puffed up, as if somebody had hit her in the mouth, and her dress was all torn.

Q Tell me about her dress. A She was all blood on her dress and her dress was torn and I seen blood on her hands and face and all.

Q When did you next see the defendant, Claymonst, after that day, that night? A The next day.

40 Q Where? A In the Third Precinct.

Q Who went to the station house with the girl? A Me and Salvatore Vella.

Q You both went? A And an army officer from the army base.

Q In his car? A Yes, sir.

Edward Frank Kastner, cross.

Q Which station did you go to? A Third Precinct.

Q And when you got there whom did you see; do you remember what officer? A Why, it was—I don't know this desk sergeant's name, but the desk sergeant was right there.

Q Would you know him if you saw him? A Yes, sir; I would; I think that is the man (pointing).

10

The Court. Who?

Mr. Mott. Lieutenant Walton.

Q Go on and tell us where you saw him on the next day at the precinct. A Third Precinct. Why, they had brought a few photos in front of us to identify this man; they asked us if we can identify any of these pictures, but we—

The Court. You were asked about the man.

Q Did you see him yourself, not the photograph; did you see the man? A Yes, sir.

20

Q The next day, was it? A Yes, sir.

Q What time of day, about? A I could not just exactly say.

Q Well, forenoon, or afternoon, or evening? A Well, it was quite awhile; I could not remember whether it was in the morning or afternoon.

Q Tell us where you saw him? A In the Third Precinct.

Q Yes, whereabouts was it? A Why, Mr. Chenoweth and Mr. Messner had him there and they had taken us in and asked us if we could identify the man and I said, "Yes; that is the man."

30

Q Do you recall what kind of a night this was, dark or light? A Why, it was a moonlight night.

Q Do you recall whether there were any lights around or near the billboard where you found the girl? A Yes, sir; right across the way from the billboard.

Q What sort of light? A A big electric light; a regular street electric light.

Cross examination by Mr. McDermit.

40

Q How old are you? A Thirty three.

Q And what business were you engaged in on the day upon which you found this girl behind the billboard at night? A Iron worker.

Q What time of day had you finished your work? A 4:15.

Edward Frank Kastner, cross.

Q Where did you go after that? A Why, I went home and washed myself and had some supper.

Q And whereabouts did you live? A 154 Delancey street, right in from Van Buren.

10 Q How far is 154 from the place where you found this little girl at the billboard? A About three blocks and a half away.

Q South, in what direction? A Why, southeast.

Q Southeast? A Yes, sir.

Q Where did you go after you had your supper? A I went over in the pool room to get a pack of cigarettes.

Q What pool room is that? A Why, Malvern street.

20 Q And how long did you remain there? A Why, I got a pack of cigarettes and there was a friend in there and I asked him, "Do you want to throw a game of pool?" and he said, "Yes," and we only had one game of pool and I met Vella and I said, "What do you say, shall we go take a swim," and he said, "Yes."

Q At the time you left the pool room to go to take a swim what time was it? A About twenty minutes to eight.

Q How do you fix the time as being twenty to eight? A That is the time I judge it was.

Q Did you have a watch? A No, sir.

Q Was there any clock in the pool room? A Yes, sir.

Q Did you look at the clock? A I did not.

30 Q But you and he concluded to take a swim? A Yes, sir.

Q Which way did you go? A We went down Tyler street towards South street, and down South street to Bay avenue.

Q Along Bay avenue to Bound Creek? A No, not along Bay avenue; we went along Bay avenue to the Central Railroad and along the Central Railroad, on to Bound Creek.

Q How long a distance from the pool room is it to Bound Creek; how long a distance approximately from Malvern street to the point where you went swimming? A About a mile and a half.

40 Q And did you go in swimming? A No, sir; we did not.

Q And did your friend go in swimming? A No, sir.

Q Why didn't you go in swimming? A The water was too low, and when it is too low there is a black scum on the water.

Q How long did you remain there? A Didn't remain there; came right back.

Edward Frank Kastner, cross.

Q What time did you start off from Bound Creek? A Why, it takes at least about thirty-five minutes to walk down there.

Q Well, then, what do you give the time as, on what do you fix the time? A I should say about twenty minutes past nine we left there.

Q Twenty minutes past nine you started to go back? A 10
Yes, sir.

Q And you were on your way back, were you, when you discovered these moans or cries? A Yes, sir.

Q And you came back by the same way that you went down? A Yes, sir.

Q Came back along the line of the Central Railroad to Bay avenue and then followed Bay avenue north to where? A Yes, sir.

Q To what spot? A North to the billboard.

Q Well, are there any houses on Bay avenue? A Well, 20
there is two on the other side of the railroad, one on each side there.

Q And those are the only houses down there? A Yes, sir.

Q How far is this billboard from those houses? A About 250 feet.

Q And are there any other houses within the neighborhood of the billboard? A Yes, sir; on Clifford street.

Q And how far away from the billboard on Clifford street were there any houses? A Two hundred feet.

Q So that the houses on Bay avenue would be about 250 feet 30
and the next two houses to this billboard would be about 200 feet on Clifford street. Now, are there any lights on Bay avenue? A Yes, sir.

Q Whereabouts on Bay avenue? A Right across from the billboard, but this is the end of the billboard, the houses are behind and where you are is the light.

Q What is the next nearest light to that? A Well, I just exactly could not say the distance, but at least 200 feet, or 150 feet.

Q There is another light about 200 feet from that light there; 40
are there lights all along Bay avenue? A Well, right there it is an awful dark spot there; it used to be, and they turned around and put two lights there about two or three years ago.

Q Those are the only lights that there are on Bay avenue at night? A No, sir; all along there is lights.

Edward Frank Kastner, cross.

Q All along Bay avenue? A Yes, sir.

Q Starting from the railroad? A Starting from South street down.

Q About how far apart? A Well, 150 feet to 200 feet.

Q What kind of lights? A Regular electric lights.

10 Q Regular arc lights? A Those big street lights.

Q The same as they have in other sections of Newark? A Yes, sir.

Q How high was this billboard? A I should judge the billboard to be about ten feet, something like that.

Q How long, or wide was it? A Well, that is something I could not say; I ain't no carpenter.

Q Well, approximately, look at the distance in the room; you say it was about ten feet high and about how long did it run? A
20 About twenty-five feet.

Q Well, about ten feet high by about twenty-five feet in running length? A Yes, sir.

Q Which way did the billboard face; how did it run? On what side of the street was it? A It was on the left-hand side of the railroad going down and on the right-hand side coming up.

Q How does this street run, east and west, or north and south? A Well, it runs this way (illustrating).

Q (*By the Court.*) What do you mean by that? A Well, there is a curve where it goes under the Pennsylvania Railroad bridge.
30

Q (*By the Court.*) When you speak of the Pennsylvania Railroad do you mean the freight line? A This is the freight line; the main line of the freight line.

Q And how close to the freight line of the Pennsylvania is this billboard? A About fifty feet.

Q About fifty feet? A Yes, sir.

Q Now, you fix the time, as I understand you, to the prosecutor, about ten to ten as the time your attention was called to something and that you put your ear to the billboard and listened?
40 A I didn't put my ear to the billboard.

Q Well, to your head.

The Court. He put his hand to his ear.

Q Well, you put your hand to your ear, is that right? A Yes, sir.

Edward Frank Kastner, cross.

Q What time was that? A That must have been about a quarter to ten, at least, because we were there at least about five minutes before we got this army officer's car.

Q Do you fix the time as a quarter to ten as the time you arrived at the billboard? A Yes, sir.

Q And you fixed the time because you remained there about five minutes and you fix the time at about ten minutes to ten when you saw this girl, because you thought you were there about five minutes? A The way I am figuring this time, the time we got to the station house was a quarter before ten. 10

Q We haven't got there yet. Just wait. You had no watch with you? A No, sir.

Q And your companion had no watch? A No, sir.

Q So that you were estimating the time on account of the distance you traveled from the pool room to Bound Creek and from Bound Creek back to the end of this billboard? 20

Mr. Mott. I object. That is contrary to what the witness said. The witness said that he fixed the time from the time he got to the station house.

The Court. It is what he said and there was no motion made to strike it out.

Q How do you fix the time by your walking from the pool room to Bound Creek and from Bound Creek back to the billboard and fix the time as a quarter of ten; how do you do that?

A Why, I have been walking that Central Railroad for the last fifteen years; I would trap all over those meadows when the whistle used to blow at Waverly I would walk from my house to Bound Creek in thirty minutes and sometimes thirty-five and that is how I judge the time. 30

Q (*By the Court.*) Where do you work? A In the ice company.

Q (*By the Court.*) Do you work as an ironworker; where did you work? A At Port Newark.

Q Then, under no circumstances could it have been nine o'clock when you reached the billboard? A I say under no circumstances. 40

Q It may have been nine o'clock in the evening when you reached the billboard and found the child? A No, sir.

Q Under any circumstances could it have been a quarter to nine? A No, sir; it could not.

Edward Frank Kastner, cross.

Q Is there any possibility of your being mistaken, it might have been any time between eight and nine o'clock that evening?

A No, sir.

10 Q So that, in view of the fact that you go up there so often and have measured the distance before, that is, measured the time it would take you, you are sure of the time fixed, ten minutes to ten as the correct time that you found the child? A Yes, sir.

Q You cannot be mistaken about that? A No, sir.

Q You have never made any other statement as to time to anybody—I will withdraw the question.

Q After you picked up this child did you carry the child?

A Yes, sir.

20 Q And how far a distance is it from where you picked up the child at the billboard to where you brought the child to the police station on Van Buren street, how long a distance is that?

A I say about a half a mile.

Q Now, then, what is the name of the other party that was with you? A Salvatore Vella.

Q Is he here today? A Yes, sir.

Q What is his business? A Why, he was a laborer for Henry Steers.

Q Did he work where you worked at that time? A No, sir.

30 Q How long did you know him? A Well, I know him for at least eight years.

Q Who did you next see outside of Salvatore Vella and this girl that night immediately after you picked the girl up; who did you first see? A Nobody at all.

Q Was there any soldier there? A Yes; we hailed a car, an army officer's car.

40 Q Now, then, when was it; how long after you had taken the child was it that you hailed the army officer's car? A Why, when we had come back from losing this Claymonst—we had lost him in the freight cars—we came back and the little girl walked out and we had taken the girl and walked her within about fifteen feet to the railroad and this automobile was up quite a ways when we seen him coming down and I got in the road and stopped the army officer.

Q Well, that is after you had chased the man into the freight yards? A Yes, sir.

Edward Frank Kastner, cross.

Q The other man struck him with his fist in the face and gave him an uppercut, he flew past where you were and pulled out a gun on you? A He didn't fly past me so fast, he did not go so fast.

Q Well, then, he pulled a gun on you? A Yes, sir.

Q Did you turn around? A No, sir.

Q Did you say anything to him? A No, sir.

Q Did he say anything? A No, sir. 10

Q Was there anything said at all of any kind? A Not as I know.

Q What part of the body did he point the gun at you? A He had it up to my face.

Q And passed you by then, did he? A Yes, sir.

Q Not running? A He stopped first and then he ran; he stopped to shove it in my face; he was at least three feet away from me when he had pulled the gun, from two and a half to three feet when he pulled the gun on me and this Vella had staggered him with the punch he gave him, and it was only about ten or fifteen feet I was from the billboard when he passed me and he kind of hesitated when he pulled the gun, and I said to Vella when he chased him, I said, "If he didn't shoot me this time he won't take chances to shoot the second time," and then we chased him. 20

Q How long after he had pointed the gun did you chase him? A Just under the railroad bridge to the box cars and lost him there.

Q Did he have the gun in his hand when he came to you or did he pull it out of his pocket? A When Vella met him he had the gun. 30

Q Did he have the gun when he was struck by the other fellow, do you know? A No, sir; I don't know.

Q How far away was Vella from you at the time he struck the man that was down there? A About ten or fifteen feet away from me.

Q Couldn't you see that distance whether he had a gun in his hand? A No, sir; I didn't see no gun in his hand at that time. 40

Q Did you see the man's hands at that time? A No, I didn't because he was down like that (illustrating).

Q What part of the body did Vella strike the man on; just indicate to the jury. A Why, he said he had uppercut him, and I seen him; he hit him under the chin.

Edward Frank Kastner, cross.

Q That is what you call an uppercut? A Yes, sir.

Q Which hand did you strike him with, right or left? A I couldn't say what hand he hit him with.

Q Then you couldn't get a chance to observe the other fellow's hands there to see whether he had a gun? A Well, I
10 turned around to light a cigarette and I was puffing on the cigarette when he ran up.

Q Oh, during the excitement, while the uppercut was going on, you lit a cigarette? A No, not then; I had already lit the cigarette.

Q How long after you lit the cigarette was it the uppercut came? A About a few minutes.

Q You were not afraid of the pistol, or anything of that kind, it didn't unnerve you, the fact that a man put a pistol in your way and your companion just gave him an uppercut; that
20 didn't excite you? A Why, I was looking in that direction when Vella had uppercut him, but I didn't see the way he had hit him until he came past me.

Q You didn't go to help your friend? A I was waiting for him to come at me; I seen him uppercut him.

Q Yes, you were waiting for the excitement or the trouble to come towards you fifteen or twenty feet away? A Well, it happened so quick.

Q And after it was all over the revolver had been pulled and the pistol was pulled on you and you picked up a stone and
30 followed after the fellow that ran away and threw it after him?

The Court. The witness is entitled to have an opportunity to answer your questions. Answer the first question.

Witness. Why, he passed me with the revolver in his hand, you see; when he come from the back of the billboard he must have had the revolver in his hand.

Mr. McDermitt. I object to "he must have had the revolver in his hand."

40 *The Court.* Granted.

Witness. Why, he must have had it.

Mr. McDermitt. I ask to strike it out.

The Court. Strike it out.

Witness. He had the revolver in his hand.

Edward Frank Kastner, cross.

Q When he reached you? A Yes, sir.

The Court. How about the stone part of the question?

A Why, he got a few feet away from me when I picked up the stone to throw at him.

Q How big a stone was it? A Well, a small stone, about that big (illustrating). 10

Q A half a pound stone? A No, not a half a pound; a regular stone you see along the highway.

Q It was not a cobble stone? A No, sir.

Q Or a stone weighing two or three pounds? A No, sir.

Q Just a stone you found along the road and you fired that at him? A Yes, sir.

Q How far was he from you when you fired the stone? A About from ten to twelve feet, at least, or fifteen feet. 20

Q What time did the soldier come there with the machine?

A Why, it must have been about ten minutes to ten.

Q I understood you to say that you first got there about a quarter to ten, is that right? A Yes, sir.

The Court. You were going to say something more when you were interrupted.

Witness. I was going to say ten o'clock; it would take us about fifteen minutes to get there.

The Court. Now, go on with your answer.

Witness. I should judge it would be about ten o'clock when this here army officer, when we hailed him; at least ten o'clock. 30

Q All right. Then you say you fixed the time at ten o'clock when the army officer arrived on the scene at the billboard? A Yes, sir.

Q And the army officer accompanied you and accompanied Vella and the child? A Yes, sir.

Q To the Third Precinct Police Station, is that right? Then you all went there in the machine? A Yes, sir. 40

Q You didn't carry the child over to the Third Precinct? A No, sir.

Q The child was put in the machine and taken from the scene down to the Third Precinct with you and the soldier and Vella?

A No soldier; he is an army officer.

Edward Frank Kastner, cross.

Q Well, army officer? A Yes, sir.

Q Well, he was an army officer? A Yes, sir.

Q What army officer was he; what army? A Well, I don't know his name.

Q I didn't ask you his name; what uniform did he wear, what
10 army? A Regular army officer's uniform.

Q Well, what army, what country? A United States uniform.

Q You then got to the police station at what time? A About a quarter-past ten.

Q Did you look at the clock, finally, then, at the police station? A Yes, we did.

Q And the police clock showed a quarter after ten? A Yes, sir.

Q You are sure you looked at the clock? A We asked the
20 time up there; I asked the army officer when we got there and I asked him what time it was and he pulled out his watch and said just a quarter after ten.

Q And this occurred at the police station, the army officer pulled out his watch and said quarter after ten? A Yes, sir.

Q Now, there is no possibility of your being mistaken about the statement of time that you have mentioned? A No, sir.

Q Do you know where Adams street is? A Yes, sir.

Q Do you know where Market and Adams street is? A Yes, sir.

Q How far is Market and Adams street from the billboard
30 down along Clifford street, how many miles or blocks? A That I cannot say, how many miles.

Q You know Adams street? A Yes, sir.

Q You know Adams street runs across Market street and you know where South Market street is, don't you? A Yes, sir.

Q Now, how far is that from Clifford street, if you know, how many miles?

The Court. What street?

Q From Clifford street where the billboard is. He is talk-
40 ing about Bay avenue and Clifford street, about a curve in the road. How far is this from where the billboard is?

The Court. He said, if my recollection is correct, that the billboard is on Bay avenue about fifty feet this side

Edward Frank Kastner, cross.

of the Pennsylvania freight lines; is not that correct; is that what you said?

Witness. Yes, sir.

Q (*By the Court.*) Do you know where Clifford street is?

A Why, Clifford street is right opposite the billboard.

Q (*By the Court.*) Opposite the billboard? Yes, sir; the billboard is back of Clifford street.

Q How far is it from that point from Adams street and Market street; have you any idea? A I should judge it to be about twenty blocks at least.

Q What distance do you call twenty blocks when you reduce it to miles? A Well, that is something I cannot say.

Q Do you call ten blocks a mile, would you? A Well, you could.

Q As far as from here to Market street depot, from the court house? A I haven't any idea.

Q How far do you think it is from the court house to Market street depot? A At least three-quarters of a mile; I would say three-quarters of a mile.

Q How many blocks do you think it is from the court house to Market street depot? A That is something I never figured out.

Q Well, it is a long distance, and you believe Adams street from this point is about twenty-odd city blocks? A Yes, sir.

Q Now, did you make out any statement at the police station when you came in there at quarter after ten that night?

A Yes, sir.

Q And did you sign the statement? A Yes, sir.

Q Who took your statement? A Why, Chenoweth and Messner.

Q And it this the gentleman on the first bench here; stand up, Chenoweth; is that the gentleman? A Yes, sir.

Q Did you go upstairs with this gentleman—did you go upstairs from the first floor to the second floor with those detectives? A Yes, sir.

Q How long were you up there giving the statements? A Why, about a half an hour.

Q And was your friend, Vella, with you during that entire time? A No, sir.

Q Did Vella give any statement? A Yes, sir.

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Edward Frank Kastner, cross.

Q Did Vella give a statement in your presence? A No, sir; he did not.

Q Did Vella sign any statement at all? A Yes, sir.

Q Did he sign a statement? A I think he did.

10 Q And did he sign the statement in your presence? A No, sir; he did not.

Q Did they take the statements of you and Salvatore Vella separately? A Yes, sir.

Q Then you did not hear the questions they put to Vella? A No, I did not.

Q Did they read the statement; did they read the statement to you that you signed there that night before you signed it? A Well, the next day they read the statement to me.

Q No, that night.

20 *Mr. Mott.* One minute.

Mr. McDermit. I beg your pardon! I want to get my question in.

The Court. What is the objection?

Mr. Mott. The witness tried to explain something about the next day.

The Court. What is the purpose of this examination?

30 *Mr. McDermit.* The purpose of this examination is to show the time and circumstances and show any statement he may have made at that time which may conflict in any way with any evidence which he may give here.

The Court. Why do you not confront him with that statement?

Mr. McDermit. I have not any statement to confront him with.

Mr. Mott. If you ask for it you will get it.

The Court. Is the purpose to confront the witness with a written statement?

40 *Mr. McDermit.* It may be; I have not seen the statement.

The Court. Is that the purpose?

Mr. McDermit. It may be for that purpose.

The Court. Then the best way is to give him the statement.

Edward Frank Kastner, cross.

Mr. McDermit. Well, with all due respect to your Honor, I do not expect to do that at this time.

The Court. Well, go on.

Q When did you next visit the police station? A We were detained there.

Q You were kept there? A Yes. 10

Q And you were held until the morning? A Yes, sir.

Q And brought before the court, were you? A Yes, sir.

Q What was said to you, if anything, in court there in regard to this matter; what statement did you make in response to any questions put to you in court there in the morning in regard to finding this child at the billboard?

Mr. Mott. I object to that question, because it is compound and I think improper. The question was, "What did you say and what was said to you." 20

The Court. It is objectionable. Sustained.

Q You were brought, after being detained there all night before the Judge in the morning, were you not? A No, sir; we were not.

Q Who were you brought before? A We were not brought before anybody then.

Q Did you make any inquiry while you were there, held there overnight, of anybody? A No, sir.

Q Did you know why they locked you up? A For a witness, detained us for a witness, yes. 30

Q Locked Salvatore Vella up for a witness, too? A Yes, sir.

Q Did you get out in the morning? A Yes, sir.

Q Did you furnish any bail to get out? A No, sir.

Q When did you next go back to the police station after being released that morning? A It was in the morning—it was in the afternoon; until the afternoon.

Q Let us see if I understand you. You were kept from quarter after ten in the Third Precinct Police Station until what time the next day before you were released? A Well, in the afternoon, it was. 40

Q Until the afternoon? A Yes, sir.

Q And what time in the afternoon was it you were released?

A I should judge it to be about four o'clock.

Edward Frank Kastner, cross.

Q Up to that period of time had you been brought in the presence of any judge or magistrate down there? A No, sir.

Q Do you understand my question?

The Court. He said, "No, sir."

Witness. I understand it.

10

The Court. Talk out loud.

Q When was it you signed the written statement; was it in the afternoon, the time you were discharged, or was the statement you signed in the early part of the morning? A Signed it in the afternoon.

Q And during that period of time how many conversations did you have with the detectives with regard to what took place down at the billboard? A Twice.

Q How many? A Twice.

20

Q Who were the detectives that interviewed you during the twelve hours that you were held there? A Why, Chenoweth and Messner, and I don't know that other man over there.

Q (*By the Court.*) Which one is he? A (*Pointing.*) No, that other man over there back of Messner.

The Court. The one standing?

Witness. Yes, sir.

The Court. The man back of Messner?

Mr. Mott. Is that the man?

30

Witness. Yes, sir.

The Court. What is his name?

Witness. I don't know his name.

The Court. What is his name? To whom does he point? ask the witness.

Q Who do you point to? A Schumacher.

Q What time was Salvatore discharged? A At the same time.

Q And were you permitted to stay together during the twelve hours you were there, or were you separated? A We were separated.

40

Q When was it, after you say the defendant had passed you with the gun in his hand and pointed it at your face, when was it you next saw him and where? A The next day at the Third Precinct.

Edward Frank Kastner, cross.

Q At what time in the day? A I could not say what time it was.

Q Now, was it in the morning of the next day while you were in custody, or was it in the afternoon at the time you were discharged? A It was in the morning.

Q And was this man brought to your cell, this man Claymonst, the defendant here? A No, sir; he was not. 10

Q And were you brought out of your cell to take a look at him? A I wasn't in no cell.

Q What is that? A I wasn't in no cell.

Q Well, were you detained in the witness room; well, was he brought into the witness room? A No, sir; he was not; he was brought in a separate room; I do not know whether it was a witness room.

Q You saw him brought into a separate room on the first floor or second floor of the Third Precinct? A Second; no, the first floor. 20

Q What time of the morning was it? A I couldn't say.

Q Well, was it eight o'clock? A No, sir; it was later than that.

Q Well, was it nine o'clock? A I couldn't say; it was later; it was, I guess, about twelve or one o'clock.

Q Then it was midday; it was noon hour? A Around that.

Q When this defendant was brought into a room where you were? A Yes, sir. 30

Q Who brought you into the room where the defendant was? A Why, Messner.

Q Lieutenant Messner? A Yes, sir.

Q That is the gentleman sitting on the first bench there, is it, in the court room? A Yes, sir.

Q And when he brought you into the room where the defendant was who else was in the room besides you and the defendant and Messner? A Chenoweth; Detective Chenoweth.

Q Was he sitting down in the room there? A No, sir. 40

Q You knew Detective Chenoweth; you had met him at about two or three o'clock in the morning when you came in there, or quarter after ten the night before when you came in with the child you met Chenoweth? A Yes, sir.

Q And you met Messner? A Yes, sir.

Edward Frank Kastner, cross.

Q Now, those were the people in the room when you were brought into the room to see Claymonst the next day? A Yes, sir.

Q Anybody else? A No, sir.

Q Was this man standing up or sitting down? A Stand-
10 ing up.

Q Did he have his hat on or clothes on? A He had his hat off.

Q How long did you remain in that room? A About five minutes.

Q What did you do while you were there the five minutes? A They asked me if this was the man and I said, "Yes, this is the man."

Q Who asked you if this was the man? A Detective Chenoweth.

20 Q Did he ask you more than once? A Yes, sir.

Q How often did he ask you? A He asked me twice.

Q Did Mr. Messner ask you any questions? A He asked if that was the man and I said, "Yes, that is the man."

Q Did you say why it was the man? A Yes, sir.

Q Did this man, this defendant, hear the detectives ask the questions of you whether he was the man or not? A Yes, sir.

Q What did he say? A He didn't say nothing.

Q Didn't say anything at all? A No, sir.

Q Didn't you talk to him at all? A No, sir; I didn't.

30 Q Did you talk with him yourself at all? A With that man there?

Q Yes. A No, sir; I didn't.

Q Did you give the officers any description of the clothing of the man you saw the night before wore? A Yes, I did.

Q What kind of a hat did the man have on that you saw the night before? A Panama hat.

Q And when you saw him in this room he had no hat whatever on? A He had it in his hand.

Q He had the hat in his hand? A Yes, sir.

40 Q You didn't see it on his head at all? A No, you must understand that man come in with his working clothes the next day; he was not dressed as he was the night before.

Q So that when he came in the afternoon for you to look at him he did not have the same clothes on he did the night before; he had his working clothes on? A Yes, sir.

Edward Frank Kastner, cross.

Q You have not given any description of having his working clothes on the night before, have you? A No.

Q What kind of clothes was he wearing the night before? A Why, he had a white Panama hat on, white shirt, dark pants, low cut shoes, and he had white socks on.

Q Any vest? A No, sir; no vest at all. 10

Q No vest on him at all? A No, sir.

Q What kind of coat was it? A No coat at all.

Q No coat at all? A No coat at all.

Q The man that you saw at the billboard had no coat whatever on? A No, sir.

Q Dark pants? A Yes, sir.

Q White shirt and white stockings and low shoes and a Panama hat? A Yes, sir.

Q Now, what was the date of the month that this occurred?

A The last day of June. 20

Q June of the present year? A Yes, sir.

Q 30th of June? A Yes, sir.

Q What day of the week was that on? A That was something I could not say, what day of the week.

Q Don't you remember what day of the week that this occurred on? A No, sir; I do not.

Q Don't you remember whether it was a Sunday night or not?

A It was not Sunday night.

Q Was it a Saturday night? A I could not say what night it was; Saturday or Sunday, I could not say. 30

Q Were you in the habit of going down to Bound Creek to swim every week? A Yes, every night.

Q Do you know where this child lives? A Where the child lives?

Q This little girl that was down to the billboard, do you know where she lives, what street she lives on? A Why, Wilson avenue, I hear them say.

Q What number of Wilson avenue? A I could not say the number.

Q How far from the billboard did this child live on this night in question; how far is Wilson avenue from this billboard? How many blocks or miles? A About ten or fifteen blocks, I should say. 40

Q About ten or fifteen blocks; were you there when her mother came to the police station? A Yes, sir.

Edward Frank Kastner, re-direct.

Q What kind of morning or day was it when her mother came there? A That was at night.

Q Was it the same night that you were arrested, that you were detained in there; was it the same night? A No, I believe the man had come that night and the woman had come in the morning, if I ain't mistaken.

Q Did you have any talk with the mother? A No; I did not.

Q Did you have any talk with the girl's father? A Why, he asked me if that was the man and I didn't answer him no questions at all.

Q He asked you to give him some explanation about how you found the child, the father? A Yes, sir.

Q And you refused to answer any questions? A Yes, sir.

Q Why was it you refused to explain to the child's father the circumstances under which you found this child? A I had told him it later when he asked me, but I did not tell him the same night.

Q Why didn't you tell him the same night? A Why, he was too excited; I didn't want to tell him what had happened to the little girl.

Q That was the only reason? A Yes, sir.

Q No other reason? A No, sir.

Q Did he take the child home with him? A No, sir; he did not.

Q Where was the child taken? A Up to Dr. Clark's.

Q (*By the Court.*) Well, you know you were detained as a witness? A Yes, sir.

Q (*By the Court.*) Then say you don't know where the child was taken if you do not know. A (No answer.)

Q So the only reason why you refused to give him any explanation of what you knew about that transaction was because he was very much excited? A Yes, sir.

The Court. He has already answered that.

40 *Re-direct examination* by Mr. Mott.

Q When did you have a talk and tell the father about it? A The next day.

Q How far from the billboard were you when you first heard the moaning? A About fifteen or twenty feet.

Dr. J. Henry Clark, direct.

Examined by the Court.

Q How far was this below Tyler street? A Why, that is about three-quarters of a block.

Q About three-quarters of a block? A Yes, sir.

Q Well, if you go easterly on South street you turn into Bay avenue just before going under this railroad that you refer to?

10

A Yes, sir.

Q And Clifford street is parallel with South street and to the north of it, isn't it? A Why, the lights run right in back of that billboard; just say, for instance, here is Clifford street and here is the billboard, or just like here, here is Clifford and right here, back here, is the billboard, and the houses are here, and the other four houses there and the billboard is right back of those four houses, within about two hundred feet of these houses.

20

DR. J. HENRY CLARK, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q Dr. Clark, you are a practicing physician of this city and county, are you? A I am; yes, sir.

Q And have been so for a good many years? A Yes, sir.

Q You are also holding some official position? A Chief Surgeon, Police Department, Newark.

Q How long have you held that position? A Thirty-three years.

30

Q Do you remember seeing the girl, Mary Jacieko? A Yes, sir.

Q Do you want to see her to identify her? A I think not; I remember her distinctly; a child four years old.

Q Where did you see her? A At Police Headquarters on the night of June 30th, a quarter after eleven in the evening.

Q Was she alone or did somebody come with her? A She was brought to me from the Third Precinct by Officer Melcher.

Q Is that the officers (pointing)? A Yes, sir. That is the child. And with her were two men whose names were given to me as Edward F. Kastner and Salvatore Vella.

40

Q Now, doctor, did you examine the girl at that time? A I did.

Q Tell the Court and jury what you found. A The child had a lacerated wound of the face, under the right eye; she had

Salvatore Vella, direct.

10 a lacerated wound on the nose and lacerated wound on both knees; her face was covered with blood, necessitating removal to discern the features perfectly; the vagina was torn entirely back to the rectum, that means the perineum, the space of the body between the vagina and the rectum was torn entirely through to the rectum; the vagina was filled with blood clots, all normal appearance, that is, of the organs, was obliterated by this hemorrhage; the thighs of the child were abraded and contused, and the child was in a very excited physical condition, making it necessary for me to lay her on the table and wait at several intervals to finish my examination because she broke off into an exhausted condition resembling coma between my periods of examination; the child under a little treatment made a statement to me.

Q Please omit that. Go on. A I advised—

20 *Mr. McDermit.* I object.

Q Well, what did you do with the child? A I sent her to the City Hospital.

Cross examination by Mr. McDermit.

Q Do you know how long she was kept in the City Hospital? A I do not.

Examined by the Court.

30 Q You stated, as I recall your evidence, that the thighs were abraded? A Yes, sir.

Q Whereabouts? A We call the thigh from the hip down to the knee.

Q Well, on the inside or the outside? A Posterior surface, on the front, down to the knee, and on two sides, from the hip to the knee, on the front of the body.

SALVATORE VELLA, sworn in behalf of the State.

Direct examination by Mr. Mott.

40 Q Where do you live? A I live 181 New York avenue.

Q How long have you lived there? A Three years.

Q Are you single or married? A Single.

Q How long have you lived in Newark, or this county? A I have lived in Newark for seventeen years, since I was born.

Salvatore Vella, direct.

Q How old are you? A Seventeen years old.

Q Do you know Mr. Edward Kastner? A Yes, sir.

Q Were you down on the meadows with him on the night of the 30th of June, last? A Yes, sir.

Q Where did you meet him that night? A I met Mr. Kastner in the pool room.

10

Q And then what did you and he do? A Why, I was sitting in the pool room and Mr. Kastner come in and bought a pack of cigarettes and he shot a game of pool and asked me to go for a swim with him and I said yes.

Q Well, where did you go? A So we went down to Bound Creek.

Q Did you have your swim? A No, sir.

Q Why not? A Because the bay was low and it was all gummy like and we could not go in.

Q Did you go back? A Yes, sir.

20

Q On the way back did you hear something, find something?
A Yes, sir.

Q Where were you at that time? A On the street.

Q What street? A South street.

Q Near what place? A Near the railroad.

Q And what was it happened? A I heard a moaning coming from behind the billboard, so I stopped my friend, Mr. Kastner.

Q And then what did you do? A So I walked towards the billboard and no more than I looked behind there this man, Mr. George Claymonst, he jumped out; he was pulling a gun, but I uppercut him and hit him in the jaw; so I hit him in the jaw and I ducked myself and he ran holding the gun pointed at me; Mr. Kastner, he picked up a stone and threw it at him; when we seen he didn't shoot us while he had the gun pointing at us, we thought it was unloaded, so we chased after him along the railroad and through the freight cars and there we lost sight of him; so we walked back and saw a little girl standing in front of the billboard; no more than we reached there the little girl was about to fall, when we held her up by the dress, and Mr. Kastner took her up and he held her in his arms and he walked to Bay avenue in back of the railroad and there we stopped an army officer from the Supply Base and we asked him to take us to the Third Precinct and he did us that favor.

30

40

Q Tell us what time it was when you got to the Third Precinct. A Quarter after ten.

Salvatore Vella, cross.

Q How near to the billboard were you when you first heard the moaning? A About from ten to twelve feet.

Q You stayed at the police station all night? A Yes, sir.

Q Detained as a witness? A Yes, sir.

10 Q Did you see the man, Claymonst, after you left the billboard at any time? A No, sir.

Q Well, then, any other time, did you see him? A The next day.

Q Well, where did you see him? A In the Third Precinct.

Q Well, about what time of day? A I don't know; it must have been about toward eleven or twelve o'clock.

Q You are sure this is the man? A Yes, sir.

Cross examination by Mr. McDermit.

20 Q You are sure about the time? A Yes, sir; quarter after ten when we reached the Police Station.

Q You are sure that you started down from the pool room in company with Kastner? A Yes, sir.

Q And you were there when the army officer came there, too, were you? A Yes, sir; on Bay avenue where we stopped the army officer.

Q Yes? A Yes.

Q Is the army officer here in court? A Well, I don't know the description of him.

30 Q Well, you saw him that night. A Yes, but I cannot remember, it is about two months ago, maybe three.

Q You could not identify him now? A No, sir.

Q It is too long back? A Yes, sir.

Q And he was in your company from the time you took the girl to the police station until a quarter after ten? A Yes, sir.

Q And remained there quite some time, did he? A Well, he remained there—he brought the little girl there and he stayed and we asked him to stay and he said, "I have got to be going," and he went away with the car.

Q He was there five or ten minutes? A Yes, sir.

40 Q You haven't any idea of what kind of looking man he was at all? A No, sir.

Q You have not seen him since? A No, sir.

Q Well, you only saw this man for a couple of minutes down there and he was running away, how is it you can remember seeing this man and you cannot give us any description of the

Salvatore Vella, cross.

soldier? A Why, I got the description of him on account of the way I seen him that night and I seen him right in the bright light.

Q What kind of shoes did he wear? A Who?

Q This man here. A He wore low cut shoes.

Q What kind of stockings? A White socks. 10

Q What kind of coat did he wear? A He didn't wear any coat.

Q What kind of pants did he wear? A He had dark pants on.

Q And no coat at all? A No, sir.

Q And white shirt? A Yes, sir.

Q Pure white shirt? A Yes, sir.

Q Couldn't be mistaken about that either? A No, sir.

Q The man could not have had a brown coat on and a brown pair of pants and brown shoes and dark brown stockings, that couldn't have been the man? A He didn't have no coat. 20

Q Well, there was no man there with a brown coat on, brown pair of pants, brown stockings? A He had brown pants.

Q What kind of pants were they? A Why, I could not exactly tell you but they must have been brown.

Q Must have been brown? A Yes, sir.

Q Could not have been blue? A Could not have been blue.

Q Could not have been blue pants? A He wore a dark pair of pants.

Q Now, then, you don't want to say he wore a brown pair of pants, do you? A No, sir. 30

Q Do you? A No.

Q No, I thought not. What you want to say was that the pants that you observed on him was a dark pair of pants? A Yes, sir.

Q And what color you could not say beyond that? A Beyond what color?

Q Beyond the fact that they were dark? A No, sir.

Q You saw this man, the defendant, in the police station on Van Buren street? A Yes, sir.

Q And you had been kept in the police station from a quarter after ten that night until the— A The next morning. 40

Q Until twelve o'clock the next day before you were released? A Yes, sir.

Q And you had given statements to the police about the matter? A Yes, sir.

Salvatore Vella, cross.

Q And you had been interviewed by the detectives several times while you were there? A Yes, sir.

Q And you were kept in a separate room away from Mr. Kastner? A Yes, sir.

10 Q And you and he did not have any chance to talk together from the time you were both held as witnesses, is that right? A No, sir.

Q Now, then, where was it that you saw Claymonst, the defendant, the next day, where? A In the Third Precinct.

Q Where? A In the Third Precinct.

Q Well, what part of the Third Precinct? A On the second floor.

Q Was he brought into the room where you were; was Claymonst brought into the room where you were? A No, sir.

20 Q Were you brought into the room where he was? A Yes, sir.

Q And who brought you in? A Mr. Chenoweth and Messner.

Q Was there anybody else in the room besides you and Claymonst and Messner and Chenoweth at that time? A No, sir.

Q And they asked you if this was the man? A Yes, sir.

Q And you said yes. A Yes, sir.

Q How often did they ask you that? A Twice.

Q How long were you in the room? Did you see what clothing this man was wearing at that time? A Why, he wore working clothes.

30 Q Those were not the clothes you saw him with the night before? A No, sir.

Q Well, he had a flat straw hat in his hand? A When?

Q At the time you saw him and identified him in the police station? A No, sir; he had a derby hat in his hand.

Q Straw hat? A It was a derby hat; it was not a straw hat.

Q He had a dark derby? A Yes, sir.

Q And the night before when you saw him he had a Panama? A Yes, sir.

40 Q Did you see the Panama after that? A No, sir.

Q Did you see the Panama hat down at the Third Precinct? A No, sir.

Q You never saw the Panama since that? A No, sir.

Q Now, you know the difference between an ordinary straw hat and a Panama hat? A Yes, sir.

Mary Jacieko, direct.

Q A Panama is a better grade of hat? A Yes, sir.

Q And the man you saw down at the billboard had a Panama hat on, you say? A Yes, sir.

Q Sure about that? A Yes, sir.

Q And he didn't have a flat straw hat? A No, sir.

Q There was no flat straw hat there? A No, sir. 10

Q And the time that you fix at ten o'clock, or ten minutes to ten, when you came there, or quarter to ten? A Yes, sir.

Q And you are sure it was a quarter after ten when you got to the Third Precinct? A Yes, sir.

Q And you are sure this is the man? A Yes, sir.

Q When you were brought into the Third Precinct was this man stood up in line with any other men to ask you to pick him out? A No, sir.

MARY JACIEKO, called. 20

Direct examination by Mr. Mott.

Q Mary, how old are you, do you know? A (Witness shakes her head affirmatively.)

Q What is your name? A Mary.

Q How old are you, Mary? A Four years old.

Q Do you go to school? A (Witness shakes her head affirmatively.)

Q What school do you go to? A Kinney school.

Mr. Mott. Will your Honor get nearer to her and ask questions and see if she is qualified or not, or shall I? 30

Q Do you go to Sunday school, Mary? A (Witness shakes her head affirmatively.)

Mr. McDermit. I will have to object to counsel indicating to the stenographer what his view is.

Mr. Mott. All right. I saw it and I think every juror saw it.

The Court. Do you mean to say, Counsellor, that she did not nod her head yes? 40

Mr. McDermit. I do not mean anything of the kind.

The Court. What is your point?

Mr. McDermit. The point is the Prosecutor has no right to state what that nod is.

Mrs. Annie Jacieko, direct.

The Court. You do not dispute the interpretation?

Mr. McDermit. I do not dispute it.

Q What church do you go to, do you know? Come on, tell me, can you? Now, you said you went to the Kinney street school; now, what church do you go to; do you know or don't
10 you know? A I don't know.

Q Is there any difference between right and wrong, Mary; you do not know the difference? A (Witness shakes her head negatively.)

Q Do you know the difference between telling the truth and telling what is not the truth? A No.

Mr. Mott. I am not very much inclined to press this child, as I said in my opening; I am somewhat doubtful whether she can qualify as a witness.

20 Q (*By the Court.*) What do you say your name is, Mary?
A Mary.

Q Is there any other name? A No.

Q (*By the Court.*) You told this gentleman here that you did not know about telling the truth or telling something that was not true, did you? A (Witness shakes head affirmatively.)

30 *The Court.* Well, under the circumstances, particularly in view of the seriousness of this matter, I do not think the Court ought to permit her to testify. A witness to testify should have the necessary intelligence to understand the questions, recall the facts and state them, and should always understand that there is a penalty for not telling the truth, and under all the circumstances the Court is constrained to decline to permit this witness to testify.

MRS. ANNIE JACIEKO, sworn in behalf of State.

Direct examination by Mr. Mott.

Q Where do you live? A 12 Wilson avenue.

40 Q Where is 12 Wilson avenue, near what other street, what other cross street? A Merchant street.

Q Is Merchant street near your home? A No, Wilson avenue.

Q Yes, but how far is your house from Merchant street? A Well, I used to live on the corner, on the corner of Merchant street and Wilson avenue.

Mrs. Annie Jacieko, direct.

Q Are you the mother of Mary? A Yes, sir.

Q How old is Mary? A She passed four the 9th of March.

Q (*By the Court.*) This year? A Last year—this year.

Q (*By the Court.*) March 9th she was four years old, is that it? A Yes, sir.

Q Do you remember on the 30th of June last where Mary was during the evening? A Well, I remember everything, because my child was in the house nine o'clock. I gave her coffee and a piece of cake. 10

Q You mean Mary was in the house? A Yes, sir.

Q And then what happened? A Well, after that she went down to call her brother; he was in front—

(Witness examined through interpreter.)

Q After you gave Mary the coffee and cake about nine o'clock what was the next thing that was done? A She went in the street to call her brother; five minutes later I seen the boy and asked him where Mary is and he said he had not seen her. 20

Mr. McDermit. I object to that.

The Court. Sustained.

A (*Continuing.*) I called her name in the street and she did not respond; I looked around the street and could not find her and I went back to the house to look in the house for her; I waited until my husband came home and told him about it and he went to the police station and looked for her on the block, but I could not find her. 30

Q When did you find her or see her? A They let us know from the court where she was.

Q When did you first see this man, Mr. Claymonst, the defendant? A The first time I seen him in the hospital.

Q What room were you in? A On the fourth floor.

Q Where was Mary? A She was on the bed.

Q And was he near the bed in Mary's room? A There was more than one child there; Mary did not have a separate room.

Q I know, but how near to Mary's bed was he? A He was right near the bed. 40

Q And who else was there besides this man? A The detectives had been there and the doctor had been there.

Q When he was there near Mary's bed did Mary say anything to you? A She hasn't said anything, but—

Mrs. Annie Jacieko, direct.

Mr. McDermit. I object to the balance of that answer. I know what the Prosecutor is trying to show. He just had it rejected by the inability of the girl to be confronted with this evidence and you cannot get it in in that way.

Mr. Mott. Have I done anything that is not right?

10

The Court. Not that has been pointed out. I might inform counsel now that any objection he desires to make, or either counsel desires to make, should be addressed to the Court and should not be the subject of a direct personal statement between counsel. You will save a lot of time and it will be very much more orderly to proceed in a proper way.

Q When this man was brought towards Mary's bed what did Mary do? A She pointed at him.

20

Mr. McDermit. I ask to strike it out. I knew what he wanted to get in; it is reprehensible; it is a statement in open court before this jury. That class of evidence to go in, showing this girl was incompetent to be a witness, by reason of the examination weeks after, and the testimony before this court of Dr. Clark as to the actual condition of that girl at that time, for the Prosecutor to attempt, by inference, to show by implication, is the worst that I have ever seen in any court in the world. I ask to strike it out. It is apparent that it is an effort to overrule your Honor's ruling. The jury must themselves disregard that. That must be stricken out. That is an endeavor to get into the records of a court of justice a proposition that your Honor has overruled. This girl has been examined and she has been disqualified. To permit this by inference to go to the jury, that this child pointed a finger at the defendant to identify him is so far from being a fair proposition that I object to that going in.

30

40

The Court. In the present situation the motion appears to be premature. It is quite true that the Court did not permit the testimony or the offer of testimony of Mary Jacieko to go before the jury, because it was not shown that she had the necessary intelligence and understood the penalties and sanctions and the obligations of the oath. Therefore, she was not permitted to testify. This situa-

Mrs. Annie Jacieko, direct.

tion is very different, however. The question is not what Mary said on that occasion; it is not so much what Mary did on that occasion. The question is what did the defendant do on that occasion. Why is it not proper, if this bit of evidence is connected up, to show that there was something tending to make it appear to the defendant that he was accused and that the defendant did something from which some unfavorable inference might be drawn from his act? I think the motion to strike out is premature and it will be denied at this time, with leave to renew at a later time, if this testimony is not connected up by showing what the defendant did. 10

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

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

WM. P. MARTIN,
Judge.

Mr. McDermit. I ask to strike it out.

The Court. Motion granted.

Mr. Mott. What does your Honor mean by "connected up"?

The Court. It has got to be shown what the defendant did. 30

Mr. Mott. I propose to show it.

The Court. You have not shown it.

Mr. Mott. Have I got to show it by this witness?

The Court. Yes, at this time.

Mr. Mott. Well, I was going to show it by another witness who was present.

Mr. McDermit. I am going to object to that remark.

The Court. When the Court rules with you, it is not necessary to make any statement. 40

Q When Mary pointed at the defendant what did the defendant do or say?

Mr. McDermit. Objected to.

Mrs. Annie Jacieko, direct.

The Court. I will restore the answer at this time subject to your motion to strike it out again, but it may be considered if properly connected.

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

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

WM. P. MARTIN,
Judge.

A He has not said anything.

20 *Mr. McDermit.* And I ask to strike it out now? There is nothing to show by this testimony that she was asked to point to the man, or she understood any question that was put to her.

The Court. The Court will decline to do so at this time, but will accept a motion later on and strike out the answer if it is not connected. It has not been shown yet except in a very general way that the defendant knew at the time the little girl pointed her finger at him that there was anything by way of accusation against him in that act.

Q Did you talk to your girl at the hospital? A No, I didn't talk to her that time.

30 *Mr. McDermit.* I ask to strike it out at this time.

The Court. The same ruling.

Mr. Mott. I do not know, your Honor, as I can connect this in any other way than I have. I want to be perfectly frank about it; the witness has told the circumstances.

40 *The Court.* The only evidence that you have presented to the Court and jury is that this defendant seems to have been arrested around eleven or twelve o'clock on the day after the 30th of June, he was taken into a room and Kastner and later Vella pointed him out, and later he appears in the custody of the policeman at the City Hospital in a room where this little girl is and she points her finger at him. How have you shown that the defendant knew, or had any reasonable cause to believe, that that little girl who was pointing her finger at him had been the victim of

Mrs. Annie Jacieko, cross.

any alleged offense or that he was accused of having committed it?

Mr. Mott. Well, I will ask one more question if I can clear it up.

Q When Mary pointed her hand did she say anything? A Yes, she said everything; she says what he has done with her. 10

Mr. McDermit. I object.

Q What did she say when she pointed her hand?

Mr. McDermit. You will have to get specifically what she said in view of the record as it stands and in view of what counsel is trying to show. It should be what language it was, and it should be *seriatim* as to what took place there.

The Court. You may cross examine. 20

Mr. McDermit. I suppose he knows what I maintain that he shall get, what facts and not conclusions—

The Court. One moment. When the Court rules on the matter it is not necessary to go on with any further statements. In view of the statements of counsel for the defense he may now cross examine the witness as to the circumstances under which this alleged transaction occurred.

Cross examination by Mr. McDermit.

Q What time of day was it you visited at the hospital? A I had been in the hospital from the morning; I cannot remember the exact time it happened; it was some time in the afternoon. 30

Q Did you have any conversation with the little girl? A Yes, sir.

Q When the defendant, this man, was in the room? A No, at that time the detectives been there alone.

Q And this man was not there? A He has been there, too.

Q Yes, but he was not there when you talked to your girl? A He had been there. 40

Q Did you talk to your girl in the English, Polish, or in what language? A At the time that the detectives been there and she told me the facts, she spoke in English.

Q Now, then, was there any conversation by this witness, by you, with your child when this man, the defendant, was in the

Carl A. Thunell, direct.

hospital; not the detectives, but this man? A Yes, she spoke in English at the time the man had been there and the detectives had questioned her.

Re-direct examination by Mr. Mott.

10 Q When Mary pointed her hand at the defendant what did she say? A She said, "This is the man that had taken me away."

Q In what language did she say that? A To me, she said it in my language, and she repeated the same thing to the detectives in English.

Q Did you tell this officer, the one standing there, what Mary said; did you tell him in English? A I had.

Q (*By the Court.*) Where was the defendant when this happened? A He stood in the hospital near the bed.

20 Q (*By the Court.*) How far away from Mary? A The fourth man from Mary.

CARL A. THUNELL, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q You are a member of the Newark detective force? A Yes, sir.

Q Did you take yourself, or with others, the defendant up to the hospital where the little girl was? A Yes, sir.

30 Q When did you take him there? A July 1st, about two-thirty in the afternoon.

Q Was there any officer with you? A Officer Messner, Officer Cotter and two newspaper men.

Q Did you have any conversation with him on the way up to the hospital? A No.

Q You didn't say anything to him on the way to the hospital? A No, sir.

Q After you got him there did you have any conversation with him? A I told him—

40 Q Just answer my question. Where did that conversation take place? A In the room where the girl was lying, beside her bed.

Q While he was standing beside her bed what did you say? A I asked him where he had seen this girl; he didn't say anything; I asked him to bend down a little further over her bed,

Carl A. Thunell, direct.

because he was inclined to look up in the ceiling; I asked him to look down in her face, and he then bent down over her bed and she kind of looked over to her mother at the time.

Q Well, go on and tell us what she did. A I asked the girl where she had seen this man and her mother asked her in Russian.

10

Q Do you understand Russian? A No, sir.

Mr. McDermit. I object.

Q You didn't understand what the mother said?

The Court. Objection sustained.

A I asked her then in English where she had seen this man and what he had done to her, and first off I asked her to point this man out, out of the line-up.

Q Was there a line-up? A Yes, there was two newspaper men and two detectives and the mother and doctor and nurse.

20

Q Where was the line-up? A The line-up was around the bed; they were standing around the bed.

Q What did Mary do? A Mary pointed this defendant out.

Q Now, I ask you if you had any conversation with him at that time, around that time. A I told him that he was charged with the crime of rape.

Q Did you tell him on whom? A On this girl.

Q What did he say? A He said nothing.

Q What? A He said nothing.

30

Q (*By the Court.*) You mean by that he did not say anything? A No, he just shrugged his shoulders.

Q Did Mary's mother tell you in English what she said in Polish or Russian? A Yes, sir.

Mr. McDermit. I object to that. How can he pass on that? He does not understand Polish. I object and ask that it be stricken out.

Mr. Mott. I will consent to that being stricken out.

The Court. Granted by consent.

40

Q Did you tell this defendant something? Answer yes or no. A Yes, sir.

Q What did you say to him? A I said that the girl had said that she was taken away by him and given a quarter for a doll, which I had previously asked her in English.

Carl A. Thunell, direct.

Cross examination by Mr. McDermit.

Q Did this girl tell you personally? A Yes, sir.

Q Did the girl tell you? A Yes, sir.

Q In English? A In English.

10 Q The little girl in bed? A Yes, sir.

Q When was it she told you that? A Right at the time that this man was up there; we were standing around the bed.

Q Didn't you say a moment ago that the mother told you that in English, and she put it to the girl in Polish?

Mr. Mott. I object.

Q Give me your first statement to the girl; who was present at the time you had this conversation with the little girl? A The officers and two newspaper men.

20 Q Now, tell me what you said to the girl, in the first place.

The Court. What is the purpose of this?

Mr. McDermit. The purpose of it is to show that he has testified to one state of facts a minute ago and is now changing it to another. I will withdraw the examination at this time.

RECESS.

Direct examination (continued) by Mr. Mott.

30 Q What day did you say it was that you went to the hospital?
A July 1st.

Q Just where was the defendant when the little girl said what she did say? A Right near the bedside.

Q And more particularly? A The third man in the line.

Q And what did you ask him to do, anything? A I asked him to bend down so he could hear what the little girl had to say.

Q Did he bend down? A He did.

40 Q Then what did the little girl say? A The little girl said that this was the man that gave me the quarter to buy the dolly.

Q Did the defendant at that time say anything? A No, sir.

Q Did you have a talk with him a little later? A About five minutes after.

Q How long before you left was it you had this talk? A Just directly before I left.

Carl A. Thunell, cross.

Q What did you say to him then? A I said, "What have you to say for yourself now?"

Q What did he say? A Nothing; shrugged his shoulder.

Q Did he say nothing? A He said nothing, the word nothing.

Q (*By the Court.*) He didn't say anything; he kept still? A 10
No, sir; he said, "Nothing."

Q (*By the Court.*) He used the word "nothing"? A He used the word "nothing."

Cross examination by Mr. McDermit.

Q What time of day was this. Never mind your book. What time of day was it?

The Court. No, put that up.

Q What time of day was it? A About twelve-thirty or one 20
o'clock.

Q When? A About twelve-thirty or one o'clock in the afternoon.

Q On what day? A July 1st.

Q What day was July 1st on? A That I could not tell; I could not say.

Q You went to the City Hospital, accompanied by whom? A Detective Cotter, Messner and the defendant.

Q You went there in an ambulance, patrol wagon? A No, in an automobile.

Q And when you came into the City Hospital you went into what ward? A Well, the ward was on the third floor. 30

Q You went up in the elevator, did you? A Yes, sir.

Q Did you have anybody with you beside the other two officers and the defendant? A Two newspaper men.

Q What were the newspaper men's names? A One man's name was Reilly.

Q Who else? A I cannot think of the other name.

Q Was Reilly the man that sat alongside of the Prosecutor here this morning? A Yes, sir. 40

Q What newspaper is he connected with, do you know? A I do not.

Q Well, he was in the automobile, was he? A Yes, sir.

Q And was he at the bedside of this little girl when you personally were talking with the little girl? A Yes, sir.

Carl A. Thunell, cross.

Q Now, what did you say to the little girl; give us the exact words. No, I will withdraw that. When you got into the City Hospital what was the first thing that was done by anybody in your crowd; who first talked? A That I cannot exactly say who was the first one that talked.

10 Q Well, who had talked ahead of you? A The mother.

Q The mother had talked? A Yes, sir.

Q Did any of the officers talk at any time? A Yes, Detective Messner.

Q He talked to the little girl? A He talked to the little girl; yes, sir.

Q And who else talked to the little girl? A Detective Cotter.

Q And how long a time was it you officers stood there talking to this little girl by her bedside, ten minutes, twenty minutes,
20 half an hour? A I should judge it was about fifteen minutes.

Q And during that entire time this man stood by the bedside, the defendant? A Yes, sir.

Q And you people were all standing up? A We were all standing; yes, sir.

Q Nobody sitting down? A No.

Q What was the mother doing? A She was kneeling down.

Q Kneeling down alongside of the bed? A Alongside of the little girl.

30 Q The child's head was on her arm? A No, sir.

Q On the pillow? A Yes.

Q And there was a nurse there? A Yes, sir.

Q And somebody else, I believe you said? A The doctor.

Q Now, what was the first thing that was done; who talked to the girl first? A The mother asked the girl first.

Q What did the mother ask the girl? A I don't know; she asked in a foreign tongue.

Q She asked the girl something in a foreign tongue? A Yes, sir.

40 Q What was next done after that? A The girl pointed at the defendant.

Q After she had spoken in the foreign tongue the child pointed? A Yes, sir.

Q How high was this bed from the floor? A Any ordinary bed.

Carl A. Thunell, cross.

Q Well, was it as high as this table (indicating the table in the court room), about three and a half or four feet high? A I should judge that.

Q And the mother was on her knees? A Yes, sir.

Q And the child was lying on the upper part of the pillow?
A Yes, sir. 10

Q Who stood next to the mother? A Detective Messner.

Q Stand up, Messner. That gentleman? A Yes, sir.

Q Who stood next to Detective Messner? A I believe that was Reilly.

Q Who? A I believe it was Reilly.

Q Who? A Reilly.

Q The reporter, he was the second one from the head of the bed? A Yes, sir.

Q Who was the next one behind him? A The defendant. 20

Q So the defendant was the third man in line behind the mother, who was kneeling, and Detective Messner and Reporter Reilly, he stood down here; how long was the bed? A Any ordinary bed.

Q Well, it was the ordinary hospital cot? A Ordinary hospital cot; I could not say.

Q A bed two and a half feet wide by six feet long? A Yes, sir.

Q Now, what was the distance from the head of the bed, where the child's head lay on the pillow, to where the defendant, Claymonst, stood; how many feet? A Just about the center of the bed. 30

Q Who was behind Claymonst? A I was.

Q And who was behind you? A A nurse.

Q So there was six people lined up alongside of the bed? A Not on the one side; the nurse was standing at the foot of the bed.

Q I am speaking about the side of the bed where you have described your position; was your position on the side of the bed? A Directly on the side of the bed. 40

Q So you were the fourth person? A Yes, sir.

Q So the mother was kneeling; then came Messner; then came Reilly; then came the defendant; then came you, and you talked from your position to the child, did you? A No.

Q Well, did you change your position? A Yes, sir.

Carl A. Thunell, cross.

Q Did you leave the foot of the bed where you were? A Yes, sir.

Q To go up to talk to the child? A Yes, sir.

Q Whose place did you take? A I went to the other side of the bed and walked to the head of the bed.

10 Q And then started your conversation? A Yes, sir.

Q In the meantime this line-up on this side of the bed was the same? A With the exception, I think, of Cotter.

Q No, I don't want you to think? A I am not sure.

Q You left this side of the bed? A The lower part of the bed.

Q And went around on the other side so you could have a conversation; do you understand Polish? A No.

20 Q Was there anybody among the officers who were present at the episode, so far as you knew, who talked Polish? A Not as far as I know.

Q Do you talk Scandinavian? A I do.

Q These people are Scandinavians. Are the little girl and her mother and father Scandinavians? A No.

Q So there was no Scandinavian language talked up there? A No.

Q So he still stayed in his position, the defendant, and you had moved on the other side of the bed; what did you say? A I asked the girl to point the man out.

30 Q Give us the language that you used; what did you say, not that you asked, but give us your language. A "Point out the man to me that hurted you."

Q Is that what you said? A Yes, sir.

Q Did you say anything besides that at that time? A No.

Q Now, after you said, "Point out the man to me that hurted you," what did the child do? Just describe her position. A She raised her little hand and pointed out the defendant.

40 Q And he was still in the same position, with these three people in front of him and she pointed her finger down the line? He wasn't next to her; do you know whether she could see him in the position in which she lay in the bed at the time, on the pillow, as to where the defendant stood; do you know of your knowledge whether she could see him? A Yes, she could see him.

Carl A. Thunell, cross.

Q How could she see this man, she laying on this side of the bed and these people and you, pointing her finger down the line?

A Well, she done it.

Q There was her mother, there was the detective next; there was a newspaper man next and the defendant down here by the foot of the bed and she pointed her finger, is that right? A That is right. 10

Q Was he still in that position at the foot of the bed when she pointed her finger? A Not at the foot.

Q Well, you said beside the bed. And now, is there any chance of your being mistaken in regard to the way this situation existed there, that the mother was on her knees at the head of the bed, with the girl lying on the pillow and next to that came Detective Messner and next to him came the reporter, Reilly? A I am not sure whether it was Reporter Reilly there or not. 20

Q Well, who was it if it was not Reporter Reilly, who was it; we want to know your best recollection. A I think the defendant was next to Detective Messner.

Q Now, you are thinking; now, give us the actual facts; tell these gentlemen just exactly who stood alongside of the defendant in rotation from the little girl down to where you left the defendant; who were the people ahead of him? A As far as I can remember, Detective Messner was next in line; then the prisoner, and then I; that is about as far as I can remember.

Q Now, you have changed your recollection; you have got the reporter out of the line; you have Reilly out now, have you? 30

A Well, he was not standing directly alongside of the bed.

Q Oh, he was near by? A Near by.

Q Now, where was he, nearer to the head of the bed, or nearer to the foot of the bed? A Nearer to the head of the bed.

Q So she was surrounded with Reilly close to where the mother was? A Yes, sir.

Q When was it that you took hold of the defendant and brought him from the foot of the bed and brought him out and made him bend down and look at this little child; when was that? 40

A That was while I was in the line on the other side.

Q Then you came around and took him out of this line and put him around on the other line? A No; he was still in the same position.

Carl A. Thunell, cross.

Q Is that right? A Yes.

Q And so the girl shifted from the side of the bed where the line-up was originally of the people you have designated and changed to the other side of the bed?

10 *Mr. Mott.* I object; there is no evidence that the girl was on the side of the bed; she was on the bed.

Q Well, where was she in the bed? A Laying in the center of the bed.

Q You are sure about that? A Yes; at the head of the bed.

Q Now, she was laying in the head of the bed, in the center of the bed? A Yes, sir.

20 Q And she was in the middle and her mother was on her knees on this side and kneeling down; was her mother doing anything with her arms, or anything, her mother caressing her, while you were there trying to talk to her? A Sometimes she was trying to do that.

Q Why did you bring him around to the other side of the bed? A To make sure of the identification.

Q She had pointed her finger down the line while they were all lined up on this side? A Right.

Q And in order to be certain that the identification was all right you took him around on the other side? A Correct.

Q Did she point her finger the second time? A Yes, sir.

30 Q Then she pointed her finger across the bed the second time? A She pointed her finger at him again also.

Q And when you brought him around she pointed at him again? A Correct.

Q What did you say to her? A I asked her to point out the man who had given her a quarter and she said, "That is the man," pointing at the same time; "that is the man that gave me a quarter to buy a little dolly."

Q That is what you said that she said when she first pointed on this side of the bed. A She said that again.

40 Q Then when did you take her around to make sure that there was no mistake, you took him around and asked the question of her again? A Correct.

Q Did she talk pretty intelligent? A No; it was very faint.

Q Did you notice that one of her eyes was entirely closed and she could not see? A One of her eyes was entirely closed.

Carl A. Thunell, cross.

Q And there cannot be any mistake about that; you don't think she could see through that eye? A That I don't know.

Q Did you notice that her mouth was all swollen up and that she could not open her mouth at all; did you notice that? A Yes, sir.

Q No other detectives spoke to her about identification except you? A Messner. 10

Q And did he talk to her about identification before or after you talked to her? A After.

Q And how long a time did you take in getting your information on both sides of the bed from her, about how many minutes? A About five minutes.

Q This girl was in a pretty exhausted condition, wasn't she? A Well, that I couldn't tell.

Q Didn't look as though the poor little thing was dying there? A No; it didn't look as though she was dying. 20

Q Didn't see these marks on her throat and side of her face and cuts all over, did you? A Yes.

Q Don't you know that this girl could not talk above a whisper? A She could whisper.

Q Yes, but she could not talk so you could hear her across the bed? A She could talk so that you could hear her if you were listening; it was very quiet there.

Q Very quiet, extremely quiet? A It was.

Q Did this poor little girl raise up in bed from the pillow? A No. 30

Q Did she raise her hand from the pillow? A Yes.

Q Which hand did she raise? A The right hand.

Q How do you know? A I was there.

Q How do you know it was the right hand? A Because I noticed it.

Q Now, which way was the bed facing, north or south, or east or west? A That I could not say.

Q The City Hospital is on Camden street? A Yes, sir.

Q On Bank and Camden street, and bounded by Fairmount avenue, is it? A Correct. 40

Q And the rooms there run north and south, do they not, the wards? A I presume they do.

Q Well, do they; the ward you were in? A Well, that must have been running north or south or east or west.

Carl A. Thunell, cross.

Q How many other beds were in this same ward that you were in? A A few.

Q How many, a few; how many? A I couldn't exactly say.

Q How many people generally are in the room there at a time? A That I could not say.

10 Q You didn't look around very closely, did you? A No, I did not.

Q Did you make out any written report of any of these statements you have sworn to here today, in your report to the police of your investigation? A I believe I did.

Q Did or didn't you? A I cannot recollect whether I did; I made out a report of the entire incident, I know that, the entire investigation.

Q Did you individually make any report of what statement this girl made to you with respect to the identification to the police, or to anybody? A That I could not say; I may have.

Q Well, don't you know that you never did.

The Court. One moment, give him a chance.

A I cannot say I made out—I made out a report of the whole investigation.

Q (*By the Court.*) Can you not say whether you did or not?

A I cannot.

Q Well, why is it that you can recollect now what took place at that time without making a report? A Why, it is imbedded in my memory.

30 Q Do you know this gentleman here (pointing)? A I do.

The Court. Pointing to whom?

Mr. McDermitt. Mr. Myer.

Q Is he embedded in your memory?

Mr. Mott. I object, asking this witness whether Mr. Myer is imbedded in his memory; I object that this is not—

40 *The Court.* Highly improper.

Q Was Mr. Myer at the hospital the day you made this investigation? A No.

Q Are you a lieutenant of the Police Department? A I am not.

Q Are you a detective? A I am a detective.

Carl A. Thunell, cross.

Q Did you talk to Mr. Myer today? A Yes.

Q Talk to him between 1 and 2? A To say hello to him.

Q How long did you talk to him; for how long a period? A Oh, for about half a minute.

Q Of course, you didn't talk to him about this case? A Yes, I spoke about this case. 10

Q Didn't tell him anything about what you were going to testify to this afternoon? A No, I did not.

Q Well, he didn't ask you any questions whether or not you heard any conversations? A No.

Q Did you make any statements to Mr. Myer or to any official, or to anybody else before today as to the statements you made here on the witness stand that this girl told you that that was the man in response to your asking her to point out the man? A Yes. 20

Q Who did you report that to? A Detectives Cotter, Messner and Chenoweth, Captain of Police Fohs.

Q (*By the Court.*) Who else, any more? A That is all I can recollect now.

Q When was it that you reported the matter to Mr. Chenoweth? A When I got back to the Third Precinct.

Q When was it that you reported the matter to Mr. Messner? A Immediately.

Q What do you mean by "immediately"? A Well, he was with us at the hospital. 30

Q You had to report to him; well, couldn't he see what you were doing there if he was around the bed? A Yes, he heard it.

Q Why was it necessary to report to him? A Well, because I told him.

Q Well, Messner was there? A Yes.

Q And Messner must have heard what went on, why did you have to report that to Messner? A I didn't have to report it; we were talking about it.

Q That was not in the shape of a formal report; well, did Messner ask the girl any questions? A I believe he did, yes. 40

Q I don't want you to believe. A He did.

Q Now, tell us what questions he asked? A I don't know.

Q Why? A He was bending down over here at the time he asked.

Carl A. Thunell, cross.

Q You couldn't hear the questions he was putting to her?
A I moved out of there then and moved down to the foot of the bed.

10 Q You moved down to the foot of the bed and Messner went up and talked to the girl in the bed and the conversation was pretty low, so you could not exactly hear what took place? A Yes, sir.

Q So whatever Messner said to the girl you did not hear, is that right? A No, I didn't hear that.

Q Did you hear the girl say anything to Messner? A I didn't hear her say anything to Messner.

Q Did you hear any part of Messner's conversation with the girl that you can tell these gentlemen of the jury? A Yes, I heard him ask the girl to point out the man.

20 Q That was after you had her point him out twice? A Yes, sir.

Q Did she point out again? A Yes.

Q That was after you had him point her out twice? A Yes.

Q Did she point him out again? A Yes.

Q Pointed out the third time? A Yes.

Q Now, you are sure about this, are you? A Yes.

Q Now, she pointed out the third time? A Yes.

Q How did she point the third time? A She raised her little hand and pointed directly at the defendant.

30 Q Where was the defendant there at the third time? A We moved him back on the other side of the bed.

Q And you had taken him around from this side of the bed and moved him to the other side? A Correct.

Q Who had taken him around? A I believe, I did.

Q You think you did? A Yes.

Q And did that because Messner was asking questions? A No, it was—

40 Q Was it necessary to get this girl to point this man out for the third time and remove him around to the other side of the bed and pick him out? A We wanted to be positive.

Q And you had some lingering possibility in your mind as to whether the identification was right on the first pointing, is that right? A No, I had no doubt.

Q Well, you were sceptical? A Well, I thought we wanted to make sure about it.

Carl A. Thunell, cross.

Q So that once, twice, three times, now, wasn't he pointed out the fourth time, just search your best recollection? A I think he was pointed out the fourth time.

Q Now, who was it that brought this fellow around to the bed the fourth time? A He was standing in the same position the fourth time. 10

Q Well, who was it that asked the little girl the question the fourth time? A The mother.

Q And then she raised up her little right hand again and pointed toward him? A Yes.

Q Do you know what the mother said to the child? A No.

Q Well, after the mother talked to the child the child raised her finger again? A Yes.

Q Now, had the child raised the finger for the mother before that? A No.

Q So that was the fourth time? A Yes. 20

Q Now, then, was that or was that not the last time? A It was the last time.

Q It was the last time? A Yes.

Q Now, the finger was pointed four different times? A Correct.

Q And there was an inquiry or something said to the child each time before the finger was pointed? A Yes.

Q So that she pointed to the defendant on one side of the bed first? A Yes.

Q There was nobody in front of him then? A Yes, I believe Messner was up there. 30

Q Messner was there? A Messner and the mother.

Q Do you mean to tell us that the mother had gone from this side of the bed from where she was kneeling to the other side of the bed? A No; she was on this side—the original side.

Q She remained on the original side all through the visit of the detectives and the defendant, to the ward, is that not true? A Correct.

Q And she never changed her position? A No.

Q But the defendant changed his position? A So did we. 40

Q And you took the defendant to the other side of the bed, did you? A Correct.

Q And you had no conversation on the other side of the bed with the little girl? A Yes.

Q Did you have any conversation on this side? A Yes.

Carl A. Thunell, cross.

Q So that you had two conversations, did you? A Yes.

Q And after you had the conversation then Messner had a conversation? A Correct.

Q And then after Messner had a conversation the mother had a conversation? A Correct.

10 Q And as a result of the four conversations the little girl pointed down to the prisoner, down to the right-hand side of the bed to where the prisoner was and after that twice on the other side; how long did this entire investigation last at the hospital? A I should judge about fifteen minutes.

Q Are you certain about that? A Well, I am not positive; I should judge about fifteen minutes.

Q Did it last five minutes? A Oh, yes.

Q Do you suppose the girl understood any question you put
20 to her or not? A I believe she did.

Q Did you know this girl before? A Never saw her before.

Q Did you tell the girl who you were? A Who I was?

Q Yes. A Yes.

Q What did you say to her? A I told her I was a police officer.

Q Told the little girl you were a police officer; are you sure about that, too? A Yes.

Q Are you? A Yes.

Q What else did you tell her? A Didn't tell her anything
30 more.

Q Didn't tell her anything more? A No.

Q And she raised her limp right hand and pointed toward the defendant? A Correct.

Q You were dissatisfied with that identification and you proceeded to talk with her again, and she raised her finger again? A Yes.

Q And still not satisfied with that, some other officers talked with her and she raised her finger again? A Correct.

Q And still being in doubt of whether she was identifying
40 anybody, you talked with her again, and this little child with the blinded eye raised her finger again? A Correct.

Q And what did she say? A She raised her finger.

Q What did she say? A When, the last time?

Q Yes. A She didn't say anything.

Q She didn't say anything? A No.

Carl A. Thunell, re-direct.

Q What did she say the time before that? A Well, I don't know just exactly what she said; Messner asked that.

Q What did she say the second time, the time after the first?

A She said that was the man who gave her a quarter to buy a little dolly.

Q To buy a little dolly? A Dolly; yes.

Q Sure, now, there was no fifth time? A No fifth.

Q You are sure, now, it was within fifteen minutes? A Well, I wouldn't say sure; it might have been seventeen minutes.

Q It might have been a half an hour? A No, I don't think it was a half hour.

Q Might have been three-quarters? A No.

Q You reported for duty July first at what time in the morning? A Nine o'clock.

Q What time did you report in for off-duty on July 1st, 1920? A Why, I believe we were out till late that night.

Q And you were talking with the little girl at the hospital; did you ask her how she felt, whether she was well or sick, or anything? A No, I didn't ask her.

Q Said nothing to her at all; did you say, "Little baby, you are all right; tell me the truth," or do anything to caress or encourage her? A No, sir.

Q Just said, "Point out the man?" A Yes, point out the man.

Re-direct examination by Mr. Mott.

Q What time did you say this was that you were up there at the hospital? A I think about one-thirty or two-thirty; either one; between one-thirty or two-thirty.

Q Did you make notes at the time? A Yes, sir.

Q When did you make your notes? A I made the notes when I made the report on that.

Q Oh, that don't tell me; when did you make your notes? A Oh, of the time?

Q Yes. A Why, right at that time.

Q Do your notes show the exact time? A Yes, sir.

Q Do you want to refer to your notes to refresh your memory of the exact time? A I want to.

Q Have you got your notes with you? A Yes.

Mr. McDermit. I object. He has testified here to his memory of the situation, of the interview up there, and

Carl A. Thunell, re-cross.

he has no right to get the benefit of his notes—to get the benefit of his time.

Q (*By the Court.*) When were these notes made? A At the time in a little notebook that I had.

10 Q (*By the Court.*) Have you got that notebook with you?
A No; I have not.

Re-cross examination by Mr. McDermit.

Q At the time that you were up there then you took down notes? A No.

Q You don't mean to say that? A No.

Q You don't want that understood at all? A No; but when I got in—

20 Q You don't want to say that?

The Court. Give the witness an opportunity. We will stay here until five or six o'clock tonight, if necessary, to give the witness a chance to answer the questions. Go on and answer the question.

A Why, I got out in the automobile and made the notes.

Mr. McDermit. I object to making an answer to this question now. The question is answered. He said he didn't make notes at that time.

30 *The Court.* He says he has not got the notebook with him. Where is it?

Witness. At home.

The Court. Where is your home; how far away?

Witness. 167 Wilson avenue.

Q Did you ever show the notebook to the prosecutor?

40 *The Court.* There is nothing here for you to examine on.

Mr. McDermit. Well, he said he left the notebook home.

The Court. The witness has not been turned over to you yet. The witness was cross examined and now he is in re-direct, and the prosecutor has asked him to produce that notebook, and he says it is not here—it is home.

Joseph F. Reilly, direct.

Re-direct examination by Mr. Mott.

Q Will you produce it tomorrow morning? A I will.

The Court. Now, you may cross examine.

Re-cross examination by Mr. McDermit.

Q When did you last see the notebook? A Well, that is a hard thing to say. 10

Q Well, did you ever show Mr. Mott, this gentleman here, the prosecutor, the notebook? A No.

Q Did you ever show this gentleman any notebook? A No.

Q Did you ever show Mr. Myer the notebook? A No.

Q Did you ever show anybody the notebook? A No; that is my personal property.

Q When did you write the notebook up; at what particular time? A I cannot understand your question. 20

The Court. He has already answered that. He said in the automobile as soon as he got out of the hospital.

JOSEPH F. REILLY, sworn in behalf of State.

Direct examination by Mr. Mott.

Q Where do you live? A 140 North Second street, Newark.

Q What is your business? A Newspaper reporter.

Q With what paper are you connected? A The Standard News Association of New York. 30

Q And were you formerly connected with our local papers? A Yes; Star-Eagle.

Q Were you at the hospital on the first day of July last?

A I was.

Q And did you see the little girl? A I did.

Q And did you see the defendant? A I did.

Q Will you tell the Court and jury just what was done? A Well, when we came into the room—by we, I mean Detectives Cotter, Thunell and Messner and a reporter for the Evening World of New York and myself; we went to an upper floor; I think it was the third or fourth floor, and we went into the ward where this little girl was lying on the bed; we gathered around the bed; the mother was sitting at the head of the bed, with her hand on the little girl's forehead, and Detective Messner stood back a little from the bed on the west side; the bed headed 40

Joseph F. Reilly, direct.

north and south; the girl's head to the north, and the mother was at the head of the bed, and Detective Messner came next, and, as I remember it, Detective Thunell and then the prisoner, and at the foot of the bed, Detective Cotter and the man from the Evening World, and I stood on the easterly side of the bed; when we got there, Detective Thunell asked the little girl, "Do you see the man here who hurt you?" And the little girl looked around and for a moment didn't answer. He repeated the question and the little girl lifted her left hand, as I remember it, and pointed to the prisoner. Detective Thunell then said, "We will make sure as to who she is pointing at," and he asked her again, "Do you see the man here who hurt you," and then she says to the mother, either he said or Detective Messner said to the mother, "Repeat that to her in Polish or Russian," and I did not know the language she spoke, and the mother repeated it.

20 *Mr. McDermit.* I object.

Q The mother said something? A Yes, sir.

The Court. Objection sustained.

Witness. The mother said something; the child looked around and lifted her hand from under the cover and pointed to this defendant, and Detective Thunell then told the defendant to lean over the bed and he leaned over the bed, and Detective Thunell asked the little girl, "What did this man do to you," and the little girl answered through her mother.

30 *Mr. McDermit.* Objected to.

Q Do not tell us what the mother said. A I am not going to tell you what the mother said.

The Court. I suppose that what counsel means is that he moves to strike that out.

Mr. McDermit. Yes, sir.

The Court. The statement the little girl answered through the mother, I presume, is moved to be stricken out, and if it is the motion is granted.

40 Q Then what was done? A The little girl said something to her mother and then she said a few words in English; the only words which I got was a quarter, and just at that moment

Joseph F. Reilly, cross.

a man from the Evening World called my attention away to something else and I only heard her reply a quarter.

Q What was done around there by the bed—I mean, did you then go away? A I then went away.

Cross examination by Mr. McDermit.

Q You are in the newspaper business? A Yes, sir. 10

Q And in that capacity you went to the City Hospital on this date? A Yes, sir.

Q What time of day was it? A It was—I think we left the Third Precinct shortly after two; somewhere between two and two-thirty.

Q When was it you left the hospital? A It was after four.

Q How long were you up to the hospital—an hour? A Oh, I was there an hour and a half, I guess. 20

Q An hour and a half. You are very sure about that, are you? A Positive.

Q Were other people there doing that time with you? A There were other people.

Q Well, did Detective Thunell withdraw during that entire time? A No, sir.

Q How long was he there? A Only the time we were in the ward with the little girl—about ten or fifteen minutes.

Q And that was the only time that any of these officers were there, was it? A I left them in the ward, or left them as they came out of the ward. 30

Q Well, you spent from two-thirty, or thereabouts, to four at the City Hospital? A Yes, sir.

Q In connection with this case? A Yes, sir.

Q And during that period of time how many minutes were you in the room where this little girl was? A Not more than fifteen.

Q Did you go away with those people from the hospital? A No, sir.

Q You heard the word “quarter” used? A Yes, sir. 40

Q How close were you to the bed when you heard the word “quarter”? A Why, I was right beside the bed, if not touching it; at the foot; within a foot of the foot of the bed.

Q Did Messner say anything to the child? A I did not hear him.

Joseph F. Reilly, cross.

Q Did anyone say anything to the child in Polish? A The mother spoke in a foreign language; I do not know whether it was Polish.

Q Who spoke to the child first after your folks had arrived?
A Detective Thunell.

10 Q Did he speak to her without speaking to her mother first?
A I think he did; I do not recollect.

Q You don't know whether or not— A I am not positive he did; I do not remember his saying anything to the mother.

Q You do not know how the conversation started? A I gave you the first question I heard. Detective Thunell said, "Do you see the man here who hurt you?"

Q How long after you arrived there was that question asked?
A Oh, within a minute after we got in the room.

20 Q Did you notice the condition of this girl? A Yes, sir.

Q Did you notice that one of her eyes was entirely closed?
A Yes.

Q And did you notice that the other eye was black and blue, and partially closed? A Yes, sir.

Q Did you notice that her mouth was all swollen so that she could not talk? A I noticed that her mouth was all swollen.

Q Did you notice that her face was swollen up two or three inches all around the nose? A No, sir.

30 Q Did you see her vomit while you were there? A No, sir; I did not.

Q What was the name of the doctor that was present when this examination was going on? A I did not see any doctor.

Q What was the name of the nurse? A I do not know; she only came into the room and asked if we were all detectives.

Q Did you talk to the child yourself? A No, sir.

Q The child could not have opened her eye, could she? A She had one eye open.

Q The other eye closed? A The other eye closed.

40 Q Do you know whether it was the right eye that was closed or the left? A The right eye was closed.

Q How was the bed lying, east and west? A North and south.

Q North, extending towards Cabinet street? A Cabinet street.

Q And south towards Bank street? A Bank street.

William J. Walzer, direct.

Q And she lay at the head of the bed, toward the northerly part of the bed? A Her head was to the north.

Q But the eye that was closed would be to the easterly side of the bed? A No, towards the west.

Q Then she lay with her limbs down towards the center of the bed? A Yes, sir. 10

Q With her head resting on the pillow? A Yes, sir.

Q And the eye that was apparently good was on the easterly side of her? A Yes, sir.

Q Now, when she identified someone in the line on the westerly side of the bed she pointed down towards the south-westerly side of the bed? A Yes.

Q You knew this man Claymonst, who was standing there, and you were in this line on this side of the bed? A No; I was opposite.

Q There wasn't any line there? A You might call it a line around the bed. 20

Q Where were you? A East of the bed; about one foot from the foot of the bed.

Q Now, assume the table here was the bed, you were on the easterly side of it? A Yes, sir.

Q Who was there with you? A The reporter from the Evening World.

Q What was his name? A Wheelwright.

Q Who was at the foot of the bed? A Detective Cotter.

Q Who else? A I think he was the only one; part of the time the man from the Evening World moved around the foot of the bed, somewhere near the bed, to talk. 30

Q How many people all together were there by the bed, including everybody? A I should say eight.

Q How was the defendant dressed when he was brought in there? A Why, he had a blue serge suit.

Q Did he have a hat on? A He had his hat in his hand.

Q What kind of a hat was it? A Black derby.

WILLIAM J. WALZER, sworn in behalf of the State. 40

Direct examination by Mr. Mott.

Q You are connected with the Newark Police Department? A Yes, sir.

Q What rank? A Lieutenant of police.

William J. Walzer, cross.

Q What were you doing on the night of the 30th of June last? A Doing desk duty.

Q Do you remember the occasion of a little girl being brought in by two men? A Yes, sir.

Q Did you see the vehicle that they were brought in with?
10 A Yes, sir.

Q What was it? A It was an army automobile?

Q What time was it when they got to the station house? A I should judge about anywhere from fifteen to twenty past ten.

Cross examination by Mr. McDermit.

Q Did you look at the clock? A Well, I didn't at the time; I looked at the clock five minutes later.

Q You made a record of the time on your book? A I made
20 a record at the time and sent her to Dr. Clark to be examined.

Q Did you take the name of the army officer? A Yes, sir.

Q Do you know what his name is? A Colonel Dietrich.

Q Is he here today? A No, sir; I understand he is in Chicago, or somewhere in the West.

Q All that you know about the transaction is that you sent them up to Dr. Clark's? A When I saw the condition of the child.

Q What condition was the child in? A The child's face was covered with blood. I took hold of the child's little dress
30 and saw the blood was down on her legs and I immediately had her placed in the patrol wagon and had her sent to Dr. Clark's for examination.

Q Well, she was in a bad condition all over her body, she was bruised all over? A Yes, sir.

Q Who went up to Dr. Clark's office with the little girl? A Officer Melcher.

Q Anybody else? A A man by the name of Kastner and a man by the name of Vella.

Q Did they subsequently come back from Dr. Clark's office?
40 A They went from Dr. Clark's office to the City Hospital and then returned to the station house.

Q Who accompanied these people; there was an officer from your station after you directed this child to be sent; who accompanied these two other fellows? A Officer Melcher.

Q And he came back with them? A Yes, sir.

Herman L. Melcher, direct.

Q Was there anybody else there besides Officer Melcher? A No, sir.

Q Were you on duty there when the girl's father came in?

A You mean the first time?

Q Yes. A The girl's father came in at nine-thirty, reported the child missing at nine-thirty. 10

Q The same night? A Yes.

Q The night of June 30th? A Yes.

Q So you got your report at nine-thirty from him? A Yes, sir.

Q And did you send out an alarm then? A I did not; no, sir.

Q Will your books show that the time was nine-thirty, will the records show that? A I believe they will.

Q (*By the Court.*) Will Mr. Salvatore Vella stand? Is that the man you mean? A Yes, sir. 20

Q (*By the Court.*) Mr. Kastner, is that the man? A That is the man, yes.

HERMAN L. MELCHER, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q You are connected with the Newark Police Department, are you? A Yes, sir.

Q On the night of the 30th of June last, did you take a little girl to Dr. Clark? A Yes, sir. 30

Q And at what time did you leave the police station? A About ten-thirty-five.

Q And did you go alone to the doctor's with the little girl or did somebody accompany you? A I took the two men with me that brought the girl in the station house.

Q That is Mr. Vella and Kastner? Stand up. A Yes, those two men.

Q After Dr. Clark got through examining, what did you do? A He ordered me to take her to the City Hospital.

Q Did you do so? A Yes, sir. 40

Q Did anybody go there with you? A The same two men.

Q Then where did you go? A Left the child at the City Hospital and brought the two men back to the police station.

Q They were held as witnesses? A Yes, sir.

Cross examination waived.

George W. Chenoweth, direct.

GEORGE W. CHENOWETH, sworn in behalf of the State.

Direct examination by Mr. Mott.

Q You are connected with the Newark Police Department?

A Yes, sir.

10 Q In what capacity? A Plainclothesman, Third Precinct.

Q Did you arrest, or participate in the arrest of the defendant? A I did.

Q Were you alone or was somebody with you? A Three others with me.

Q When did you arrest him? A I arrested him in Harrison about 1:45 P. M. on July 1st.

Q Now, how long had you been looking for him before you found him? A I started in on the case about 11:30 P. M., June 30th.

20 Q At that time what did you have to work on? A A description given to us by Kastner and Vella.

Q And was it on that description that you identified this man and arrested him? A It was, yes, sir.

Cross examination waived.

STATE RESTS.

30 *Mr. Mott.* I would like to call Mr. Chenoweth in this case to prove the distance of Wilson street from the home of this little girl, where this little girl lived, to the billboard.

Mr. McDermitt. I object.

The Court. Overruled.

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

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

40

WM. P. MARTIN,
Judge.

George W. Chenoweth, direct.

GEORGE W. CHENOWETH, recalled in behalf of the State.

Direct examination by Mr. Mott.

Q Do you know what the distance is from Wilson street, near Clifford, to the billboard—from Wilson street near Merchant to the billboard on Bay avenue near Clifford street?

10

Mr. McDermit. One minute. I do not understand there is any Wilson street; Wilson avenue.

Mr. Mott. Wilson avenue.

The Court. That is Wilson avenue, old Hamburg place?

Mr. Mott. Yes.

A There would be two routes to take to that place. One would be through Merchant street to Lafayette street, go through Tyler street all the way to the end, to South street, and then to the left of South street, that would be east on South street to the billboard, which is about one, two, three, four, five, six, about thirteen blocks from Wilson avenue and Merchant street to the spot where the billboard is on Bay avenue and South street.

20

Q (*By the Court.*) How many blocks did you say? A About thirteen blocks.

Q And that would be about how far? A That would be, I should judge, about a mile.

Q Are you familiar with Bay avenue near the billboard there? A I am.

Q How is that lighted?

30

(Objected to.)

(Objection sustained.)

Q (*By the Court.*) When did you see the place, I mean, with reference to June 30th? A July 1st, 2 A. M.

Q And how did you find it lighted then? A Bright.

Q Well, just tell us. A At the east of the billboard there is an electric light on the south side of Bay avenue; west of the billboard about 200 feet is another electric light.

Q What kind of electric light? A Why, hanging light, street light, are light they call it, and the morning was full moon and bright.

40

Mr. McDermit. I move to strike out the condition on July 1st, 2 or 3 o'clock that morning. It is not germane as to how it was that night at 10 o'clock.

George Claymonst, direct.

The Court. Denied.

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

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

10

WM. P. MARTIN,
Judge.

Cross examination by Mr. McDermit.

Q You saw the defendant that night? A Which night?

Q Why, the night you made the examination down there to 2 o'clock in the morning. A No, sir; I did not see him.

Q Was he at the police station the night before? A No, sir; I seen him that afternoon, July 1st.

Q Never saw him before that time? A I do not remember
20 seeing him.

Q Did you tell him what he was charged with? A Yes.

Q And he denied it?

Mr. Mott. I object.

The Court. That is not referred to in his direct evidence.

Mr. McDermit. Does your Honor exclude it?

The Court. Yes, certainly.

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

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

WM. P. MARTIN,
Judge.

Mr. McDermit opens for the defendant.

GEORGE CLAYMONST, sworn in his own behalf.

40 *Direct examination by Mr. McDermit.*

Q How long have you lived in the City of Newark? A Fifteen years.

Q How old are you? A Thirty-one.

Q And where were you living on June 30th, 1920? A 38 Wilson avenue.

George Claymonst, direct.

Q Where were you working at that time? A Working down in Harrison.

Q And for whom were you working in Harrison; who did you work for over there? A The Worthington Pump Works.

Q What time did you return from work that day? A I quit work five o'clock and washed up and dressed, ring my time card; it was twenty-five minutes after five. 10

Q And what did you do after you left the factory, which way did you go to your home? A Walked through the swamp to Edison's and down Harrison avenue and past the Hyatt Roller Bearing Company's plant and past the Crucible Steel plant and walked across the bridge.

Q (*By the Court.*) That is the Jackson street bridge? A Crossed Market street and turned in Jackson street and turned into Ferry street and walked through Ferry street and to Wilson avenue, to 38. 20

Q And did you live at 38 Wilson avenue? A 38 Wilson avenue.

Q And what time was it you got there? A Six o'clock.

Q What did you do next after you got home? A I washed myself again and sat by the table and got my supper.

Q Now, then, who did you live with; who did you live with or board with there? A Mr. Yaramines.

Q How long had you lived there at that time? A How long I lived there? 30

Q Yes. A About three years.

Q How long did you remain there after you came in for your supper? A After supper, about one hour.

Q And what did you do then? A Then I walked to my room and I got dressed.

Q How did you dress yourself; tell the jury what you put on. A I take working clothes off and put new pair of shoes, dark brown shoes, and put brown pants and shirt, blue stripe, and brown coat and collar and tie.

Q What kind of hat? A Flat straw hat. 40

Q What kind of stockings did you wear? A Brown.

Q Now, after you came out of the house where did you go to? Wait a minute. What time was it when you came out of the house? A About ten minutes before eight I go off from the house.

George Claymonst, direct.

Q What time was it you left your house after you put your clothes on? A About eight o'clock or a few minutes after eight.

Q When you came out a few minutes after eight, which way did you go? A I walked Wilson avenue and passed Merchant street and turned Ferry street, walking on Van Buren street, Jackson and Adams was last; I turned Adams street and walked
10 in the restaurant, 135 Adams street.

Q You walked from 38 Wilson avenue to the restaurant, 135 Adams street? A 135 Adams street.

Q Do you know where Ferry street is? A Yes, sir.

Q How near is 135 Adams street to Ferry street? A A few houses.

Q Well, now, does the restaurant lay towards Market street, or does it lay down toward Lafayette street? A Between
20 Ferry and Lafayette, in the middle.

Q Now, was it on the easterly or westerly side of the street; westerly means the upper side towards the Court House, or is it on the easterly side? A On the other side.

Q On the easterly side? A Yes, sir; on this side (illustrating).

Q Is 135 Adams street on the easterly or westerly side of Adams street? A One side is factories over there and the other side is restaurant.

Q West is towards the Court House here, and this side of
30 Adams street, the other side, is towards the meadows, the easterly side. Now, which side is it, the side towards the meadows or the side towards the Court House? A I do not understand.

Q (*By the Court.*) Is it on the same side that Jersey City is? A I say between Lafayette and Ferry street.

Q Yes, when you come up from 58 Fleming avenue to the corner of Ferry street and Adams street, do you walk across the street all the way over to the other side of Adams street, or do you turn— A I walked in to Ferry street and turned back
40 and crossed Adams on the other side.

Q You crossed Adams? A Yes.

Q Then it is on the westerly side? A Yes.

Q Now, when you got in the restaurant, who did you meet there? A First I meet Mrs. Thorne.

George Claymonst, direct.

Q How long did it take you to walk from your home at 58 Fleming street up to 135 Adams street? A About twenty minutes.

Q So then you arrived in the restaurant about eight-thirty, is that right?

Mr. Mott. I object. I think the witness should say what time he arrived. 10

The Court. Objection sustained.

Q What time did you arrive in the restaurant?

The Court. It took him how long, did he say, to go up there?

A Twenty minutes.

Q What time was it you left Fleming avenue to go to Adams street? 20

The Court. He did not live on Fleming street. He says he lived at 38 Wilson avenue.

Q What time was it you left 38 Wilson avenue? A Ten minutes after eight.

Q How long did it take you to get from this number up to Adams street? A About twenty minutes.

Q What time was it then? A About half-past eight.

Q Now, then, what did you do from half-past eight on? A I was sitting there at the table with Mrs. Thorne; sit there. 30

Q Who were you sitting there with? A Mrs. Thorne.

Q Is Mrs. Thorne here at the Court House? A I guess she is.

Q Now, how long did you remain in Thorne's place until you left there—were you at any other place from the time you went into Thorne's place that evening? A No, sir.

Q When did you leave Thorne's place? A I did not feel like eating.

Q I did not talk about eating. How long from half-past eight, the time you say you got to Thorne's restaurant, how long did you remain, stay there? A I stayed until eleven o'clock, about eleven o'clock. 40

Q Now, who was there in Thorne's place that you know or met or talked to between half-past eight o'clock and eleven

George Claymonst, direct.

o'clock? A Jack Thorne came in and sit alongside of his mother.

Q Who is Jack Thorne? A Mrs. Thorne's son.

Q How old is he? A About twenty-eight.

10 Q Who else came in there? A And I saw there—there was a workingman used to work in the restaurant, Charlie Bernord and Mike Belchus, and the lady that was working there cooking, Mrs. Komkowski.

Q Mrs. Lenora Karansas? A I guess it is.

Q How big a place is this restaurant? A Not so big.

Q Well, how large about, is it a store or what is it, any tables in there? A Yes, plenty of tables.

Q How many people were in it that night so far as you could see? A What I remember there was a big bunch when I came in.

20 Q A man by the name of Kastner testified here this morning that he met you down at the time of ten minutes to ten, or thereabouts, on Bay avenue and that you had pulled a revolver or pistol or revolver and had pointed it at his face? A I never was there.

Q Do you know anything about this girl child? A No, sir.

Q Did you ever see this child or have anything to do with this child? A No, sir.

Q Do you know anything about this man Vella who testified here, this other man? A No, sir.

30 Q Did you have any trouble with any men that night of June 30th at ten o'clock or in the neighborhood of ten minutes to ten, or a quarter after? A Never had any trouble at all.

Q Never were down there? A No, sir.

Q Do you know anything about where a street called Clifford street is? A No.

40 Q When did you first know that you were charged with having made this assault upon this child and ill-treated her down there; when did you first hear that; who first told you that? A July 1st at the Third Precinct the Judge read me a slip and told me it was against me.

Q At the Third Precinct on the 1st of July the Judge read you a statement and said it was against you? A Two men and the captain.

Q What did you say? A I said, "I don't know anything about it."

George Claymonst, direct.

Q Did you see any one of these men before? A No, sir.

Q Did you know those men before? A No, sir; I never saw them.

Q Did you ever see this girl before? A No, sir.

Q Did you ever see her mother or any of the people before?

A I don't know.

Q You don't know anything about this affair at all? A No, sir. 10

Q Where were you arrested? A Arrested in the shop.

Q What time were you arrested in the shop? A It was in the afternoon, about two o'clock.

Q And was Mr. Chenoweth, was that the gentleman that arrested you? A I do not realize, but the other detective had been there who got specks on and some oldish fellow.

Q Where was it they arrested you? A I was working; my department. 20

Q And what department are you in? A M-13.

Q And how long have you been in M-13 department over there? A Over eight months.

Q And had you been working regularly at that time? A I work all the time.

Q (*By the Court.*) What do you do? A Making those large condensers over there.

Q (*By the Court.*) Then you were a mechanic? A No; shipping those condensers.

Q Do you know anything at all about this occurrence down there this night, or anything about this trouble that took place down there at all? A No, sir. 30

Q What time did you go to bed that night? A That night?

Q Yes; the night at this Thorne's place; you were down there; you left there, as I understand it, at eleven-thirty or after eleven o'clock; what time was it you went to bed that night? A About half-past eleven, I was home.

Q You went to your regular boarding place? A I have a key in my pocket; I walk in my room and hang my shirt and collar and tie and coat and go to bed. 40

Q Now, what kind of clothing did you put on when you went to your workshop the morning of the first of July? A I had a khaki coat.

Q One of those military coats? A Yes.

Q And? A And a derby hat and heavy dark-brown shoes.

George Claymonst, cross.

Q Now, you were arrested and brought in to the police station on Van Buren street that afternoon; what kind of clothes did you have on you? A That khaki coat and derby hat and some kind of dark pants.

10 Q Did you have a straw hat on your head or straw hat in your hand in the Third Precinct when you were arrested in the afternoon and brought there? A No, sir; derby hat I had; he told me to take my derby hat off and he looked me all around to the neck and looked over my head; looked my head all around.

Q Do you mean he put his hands on your head? A No; he took my derby hat off and he looked my neck all around, and those men that was there examined me.

20 Q Then the men that were here this morning that testified that you were the man they met down at the billboard, with the man that after you took your hat off to, the detective, stayed to examine you all around? A Yes.

Q Now, I ask the question whether or not you had a straw hat with you in the room at the police station? A No; derby hat.

Q Black derby? A Black derby.

Q Now, what hat was it you wore the night before? A Straw hat.

Q That was a flat, plain straw hat? A Flat.

Q You didn't wear that to work that day? A No, sir.

30 Q And so far as you know the detectives did not have any plain, flat, white hat at the place? A No, sir.

Q Where is that white straw hat? A The policeman has it.

Mr. McDermitt. I ask for the production of the hat.

Mr. Mott. Mr. Chenoweth tells me he' has it and will bring it here tomorrow morning.

Mr. McDermitt. Without subpoena, is that understood?

The Court. Yes.

Mr. Mott. He will bring the hat he has got.

40 *Cross examination by Mr. Mott.*

Q You know this man? A Yes; I see him.

Q Oh, do you know him? A I see him in the street walk around.

Q Did you ever speak to him? A Sometimes.

George Claymonst, cross.

Q Well, you know him pretty well, don't you?

The Court. Who is the man to whom the witness' attention is directed?

Mr. Mott. George Jacieko.

Q You know him? A Why, I was going to work in the shop and he came to work, and he told me he worked in the Hyatt Roller Bearing Company, and he told me he worked down in the Hyatt Roller Bearing Company, and I told him I worked in the pump works. 10

Q Well, you live right near him? A I don't know how many houses he lives below mine, but I live 38.

Q Yes, and he lived just a few houses on the other side of the street. A I don't know the number of the house; I know he lived there, but I don't know the number of the house. 20

Q You knew he lived right near you on Wilson avenue, didn't he? A Wilson avenue; I don't know the number. 20

Q But you know it was near your home? A He lived there; I know that, but I don't know the number.

Q He lived near your home?

Mr. McDermit. What is the number, Mr. Mott?

Mr. Mott. Twelve.

Mr. McDermit. And what number does he live at?

Mr. Mott. Thirty-eight. 30

Q How long have you lived there? A About three years.

Q Well, you had seen this little girl, Mary, around on the street there? A No; I don't know the children or anything over there.

Q You mean to say that you never saw that little girl, Mary, on the street? A No, sir.

Q In the three years you lived there? A Lots of children in the street, but I don't know who they belong to.

Q I didn't ask you that. I asked you if you had ever seen the little girl, Mary. Mary, come here. I ask you if you have ever seen this little girl on the street. A No. 40

Q Never saw her playing in the street? A No, sir.

Q Never saw her around there at all? A No, sir.

Q And you lived there three years? A Three years.

George Claymonst, cross.

Q (*By the Court.*) Are you in the same block as number Twelve? A Thirty-eight.

Q (*By the Court.*) I know you said thirty-eight; is not thirty-eight on the same block as number twelve? A Same block.

10 Q (*By the Court.*) Same side of the street? A I don't know if it is the same.

Q (*By the Court.*) It is nearer Broad street then, thirty-eight; it is just this side of thirty-eight. Where do they commence to number at Wilson avenue, at Tyler street or Merchant street? A My side is across the street from the school; the other side is the school.

Q (*By the Court.*) You were across the street from the school? A The other side of the school.

20 Q When you say the first time you saw Mr. Chenoweth—when did you see him first? A I know so many years; he is in the Third Precinct.

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

Q Did you say you saw him on the first of July? A No.

Q I thought you said—I may be mistaken—that you saw him on the first day of July in the precinct, Third Precinct; did you say that? A Well, it is so many; I don't know which one; there was there so many of these I don't know who was there.

30 Q Were you at the police station the day before you were arrested? A Before I was arrested?

Q Yes. A I never was in the police station.

Q Then you didn't go to the police station the day before you were arrested? A No, sir.

The Court. The arrest is testified to have been made on the first of July.

Q About what time of day was it when you got to the police station with Mr. Chenoweth on the first? A About half-past two.

40 Q How do you say you were dressed on the night before you were arrested? A Brown suit, brown shoes and straw hat; flat straw hat.

Q And what kind of shirt? A Blue stripes.

Q Well, it was a white shirt with blue stripes? A Blue stripes.

George Claymonst, cross.

Q It was a white shirt with blue stripes? A Yes; blue stripes.

Q White shirt? A White shirt and blue stripes; different kinds of stripes.

Q And you had on a white necktie? A Brown.

Adjourned to October 22, 1920, at 10 o'clock A. M.

10

Friday, October 22, 1920.

Continued pursuant to adjournment.

Present, counsel as before stated.

GEORGE CLAYMONST, defendant, recalled.

20

Further cross examination by Mr. Mott.

Q Where were you born? A Lithuania.

Q In Russia. How old were you when you came to this country? A Seventeen.

Q Did I ask you whether you are married? A Single.

Q Are you a citizen of this country? A No, not yet.

Q After you were arrested the police officers took you up to the hospital where the little girl was, didn't they? A Yes.

Q Did you see the little girl there? A Yes.

Q Did you bend down over the bed so that you could hear what she said? A I was the second or third person from the bed or the girl.

30

Q Well, did you lean down over the bed so you could hear what she said? A Yes.

Q Did she then say that you were the man that hurt her; did she say that? A No.

Q Did she say that you were the man that gave her the quarter? A No; she didn't say that I give her the quarter; she said somebody give her the quarter.

40

Q You never gave her a quarter? A No, sir.

Q Had you ever spoken to the little girl? A No.

Q Never spoke to her at all? A No.

Q I believe you said you had never seen her on the street?
A No.

George Claymonst, cross.

Q Did she point her hand at you? A The officers told her to point.

Q She did point her hand at you? A She did.

Q What? A She did.

10 Q You said when you went into the restaurant on Adams street, if I am not mistaken, that you did not get anything to eat, is that right? A No.

Q Well, did you get anything to eat? A No.

Q Had you had your supper? A I had my supper home.

Q Where? A Where I live.

Q What is the name of the people you had your supper with? A Charlie Yaraminies.

20 Q What time did you have your supper that night? A I sat at the table half-past six; I was half-past six to get through my supper.

Q If you didn't want anything to eat what did you go into the restaurant for? A To speak to the people there.

Q What? A To speak with my people there.

Q They were friends of yours? A I was board there about seven years.

Q You boarded there about seven years? A Yes, before this place.

Q Before you went to Charlies Yaraminies? A Yes, sir.

30 Q How long had you been with Charlie Yaraminies? A Three years, about three years.

Q Then you had been living right in that neighborhood for at least ten years? A All the time in Newark.

Q Was Mrs. Yaraminies home that night when you had supper? A Yes.

Q She has a little girl, hasn't she? A Three children.

Q One of them is a girl? A One girl.

Q Did you see the girl? A Yes, she was in the house.

Q Was Mrs. Yaraminies home? A She gave me supper.

Q Was he there? A She was there.

40 Q Was he, too? A The man, no.

Q Did you see the man that night? A I don't see the man, but she gave me the supper.

Q Well, did you see him afterwards; did you see him that night? A I went past Wilson avenue and I seen him working in that Jewish store.

George Claymonst, cross.

Q Did you go down Wilson avenue? A After supper I went down Wilson avenue to 135 Adams street.

Q How far is it from your home to 135 Adams street? A About four or five blocks.

Q (*By the Court.*) You mean by that four or five blocks away? A Yes, sir. 10

Q Now, in going from your house down Wilson avenue to 135 Adams street you pass right by the house of Mrs. Jacieko?

A I pass there, yes.

Q What time was it when you left the restaurant? A About eleven o'clock.

Q And where did you go? A Walked Adams street and turned Ferry street and walked Ferry all the way home.

Q (*By the Court.*) You went on Adams to Ferry and then down Ferry by Jackson, Van Buren, Polk, then Merchant street, and then into Wilson avenue, is that it? A Yes, sir. 20

Q Are you sure you left your house after supper about eighteen? A About that.

Q Wasn't it nine? A No, sir.

Q Couldn't it have been nine? A No.

Q Haven't you said it was nine? A No.

Q At no time? A I know the time was ten minutes after eight.

Q And what time did you say it was when you reached the restaurant? A Half-past eight, about half-past eight.

Q Wasn't it after nine o'clock? A No, sir. 30

Q Haven't you said it was? A No, sir.

Q Can you read? A Not much.

Q Well, can you read English? A A little bit, not much.

Q Can you read English writing? A No.

Q I show you Exhibit S. 1 for identification and ask you if that is your signature there; did you write that; did you write George Claymonst, 138 Wilson avenue, there? A Well, it is my name there, but I ain't positive it is my writing there.

Q (*By the Court.*) Is that what you say? A Yes. 40

Q Claymonst, don't you know that is your writing? A Well, it looks mine; but I ain't positive it is mine; it looks a little bit different than I write.

Q Don't you know your own handwriting when you see it? Answer that. Don't you know your own handwriting when you see it? A Yes.

George Claymonst, cross.

Q Is that your writing? A It looks like mine.

Q Is it yours? A It is mine.

Q It is yours, yes. Why did you say you didn't know whether it was your handwriting or not? A I no realize.

10 Q Why didn't you realize it was your handwriting? Will you answer that?

Mr. McDermitt. Does he mean realize or recognize? Let us be fair to the defendant.

Mr. Mott. Yes. I was assuming, Mr. McDermitt, that realize meant recognize.

Q Why did you say that you did not know whether that was your handwriting? A That is on the top mine, but on the bottom it is not mine.

20 Q I show you a line and ask you whether or not you wrote "George Claymonst, 38 Wilson avenue," there? A Yes, that is mine.

Q But I ask you whether you did not know whether it was yours or not. A I was mistaken; I look at the second line.

Q I direct your attention to your own name, not somebody else's name. A It is mine.

Q Didn't you tell the police that it was nine-fifteen when you got to the restaurant? A No, sir; I did not.

Q Sure, are you, you are sure? A Yes.

30 Q Didn't you tell the police that it was about nine o'clock when you left your house? A I told the police it was half-past eight, about that time.

Q No, that may be; I am not disputing that now; I am asking you if you didn't tell that it was nine o'clock. A No, I didn't.

Q Where were you when you signed your name to this paper, Exhibit S. 1 for identification?

Mr. McDermitt. Do you understand what he means?

Witness. No.

40 Q Where were you when you signed your name there? A Third Precinct.

Q George Messner, stand up. Was that man there at the time? A Yes.

Q Chenoweth. Was this man, Mr. Chenoweth, there? A No, the other man. This man was there, but he don't write, he was in the room, but he don't write nothing.

George Claymonst, re-direct.

Q Officer Messner did the writing, did he? A Yes, sir.

Q Officer Chenoweth was there? A He was in the room.

Q Farrell. Was Officer Farrell there, too? A Yes.

Re-direct examination by Mr. McDermit.

Q How long have you known the people that kept the restaurant on Adams street? A Since I came here to this country. 10

Q Well, how long ago is that, that you first formed the acquaintance of the people who kept the restaurant? A How long that restaurant?

Q What? A How long they got the restaurant.

Q About how many years when you first met Mrs. Thorne?

A I know her, I think, thirteen years.

Q Well, you lived seven years with Mrs. Thorne and you lived three years with your present people where you are boarding? A When I come from the other side I knew her. 20

Q Did she come from the same part of the country you came from? A Yes.

Q So you knew Mrs. Thorne, who kept this restaurant, in the country where you were born, is that right, your country? A Yes.

Q Now, the prosecutor asked you with respect to the paper that he has not offered in evidence here and asked whether you had signed your name to that paper? A I signed it.

Q That is your signature on that paper? Why was it you hesitated to say you didn't know whether it was your signature on that paper if it was your signature? A The first line is my signature and the bottom I don't know what it is. 30

Mr. McDermit. May I see that paper?

Mr. Mott. Well, it is not offered in evidence. You can see anything I have got.

Q So that when the prosecutor showed you—may I take that back to show to him? I want to show how easy you are to be mistaken—is George Claymonst, 38 Wilson avenue, on the same line with that “signed”; did you write the word “signed”? A I know that I signed my name; I don't know whether the same line or not. 40

Q Did you write the word “signed”? It says “signed,” “George Claymonst, 38 Wilson avenue,” on one line. I am asking you whether or not you wrote this first word. Is that

George Claymonst, re-direct.

your handwriting? A I put my name, I think, it is plain paper at the bottom.

Q No, that is not what I asked you.

The Court. One moment.

(Answer read.)

10

Q Did you write—do you understand this question, that word is “signed.” Is that your handwriting? A This is not mine, just my own name, that is all I put on.

The Court. Now he says, “That is all mine.” He refers to just the name, George Claymonst.

Mr. Mott. And the address.

Mr. McDermit. And 38 Wilson avenue.

20

Q I ask you plainly again whether or not the word “signed,” which is on the same line as your name and address, whether you wrote the word “signed”? A I think it was, but it was the line, the plain line.

Q I want you just to keep out of your mind for a minute, “George Claymonst, 38 Wilson avenue.” Keep that away, as though it was covered. Look at the word “signed,” this writing up there; is that your handwriting? A This is not my writing (indicating); this is not my writing (indicating); yes, this is mine.

30

Mr. McDermit. Referring to the words, “George Claymonst, 38 Wilson avenue.”

Q Now, then when you were asked by this gentleman, Mr. Mott, about your signature on this line, did you hesitate about answering on account of the other word being in somebody else’s writing there; is that the reason you were unwilling to say it was on your signature? A Yes.

Q Now, then, on the next line is the word “witness”; is that your handwriting? A No, sir.

40

Q Is “George Messner” your handwriting? A No, sir.

Q Is “George W. Chenoweth” your handwriting? A No, sir.

Q Is “James Farrell” your handwriting? A No, sir.

Q I show you a straw hat and ask you to look at that hat. Take ahold of it.

George Claymonst, re-cross.

The Court. Go away back by the jury, Mr. McDermitt, and then he will talk to you and the jury will all hear what he says.

Q Do you know where this straw hat comes from? A That is my straw hat.

Q Well, now, how did that straw hat get here; do you know? 10

A It was left in the house; I was to work.

Q You have been in jail since the first day of July? A Yes.

Q When did you last see that straw hat, the straw hat in front of you? A The first time I see now.

Q Well, you see it now?

The Court. He has already answered that, Mr. McDermitt: "I left it in the house when I go to work."

Q Now, was that straw hat in the house on the day upon which you were arrested? A I was going to work and left my straw hat in the house. 20

Q You had worn to your work on that day, as I understand you, khaki clothing, to your work? A Yes.

Q You said khaki, what do you mean by that? A Why, I left all the clothes at the house.

Q Did you go to work without any clothes on? A Different clothes.

Q Well, what kind of clothes? A Yellow clothes and derby hat. 30

Q Were your pants yellow? A No.

Q Was your coat yellow? A Coat, khaki was coat, and derby hat and gray pants and dark brown shoes.

Q To work? A Yes, to work.

Q Did you have any blue suit on when you were taken into the hospital in the afternoon? A No, sir.

Q Did you hear the testimony of Mr. Reilly, the reporter, that when the girl pointed you out you had a blue suit on at the hospital? A No.

Q They took you in the same suit to the hospital as you were taken from the workshop? A Yes, sir. 40

Re-cross examination by Mr. Mott.

Q I understood you to say that when you signed this paper it was a blank piece of paper, is that right? A Yes, sir.

George Claymonst, re-direct.

Q Was there any writing on it at all when you signed your name? A I signed the last, it was plain.

Q Well, do you mean the names written below your name were not there? A Yes, some on lines that was signed.

10 *The Court.* What does he mean? Let me inquire, if there was not anything at all written ahead of his signature when he signed his signature.

Q Well, what is on the paper above your name was there when you signed it, wasn't it, the writing? A There was writing there; I do not know what writing; he told me to sign your name; I put the last name.

Q (*By the Court.*) Well, did you not say something about there was one line or a few lines? A (Not answered.)

20 *Mr. McDermit.* I think he intends to convey and does convey that the line he signed his name was blank. I offer that hat in evidence.

Q Now, he is where you signed your name and address on this line, to which I am now pointing? A Yes.

Q Was there writing on this piece of paper above your name there when you signed your name there? A There was writing first and after put the name on.

Q And the names below your name were written after you signed it? A Yes.

30 *Re-direct examination by Mr. McDermit.*

Q Do you own a Panama straw hat? A No.

Q Was there any Panama straw hat in your house, in your room? A No.

Q Did you ever own a Panama straw hat? A No.

Q Did you see any Panama straw hat on the night that you were in Thorne's place? A No.

Q Did you have a Panama straw hat there at all? A No, sir; I never did.

40 Q And what was the kind of hat you had, the hat you wore this night at Mrs. Thorne's? A The same what I got there.

The Court. The same as that just shown to you?

Witness. This straw hat.

Q Is this the one? A Yes.

Mrs. Mary Thorne, direct.

Q Will you kindly put that hat on your head? (Witness does so.)

Q What you mean is that you did not have a Panama hat, isn't it? A No buy this year; that hat is for last year; that is what I got.

Q (*By the Court.*) Do you know what a Panama hat is? A 10
Yes, sir.

MRS. MARY THORNE, sworn in behalf of defendant.

Direct examination by Mr. McDermit.

Q Where do you live? A I live Adams street, 289.

Q Do you know the defendant here, the man sitting alongside of me; do you know him? A George Claymonst?

Q Yes. A Yes; oh, yes; I know him good.

Q How many years do you know him? A I know he was a 20
little boy in the old country now.

Q Did he, when he came to this country, come to board with you for awhile? A Boarded first at another place, and after come to my place; my house.

Q For how long a time did he board with you? A He board for seven years like that.

Q Do you remember the night of June 30th of the present year, June 30th? A June 30th?

Q Yes. A Yes.

Q Do you remember that night? A Yes. 30

Q And do you know where 185 Adams street is?

The Court. You mean 135?

A Yes.

Q And what was conducted at 135 Adams street on the night of June 30th—what business? A Restaurant.

Q And whose restaurant business was that; who run the place there? A I run the place.

Q And how long did you have that restaurant at that place before June 30th? A I had it, I guess, about four or five 40
months.

Q Did Mr. Claymonst, the defendant, did he come to your place often? A He come often.

Mr. Mott. I object.

Mrs. Mary Thorne, direct.

The Court. Sustained. Let these witnesses tell their story.

Q On the night of June 30th, was this defendant in your restaurant? A Yes; he was that night; the night in the restaurant.

10 Q What time did he come into the restaurant that night—that evening? A He come half-past eight, like that; I see him; I come out from the kitchen; I see him; I said, “Hello, George,” I said, “how do you feel?” He said, “All right.”

Q And after you came out to the restaurant and started to talk to him, how long did he stay in the restaurant? A He stay after ten o'clock like that I see him in the restaurant.

Q What time was it that he left the restaurant that night? A It was like half-past eleven, like that time.

20 Q Now, then, during the time since he came in there, since half-past eight in the evening, until half-past eleven at night-time, was he there all the time? A All the time.

Q How do you know that? A I see him all the time; I talk awhile with him; after he talk with my son; after talk with other people.

Q How large a room is this restaurant—how many tables have you? A Nine tables, I guess; eight or nine tables.

Q And is your son, John Thorne, is he here? A He is here; I guess he is here; he is here.

30 Q Is John Thorne here; is this your son? A Yes, that is my son.

Q Was he there that night? A Yes; I called him up; I want to buy a phonograph.

Q And what time did your son come to the restaurant that evening? A Yes; I didn't stay all the time in the restaurant that night; I stay and wait for my son to come to see a phonograph; after my son come, he said, “Mother—”

Mr. McDermit. I move to strike that out.

40 *The Court.* Madam, you answer the questions, and when you do, speak out loud, so that we can all hear you.

Q What time did your son John come to the restaurant that evening—what time did John come there? A He come after eight, I guess.

Q After eight? A Yes.

Mrs. Mary Thorne, cross.

Q And how long did John stay in the restaurant that evening? A He no stay long; about nine o'clock.

Q What time did he go away from there? A About nine o'clock.

Q Do you know a man by the name of—

The Court. Let her tell who were the others there. Why lead her? 10

Q Who else was in there that night? A There was lots of people; I cannot remember every one now.

Q Well, if I point somebody out in the court room can you tell whether he was there or not? A One lady was a waiter; she worked in the restaurant, and another one or two men, Mike Bulchas.

Q Was a man named Mr. Beno, Charles Beno? A Charles Beno. 20

Q Look at that man there. A Yes.

Q What is his name? A Charles Barry.

Q (*By the Court.*) How do you spell it? A I don't know.

Q Miss Schott, will you stand, please? Look at that girl down there. A Yes; she worked in the restaurant.

Q Was she there that night?

The Court. She has already said she was. She said a lady that worked there in the restaurant.

Witness. Yes; a waitress. 30

Q Was she in the restaurant that evening from eight o'clock until eleven o'clock on June 30th? A Yes.

Cross examination by Mr. Mott.

Q You knew Claymonst in the old country, in Lithuania? A Yes.

Q How old are you? A How old I?

Q Yes. A I am forty-eight now.

Q You are married? A Sure. 40

Q Did you marry in this country or Lithuania? A Old country—Lithuania.

Q You and your husband came over together? A Yes—no, my husband come first.

Q And then you came after? A I come after.

Mrs. Mary Thorne, cross.

Q You said you knew George all his life, did you? A Yes; I know him, he was a little boy in the old country; I know the father and mother, too.

Q You knew all his family? A Yes.

Q You are no relation to him? A What?

10 Q Are you related to him? A I know him as a good fellow.

Q No; are you any relation; is he a relative of yours? A No, sir.

Q (*By the Court.*) Is he a brother or cousin, nephew, or any of his family? A No; just I know him.

Q He knew your husband, too, didn't he; your husband knew him in the old country? A Yes; my husband know the father and mother and met the whole family.

20 Q Now, when was this that George was in your restaurant? A What time?

Q Yes; was it July? A No; it was June; last June, I guess.

Q Well, you say you guess; do you know what you are talking about? A I no understand what you say.

Q I am asking you when it was; what night is this you are talking about that you say George came in your place? A It is Wednesday.

Q And what month? A This was last June.

Q Now, what time do you say he came into your restaurant?

30 A Half-past eight; about that time.

Q Well, was it; you are sure it was after eight; or could it have been eight o'clock? A After eight.

Q How much? A Half-past eight; like that time; I know the time, you know.

Q And how late did you stay there? A Oh, I stayed quarter to twelve.

Q Didn't you go out at all during that evening? A No; stay in the restaurant.

Q And what time did he go out? A He go out after eleven.

40 Q Now, do you know what time your son, John, got there? A My son got there, I guess, about nine o'clock; I left George about nine o'clock.

Q No; you say your son, John, got there about nine o'clock?

A Yes.

Q You guess it was about nine o'clock? A I mean nine.

Mrs. Mary Thorne, cross.

Q You mean nine, is that right? You understand me, don't you, Mrs. Thorne? I am asking you if your son, John, came into the restaurant about nine o'clock. A No; he come first nine o'clock; he go out home.

Q What? A Nine o'clock he go home.

Q Nine o'clock he went? A Go from my place. 10

Q Then he got to your place about—what time did he get to your place? A What time he come?

Q Yes. A He come about eight o'clock.

Q Who was there first, George or John? A I do not know; I cannot tell.

Q (*By the Court.*) Were you working in the kitchen? A I work in the kitchen and I go from the kitchen and see George in here.

Q (*By the Court.*) I did not ask you that. I want you to answer questions, Mrs. Thorne. Did you work in the kitchen back of the restaurant? A I work in the kitchen back of the restaurant. 20

Q (*By the Court.*) And were you serving many people that night? A Lots of people.

Q (*By the Court.*) There were a great many; how many were there? A I cannot tell; I can't tell that.

Q (*By the Court.*) How many people were out in the restaurant, eating in the restaurant, when you were in the kitchen? A I can't tell that; I know altogether there was a couple of people; a couple of men. 30

Q (*By the Court.*) Did you cook the food for them? A No; I no cook.

Q What were you doing in the kitchen? A Help wash the dishes and help bring in the table something.

Q (*By the Court.*) Did you wait on the table, too? A Sometimes I help.

Q (*By the Court.*) You didn't see this Claymonst come in, did you? A I seen him in the restaurant.

Q (*By the Court.*) Did you see him come in? A No. 40

Q (*By the Court.*) And all you know is that after a time you went out in the restaurant and you saw him there, is that so? A Yes.

Q (*By the Court.*) And then you went back in the kitchen four or five more times that evening after he came? A Yes;

Mrs. Mary Thorne, cross.

when I come in I see him and talk a couple of words and go back in the kitchen.

Q (*By the Court.*) How long did you stay there? A In the kitchen, I cannot tell; I go and I come out; I don't know how long I stay in the kitchen.

10 Q (*By the Court.*) Well, then, you were back and forth between the kitchen and the restaurant, and you were principally helping in the kitchen, is that right—is that right that night? A Yes.

Q (*By the Court.*) You do not know exactly what time he did leave, do you? A I left—

Q (*By the Court.*) He left? A Left the restaurant after eleven.

20 Q (*By the Court.*) I asked you if you were there in the restaurant when he left? A No, sir; I no stay in the restaurant; I no understand what you say.

Q (*By the Court.*) Well, now, which is it, madam, do you understand my question? I am asking you if you were in the restaurant when Claymonst went out. A Claymonst go first out.

Q (*By the Court.*) Claymonst went out first? A Yes.

Q (*By the Court.*) Did he go out and come back? A No; he no come back.

30 Q (*By the Court.*) Were you there when he went out? A I stay a couple of minutes more and go home, too.

(Examined through interpreter.)

Q (*By the Court.*) Now, you say, Mrs. Thorne, that you worked principally in the kitchen, helping out there, and that you went back and forth in the restaurant; that is so, is it? A Yes, sir.

Q (*By the Court.*) And now, I ask you if you happened to be in the restaurant at the time Claymonst went home or went out? A I was in the restaurant.

40 Q (*By the Court.*) At the time he left? A Yes, sir.

Q (*By the Court.*) How do you know that? A I see.

Q (*By the Court.*) Oh, but you were in the kitchen most of the time? A I was in the kitchen and in the restaurant.

Q (*By the Court.*) Both? A Yes; I clean the table and work in the kitchen and put the dishes in the kitchen and go out

John Joseph Thorne, direct.

and clean the tables; I see the people all the time; they come in the kitchen and go in the restaurant.

Q (*By the Court.*) Then you saw the people all the time; you came in from the kitchen and went out in the restaurant and back again, did you? A Yes, sir.

Re-direct examination by Mr. McDermit.

10

Q Was Claymonst in the restaurant? If you do not understand the question, say so. I want to get the situation. From the time that Claymonst came into your restaurant that night until the time that he left, what was the time that he left? A After eleven o'clock.

Q After eleven? A Yes, sir.

Q What was the time when he came in there? A It was half-past eight.

Q You saw him in your restaurant from half-past eight until half-past eleven all the time? A Yes, sir.

20

Re-cross examination by Mr. Mott.

Q Will you give me the name of one man that was in the restaurant besides Claymonst—just one man; do you know one man that was there besides him? A It was Bulchas, Mike.

Q Well, did he work there? A No, sir.

Q Mike didn't work there? A No, sir; he used to come to the restaurant.

Q What time did he come in that night? A I don't know.

30

Q What time did he go out? A He go out first.

Q Well, what time did he go out? A I don't know; I no look at the time.

JOHN JOSEPH THORNE, sworn in behalf of the defendant.

Direct examination by Mr. McDermit.

Q Where do you live? A 66 Main street, East Orange.

Q And you are related to the last witness, are you, Mrs. Thorne? A Yes, sir.

40

Q What is the relationship? A Mother.

Q Do you remember she had the restaurant at 135 Adams street? A I do.

Q And do you remember the night of June 30th? A I do.

John Joseph Thorne, direct.

Q And do you know the defendant here, George Claymonst?
A I do.

Q How long have you known him? A About twenty-two year—twenty-three.

Q And you know him from living with you? A Yes, sir.

10 Q And on this night in question were you down at 135 Adams street? A I was.

Q And what time in the evening did you get there? A About sixteen minutes after eight.

Q And was Claymonst there at the time? A No, sir.

Q How long after you were in there did Claymonst come in?
A I should say it was about from three to five minutes from the time I went into the restaurant to the time I seen him.

Q Now, how long after you came in there—how long did you
20 remain in the restaurant? A Until a quarter after nine.

Q And when you left at a quarter after nine was George Claymonst still there? A I left him sitting at a table.

Q What was he doing sitting at the table? A Talking about the family in Europe.

Q Who was he talking to? A My mother and Mike Belchas and Charles Bernord.

Q So you had stayed in the restaurant an hour, from sixteen after eight until a quarter after nine; now, how did you fix the time?
30 A Because I looked at my watch when I got off the South Orange avenue car at Adams and Ferry street; I had an appointment to go with Mike Belchas to this man's house; they had that musical piece I was to purchase.

Q And the object of your visit down there was to meet him to make this purchase? A Yes, sir.

Q And when you got there did you look at your watch? A I did.

Q And you are positive when you left there that Claymonst was seated at the table? A I am.

Q Did you notice him closely? A Yes; we had a conversa-
40 tion for about ten minutes together.

Q How was he dressed? A I will give you the best I can remember, and that is all; that is, he had a dark-brown suit on; hat, I do not know; one time he had his hat off and I didn't look for it, and I didn't know what hat he had on; I know he had a dark suit on and dark-brown shoes, with brown toes—

John Joseph Thorne, cross—re-direct.

what they call a Blucher shoe. That is all the clothes I know he had on; I never noticed anything else.

Q Did you notice whether he had any white socks on? A I did not.

Q Did he leave the table at any time while you were there during that hour? A He got up once or twice. 10

Q Did he go out? A No, sir; not out of the restaurant; he went to the lavatory.

Cross examination by Mr. Mott.

Q How long have you known Claymonst? A About twenty-three years.

Q Is that all your life? A No.

Q How old are you? A That is as long as I can remember.

Q How old are you? A Thirty years of age the twenty-fifth of November, 1920. 20

Q You knew him then in Lithuania? A Yes; I did.

Q You and he as boys played there together? A We did.

Q You knew his father and his mother? A I did.

Q You have kept up the acquaintance all the years since you came to this country? A Well, I wouldn't consider it an acquaintance; we spoke whenever we met, but we were not really thick friends.

Q Yes, but you went one way and he went another? A Yes; that is right; absolutely.

Q Do you know where your mother was all the while you were there? A Yes; I remember that plainly. 30

Q Where was it? A When I entered the restaurant I did not see my mother; I seen Charles Bernord and three other men that I didn't pay any attention to, and I asked Charles if my mother was in, and he said, "Yes," and immediately I walked to the back; it was a pretty warm night.

Q And you found her there? A I found her in the rear of the restaurant.

Q (*By the Court.*) Out doors? A No, sir; in the kitchen.

Q (*By the Court.*) In the kitchen? A Yes. 40

Re-direct examination by Mr. McDermitt.

Q And what did you do upon seeing her in the kitchen? A I shook hands and said, "Hello, Ma," and I said, "Come on our in the restaurant where the fan is." So as we walk out in the

Charles K. Bernord, direct.

10 restaurant we picked the first table where the fan is on the counter, so as I entered the restaurant I saw the defendant; I do not know where he came from, but as I entered the restaurant I noticed this man and he come there and he said, "Hello, Jack," and I said, "How are you, George?" My mother and I sat on the same side of the table, and the defendant sat on the other side; I occupied the first chair on this side of the table and the defendant occupied the first chair on the opposite side of the table. Charlie Bernord opened up a bottle of home brew that he had and mother and I shared it, and the defendant had another bottle.

Q Did she remain there? A When I left the restaurant?

Q You left at nine-fifteen? A Yes.

Q Was Claymonst still sitting in the same position when you left? A Yes.

20 Q Was your mother still there in the same position? A No; my mother was up at another table talking to a witness that is here today; when I got up to go home mother got up also.

CHARLES K. BERNORD, sworn in behalf of the defendant.

Direct examination by Mr. Mott.

Q Where do you live? A 289 Adams street.

Q How long have you lived at 289 Adams street? A About four years.

30 Q And who lives at 289 Adams street? A Mrs. Thorne.

Q And is Mrs. Thorne the lady who keeps the restaurant at 135 Adams street? A Yes, sir.

Q And you know the defendant here, Claymonst? A Yes; I know him.

Q How long have you known George Claymonst? A I know him for about six years.

Q And do you remember the night of June 30th, the last of that month? A Yes.

40 Q Where were you on the evening of June 30th? A I was in the restaurant, helping Mrs. Thorne.

Q You were in the restaurant at 135 Adams street? A Yes, sir.

Q What time did you get in the restaurant there? A I was all day up there.

Charles K. Bernord, direct.

Q Well, were you there at seven o'clock in the evening?

Mr. Mott. I object.

The Court. Sustained.

Q What do you mean by all day? A I was from eight o'clock to twelve o'clock at night. 10

Q (*By the Court.*) Eight in the morning to twelve at night?

A Yes, sir.

Q Now, did you see this man there that night (indicating)?

A Yes, I see him.

Q What time did you see him there that night? A I got out of the kitchen, I say, about quarter after eight—about twenty-five after eight.

Q You came out of the kitchen? A Yes; out of the kitchen.

Q Between fifteen and twenty-five after eight, and you saw Claymonst there? A Yes, sir. 20

Q Did you see John Thorne there? A Yes, sir.

Q And you left there yourself at twelve o'clock at night? A Yes; I closed the place.

Q Do you know what time the defendant, Claymonst, left there? A He left twenty-five after eleven.

Q And during the time, half-past eight or twenty-five after eight, until half-past eleven, were you always in the restaurant there? A I was time off, an hour, from half-past six to seven I was up in the store and got some stuff and come back and stay all night. 30

Q And from half-past eight to twelve you were there continuously? A Yes, sir.

Q And during that time, half-past eight till the time you left, was Claymonst? A Yes, sir.

Q Did you talk to him? A Yes; I talked to him; I sold two cigars and brought home brew.

Q Did you notice what clothes he had on? A He had a black straw hat.

Q I show you this straw hat; does that resemble the hat he had? A Yes, sir. 40

Q What kind of coat did he have on? A I can't tell about the coat; it was dark green or dark brown; I cannot tell that.

Q Well, he wore a coat? A Yes, sir.

Q And did you notice what kind of shoes he wore? A He had brown shoes; flat toes.

Charles K. Bernord, cross.

Cross examination by Mr. Mott.

Q You worked there, didn't you? A Yes, sir.

Q You were cook there? A No, I wasn't cook; I was waiting on the table.

10 Q How long had you worked there? A I worked from May 17th.

Q What nationality are you? A Lithuanian.

Q Where were you born? A In Russia.

Q How long have you been in this country? A Nine years.

Q Are you a citizen? A Yes.

Q Did you know Claymonst in the old country? A No.

Q You met him here? A Yes.

Q Did you know the Thornes there? A Yes.

Q You knew them in Lithuania? A No.

20 Q You met them here? A Met them here.

Q Now, you worked with Mrs. Thorne before she had this restaurant, didn't you? A Yes.

Q You worked for her as a bartender on Chestnut street when she had a saloon there? A Yes.

Q How long did you work as bartender in that saloon on Chestnut street? A Three years.

Q Well, now, altogether how long have you worked for Mrs. Thorne? A Altogether three years and four or five months.

Q Claymonst used to come to the saloon? A Not much.

30 Q Well, he did come there; you have seen him there? A Yes; I have seen him have a glass of beer and walk out.

Q I mean, he used to come as any man would come to the saloon on Chestnut street? A Yes.

Q And you knew him there? A Yes.

Q You saw Jack Thorne there that night? A In the restaurant?

Q Yes. A Yes, I seen him.

Q Who was there first, you or he? A I was the first.

40 Q How long were you there when John came in? A I was from when John come in, I was from eight o'clock in the morning I was to this time.

Q Who came in first, John or Claymonst, that night? A John was come in first.

Q How long was John in there before Claymonst came in? A About fifteen or sixteen minutes.

Charles K. Bernord, cross.

Q Now, what time was it that Claymonst came in that night?
A Twenty-five after eight.

Q What makes you think it was eight-twenty-five when Claymonst came into the restaurant? Do you hear my question? What makes you say it was eight-twenty-five when Claymonst came into the restaurant? A I know that. 10

Q Well, is that the right time? A Yes, that is right.

Q Was it eight-twenty-five or seven-twenty-five? A Eight-twenty-five.

Q Sure? A Yes.

Q You got to the restaurant seven o'clock, didn't you? A No.

Q How soon after seven? A I leave the restaurant at half-past six and come back at seven.

Q Well, you come back at seven? A Yes. 20

Q And you relieved your cook at that time? A Yes, the cook left at seven o'clock.

Q And the cook went out and was gone about fifteen minutes, wasn't he? A After seven.

Q Yes. A No, cook leave me seven.

Q Well, how long was the cook gone; how long was the cook out? A He out for the night, he don't come back.

Q Didn't he come back? A He did come back at nine o'clock, after. 30

Q How long after the cook went out did Claymonst come in?
A It was about an hour and a half or hour and twenty-five minutes.

(Paper marked S. 2 for identification.)

Q I show you Exhibit S. 2 for identification and ask you if you signed your name there; is that your writing? A Yes, sir.

Q What did you write on this paper, Casimer Bernord; did you write your address? A Yes, sir.

Q Well, read it; what is the address? A 289 Adams street. 40

Q Where were you when you signed your name, Casimer Bernord—what do you say it is, Bernotos? A "T-a-s."

Q 289 Adams street. Where were you when you wrote those words? A Third Precinct.

Q You made a statement to the police, didn't you? A Yes.

Charles K. Bernord, cross.

Q In that statement to the police did you say, "I relieved my cook at seven o'clock"; did you say that? A No, I didn't say that.

Q Didn't you say that? A I say, "Cook gone, relieved me seven P. M."

10 Q Did you say he went out; did he go out? A The cook gone.

Q Yes, the cook was out about fifteen minutes; did you say that? A Yes.

Q When George Claymonst came in, did you say that? A I don't remember that.

Q Can you read? A No, I read my name.

Q Well, did you say that you didn't say to the police, "I relieved my cook at seven P. M. and he went out; the cook was out about fifteen minutes when George Claymonst came in"; did you say that? A Yes.

Q That was true when you said it? A Yes.

Q Then why do you now say that Claymonst came in an hour later, eight-fifteen? A I see that time.

The Court. Can you not make an intelligent answer?

Witness. I no understand.

The Court. You have been selling drinks over the bar for years, have you not, talking to customers?

Witness. Talking Lithuanian with the customers.

30 Q Cassimir, you made this statement to the police on July 1st, did you not? A Yes, sir.

Q Now, on July 1st, you remembered, did you not, what happened; that was the day after the 30th, wasn't it? A Yes.

Q You told the police, you say, that your cook went out at seven o'clock, came back in fifteen minutes, and that then George Claymonst came in? A Yes, I think so.

Q Now, why do you now say Claymonst came in an hour later, 8:15? A The cook man was in the Third Precinct.

40 Q Well, as long as the cook man was in the Third Precinct did you think you would tell the truth then and now you won't tell the truth?

Mr. McDermit. I submit he does not understand that. I submit he does not know what relief means in that statement.

Michael Balchus, direct.

Mr. Mott. Well, I do not care about that; he says the cook went out at seven o'clock and was out fifteen minutes. Now, those are short words; he understands that.

The Court. Objection overruled.

Q Now, what is the matter? Can't you tell the truth about that? 10

Mr. McDermit. That statement is objected to. I do not see where he has any authority to tell that to the witness. He is not the jury or the Court.

The Court. Sustained.

Mr. Mott. He says in one place seven-fifteen, in another eight-fifteen. I want to know which is true. They are not both true; that is true.

Q Now, Cassimir, did Claymonst come in fifteen minutes after seven or fifteen minutes after eight? A Twenty-five minutes after eight; that is when I see him. 20

Q Why did you tell the police he came in fifteen minutes after seven? A I was excited.

MICHAEL BALCHUS, sworn in behalf of defendant.

Direct examination by Mr. McDermit.

Q You understand English, do you? A A little.

Q Do you know how to talk up? A Yes. 30

Q Well, do that. Where do you live? A 289 Adams street.

Q And do you know this man here? A Yes.

Q What is his name? A George Claymonst.

Q And do you know Mrs. Thorne? A Yes, sir.

Q And Mr. Thorne? A Yes, sir.

Q And do you know the cook or waiter who just left the stand? A I saw him a couple of times, but I don't know his name.

Q Do you remember the night of June 30th? A Yes, sir.

Q Were you in the restaurant at 135 Adams street? A Yes, 40
sir.

Q What time did you go in there? A Eight o'clock.

Q And what time did you leave there? A Quarter to ten.

Q And whom did you see in there at that time? A Why, George Claymonst.

Eleanora Karashowski, direct.

Q And was George Claymonst in that place from eight o'clock, the time you came in, until you left, a quarter to ten?

A Yes, sir.

Cross examination by Mr. Mott.

10 Q Now, who was there first, you or Claymonst? A I was.

Q How long had you been there when he came in? A About two hours.

Q Now, how long had you been in the restaurant when Claymonst came in? A About a half an hour later.

Q What time did he come in? A About twenty-five after eight or half-past eight.

Q And are you sure; you left what time? A Quarter to ten.

20 Q Where were you born? A In Russia.

Q Where was that, what country, what province? A Lithuania.

Q How long have you been in this country? A Seven years.

Q Are you single or married? A Single.

Q Did you know Claymonst in Lithuania? A No, sir.

Q Did you know his people? A No, sir.

Q Did you not come from the same part of Lithuania that he did? A No, sir.

30 ELEANORA KARASHOWSKI, sworn in behalf of defendant.

Direct examination by Mr. McDermit.

Q Do you know where this restaurant is; 135 Adams street?
A Yes, sir.

Q And do you know George here? A Yes, I know.

Q What is his last name? A Claymonst.

Q George Claymonst? A Yes.

Q How long have you known George? A Well, maybe two weeks I know; I just work in the restaurant and I know nothing.

40 Q You know him only two weeks? A Yes; maybe three weeks.

Q Well, were you in this restaurant on the night of June 30th, 135 Adams street? A Yes, sir.

Q What doing? A Working.

Q Cooking? A Cooking, and I do everything, waiter.

Eleanora Karashowski, direct.

Q Waiting there, too? A Yes, waiter and clean the table and wash dishes, and I do everything.

Q Did you see George there that night? A Yes, I see him.

Q What time did George come there? A Well, I cannot tell the time, I see him maybe it is eight o'clock and maybe half-past; I cannot see the time; I cannot tell. 10

Q How long did George stay there? A I go half-past eleven. George left in the restaurant.

Q And did George go out of the restaurant any time from the time he came in there, eight-thirty, until you left there; did he go away anywhere that night? A This night?

Q Yes. A No, I first go out.

Q You first go out? A Yes, George left in the restaurant half-past eleven I see him.

Q Was George in there from the time he came in first until the time you went out, was he in there all the time? You understand me? George came in what time? A I can't tell what time, maybe eight and maybe half-past eight; I can't tell for sure; I no see the time. 20

Q Do you remember Mr. Thorne's coming there, Mrs. Thorne's son? A Yes.

Q Do you remember seeing him? A Yes, I see; I don't know what time.

Q He was in the restaurant that night? A Yes, I know.

Q Did you see the other boys that were there that night? A Yes, the other boys. 30

Q And why did you say it was eight or half-past eight when George came in there; why did you say that; how do you know that? A Well, I see him sit down at the table; I don't no say nothing.

Q (*By the Court.*) You mean by that you did not talk to George Claymonst? A No, I no talk to him; I just see him.

Q Who was George talking to; who was talking to George? A Why, I seen Mrs. Thorne, her son and this Michael; I cannot tell all the people; I don't see much; I was working; I can't tell. 40

Q You are sure you left at half-past eleven that night? A Yes, sir.

Q When did you first hear after that that George was arrested in this matter? A Well, I can't tell; I see him eight or half-past eight.

Eleanora Karashowski, cross.

Q (*By the Court.*) He asked you when you heard that Claymonst had been arrested by the police? A (No answer.)

Q You left at eleven-thirty that night? A Yes.

Q The next day you came back to work? A Yes.

10 Q When was it you heard he was arrested; what day did anybody tell you he was arrested? A Quarter after eight, the 30th of June, Wednesday night.

Q Well, he wasn't arrested on that night? A Yes.

Q Well, he was in the place at eleven-thirty when you went out, wasn't he—do you know what I mean by arrested? I do not mean restaurant. Do you know what I mean by arrested?

A I no in the restaurant. I do not know what you say.

Cross examination by Mr. Mott.

20 Q How long have you known George? A Well, maybe three weeks, maybe two weeks.

Q Where were you born? A Lithuania.

Q How long have you been in this country? A Thirteen years.

Q How long have you worked for Mrs. Thorne? A Two months.

Q Did you ever work for her before that? A Yes, I work before.

30 Q Where did you work for her before? A This is another man got the restaurant.

Q While you worked—how long have you known Mrs. Thorne? A Oh, maybe two years.

Q Where did you meet her; did you know her when she had the saloon on Chestnut street? A Yes, I know her, but I don't know she got a saloon; people talk she got a saloon; I don't know.

Q Well, you didn't look at any watch or clock when George came in that night? A No, I no look.

40 Q Well, how do you know it was eight-thirty? A Well, I know from myself it is a long time him there until half-past eleven.

Q Did anybody tell you it was half-past eight when George came in? A I don't know.

Q What? A I don't know.

Eleanora Karashowski, re-direct.

Q Oh, yes, you know whether anybody told you whether it was half-past eight when George came in? Did anybody tell you that? A Yes, tell me.

Q Who told you? A That I don't know; I see myself; I see.

Q Who told you it was half-past eight when George came in that night; who told you that; did Mrs. Thorne tell you that? 10

A Everybody tell.

Q Who told you it was half-past eleven when he went out?

A I see time.

Q Oh, you saw the time? A Yes, I don't know sure.

Q You have talked with Mrs. Thorne about this, haven't you?

Mr. McDermit. I think we ought to have an interpreter. It is only fair to the witness.

The Court. You did not demand an interpreter when you put the witness on the stand. 20

Mr. McDermit. I say now we have got a witness that we will need an interpreter for.

Q Did anybody tell you it was half-past eleven when he left?

Mr. McDermit. She answered that and said she looked at the time. This is not a fair question to repeat.

The Court. I think in a case of this character, where the witness does not understand the question exactly, or the shade of meaning in the question, that it is proper to repeat the question. 30

Q Did you talk with Mrs. Thorne about this? A I talk.

Q About the time George Claymonst came in the restaurant that night and the time you went out; did you talk with Mrs. Thorne; have you talked with Mrs. Thorne? A No.

Q Never said a word to her about it? A No.

Q Never spoke to her about it? A I talk; I cannot tell that.

Re-direct examination by Mr. McDermit.

40

Q Did you understand what this gentleman was talking to you about at all.

Mr. Mott. You do not mean to say that she does not understand my questions, but does understand yours?

Mary Yaraminies, direct.

Q Did you understand what this gentleman asked you? A Yes, I understand.

Q What did he ask? A He ask if I talk with Mrs. Thorne.

Q Did you fix the time from what you know yourself?

10 *Mr. Mott.* I object.

The Court. Sustained.

Q How do you know it was half-past eleven that you left there? A I got home at half-past.

Q How do you know? A I looked at the time.

Q Where did you look at the time? A Every time I look at the time.

Q (*By the Court.*) Are you the only cook there? A No—yes.

20 Q (*By the Court.*) Were you the only cook there that night? A Yes, I cook.

Q Did you go out as seven o'clock and buy something and come back about fifteen minutes later? A I no buy this night.

Q You didn't go out at seven o'clock? A No.

MARY YARAMINIES, sworn in behalf of defendant.

Direct examination by Mr. McDermit.

30 Q (*By the Court.*) How long have you been in this country? A Fifteen years.

Q Where do you live? A 38 Wilson avenue.

Q How long have you lived there? A Five years.

Q Do you know George Claymonst? A Yes, sir.

Q How long have you known George? A Why, George Claymonst, three years and three months; last April three years.

Q Did George board with you on the 30th of June of this year? A Yes.

Q Board in your house? A Yes.

Q Did he live there in your house? A Yes.

40 Q And do you remember June 30th? A I remember June 30th. He come home six o'clock for dinner.

Q Do you remember June 30th? A Yes.

Q Answer that. Do you remember June 30th? A Yes; he come at six o'clock to supper; maybe quarter to six, and maybe half-past six, and I see it is time to go out—

Mary Yaraminies, cross.

Q (*By the Court.*) What time did he get through eating his supper? A Maybe quarter to seven; yes, maybe; I can't say.

Q Then, what did he do after he eat his supper; what did George do after he eat his supper? A George go in his room; I no see him; he get dressed and he come out, and I don't see him what time he go out. 10

Q (*By the Court.*) You mean by that he went to his room and then he went out later, and you do not know what time he went out, is that what you mean? A Yes.

Q When did you see him again after he went out; what time did he come home that night?

The Court. He asked you do you know what time he came home that night.

Q Do you know what time George come back to the house that night? A I don't know. George got key; get in the house; I come ten o'clock and my husband come maybe twenty minutes after eleven, and I don't see George come; I don't see George come, and then my husband come maybe twenty minutes to eleven, and I don't see; George has got key. 20

Q (*By the Court.*) Did your husband come in twenty minutes of eleven or half-past eleven? A No; to eleven.

Q No; did he come in twenty minutes of eleven or after eleven? A No; not after eleven—to eleven.

Cross examination by Mr. Mott.

Q Was George the only boarder you had at that time; was George the only man that was boarding with you at that time? Well, now, is it going to happen you could hear all Mr. McDermit's questions and can't understand mine? Well, did you have any other boarder besides George—how many boarders did you have? A One. 30

Q That is George? A Yes.

Q Just one, George? A Yes.

Q Have you a little girl? A Yes.

Q How old is she? A Ten. 40

Q Where was George's room? A In the front.

Q Upstairs? A No.

Q On the ground floor? A Yes.

Q You did not see George go out that night? A No; I don't see.

Mary Yaraminies, cross.

Q And you don't know what time he came in? A No.

Q That right? A That is right.

Re-direct examination by Mr. McDermit.

Q Was he in when you came in twenty minutes after ten?

10 *The Court.* Just a moment. Have you finished?

Mr. Mott. No.

Cross examination continued by Mr. Mott.

Q Did the police officers come to your house to see you about twelve o'clock July 1st? A July 1st?

Q Yes. A July 1st comes the detective.

Q Mr. Messner, stand up. Did that man come to see you? A Yes.

Q Mr. Thunell. Did he come; was he around that day? A
20 I don't know; four come. I don't know; two.

Q Mr. Chenoweth? A Yes.

Q Mr. Cotter. Did he come? A Maybe.

Q Well, there were four? A Yes. I know four.

Q On July 1st at your house about twelve o'clock noon when these officers came to see you, did you say to the police officers that the boarder came into the house the night before and did not go out at all? A I say no go out?

Q Did you say that? A I was like this; me with the key the man lost; I forget myself; I don't see the dress; I no see
30 him start.

Q Well, madam, you are talking outside of the question. Did you say to those four police officers that your boarder did not go out of the house at all after supper the night before?

A I no say sure; I say maybe go out and maybe not; I don't see go out; maybe sleeping—

The Court. No. You answer that question yes or no.

Q Did you say that he did not go out that night? A What?

Q Did you say that you thought your boarder did not go out
40 of the house that night after he came home? A I say—

Q No; I want to know did you say that? A I don't understand what you mean; say it again.

Q Well, you can laugh over this. Did your little girl come into your room and say to you, "Why, mother, I looked into his room and he was not there"? A My girl?

Mary Yaraminies, cross.

Q Yes, your girl. A No remember.

Q In George's room. And did she say that while the police were there? A No; I no saw.

Q Had you said to the police officers that the boarder did not go out of the house at all the night before, and did your little girl speak up and say, "Mother, I looked in the room"— 10

Mr. McDermit. I object.

The Court. Overruled.

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

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

WM. P. MARTIN,

Judge.

Q Didn't she say that? A I no understand what you say. 20

Q It is funny you don't understand. You have got a little girl? A Yes.

Q And the four police officers were there? A Yes.

Q And the four police officers were there? A Yes.

Q Did your little girl say, while the police officers were there, "I looked in his room and he was not there"? A My Rosie?

Q Yes. Did she say that? A I don't know; I know this detective—

Q Did your girl say that? A My girl no say it.

Q And when the girl said that did you then speak to her in Lithuanian? A My girl? 30

Q Yes. A Yes, my girl speak Lithuanian.

Q And did the police officers then tell you to go out of the room and let them talk with the girl alone, did they? A No, my girl didn't go to the police station.

Q But did the police officers, after you spoke to your girl in Lithuanian, ask you to go out of the room so they could talk to the girl alone? A No.

DEFENDANT RESTS.

40

George W. Chenoweth, direct.

GEORGE W. CHENOWETH, recalled in behalf of the State in rebuttal.

Direct examination by Mr. Mott.

Q Did you see the last witness, Mary Yaraminies, on July
10 1st, at her house? A Yes.

Q Yes? A Yes.

Q About what time? A Around twelve o'clock noon.

Q Who was with you? A Officer Cotter, Thunell and Messner.

Q Did she then say to you, in response to inquiry, that the boarder came home and did not go out of the house at all on the previous night? A She did.

20 *Mr. McDermit.* Objected to on the ground it is improper. Any statement she made cannot bind this defendant.

The Court. Of course, it cannot. May not the witness be confronted with a contradictory statement made to the officers?

Mr. McDermit. It is not a proper question to this issue. Now, it is not a proper question, the mere statement the following day that he was in his room is not a material proposition.

30 *The Court.* It is not material to the issue?

Mr. McDermit. Yes, sir.

The Court. Is it not relevant to the issue?

Mr. McDermit. At that particular time.

40 *The Court.* The question in issue is where the defendant was about a quarter to ten. This witness says that he went out at some time; she did not know when, that she came in about ten o'clock and that her husband came in about twenty minutes to eleven, and I suppose that the inference that the State asks the jury to draw from that is that this defendant was out until after her attention was called to the fact that her husband came in. Therefore, it is something that has some relevancy to the situation.

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

George W. Chenoweth, direct.

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

WM. P. MARTIN,
Judge.

Q And after she made that statement did her little girl come in the room? A She did. 10

Q And did the little girl say, "I looked in his room and he was not there"? A She did.

Mr. McDermit. I ask to strike that out. It does not state the time when she looked into the room.

Witness. A little after nine.

The Court. You move to strike out the last answer of the officer?

Mr. McDermit. Yes, sir. 20

The Court. How can you wait until after the question is asked and not object to it and take chances on what the answer is going to be and then if unfavorable move to strike it out?

Mr. McDermit. He does not fix any time.

The Court. The Court declines to rule upon the motion of the defendant, or his objection, so that there will be no question as to what the Court does under the rule which was recently laid down by the Court of Errors and Appeals in the case of *State v. Young*. 30

Q Did the girl say what time she looked? A Yes, sir.

Mr. McDermit. Objected to as leading.

The Court. Sustained. Mr. Prosecutor, in view of the fact that the objection has come in in time the Court states the law to be it does not make any difference what the little girl said with respect to your direct examination of Chenoweth. The only reason why you were permitted to ask Yaraminies what her little girl said was for the purpose of refreshing her memory. Therefore, you cannot bring in by this witness a contradiction of what she says about what the little girl said, because you are bound by her answer on that collateral fact. 40

Cross examination waived.

George X. Messner, direct—cross—re-direct.

GEORGE X. MESSNER, sworn in behalf of the State in rebuttal.

Direct examination by Mr. Mott.

10 Q You are a member of the Police Department? A Yes, sir.

Q Were you one of the officers who went to the home of Mrs. Mary Yaraminies on July 1st last? A Yes, sir.

Q And did you then have or overhear a conversation with her? A I did.

Q And did she then say that the boarder came home that night and did not go out again during the night? A She did.

Cross examination by Mr. McDermit.

20 Q Give us her exact language? A Why she told us in the American language.

Q Give us her words; give us the narrative, please. A She told us when he came home for supper he had his supper at six o'clock and he never left the house.

Q That was all that was said? A Why, the little girl come in.

Q No; not what the little girl said. That is the way I understood it.

Q You went to see her at noon? A At twelve o'clock.

30 Q And she said he came for supper and didn't leave the house? A Didn't leave the house.

Q And that was all that was said? A Yes, sir.

Re-direct examination by Mr. Mott.

Q I show you Exhibit S. 2 for identification and ask you in whose handwriting the body of that is. A My own.

Q Where was that written? A In the Third Police Precinct.

Q By whom was it signed? A By myself and Lieutenant Thunell and Cassimir Bernord.

40 Q Did you see him sign his name thereto? A I did.

Q And what is that? A That is a voluntary statement.

Q Made by whom? A Made by the witness.

Q Did you correctly write down what he said? A Word for word.

Q And especially the times and place? A Yes, sir.

Charge to Jury.

Q You state there as he told you? A Yes.

Q And you saw him sign that? A Yes.

Mr. McDermit. There is no objection to any of these statements going in.

Mr. Mott. I offer Exhibit S. 2.

(Paper marked Exhibit S. 2 by striking out the words "for identification.") 10

Mr. Mott. I offer the statement made by George Claymonst. Is there any objection?

Mr. McDermit. No objection. We admit the signature.

(Paper marked Exhibit S. 1 by striking out the words "for identification.")

STATE RESTS.

DEFENDANT RESTS. 20

Mr. McDermit sums up for defendant.

Mr. Mott sums up for State.

RECESS.

MARTIN, J.

Gentlemen of the Jury: The function of the Court is to instruct the jury with reference to the principles of law governing the case. The principles of law as charged should be accepted as a correct statement of the law. The jury, however, are the sole judges of the facts, weight of testimony, credibility of witnesses, inferences to be drawn from the evidence, and the ultimate conclusions to be reached upon all the facts. The Court, in referring to the evidence, is not to be understood as deciding any facts, but merely as attempting to elucidate the evidence for the convenience or assistance of the jury, or to illustrate or explain principles of law. If the Court errs in its statement of any evidence, or assumes the existence of evidence that is not actually before the jury, the jury are to rely upon their recollection and not upon the recollection of the Court. If any part of the evidence is referred to, seemingly giving it particular emphasis, the jury are not to disregard other evidence which they may deem of equal or greater importance. 30 40

Charge to Jury.

The law presumes that the defendant is innocent, and this presumption of innocence can be overcome only by evidence showing beyond a reasonable doubt the guilt of the defendant. The burden of proving the guilt of the defendant beyond a reasonable doubt is upon the State, and does not shift from the State throughout the whole case.

10

“Reasonable doubt is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is on the prosecution. If, upon such proof, there be reasonable doubt remaining, the defendant is entitled to the benefit of it by an acquittal. The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt; because, if the law should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.”

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This defendant is presented here upon an indictment found by the Grand Jury, which contains two counts. The first is a charge of the commission of the offense known as simple assault and battery. It is, substantially, that he did, at the City of Newark, on the 30th day of June, 1920, make an assault upon Mary Jacieko, and then and there did beat, wound and ill-treat her. In order to show in law a simple assault and battery, there must appear two elements, an unlawful corporal hurt, or physical injury, and an intention to inflict the injury. The second count of the indictment is that which has come to be known commonly as carnal abuse. It is that George Claymonst, being then and there above the age of sixteen years, on the 30th day of June, 1920, did make an assault upon Mary Jacieko, and did unlawfully and carnally abuse the said Mary, she being then and there a woman under the age of twelve years.

Charge to Jury.

The statute under which that indictment seeks to allege the commission of the offense is, in part, as follows:

“Any person who * * * being of the age of sixteen or over, shall unlawfully and carnally abuse a woman child under the age of twelve years, with or without her consent, shall be guilty of a high misdemeanor, * * * .”

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The difference between carnal abuse and the common law crime of rape is, substantially, that there must be penetration in the case of rape, which is not necessary to be shown under a charge of the commission of carnal abuse. To complete this latter crime it must be shown (1) that the accused is the age of sixteen years and upwards, and as to that there is no denial, (2) that he shall unlawfully and carnally abuse the woman that is in dispute and (3) that she shall have been under the age mentioned in the statute, which is twelve years of age in this case. Carnal abuse is the assault or debauchery of the female sexual organs by the genital organs of the male.

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In this cause counsel for the defendant has presented to the Court, after the summing up began, a request, which concerns the effect which you may give to evidence of a so-called alibi, but, although it need not be considered, the Court will consider it. The request is as follows:

“If a reasonable doubt is engendered by reason of the evidence of an alibi, the defendant is entitled to the benefit of it in his favor.”

I will charge you that.

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“In a case where the presence of the defendant, at the commission of the crime, is essential to his conviction, the state must establish that fact beyond a reasonable doubt, just as it must establish the essential elements of any crime.”

“Testimony tending to break the force of the State’s *prima facie* case by testimony that the defendant was ‘alibi,’ is not the offer of an affirmative issue advanced by the defense. It is merely showing a state of facts inconsistent with an essential element of the indictment. The jury may, notwithstanding such testimony, believe that the defendant was present as charged, or they may believe that he was absent, in which event he is said to have proved his ‘alibi.’ A third result may be that the defend-

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Charge to Jury.

ant's testimony may create such a degree of uncertainty as to his whereabouts that the jury are not satisfied, beyond reasonable doubt, of his guilt of the crime for which he was indicted."

10 The Court has no intention of endeavoring to repeat the evidence that is before you, but will content itself with a very brief outline of some of the contentions of the State and of the defense.

The State contends that about ten minutes to ten o'clock on Wednesday evening, June 30th, 1920, while Edward Frank Kastner and Salvatore Vella were coming in towards the central part of the city, or the populous region, from Bound Creek, along Bay avenue, and had come under the Pennsylvania short line, or freight line, which it was called, they heard moaning; that they stopped and listened and a man came out from behind the billboard; that Vella struck him; that he pulled a pistol and put it under the chin or in the face of Kastner; that Kastner did not strike him; that the person, whoever it was, was followed by these two men for a short distance, probably two blocks, and he he was lost amongst the freight cars; that these men then returned and they saw this little girl, who was four years of age last April, coming out from behind the billboard, crying, with blood on her face, blood on other parts of her person, and the condition which they more minutely described; that they went into the road, on the highway of Bay avenue, and Colonel Dietrich, an army officer, came along and he took Mr. Kastner and Mr. Vella and the little girl to the Third Precinct Police Station, where Kastner and Vella say they arrived at quarter-past ten o'clock, and fix the time, or one of them does at least, by saying he asked Colonel Dietrich what time it was, and Colonel Dietrich took out his watch and said or showed what it was and it was a quarter-past ten; that near the billboard there was suspended an electric light and that a person coming out from behind the billboard would have his face toward the electric light, and that it was a bright moonlight night; that by reason of the seriousness of the danger to Kastner, who, for ought that he knew, might have been shot, and that by reason of the light, as to both of them, that they had an opportunity and that they embraced the opportunity to see and remember the face of the person who came out on that occasion; that on the next day, at the City Hospital, when in the presence of this defendant, little Mary Jacieko

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Charge to Jury.

was asked to point out the man who hurt her, that she pointed out this defendant, who stood around her bedside with Mr. Chenoweth, Mr. Messner, Mr. Reilly, and one or two other persons, including a New York World reporter, and that this defendant remained silent, and then he was taken around on the other side of the bed and the little girl said that this is the man, or he, or substantially to that effect, that he gave me a quarter to buy a doll, and the defendant still remained silent; that after he was taken out, I think by Mr. Thunell, although I will not be sure about the name of the officer, the officer asked him what he had to say about all this, and the defendant said "nothing," using the word "nothing."

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The Court warns you, as a matter of law, that the little girl, Mary Jacieko, was excluded from the witness stand by the Court, in the exercise of its discretion, and that there was no permission given to allow what the little girl did to come before you for the purpose of letting you be informed of what she might say if she had testified. The little girl was not permitted to testify because she could not understand the nature of an oath, and what she did, if she did anything, or said, if she said anything, in the presence of this defendant on July 1st was not done under oath and there was no sanction; hence you cannot regard what she did or said on that occasion as any evidence against this defendant, nor can you take into consideration what anybody else may have done or said on that occasion as evidence against the defendant; but evidence of the transaction, or tending to show what occurred concerning the alleged transaction, was permitted to go before you for the purpose of letting you have all of the circumstances and all of the incidents of that transaction to consider whether or not there was anything in the conduct of this defendant on that occasion which evinced any consciousness on his part of guilt.

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The State contends that if he had been an innocent man he would have said, "I am innocent," or something to that effect; that if he had been a guilty man he might have said, "I am guilty"; that if he remained silent you have a right to consider whatever, if any, inference you may draw from his conduct on that occasion, in the presence of an accusation, if there was any, and what that inference shall be is for you to decide, and whether or not it shall be against him it is for you to say; the State contends that by the evidence of Mr. Kastner and the evidence of

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Charge to Jury.

Salvatore Vella and the conduct of this defendant on that occasion, that your verdict in this case should be guilty.

10 The defense is a denial, and the defendant does not rest contented with his mere denial of the allegation, which, he says, rightfully, that it is not for him to prove his denial, but that the State has failed to prove, beyond a reasonable doubt, that he is guilty. The defendant says that on the evening in question, on Wednesday, June 30th, he went, early in the evening—I have forgotten the time he said—to Thorne's and that he remained there until eleven o'clock; Mary Thorne says that he stayed there until half-past eleven o'clock; Charles Bernord says that he stayed there until twenty-five minutes past eleven; John J. Thorne says that when he left the place about a quarter-past nine he left the defendant in it; Michael Balchus says that when he left at a quarter to ten he left the defendant in the place; the defendant
20 says that on that night he had a brown suit of clothes on, brown shoes, a white shirt with blue stripes and a brown necktie; John J. Thorne says that he had a dark brown suit and his shoes were dark brown; the defendant says he wore a straw hat that night, I think, but not a Panama straw hat; he said he never had any; therefore, the defendant's contention is, principally, in addition to his denial, that at a quarter to ten, or ten minutes to ten, or ten o'clock, he was in Thorne's place, at 135 Adams street, some twenty long blocks away from the scene of the alleged offense, and that by his own testimony and the evidence of Mary Thorne
30 and Charles Bernord he was in that place, and, also, that he had different clothing on from that which Kastner and Vella say the man wore who apparently committed the crime; Eleanora Karashowski also says the same thing with reference to the defendant being in Thorne's place. Therefore, the defendant says you ought not to find him guilty—that you cannot find him guilty, beyond a reasonable doubt, upon the evidence in the case.

The State has introduced the statements of Claymonst and Charles Bernord in evidence, which, the State contends, contradict the testimony as given by these witnesses on the stand, and
40 their evidence should not be considered as reliable, because they made statements of a contradictory nature elsewhere. The defendant says, in his statement, S. 1, that he did not leave the house until nine o'clock, whereas he testified to you here, as I remember it, that he left there about eight o'clock, or eight-fifteen, and Charles Bernord, a witness, said to you on the witness

Defendant's Request to Charge.

stand that the defendant came in shortly after eight o'clock; I think it was eight twenty-five; whereas in his statement he fixes the time as seven-fifteen.

Gentlemen of the jury, it is for you to consider and weigh all this testimony and ascertain where the truth is. If you find, beyond a reasonable doubt, that the defendant is guilty of the offense charged in the indictment, which is contained in the second count, then your verdict should be guilty. If you do not so find him guilty, then you must consider whether or not he is guilty, under the evidence and the law, of simple assault and battery. If you so find, then you should find him guilty of assault and battery. If you do not so find, your verdict, of course, will be not guilty.

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(The jury retires.)

The Court. Mr. McDermit has addressed the Court and said, "I notice that the hat has not been given to the jury, and my recollection is that I offered it in evidence." The Court said that it is not his recollection that it has been offered in evidence, or that it was in evidence. The stenographer then referred to his minutes and found that an offer had been made, but that it had not been received in evidence. Thereupon the Court directed that it be received in evidence and marked Exhibit D. 1 and sent to the jury at Mr. McDermit's request.

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You make such a request?

Mr. McDermit. Yes, sir.

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

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

WM. P. MARTIN,
Judge.

DEFENDANT'S REQUEST TO CHARGE.

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"If a reasonable doubt is engendered by reason of the evidence of an alibi, the defendant is entitled to the benefit of it in his favor."

*Certificate of Court Stenographer.*ESSEX COUNTY COURT OF GENERAL QUARTER
SESSIONS.

STATE

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vs.

GEORGE CLAYMONST.

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

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I, Harold T. Cook, the official stenographer of the Essex County Court of General Quarter Sessions, Part I, do hereby certify that the foregoing transcript contains the entire record of the proceedings and testimony taken by me at the trial of the case of the State of New Jersey vs. George Claymonst, assault and battery and abuse, which trial was held before the Honorable William P. Martin, Presiding Judge of the Essex County General Quarter Sessions Court in and for the County of Essex, and a jury, on Thursday, October 21st, 1920, and Friday, October 22nd, 1920, at Newark, New Jersey.

HAROLD T. COOK.

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Certificate of Judge.

ESSEX COUNTY COURT OF GENERAL QUARTER
SESSIONS.

STATE

vs.

GEORGE CLAYMONST.

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

I, William P. Martin, Presiding Judge of the Essex County Court of General Quarter Sessions and the Judge who presided over the aforesaid cause, certify that the above-printed book contains the entire record of the proceedings had upon the trial of the said cause, and that the same is returned by the plaintiff-in-error therein with the writ of error bringing up the bill of exceptions signed and sealed in this cause.

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WM. P. MARTIN,
*Presiding Judge of the Essex County Court
of General Quarter Sessions.*

Dated, December 29th, 1920.

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Assignments of Error.

ASSIGNMENT OF ERRORS.

New Jersey Supreme Court

10	STATE OF NEW JERSEY,	}	<i>On Writ of Error.</i>
	<i>Defendant-in-Error,</i>		
	<i>vs.</i>		
	GEORGE CLAYMONST,	}	<i>Assignment of Errors.</i>
	<i>Plaintiff-in-Error.</i>		

20 Afterwards to wit, in the Supreme Court of Judicature comes the said George Claymonst, by McDermit & McDermit, his attorneys, and says, that in the record and proceedings aforesaid and also in the giving of the verdict and judgment there is manifest error in this, to wit:

1. In that upon the trial of said cause, the Trial Judge permitted the State's witness, Mrs. Annie Jacieko, to testify and give evidence of a conversation had by her with her daughter, Mary Jacieko, at the City Hospital, which evidence is as follows:

30 "Q When this man was brought towards Mary's bed what did Mary do? A She pointed at him.

(Motion made to strike out, etc.)

30 Q When Mary pointed at the defendant what did the defendant do or say?

(Objection and exception.)

A He has not said anything.

Q When Mary pointed her hand did she say anything?

A Yes, she said everything; she says what he has done with her."

40 2. In that upon the trial of said cause the Trial Judge permitted the State's witness, Carl A. Thunell, to testify and give evidence, as to the statement and what was said by Mary Jacieko, at the City Hospital, which testimony is as follows:

"Q Then what did the little girl say? A The little girl said that this was the man that gave the quarter to buy the dolly."

Assignments of Error.

3. In that upon the trial of said cause, the Trial Judge permitted the State's witness, Joseph F. Reilly, to testify and give evidence of what Mary Jacieko said and done at the City Hospital, which evidence is as follows:

"* * * When we got there, Detective Thunell asked the little girl, 'Do you see the man here who hurt you?' 10
And the little girl looked around and for a moment didn't answer. He repeated the question and the little girl lifted her left hand, as I remember it, and pointed to the prisoner. Detective Thunell then said, 'We will make sure as to who she is pointing at,' and he asked her again, 'Do you see the man here who hurt you?' * * * The little girl said something to her mother and then she said a few words in English; the only words which I got was a quarter, and just at that moment a man from the Evening World called my attention away to something else and I 20
only heard her reply a quarter."

4. In that upon the trial of said cause the Trial Judge permitted and allowed George W. Chenoweth, a witness for the State, to give evidence and prove the distance of Wilson avenue from the home of the little girl, Mary Jacieko, to the billboard, when the said witness was not the city surveyor, but only a detective in the Department of Police.

5. In that upon the trial of said cause, the Trial Judge refused to strike out the testimony of the State's witness, George 30
W. Chenoweth, given as to the location and distance from the home of Mary Jacieko to the so-called billboard.

6. In that upon the trial of said cause the Trial Judge permitted the prosecutor to question the defendant's witness, Mary Yaraminies, as to what her little daughter stated in her presence when she was being questioned by the officers—which was matter collateral to the issue.

7. In that upon the trial of said cause the Trial Judge permitted the witness for the State, George W. Chenoweth, in rebuttal, to testify to the following evidence: 40

"Q And after she made that statement did her little girl come in the room? A She did.

Q And did the little girl say, 'I looked in his room and he was not there'? A She did."

Assignments of Error.

8. In that upon the trial of said cause, the Trial Judge charged the jury:

10 "The Court warns you, as matter of law, that the little girl, Mary Jacieko, was excluded from the witness stand by the Court, in the exercise of its discretion, and that there was no permission given to allow what the little girl did to come before you for the purpose of letting you be informed of what she might say if she had testified. The little girl was not permitted to testify because she could not understand the nature of an oath, and what she did, if she did anything, or said, if she said anything, in the presence of this defendant on July 1st, was not done under oath and there was no sanction; hence you cannot regard what she did or said on that occasion as any evidence against this defendant, nor can you take into consideration what anybody else may have done or said on that occasion as evidence 20 against the defendant; but evidence of the transaction, or tending to show what occurred concerning the alleged transaction, was permitted to go before you for the purpose of letting you have all of the circumstances and all of the incidents of that transaction to consider whether or not there was anything in the conduct of this defendant on that occasion which evinced any consciousness on his part of guilt."

30 Plaintiff-in-error, George Claymonst, prays, that the judgment aforesaid be reversed and altogether for nothing holden, and that he may be restored to all things he has lost by reason of the said judgment, etc.

McDERMIT & McDERMIT,
Attorneys for Plaintiff-in-Error.

*Specification of Causes.***SPECIFICATION OF CAUSES.**

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY,

*Defendant-in-Error,**vs.*

GEORGE CLAYMONST,

*Plaintiff-in-Error.**On Writ of
Error.*

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*Specification
of Causes.*

George Claymonst, the plaintiff-in-error, by McDermit & McDermit, his attorneys, hereby specifies the causes in the record relied upon for relief or reversal in the aforesaid cause as follows:

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1. Because the Trial Judge permitted the State's witness, Annie Jacieko, to testify and give evidence of the conversation had by her with her daughter, Mary Jacieko, at the City Hospital, which evidence was hearsay and illegal because the person, Mary Jacieko, was and is living and was the proper person to testify, and give evidence as to what was done to her by the defendant.

2. Because the Trial Judge permitted the State's witness, Carl A. Thunell, to testify and give evidence, as to the statement and conversation, and what was said by Mary Jacieko, at the City Hospital, which evidence was hearsay and illegal, because the person, Mary Jacieko, was and is living and was the proper person to testify and give evidence as to what was done to her by the defendant.

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3. Because the Trial Judge permitted the State's witness, Joseph F. Reilly, to testify and give evidence as to the statement and conversation and what was said by Mary Jacieko, at the City Hospital, which evidence was hearsay and illegal, because the person, Mary Jacieko, was and is living and was the proper person to testify and give evidence as to what was done to her by the defendant.

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4. Because the Trial Judge permitted the State's witness, George W. Chenoweth, to give evidence, in order to prove the

Specification of Causes.

10 distance of Wilson avenue from the home of the said Mary Jacieko to the billboard, where the said Mary Jacieko was alleged to have been found and raped, when the said witness was not competent to so testify, in that he was not a surveyor, nor city surveyor, but only a detective in the Department of Police of the City of Newark and that the evidence as given by him was not evidence showing the condition of the locality as of the time of the happening of the crime.

20 5. Because the Trial Judge permitted the State's witness, George W. Chenoweth, to testify in rebuttal, in order to contradict the defendant's witness, Mary Yaraminies, as to what she testified to on cross examination, in that her little girl had said that she looked in the defendant's room and he was not there, she the said witness having denied this, and the Trial Judge permitted the said State's witness to testify that the little girl so stated in the presence of her mother, the witness, Mary Yaraminies, thereby bringing out a contradiction of what the witness, Mary Yaraminies, said about what her little girl had said, the same being hearsay and illegal and was collateral facts, and the State was bound by the answer of the defendant's witness and she could not be contradicted.

30 6. Because the Trial Judge charged the jury, that he had permitted the State's witnesses to give evidence of the transaction of what was stated and testified to, as to the conversations with the complaining witness, Mary Jacieko, at the City Hospital, for the purpose of letting them have all of the circumstances and incidents of that transaction so that they may consider whether there was anything in the conduct of the defendant on that occasion, which would evince any consciousness on the part of the defendant as to his guilt; when as a matter of law the little girl, Mary Jacieko, was excluded from the witness stand by the Court, and that there was no permission given to allow what the little girl did, or what was said by her, to come before the jury, for the purpose of letting them be informed of her testimony. The little girl, Mary Jacieko, not
40 having been permitted to testify, because she could not understand the nature of an oath, if she did or said anything at the City Hospital it was not done under the sanction of an oath, and therefore, the jury could not regard what little Mary Jacieko did or said on that occasion as any evidence against this de-

Specification of Causes.

fendant, nor could the jury take into consideration what the other witnesses for the State may have said, or done, at the City Hospital, as evidence against the defendant.

7. Because the Court permitted the State's witnesses, Mary Jacieko, Carl A. Thunell, and Joseph F. Reilly, to give evidence as to what was said, and done, at the City Hospital, by Mary Jacieko, who was not at the time under the sense of impending death and is today living, all of which evidence was illegal, as the said Mary Jacieko was excluded from the witness stand by the Court, and no permission given to allow what she did to come before the jury, for the purpose of letting them be informed of her testimony. Inasmuch as the little girl, the said Mary Jacieko, was not permitted to testify because she could not understand the nature of an oath, therefore what she did, if she did anything, or if she said anything, and any conversations had with her by the said witnesses was not done under the sanction of an oath, hence what Mary Jacieko may have said, or done, on that occasion to these witnesses, it cannot be regarded as any evidence against this defendant.

McDERMIT & McDERMIT,
Attorneys for Plaintiff-in-Error.

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Opinion of Supreme Court.

OPINION.

Filed June 13, 1921.

NEW JERSEY SUPREME COURT.

No. 4, February Term, 1921.

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THE STATE,

vs.

GEORGE CLAYMONST.

Error to Essex Quarter Sessions.

Argued before Gummere, Chief Justice, and Justices Bergen and Katzenbach.

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For plaintiff-in-error, Frank M. McDermit.

For the State, J. Henry Harrison, prosecutor of the pleas, and Wilbur A. Mott, assistant prosecutor.

The opinion of the Court was delivered by GUMMERE, *C. J.*

The defendant was indicted and convicted of the crime of carnal abuse committed upon the body of one Mary Jacieko, a little child, four years of age, at about ten o'clock in the evening of June 30th, 1920.

The first ground upon which we are asked to reverse this conviction is that the Trial Court improperly permitted the State to prove by a number of witnesses that on the day after the commission of the assault, and while this little child was in the City Hospital, the defendant, in company with several other men, was taken to her bedside, and that she then and there identified him as the man who had committed the assault upon her. The pith of the contention is that, as the child was too young to understand the sanctity of an oath, and had already been excluded by the Court as a witness for that reason, her statement identifying the defendant should therefore have been excluded. It is the universal experience that little children long before they are old enough to appreciate the obligation of an oath can readily identify persons with whom they are brought in contact. A little child not only learns to know her parents and those with whom she lives, but also her playmates and others with whom she is brought

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Opinion of Supreme Court.

into more or less close association. This being so, the reliability of the identification naturally depends upon the condition which operate upon the child's mind in making it. But, although the ground upon which the exception is rested is unsubstantial, it is to be remembered that an identifying statement made by a person upon whom a criminal act has been committed is not of itself evidential against the alleged criminal. It must not only be made in his presence, but it must also be considered in connection with his reply thereto, if he made one, or with his silence, if he stood mute. In the present case the witnesses, or some of them, who were called by the state to prove the identification testified that he said nothing whatever when pointed out by the little girl as the person who had committed the assault upon her. There was nothing in the then surrounding circumstances, so far as the case discloses, which rendered a reply to the charge inexpedient or improper or which suggested a belief on his part that his security would be better promoted by silence than by a response to the charge. As was said in *Donnelly v. State*, 26 N. J. L. 601, 613, "When a matter is stated in the hearing of one which injuriously affects his rights, and he understands it and assents to it wholly or in part by a reply, both are admissible in evidence; the answer because it is the act of the party and the statement as giving point and meaning to the action. So also silence, unless it be accounted for by some sufficient reasons, may be taken as a tacit admission of the fact stated; because a person knowing the truth or falsity of a statement affecting his rights, made by another in his presence, under circumstances calling for a reply, will naturally deny it, if he be at liberty so to do, if he does not intend to admit it. * * * The influence which such testimony should have upon the minds of jurors is a different question from its legal admissibility. All the circumstances of time and occasion should be considered by them when estimating the value of the implied admission."

The next ground upon which plaintiff-in-error seeks a reversal is that the Trial Court improperly admitted in evidence the testimony of Officer Chenoweth as to the distance between the home of this little girl and the place where she was found after the assault was committed upon her. It is not denied that the fact sought to be proved was a material one, but it is contended that the testimony was illegal because it was evidence of a collateral transaction, and, "therefore, was contrary to

Opinion of Supreme Court.

the doctrine of *res inter alios acta.*” The statement of the ground of objection is itself a refutation of its soundness. It is elementary law that a fact material to the issue is provable by any person who has knowledge thereof.

It is also argued that it was improper to permit this same witness to testify that some four hours after this little girl was assaulted he visited the location where she was found, and that it was then brightly illuminated by an electric arc light. The condition of the location, as to light, at the time the little girl was found, was an important fact in the case, for the reason that the parties who discovered her testified that they saw a man running away from the scene, and they afterward identified the defendant as the person whom they then saw. The validity of the testimony is challenged upon the ground “that it was not germane as to how the place was with relation to light at the time the little girl was found.” We cannot concur in this view. The general rule is that testimony is relevant when the fact to which it is applied is so related to another (and material) fact that, according to the common course of events, the existence of the former fact proves or renders probable the existence of the latter. *Fishman v. Consumers Brewing Co.*, 78 N. J. L. 302. The condition of a street light at two o’clock in the morning, in the absence of any proof of the existence of abnormal conditions with relation to it, is some evidence of its condition a few hours earlier on the same night.

The next ground of reversal is that the Court improperly permitted this same witness to testify that at an interview which he had with one Mary Yaraminies (a witness produced by the defendant, and the keeper of a lodging house where he was living) concerning the presence or absence of the defendant from the house on the evening of June 30th, her daughter came into the room and said: “Why, mother, I looked into his room” (referring to the defendant) “and he was not there.” The argument is that the testimony should have been excluded because the defendant was not present at the time of the interview, and the daughter’s statement, therefore, was not evidential against him. This is true; but the testimony was, nevertheless, competent for the purpose of affecting the credibility of the witness Yaraminies, for she had already been asked on her cross examination whether her daughter had not, in the presence of Officer Chenoweth and of some other police officers, made this speci-

Opinion of Supreme Court.

fic statement to her and she had expressly denied it. *McBain v. Edgar*, 65 N. J. L. 637; *State v. Brady*, 71 N. J. L. 361.

10 The last ground upon which the validity of this conviction is attacked deals with what the Court said in its charge to the jury with relation to the consideration to be given by that body to what the little girl said in identifying the defendant as the person who assaulted her. It is not necessary to quote at length the somewhat voluminous instruction complained of. It is enough to say in disposing of the contention that, if there was legal error in this part of the charge, the error was beneficial to the defendant and harmful to the State; and this being so, the defendant cannot successfully attack the instruction. In order to justify a reversal for error of law committed by the Trial Court, it must appear that the error was harmful to the defendant.

20 The conviction will be affirmed.

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*Assignment of Errors.***ASSIGNMENT OF ERRORS.****New Jersey Court of Errors and Appeals**

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STATE OF NEW JERSEY,

*Defendant-in-Error,**vs.*

GEORGE CLAYMONST,

*Plaintiff-in-Error.**On Writ of Error.**Assignment of
Errors.*

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Afterwards to wit, in the Court of Errors and Appeals in the last resort in all causes, comes the said George Claymonst, by James R. McDermit, his attorney, and says, that in the record and proceedings aforesaid and also in the giving of the verdict and judgment there is manifest error in this, to wit;

1. In that upon the trial of said cause, the Trial Judge, permitted the State's witness, Mrs. Annie Jacieko, to testify and give evidence of a conversation had with her daughter Mary Jacieko, at the City Hospital, which evidence is as follows:

“Q When this man was brought towards Mary's bed, what did Mary do? A She pointed at him.

(Motion made to strike out, etc.)

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Q When Mary pointed at the defendant what did the defendant do or say? (Objection and exception.) A He has not said anything.

Q When Mary pointed her hand did she say anything? A Yes, she said everything, she says what he has done with her.”

2. In that upon the trial of said cause, the Trial Judge permitted the State's witness, Carl A. Tunell, to testify and give evidence, as to the statement, and what was said by Mary Jacieko, at the City Hospital, which testimony is as follows:

“Q Then what did the little girl say? A The little girl said that this man was the man that gave the quarter to buy the dolly.”

3. In that upon the trial of said cause, the Trial Judge permitted the State's witness, Joseph F. Reilly, to testify and give

Assignment of Errors.

evidence of what Mary Jaceiko said, and done at the City Hospital, which evidence is as follows:

* * * "When we got there, Detective Tunell asked the little girl. 'Do you see the man here who hurt you?' And the little girl looked around and for a moment didn't answer. He repeated the question and the little girl lifted her left hand as I remember it, and pointed to the prisoner. Detective Tunell then said, 'We will make sure as to who she is pointing at,' and he asked her again, 'Do you see the man here who hurt you?' The little girl said something to her mother and then she said a few words in English; the only words which I got was a quarter, and just at that moment a man from the Evening World called my attention away to something else and I only heard her reply a quarter."

4. In that upon the trial of said cause, the Trial Judge permitted and allowed George W. Chenoweth, a witness for the State, to give evidence and prove the distance of Wilson avenue from the home of the little girl, Mary Jacieko, to the billboard, when the said witness was not the City Surveyor but only a detective in the Department of Police. 20

5. In that upon the trial of said cause, the Trial Judge refused to strike out the testimony of the State's witness, George W. Chenoweth, given as to the location and distance from the home of Mary Jacieko to the so-called billboard. 30

6. In that upon the trial of said cause, the Trial Judge permitted the prosecutor to question the defendant's witness, Mary Yaraminies, as to what her little daughter stated in her presence when she was being questioned by the officers—which was matter collateral to the issue.

7. In that upon the trial of said cause the Trial Judge permitted the witness for the State, George W. Chenoweth in rebuttal, to testify to the following evidence:

"Q And after she made that statement did her little girl come in the room? A She did. 40

Q And did the little girl say, 'I looked in his room and he was not there?' A She did."

Assignment of Errors.

8. In that upon the trial of said cause the Trial Judge charged the jury:

10 “The Court warns you, as matter of law, that the little girl, Mary Jacieko, was excluded from the witness stand by the Court, in the exercise of its discretion, and that there was no permission given to allow what the little girl did to come before you for the purpose of letting you be informed of what she might say if she had testified. The little girl was not permitted to testify because she could not understand the nature of an oath, and what she did, if she did anything, or said, if she said anything, in the presence of this defendant on July 1st was not done under oath and there was no sanction; hence you cannot regard what she did or said on that occasion as any evidence against this defendant, nor can you take into consideration what anybody else may have done or said on that occasion as evidence against the defendant; but evidence of the transaction, or tending to show what occurred concerning the alleged transaction, was permitted to go before you for the purpose of letting you have all of the circumstances and all of the incidents of that transaction to consider whether or not there was anything in the conduct of this defendant on that occasion which evinced any consciousness on his part of guilt.”

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30 Plaintiff-in-error, George Claymonst, prays that the judgment aforesaid be reversed and altogether for nothing holden, and that he may be restored to all things he has lost by reason of the said judgment, etc.

JAMES R. McDERMITT,
Attorney for Plaintiff-in-Error.

*Specification of Causes.***SPECIFICATION OF CAUSES.**

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY,

*Defendant-in-Error,**vs.*

GEORGE CLAYMONST,

*Plaintiff-in-Error.**On Writ of Error.* 10*Specification
of Causes.*

George Claymonst, the plaintiff-in-error, by James R. Mc-Dermitt, his attorney, hereby specifies the causes in the record relied upon for relief or reversal in the aforesaid cause as follows:

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1. Because the Trial Judge permitted the State's witness, Annie Jacieko, to testify and give evidence of the conversation had by her with her daughter, Mary Jacieko, at the City Hospital, which evidence was hearsay and illegal because the person Mary Jacieko was and is living and was the proper person to testify, and give evidence as to what was done to her by the defendant.

2. Because the Trial Judge permitted the State's witness, Carl A. Tunell, to testify and give evidence, as to the statement and conversation, and what was said by Mary Jacieko, at the City Hospital, which evidence was hearsay and illegal, because the person Mary Jacieko was and is living and was the proper person to testify and give evidence as to what was done to her by the defendant.

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3. Because the Trial Judge permitted the State's witness, Joseph F. Reilly, to testify and give evidence as to the statement and conversation and what was said by Mary Jacieko at the City Hospital, which evidence was hearsay and illegal, because the person Mary Jacieko was and is living and was the proper person to testify and give evidence as to what was done to her by the defendant.

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4. Because the Trial Judge permitted the State's witness, George W. Chenoweth, to give evidence, in order to prove the distance to Wilson avenue from the home of the said Mary

Specification of Causes.

Jacieko to the billboard, where the said Mary Jacieko was alleged to have been found and raped, when the said witness was not competent to so testify, in that he was not a surveyor, nor City Surveyor, but only a detective in the Department of Police of the City of Newark, and that, the evidence as given by him was not evidence showing the condition of the locality as of the time of the happening of the crime.

10 5. Because the Trial Judge permitted the State's witness, George W. Cheneweth, to testify in rebuttal, in order to contradict the defendant's witness, Mary Yaraminies, as to what she testified to on cross examination, in that her little girl had said, that she looked in the defendant's room and he was not there, she, the said witness having denied this, and the Trial Judge permitted the said State's witness to testify that the little girl so stated in the presence of her mother, the witness Mary Yaraminies, hereby bringing out a contradiction of what the witness, Mary Yaraminies said about what her little girl had said, the same being hearsay and illegal and was collateral facts, and the State was bound by the answer of the defendant's witness and she could not be contradicted.

20 6. Because the Trial Judge charged the jury, that he had permitted the State's witnesses to give evidence of the transaction of what was stated and testified to, as to the conversations with the complaining witness, Mary Jacieko, at the City Hospital, for the purpose of letting them have all of the circumstances and incidents of that transaction so that they may consider whether there was anything in the conduct of the defendant on that occasion, which would evince any consciousness on the part of the defendant as to his guilt; when as a matter of law the little girl, Mary Jacieko was excluded from the witness stand by the Court, and that there was no permission given to allow what the little girl did, or what was said by her, to come before the jury, for the purpose of letting them be informed of her testimony. The little girl, Mary Jacieko, not having been permitted to testify, because she could not understand the nature of an oath, if she did or said anything at the City Hospital it was not done under the sanction of an oath, and therefore, the jury could not regard what little Mary Jacieko did or said on that occasion as any evidence against this defendant, nor could the jury take into consideration what the other witnesses for the

Specification of Causes.

State may have said, or done, at the City Hospital as evidence against the defendant.

7. Because the Court permitted the State's witnesses, Mary Jacieko, Carl A. Tunell and Joseph F. Reilly, to give evidence as to what was said and done at the City Hospital by Mary Jacieko, who was not at the time under the sense of impending death and is today living, all of which evidence was illegal, as the said Mary Jacieko was excluded from the witness stand by the Court, and, no permission given to allow what she did, to come before the jury, for the purpose of letting them be informed of her testimony. In as much as the little girl, the said Mary Jacieko, was not permitted to testify because she could not understand the nature of an oath, therefore what she did, if she did anything, or if she said anything, and any conversations had with her by the said witnesses, was not done under the sanction of an oath; hence what Mary Jaceiko may have said, or done, on that occasion to these witnesses, it cannot be regarded as any evidence against this defendant.

JAMES R. McDERMITT,
Attorney for Plaintiff-in-Error.

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New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>	}	<i>On Error to the Supreme Court.</i>
<i>vs.</i>		
GEORGE CLAYMONST, <i>Plaintiff-in-Error.</i>		

BRIEF FOR DEFENDANT-IN-ERROR.

The plaintiff-in-error was tried and convicted of carnal abuse upon one Mary Jacieko, a little girl four years of age.

A writ of error was taken to the Supreme Court, where the judgment of the Essex Quarter Sessions was affirmed. The opinion in the Supreme Court affirming the judgment below will be found on page 127.

There were in the Supreme Court eight assignments of error (p. 120) and seven specifications of causes (p. 123).

In this court there are *eight assignments of error* (p. 132) and *seven specifications of causes* (p. 135). The assignments of error and the specifications of causes in this court are identical with the assignments of error and specifications of causes in the Supreme Court.

There is in this court no assignment of error or specification of causes for reversal which, in any way or manner, alleges or suggests error in the Supreme Court. In our opinion, under the 136th or the 137th sections of the Criminal Procedure Act, error in the Supreme Court cannot be alleged or stated by means of a specification of cause for reversal. Under those sections specifications of causes for reversal relate wholly and solely to matters

that occurred at the trial. The prayer for relief at the end of the assignments of error (p. 134) is as follows:

“Plaintiff-in-error, George Claymonst, prays that the judgment aforesaid be reversed and altogether holden, and that he may be restored to all things that he has lost by reason of said judgment, etc.”

In the recent case of *State v. Matthias Andres*, No. 53, June Term, 1921, this Court says:

“A proper assignment of error must be filed in this court to challenge the judgment of the Supreme Court when brought here on error. Without it there is nothing for this Court to pass upon. And that is the situation before us.”

We respectfully insist that there is nothing for this Court to pass upon, and therefore that the writ of error out of this Court to the Supreme Court should be dismissed.

State v. Andres (No. 53, June Term, 1921);

State v. Belkota, 113 Atl. 142;

Diamond Mills Paper Company v. Leonard Hygiene Ice Co., 113 Atl. 139.

It will serve no useful purpose to recount the terrible story of the crime committed upon this little girl. The facts are clearly stated in the testimony of Kastner (p. 7), Vella (p. 30) and Dr. J. Henry Clark (p. 29).

Assignments 1, 2 and 3.

Specifications 1, 2, 3 and 7.

It appears from the testimony of *Officer Thunell* (p. 42) that on July first, about two o'clock in the afternoon, with Officers Messner and Cotter and two newspapermen, he took the defendant to the hospital where the little girl then was. The crime was committed on the thirtieth day of June.

These assignments and specifications all relate to questions that were asked persons who were present as to

what occurred while the defendant was at the bedside of the little girl in the hospital.

The questions and answers which are specified in Assignment Number 1 are as follows:

“Q When this man was brought toward Mary’s bed, what did Mary do? A She pointed at him” (p. 38, l. 18).

“Q When Mary pointed at the defendant, what did defendant do or say? A He has not said anything” (p. 39, l. 42).

“Q When Mary pointed her hand, did she say anything? A Yes, she said everything; she says what he has done with her” (p. 41, l. 10).

The question and answer specified in Assignment No. 2 is as follows:

“Q Then what did the little girl say? A The little girl said that this was the man that gave the quarter to buy the dolly” (p. 44, l. 38).

The testimony specified in Assignment No. 3 is part of the testimony given by *Joseph F. Reilly* as to what occurred at the bedside of the little girl. His testimony on that point begins on page 59, line 35, and continues through to page 60 and the top of page 61.

OFFICER THUNELL testifies (p. 44, l. 32) as follows:

“Q Just where was the defendant when the little girl said what she did say? A Right near the bedside.

“Q More particularly? A The third man in the line.

“Q What did you ask him to do—anything? A I asked him to bend down so he could hear what the little girl had to say.

“Q Did he bend down? A He did.

“Q Then what did the little girl say? A The little girl said that this was the man that gave me the quarter to buy the dolly.

“Q Did the defendant at that time say anything? A No, sir.

“Q Did you have a talk with him a little later? A About five minutes after.

“Q How long before you left was it you had this talk? A Just directly before he left.

“Q What did you say to him then? A I said, ‘What have you to say for yourself now?’

“Q What did he say? A Nothing; shrugged his shoulder. * * *

“Q Did he use the word ‘nothing’? A He used the word ‘nothing.’ ”

We respectfully submit that this testimony was competent. The defendant was present at the bedside of the little girl, and in view of the fact that he heard what she said and saw her point him out as the man who had hurt her and had given her a quarter to buy a dolly and remained silent was competent evidence.

Donnelly v. State, 2 Dutch. 601;

State v. D’Adame, 84 N. J. L. 386.

The State called the little girl, *Mary Jacieko* (p. 35), but the Court did not permit the child to be sworn as a witness (p. 36).

Assignments 4 and 5.

Specification 4.

These assignments and this specification relate to the testimony given by *Officer George W. Chenoweth* as to the distance from Wilson avenue and Merchant street to the billboard on Bay avenue and Clifford street, where the crime was committed.

Mrs. Annie Jacieko, the mother of Mary, testified (p. 36) that she lived at 12 Wilson avenue, on the corner of Merchant street.

The record shows (p. 67) that no objection of any kind was made to this testimony, *and no motion was made to strike it out.*

OFFICER CHENOWETH (p. 67, l. 40) testified, without any objection, as to how the street was lighted near the billboard, back of which the crime was committed. After

this testimony was in without objection, counsel for the plaintiff-in-error said (p. 67, l. 42):

Mr. McDermit. I move to strike out the condition on July first, two or three o'clock that morning; it is not germane as to how it was that night at ten o'clock."

This motion was denied.

Obviously, this testimony should not have been stricken out, first, because no objection was made to it until after it was in, and, second, because the difference in time was not sufficient to make it incompetent. In any event, there is no *assignment of error or specification of cause* based on the refusal of the Court to strike out the testimony with relation to the condition of the lights.

Assignments 6 and 7.

Specification 5.

MARY YARAMIAMIES was called as a witness for the defense. She testified, (p. 104) that the defendant boarded with her, and that on June 30 he came home to supper at six o'clock; that he got through his supper about a quarter to seven, went to his room, dressed and went out and she didn't see him again.

On cross examination the witness was asked (p. 106, l. 25):

"Q On July 1st, at your house, about twelve o'clock noon, when these officers came to see you, did you say to the police officers that the boarder came into the house the night before and did not go out at all? A I no say sure (p. 106, l. 35). I say maybe go out and maybe not; I don't see go out; maybe sleeping."

This was all the answer it was possible to draw from the witness. In order to refresh her memory she was asked:

"Q Well, you can laugh over this. Did your little girl come into your room and say to you, 'Why, mother, I looked into his room and he was

not there'?" (p. 106, l. 38.) "A My girl no say it" (p. 107, l. 29).

So far, this evidence clearly did not harm the defendant.

On rebuttal *Officer Chenoweth* was called to testify as follows (p. 108, l. 17):

"Q Did she then say to you, in response to inquiry, that the boarder came home and did not go out of the house at all on the previous night? A She did."

It will be observed that no objection to this question was made at all until after it was answered. The object of this testimony was to discredit the witness by showing that she had made to the officer a statement contrary to the one she made on the witness stand, and for that purpose we respectfully submit it was competent.

After this testimony was in the witness was further examined as follows (p. 109, l. 5):

"Q And after she made that statement did the little girl come in the room? A She did.

"Q Did the little girl say, 'I looked in his room and he was not there'? A She did."

No objection to this testimony was made until after it had been given. After the testimony was in, counsel for the plaintiff-in-error says:

"I ask to strike that out. It does not state the time when she looked into the room."

"*Witness.* A little after nine."

The only ground on which counsel asked the Court to strike out the question was, "It does not state the time when she looked into the room."

The witness thereupon states the time. Therefore, the ground on which the Court was asked to strike out the question or the answer, or both, failed because the witness stated the time.

In any event, counsel was not entitled to have the testimony stricken out, because no objection was made until after it was in.

Assignment 8.**Specification 6.**

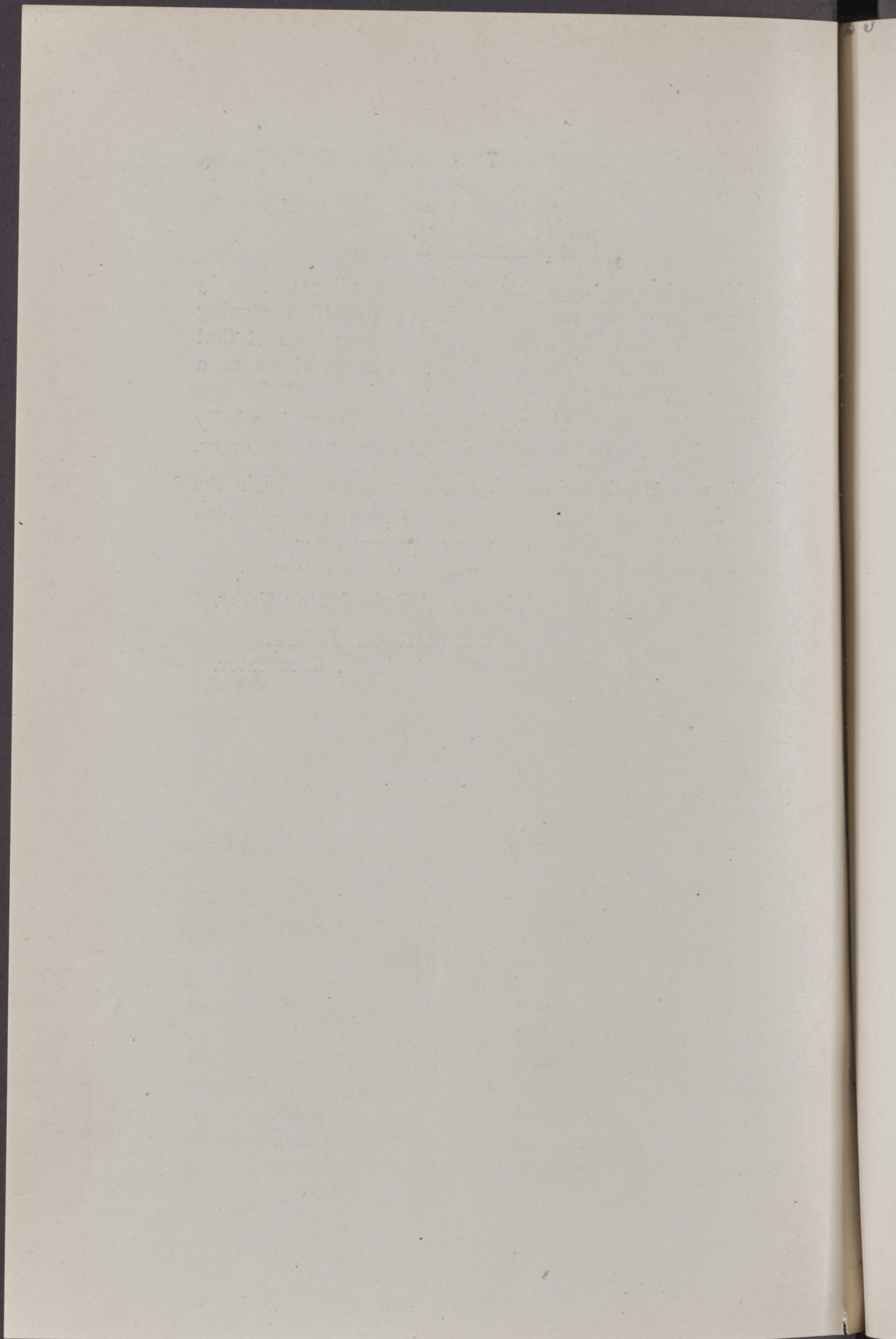
This assignment and this specification alleges error in the portion of the charge found on page 115, beginning at line 17, where the Court comments upon the fact that the little girl, Mary, was not allowed to be sworn as a witness.

We submit that this portion of the charge is wholly beneficial to the defendant, and does not constitute error.

We respectfully submit that there was no error in the record and that the judgment below should be affirmed.

J. H. HARRISON,
Prosecutor of the Pleas,
Attorney of Defendant-in-Error.

WILBUR A. MOTT,
Assistant Prosecutor.



New Jersey Court of Errors and Appeals

STATE OF NEW JERSEY, <i>Defendant-in-Error,</i>	} <i>On Writ of Error.</i>
<i>vs.</i>	
GEORGE CLAYMONST, <i>Plaintiff-in-Error.</i>	} <i>Sur Indictment and Conviction for Assault and Battery and Abuse.</i>

BRIEF OF PLAINTIFF-IN-ERROR.

Plaintiff-in-error was indicted and convicted on two counts, one for assault and battery and the other for carnal abuse in and upon Mary Jacieko, a woman under the age of twelve years.

The case comes up for review on bill of exceptions and specification of causes, with certificate bringing up the entire record under section 136 of the Criminal Procedure Act of 1898.

On the night of June 30, 1920, at about ten minutes to ten, while one Edward Frank Kastner and another Salvatore Villa were coming in towards the central part of the City of Newark, and had come under the Pennsylvania short line or freight line, they heard moaning, coming from behind a bill board and that soon thereafter a man came out from behind the bill board, whom they identify as being the defendant. That these two men saw a little girl, Mary Jacieko, who they noticed had been badly mistreated, she being four years old, and was at the time crying, with blood on her face and other parts of her person. Both these men took Mary in an automobile to the Third Precinct Police Station.

The State contended that this defendant was guilty of the crime because of the identification of Edward Kastner and Salvatore Villa, and when confronted with the little girl lying in bed, the defendant remained silent,

by reason of which an inference of admission should be drawn against the defendant.

The defendant set up a denial and an alibi as his defense, proving by several witnesses his movements on the night in question.

SPECIFICATION OF ERRORS.

1. The admission of the evidence of Mrs. Annie Jacieko, as to conversations with Mary Jacieko at the City Hospital.

Exception, pp. 39, 40.

Assignment of Error No. 1.

Specification of Cause No. 1 and 7.

2. The admission of the evidence of Carl A. Thunell, as to statements and conversations of Mary Jacieko at the City Hospital.

Assignment of Error No. 2.

Specification of Cause No. 2 and 7.

3. The admission of the evidence of Joseph R. Reilly, as to statements and conversations of Mary Jacieko at the City Hospital.

Assignment of Error No. 3.

Specification of Cause No. 3 and 7.

4. The admission of the evidence of George W. Chenoweth, as to what course a person would take to go to the bill board where Mary Jacieko was found, from her home, and what the distance was, and the condition of the locality in general.

Exception, p. 68.

Assignments of Error No. 4 and 5.

Specification of Cause No. 4.

5. The admission of the evidence of George W. Chenoweth, as to what the little daughter had stated, of Mrs. Mary Yaraminies, when the mother Mrs. Yaraminies was being questioned as to the whereabouts of the de-

defendant on the night of the crime which was a collateral matter and could not be contradicted or proven.

Objection, p. 109.

Assignment No. 6 and 7.

Specification of Cause No. 5.

6. The charge of the Court as follows:

“The Court warns you, as matter of law, that the little girl, Mary Jacieko, was excluded from the witness stand by the Court, in the exercise of its discretion, and that there was no permission given to allow what the little girl did to come before you for the purpose of letting you be informed of what she might say if she had testified. The little girl was not permitted to testify because she could not understand the nature of an oath, and what she did, if she did anything, or said, if she said anything, in the presence of this defendant on July 1st, was not done under oath and there was no sanction; hence you cannot regard what she did or said on that occasion as any evidence against this defendant, nor can you take into consideration what anybody else may have done or said on that occasion as evidence against the defendant; but evidence of the transaction, or tending to show what occurred concerning the alleged transaction, was permitted to go before you for the purpose of letting you have all of the circumstances and all of the incidents of that transaction to consider whether or not there was anything in the conduct of this defendant on that occasion which evinced any consciousness on his part of guilt.”

The errors will be considered in their numerical order.

BRIEF OF ARGUMENT.

1, 2 and 3.

These three specifications will be considered together. The evidence of Mrs. Annie Jacieko is found on page 38, line 18; “Q When this man was brought towards Mary’s bed what did Mary do? A She pointed at him.” (Motion made to strike out, etc.), and page 40, l. 15, she

states in answer to the question on page 39, l. 42, "When Mary pointed at the defendant what did the defendant do or say? A He has not said anything." Page 41, l. 10, "When Mary pointed her hand did she say anything? A Yes, she said everything; she says what he has done with her." On p. 42, l. 10, "Q When Mary pointed her hand at the defendant what did she say? A She said, 'This is the man that had taken me away.'"

The evidence of Carl A. Thunell on p. 44, l. 35, "Q Then what did the little girl say? A The little girl said that this was the man that gave me the quarter to buy the dolly."

The evidence of Joseph F. Reilly is found on p. 59, l. 35, which is as follows:

"Q Will you tell the Court and jury just what was done? A Well, when we came into the room—by we, I mean Detectives Cotter, Thunell and Messner and a reporter for the Evening World of New York and myself; we went to an upper floor; I think it was the third or fourth floor, and we went into the ward where this little girl was lying on the bed; we gathered around the bed; the mother was sitting at the head of the bed, with her hand on the little girl's forehead, and Detective Messner stood back a little from the bed on the west side; the bed headed north and south, the girl's head to the north, and the mother was at the head of the bed, and Detective Messner came next, and, as I remember it, Detective Thunell and then the prisoner, and at the foot of the bed, Detective Cotter and the man from the Evening World, and I stood on the easterly side of the bed; when we got there, Detective Thunell asked the little girl, 'Do you see the man here who hurt you?' And the little girl looked around and for a moment didn't answer. He repeated the question and the little girl lifted her left hand, as I remember it, and pointed to the prisoner. Detective Thunell then said, 'We will make sure as to who she is pointing at,' and he asked her again, 'Do you see the

man here who hurt you,' and then she says to the mother, either he said or Detective Messner said to the mother, 'Repeat that to her in Polish or Russian'; and I did not know the language she spoke and the mother repeated it." And on p. 60, l. 42—"The only words which I got was a quarter—I only heard her reply a quarter."

Mary Jacieko, the girl upon whom the assault and debauchery was alleged to have taken place, was a little girl about four years old, p. 35, l. 25; and she was not permitted to testify because she did not have the necessary intelligence to understand the questions nor recall the facts, and understand the sanction of an oath. Case, p. 36, l. 25. Because of this fact the State then attempted through three witnesses to prove conversations made by Mary at the City Hospital, claiming that the defendant was then present and therefore, admissible as evidence against him. But the State later shifted to the point and position that, the only reason that they put the evidence in was, for the purpose of showing whether there was anything in the conduct of the defendant on that occasion which evinced any consciousness on his part of guilt.

The evidence of conversation and identification made by Mary, the little girl at the hospital, was illegal, because it is tantamount to making a third person give evidence of a living witness which could have been testified to by the living witness, against the defendant, without the sanction of an oath, because Mary Jacieko is living and was the proper person to testify and give evidence as to what was done to her by the defendant, if anything. She was disqualified from testifying and under the Court's discretion—as she showed lack of intelligence. How can the Supreme Court now say that from experience a child of her mere age was able to make an identification and be binding on defendant? Her testimony was introduced ostensibly for the purpose of putting in her testimony, which she could not supply under oath, under the pretense that the defendant was present at the time. How did the defendant happen to be present? He was in custody and

was brought to the hospital by Detective Thunell while in custody, in order to subject him to make evidence against himself; for Thunell testified, p. 43, l. 15, "I asked her then in English where she had seen this man and what he had done to her, and first off I asked her to point THIS MAN OUT, OUT OF THE LINE UP." So, therefore, the little girl Mary had no freedom of action, showing that what she was doing at the City Hospital was not a spontaneous action of her part, free from the interference of any intervening human agency, but rather, tutored and coached by Detective Thunell, thereby putting the defendant in a position to make evidence against himself, which was illegal and contrary to law.

In order for actions of a defendant in a criminal case to be submitted to a jury to show acquiescence in something they must not be under circumstances which render a reply inexpedient, improper or impossible.

Donnelly v. The State, 26 N. J. L. 436-601.

It has been held in several well considered cases that the fact that the party was under arrest or in custody, charged with a crime may make it natural rather than unnatural for him to remain silent when statements with reference thereto are made.

Commonwealth v. Kenny, 12 Mete. (Mass.) 235; 46 Am. Dec. 672;

Commonwealth v. Walker, 13 Allen (Mass.), 570;

State v. Foley, 144 M. 600, 46 S. W. 733;

State v. Young, 99 Mo. 666, 12 S. W. 879;

State v. McCullum, 18 Wash. 394; 51 Pac. 1044;

Rex v. Appleby, 3 Starkie, 33;

Bob v. State, 32 Ala. 560.

State v. Diskin, 34 La. Ann. 919; 44 Am. R. 448.

4.

This specification refers to the admission of the evidence of George W. Chenoweth, as to what course a person would take to go to the bill board where Mary Jacieko

was found, from her home, and what the distance was, and the condition of the locality in general.

The evidence of the witness, George W. Chenoweth, is found on pages 67 and 68. This was illegal because it was evidence of a collateral transaction, in that it affected the defendant by giving effect to acts, conduct and declarations of strangers, making the defendant bound by the conduct and acts of other persons unconnected in the transaction. In that it being contrary to the doctrine of *res inter alios acta*. Being to things done in reference to other. The testimony of Chenoweth shows similar acts on the part of a person to be applied to the particular act in question.

The Supreme Court states in its opinion:

“The next ground upon which plaintiff-in-error seeks a reversal is that the Trial Court improperly admitted in evidence the testimony of Officer Chenoweth as to the distance between the home of the little girl and the place where she was found after an assault was committed upon her. It is not denied that the fact sought to be proved was a material one, but it is contended that the testimony was illegal because it was evidence of a collateral transaction, and therefore, was contrary to the doctrine of *res inter alios acta*. The statement of the ground of objection is itself a refutation of its soundness.”

In this the Supreme Court is in error, because the ground of objection was to the testimony of Officer Chenoweth, as to what course a person would take to go to the bill board where Mary Jacieko was found, from her home. Seeking to show by this testimony that a person would go to the place of the crime through dark streets, lonesome and deserted, where a person would not be seen by anyone—accounting for the fact that defendant could not be seen by any person with the child, as he would have to use such dark and isolated streets to get to where the child was found, thereby binding the defendant, on the act of some other third person unconnected with the defendant.

The maxim *res inter alios acta* is employed in the application of various principles. In criminal prosecutions it is employed as denoting the principle which excludes evidence of the acts of others for whose doings accused is not responsible. (Corpus Juris, Vol. 16, p. 572, Sec. 1113.)

It was in this sense that it was and is applied in this case and misunderstood by the Supreme Court—and under this theory and rule of evidence it is here again argued—and I submit that grievous error exists in the admission of this testimony, making the acts of another for whose doings this defendant was held responsible. The general rule is that the law will not consider evidence that a person has done a certain act at a particular time as probative of a contention that he has done a similar act at another time.

Crosby v. Wells, 73 N. J. L. 790;
Scull v. Skillton, 70 N. J. L. 792;
Apgar v. Woolston, 43 N. J. L. 57;
Temperance Hall Ass. v. Giles, 33 N. J. L. 260;
Clark v. Clark, 2 N. J. L. 104;
Coryell v. Calbaugh, 1 N. J. L. 90;
Coyne v. Sayre, 54 N. J. Eq. 702.

It is even clearer that a person cannot be shown to have done an act by evidence that another person has done a similar act.

Lay v. Fuller, 178 Ala. 375, 59 S. 609;
Berrent v. Simpson, 109 N. Y. S. 753.

In criminal cases the rule of exclusion is even more important than in civil cases, because the consequences of its violation are more serious, and the danger of conviction on irrelevant matter is more direct.

Lightfoot v. People, 16 Mich. 507, 511;
State v. Kirby, 63 Pac. 752;
Spriggins v. State, 60 S. W. 54.

In an action upon a policy of burglary insurance in which the insured claimed that the burglar entered his

store by means of the transom over the door, evidence that other stores on the same street had been entered in that way was inadmissible, as having no tendency to prove a burglary upon the store of the insured.

Rosenburg v. Peop. Surety Co., 104 App. Div. 436, 125 N. Y. S. 257.

(The cases are collected in *Corpus Juris*, Vol. 22, page 744, Sec. 835.)

In the case of *Temperance Hall Ass. v. Giles*, 33 N. J. L. 260, being a case where plaintiff fell into an area leading to the cellar under the defendant's hall, the area being 10 minutes from the main walk. There was no gate and, it was at night, the plaintiff could not see where she was going because there was no light. The defendant offered to prove that over 10,000 people had passed the area without accident since the hall was constructed. This evidence was excluded under the above doctrine.

In the case of *Emerson v. Lowell Gas Light Co.*, 4 Allen (Mass.) 410, for damages caused by leaking gas tubes injuring plaintiff's health, he offered to show that a large number of houses in the neighborhood, the drains of which were connected with the same sewers which had served his house, were filled with gas, and wherever the gas entered sickness followed. This evidence was excluded on the ground that the attending circumstances may be so different, that the occurrence of sickness in one house, would not have a tendency to show the occurrence of sickness to the occupants of another house; thereby reaffirming the doctrine that similar acts cannot be allowed in evidence to prove the particular act in question, and by analogy the evidence of *Chenoweth* as to a course that a person would take to go to the bill board where Mary Jacieko was found, from her home, was inadmissible, as it tended to prove similar acts to have been done by a stranger which would have been likely to have been done by the defendant. By analogy it can be argued that it is generally inadmissible, when the issue is as to whether a person did a particular thing at a certain time to show

that he did a similar thing at some other time, as in the present case that A on a certain occasion or at any time may have pursued a course or conduct in going to a certain locality cannot be proven to show that B at some other time did likewise.

The effect of this rule of evidence is to prevent a litigant party from being concluded, or even affected, by the evidence, acts, conduct or declarations of strangers. It would not be only highly inconvenient but also manifestly unjust, that a defendant charged with crime should be bound by the acts of mere unauthorized strangers, and if a party ought not to be bound by the acts of strangers, so neither ought their acts or conduct to be used as evidence against him.

Upon the question of the admissibility of the evidence of this witness Chenoweth to prove the distance and the condition of the light from the hanging street are light at or near the scene where the little girl was found, the evidence was illegal.

In *Yates v. People*, 32 N. Y. 509, upon the question to prove the amount of light cast by the lamp on the night in question it was held that to prove by evidence showing the amount of light cast by the lamp on a night four months afterwards is irrelevant, the conditions not being shown to be the same.

5.

This refers to the admission of the evidence of George W. Chenoweth, as to what the little daughter had stated, of Mrs. Yaraminies, when the mother, Mrs. Yaraminies, was being questioned as to the whereabouts of the defendant on the night of the crime, which was a collateral matter and could not be contradicted. On page 106, line 42, Mrs. Mary Yaraminies, a witness for the defendant, upon cross examination was asked at line 45, "Did your little girl come into your room and say to you, 'Why, mother, I looked into his room and he was not there'?"

and the witness answered that she did not remember. Then Mr. Chenoweth was called in rebuttal to rebut this evidence of a statement supposed to have been made by the daughter of Mrs. Yaraminies, a third person, which issue is collateral to the case. On page 109, line 10, Mr. Chenoweth was asked this question, by the Prosecutor, "Q And after she made that statement did her little girl come in the room? A She did. Q And did the little girl say, 'I looked in his room and he was not there?' A She did." (Motion to strike out, etc.)

All of this took place when the defendant was not present and the daughter of Mrs. Yaraminies was a third person, not connected with the case whatever, and the State was bound by the answer as given by the witness Mrs. Yaraminies and could not be contradicted.

On the trial the accused was a witness and was asked if he had ever had any trouble with anyone, and answered that he never had. On cross examination he was asked if he did not have a dispute with one C., and drew a razor on him. HELD, that this evidence was incompetent, but if at all competent on cross examination, being irrelevant and immaterial, the State was bound by the answer of the accused and could not contradict it.

Bullock v. State, 36 Vr. 557.

C. was called as a witness by the State and testified that about eighteen years prior the prisoner worked for him, and in a dispute had come at the witness with a razor, &c. HELD, that this testimony was incompetent.

Bullock v. State, 36 Vr. 557.

6.

This is as to the charge of the court where the Judge charged that he had permitted the State's witnesses to give evidence of the transaction of what was stated and testified to, as to the conversations with the complaining witness, Mary Jacieko, at the City Hospital, for the purpose of letting them have all of the circumstances and

incidents of that transaction, so that they may consider whether there was anything in the conduct of the defendant on that occasion, which would evince any consciousness on the part of the defendant as to his guilt; when as a matter of law the little girl, Mary Jacieko, was excluded from the witness stand by the Court, and that there was no permission given to allow what the little girl did, or what was said by her, to come before the jury, for the purpose of letting them be informed of her testimony. The little girl, Mary Jacieko, not having been permitted to testify because she could not understand the nature of an oath, if she did or said anything at the City Hospital it was not done under the sanction of an oath, and therefore, the jury could not regard what little Mary Jacieko did or said on that occasion as any evidence against this defendant, nor could the jury take into consideration what the other witnesses for the State may have said, or done, at the City Hospital, as evidence against the defendant, and the jury could not consider the same as affecting the defendant.

The same argument and points raised under specifications 1, 2 and 3 apply here because the Court, by permitting the State's witnesses, Mary Jacieko, Carl A. Thunell, and Joseph R. Reilly, to give evidence as to what was said, and done, at the City Hospital, by Mary Jacieko who was not at the time under the sense of impending death and is today living, all of which evidence was illegal, as the said Mary Jacieko was excluded from the witness stand by the Court, and no permission given to allow what she did to come before the jury, for the purpose of letting them be informed of her testimony. Inasmuch as the little girl, the said Mary Jacieko was not permitted to testify because she could not understand the nature of an oath, therefore what she did, if she did anything, or if she said anything, and any conversations had with her by the said witnesses was not done under the sanction of an oath, hence what Mary Jacieko may have said, or done, on that occasion to these witnesses, it cannot be regarded as any evidence against

this defendant and considered by the jury for any purpose whatever, and the Court should have so instructed the jury on this evidence, that it was completely eradicated from the case—and not to be considered by them against the defendant for any purpose whatever.

Respectfully submitted,

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November Term, 1921.

