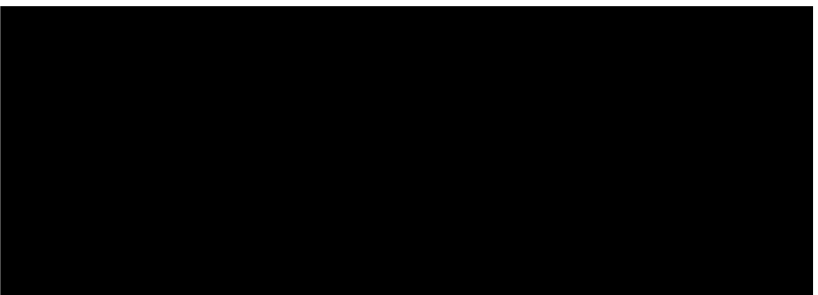
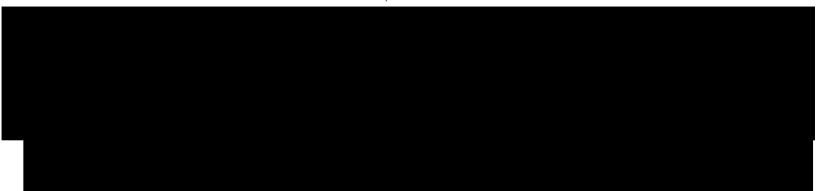


Cheshire, } No. 3573.
Feb. 21, 1946. }

STATE v. CHARLES J. LYNCH.



Arthur Olson, County Solicitor (by brief), for the State.

Howard B. Lane (by brief), for the defendant.

PER CURIAM. Whether or not the testimony concerning the fact of the complaint by the child could be received before she testified need not be decided. The mere fact that she made a seasonable complaint is admissible, though hearsay, for either of two purposes: (1) to contradict the inference of the incredibility of the complainant's testimony that might be drawn from her failure to complain seasonably of the assault, or (2) as bearing on the complainant's state of mind with reference to consent to the assault. In the case of a child below the age of consent, the latter is immaterial. But even a prompt complaint is no evidence at all of the truth of the facts therein stated, and we have held it error to permit an argument to the jury to that effect. "The complaint was no more than hearsay and its early making did not improve its quality as such or serve to show that its averments were true." *State v. Wargo*, 83 N. H. 532, 535. Insofar as the mother's testimony was hearsay, it was inadmissible to prove the

defendant's guilt. *State v. Knapp*, 45 N. H. 148, 155; Wig. Ev. (3d ed.), s. 1136. The evidence is undisputed that the defendant was arrested four days after the alleged crime, that the sheriff talked with the child that day, and that thereafter the child made the declaration to her mother. This does not permit a finding that the declaration to the mother was so spontaneous as to be admissible as a part of the *res gestae*. *Bennett v. Bennett*, 92 N. H. 379.

New trial.

MEMORANDUM

MR. JUSTICE PAGE, having attained the age of seventy years on the twenty-second day of February, 1946, retired under the constitutional limitation.

On the twenty-third day of February, 1946, MR. FRANK ROWE KENISON was appointed an associate justice of this court to fill the vacancy occasioned by the retirement of MR. JUSTICE PAGE, and took his seat upon the bench at the March session, 1946.

Hillsborough, } No. 3555.
Mar. 5, 1946. }

THOMAS THIBEAULT *v.* MANCHESTER SHOE MFG. CO.

SAME *v.* LOUIS H. SALVAGE SHOE CO.