

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Defendant in Certiorari,
v.
PHILIP LEVINE,
Prosecutor in Certiorari.

} Certiorari on
Indictment.

THE STATE OF NEW JERSEY,
Defendant in Certiorari,
v.
DAVID L. KELSEY,
Prosecutor in Certiorari.

} Certiorari on
Indictment.

BRIEF OF WILLIAM J. CROSSLEY, PROSECUTOR
OF THE PLEAS OF THE STATE OF NEW JER-
SEY, IN AND FOR THE COUNTY OF MERCER,
FOR THE STATE OF NEW JERSEY, DEFENDANT
IN CERTIORARI.

The above-named prosecutors have each sued out a writ of *certiorari* to remove indictments found against them, respectively, by the grand jury of the county of Mercer, at the January term, 1910, of the Court of Oyer and Terminer. The issues involved in both cases are substantially the same, and therefore can be argued together.

The first count of the indictment against the prosecutor Philip Levine, after reciting the filing of a bill of complaint by the Peoples Brewing Company of Trenton against Harris Levine and Samuel Levine, and setting out the material allegations of the bill, shows that an order to show cause was made therein why an injunction should not issue according to the prayer of the bill; that the order to show cause came on for a hearing before the Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, then and there sitting and acting for and on behalf of the Chancellor, upon the bill of complaint, and, among others, of the affidavit of one John Gormany hereinafter in this court mentioned and set out, and, among others, the affidavit of the said John Gormany was presented and read upon the said hearing of the said order to show cause before the said Vice Chancellor, and that it became and was a material question for the Vice Chancellor to determine whether or not the lager beer supplied by the complainant to the defendants was a good and wholesome product. It then proceeds to charge:

“And the said Philip Levine, willfully contriving and intending to pervert and obstruct justice and the due administration of the law, and to cause the said Honorable Edwin Robert Walker, one of the Vice Chancellors of the State of New Jersey, as aforesaid (then and there sitting and acting for and on behalf of the Chancellor of the State of New Jersey to determine the matters and things set forth in the said bill of complaint and whether the said defendants, Harris Levine and Samuel Levine, had violated the terms of their said agreement, and whether an injunction should issue against them, pursuant to the prayer of the said bill of complaint, or whether they had any matter, cause or thing to discharge them of and from their said agreement), wrongfully to give judgment in behalf of the said defendants, Harris Levine and Samuel Levine, did, at the city of Trenton, in the county of Mercer aforesaid on

the eleventh day of October, *nineteen hundred and nine, wilfully and feloniously publish a certain false, forged and counterfeit affidavit, of the tenor and purport following, to wit:*

(Affidavit is here set out in full.)

“Said affidavit being a record and an authentic matter of a public nature, for use before the said Honorable Edwin Robert Walker, Vice Chancellor as aforesaid, for the purpose aforesaid, he, the said Philip Levine, well knowing the same to be false, forged and counterfeited, and purporting it to be sworn to before him, the said Philip Levine, by the said John Gormany (he, the said Philip Levine), then and still being one of the justices of the peace in and for the county of Mercer aforesaid, and being commissioned and sworn, and duly authorized under the laws of the State of New Jersey to administer oaths and affirmations); whereas in truth and in fact the *said false, forged and counterfeit affidavit was only signed, but not sworn to by the said John Gormany, the purporting affiant, before the said Philip Levine, justice of the peace as aforesaid;* and whereas in truth and in fact he, the said Philip Levine, justice of the peace as aforesaid, did not administer any oath to the said John Gormany of and concerning the said false, forged and counterfeit affidavit, and of and concerning any of the matters and things therein stated and set forth, with intent then and there to prejudice, defeat, impair and impede the rights and remedies of the said complainant, the Peoples Brewing Company of Trenton, a corporation of the State of New Jersey, as aforesaid, and with intent then and there to pervert justice and the administration of the law; to the evil example of all others in the like case offending, 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.”

The second count, after showing the course of the proceeding as in the first count, charges (in the language of the 18th section of the "Crimes act") that the said Philip Levine did

"feloniously use and offer for use before the said Honorable Edwin Robert Walker, Vice Chancellor as aforesaid, for the purpose aforesaid, knowing the same to be untrue, a certain oath and deposition required and authorized to be taken in the aforementioned proceeding, then and there pending, and to be determined as aforesaid, he, the said Philip Levine, then and there knowing said oath and deposition to be untrue,"

of the tenor, &c., following:

"with intent then and there to prejudice, defeat, impair and impede the rights and remedies of the said complainant, the Peoples Brewing Company of Trenton, a corporation of the State of New Jersey, as aforesaid, and with intent then and there to pervert justice and the administration of the law, to the evil example of all others in the like manner offending, contrary," &c.

The third count makes the same preliminary recitals as in the first count and then charges (in the language of the 197th section of the "Crimes act") that the said Philip Levine did

"feloniously and falsely make, forge and counterfeit, and did cause, counsel, hire, command and procure to be falsely made, forged and counterfeited, and did willingly act and assist in the false making, forging and counterfeiting of a certain affidavit, being a record and an authentic matter of a public nature, purporting to have been sworn to before him, the said Philip Levine, by the said John Gormany,"

of the tenor, &c., following:

"whereas in truth and in fact the said falsely made, forged and counterfeited affidavit was only signed and not sworn to by the said John Gor-

many, the purporting affiant, before the said Philip Levine, justice of the peace as aforesaid; and whereas in truth and in fact, he, the said Philip Levine, justice of the peace as aforesaid, did not administer any oath to the said John Gormany, of and concerning the said false, forged and counterfeited affidavit, and of and concerning any of the matters and things therein stated and set forth, with intent then and there to prejudice, injure, damage and defraud the said the Peoples Brewing Company of Trenton, a corporation existing under and by virtue of the laws of the State of New Jersey, contrary," &c.

After the same recitals as in the first count, the fourth count charges (in the language of the latter part of said 197th section of the "Crimes act") that the said Philip Levine did

"feloniously utter and publish as true, and did cause, counsel, hire, command and procure to be uttered and published as true a certain false, altered, forged and counterfeit affidavit, being a record, and an authentic matter of a public nature, purporting to have been sworn to before him by the said John Gormany,"

of the tenor, &c., following:

"whereas in truth and in fact, the said false, altered, forged and counterfeited affidavit, was only signed; and not sworn to by the said John Gormany, the purporting affiant, before the said Philip Levine, justice of the peace as aforesaid; and whereas in truth and in fact, he, the said Philip Levine, justice of the peace as aforesaid, did not administer any oath to the said John Gormany, of and concerning the said false, forged and counterfeit affidavit, and of and concerning any of the matters and things therein stated and set forth; he, the said Philip Levine, having then and there feloniously uttered and published as true the said affidavit, being a record and an

authentic matter of a public nature as aforesaid, knowing the said affidavit, being a record and an authentic matter of a public nature, to be false, altered, forged and counterfeited, with intent then and there to prejudice, injure, damage and defraud the said Peoples Brewing Company of Trenton, a corporation existing under and by virtue of the laws of the State of New Jersey, contrary," &c.

Philip Levine was indicted upon ten indictments, numbers 87 to 96, both inclusive, and eight of the indictments charge in each of the four counts therein, the offence to have been committed as set out in the above recited counts.

Two of the indictments returned against Philip Levine, numbers 93 and 95, are identical with the last mentioned indictments, except that in each count therein it is charged that the affidavit set out therein was neither signed, nor sworn to, by the purporting affiant before the said Philip Levine.

By stipulation (see case of Levine, page 46), it is consented that the disposition to be made by this court with respect to indictment 87 against Philip Levine shall be considered as the disposition of indictments 88, 89, 90, 91, 92, 94 and 96, and that the disposition to be made by this court of indictment number 93 against Levine shall be considered as the disposition of indictment number 95.

The prosecutor, David L. Kelsey, was presented upon eight indictments, 97 to 104, both inclusive, each of which charges that the affidavit mentioned therein was only signed and not sworn to by the purporting affiant before the said David L. Kelsey, one of the justices of the peace of the county of Mercer.

The language of the eight indictments charging the offence against the defendant Kelsey is identical with the indictments against Levine, except that the defendant Kelsey is charged with offering an affidavit signed but not sworn to.

With respect to the eight indictments found against David L. Kelsey, while no formal consent has been signed, it is the understanding that the disposition to be made by this court of indictment number 97, removed by the writ of *certiorari*, shall be considered as the disposition of all of the said eight indictments found against the prosecutor, David L. Kelsey.

Each of the indictments found against the prosecutors contain four counts, and in each count of each indictment the alleged affiant is one and the same person, and each count contains a copy of the same affidavit of said alleged affiant.

The points advanced by both prosecutors are substantially identical, and for purpose of argument may be collated under the following heads:

FIRST.

That the indictment does not, nor does any of the counts therein, charge a crime.

The only sections of our "Crimes act" dealing with the subject-matter of the indictments are:

SECTION 18, P. L. 1898, PAGE 798.

"18. * * * or any person who shall use or offer for use for any purpose whatever, any oath or deposition required or authorized to be taken in any suit or legal proceeding in this state, or for any lawful purpose whatever, whether the same shall be taken in or out of this state, knowing the same to be untrue, shall be guilty of a high misdemeanor, and punished accordingly; and be thereafter rendered incapable of giving testimony in any court of this state, until such time as the judgment so given shall be reversed."

SECTION 197, P. L. 1898, PAGE 848.

"197. Any person who shall falsely make, alter, forge, or counterfeit, or cause, counsel, hire, command (command), or procure to be falsely made, altered, forged or counterfeited, or willingly act or assist in the false making, altering, forging or counterfeiting any record or other authentic matter of a public nature * * * with intent to prejudice, injure, damage or defraud any person or persons, body politic or corporate, or who shall utter or publish, or cause, counsel, hire, command or procure to be uttered or published, as true, any of the above false, altered, forged, or counterfeited matters as above specified and described, knowing the same to be false, altered, forged or counterfeited, with intent to prejudice, injure, damage or defraud any person or persons, body politic or corporate, shall be guilty of a high misdemeanor."

Irrespective of our Crimes act the offence charged in the indictments is a common law offence.

In *Bishop's New Criminal Law*, Vol. 1, page 287, § 468, the learned author states:

"Undoubtedly not all the forms of obstructing public justice have hitherto been passed upon by the courts, or specified in forbidding statutes. And when new forms appear, the principles which controlled the former decisions should be applied to them. Among those already found to be indictable—*perjury and its affinities*—perjury, not speaking of its affinities, is the willful giving under oath, in a judicial proceeding, or other course of justice, of false testimony material to the issue or point of inquiry. Therefore it is an obstruction of justice, and so likewise are such affinities as the persuading of a witness to commit perjury, which, if he does it, is called subornation of per-

jury; attempting to induce him to take a false oath; even tampering with him short of this direct act, as by undertaking to intimidate him; and making or publishing false affidavits prejudicial to justice or to the workings of the government, in cases not amounting technically to perjury, severally indictable, therefore, at the common law, as well as under numerous statutes," citing

Omealy v. Newell, 8 East 364.

Rex v. DeBeauvoir, 7 Car. & P. 17.

Rex v. O'Brian, 2 Str. 1144, 7 Mod. 378.

In *Omealy v. Newell*, 8 East 363, the facts, briefly, were as follows:

The defendant, a citizen of the United States of America, who had come to England, was arrested and held to bail by a judge's order upon an affidavit of debt contracted in America, sworn to by the plaintiff, another citizen of America, then at Paris, before a person of the name of Bonomee, who verified the affidavit in this manner: 'Sworn at Paris on (a certain day) before me, notary public, magistrate competent in this behalf, and duly authorized by the laws of France to administer oaths and take affidavits.' An application was made for the defendant's discharge upon the ground of the insufficiency of the affidavit to hold to bail. Upon a question which arose incidentally, and which the court also desired to hear spoken to, how far the making or knowingly using such an affidavit, if false, was punishable, Lord Ellenborough, C. J., at the conclusion of the argument, said that he had not the least doubt that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment; that the case of *King v. Mawbey*, and others, went the whole length of that proposition.

“Lord Ellenborough, C. J., delivering the judgment of the court, among other things said: ‘In none of these cases can the party making a false affidavit be indicted specifically for the crime of perjury in the courts of this country; but in all of them, as far as the party is punishable at all, he is punishable for a misdemeanor in procuring the court to make an order to hold to bail by means and upon the credit of a false and fraudulent voucher of a fact produced and published by him for that purpose, the party injured thereby is not without his remedy; nor the court without its due means of punishment, in respect of the abuse and contempt committed against its authority.’”

The case of *King v. O'Brian* is reported in 2 *Strange* 1144, and is to be found in Vol. 93 of the reprinted English Reports, page 1090; also in 22 *King's Bench* (Session Case 230), reported in reprinted English Reports, page 231. Perhaps the most comprehensive report of the case is to be found in 7 *Mod.* 379, and in Vol. 87 of the reprinted English Reports, at page 1305, viz.:

“O'Brian was indicted at the Old Bailey, for publishing a false, forged and counterfeit affidavit, well knowing it to be so, purporting it to be sworn before Mr. Engeer, a justice of the peace, the contents of which were, that Mrs. A. B., being an officer's widow, and entitled to the yearly pension of sixteen pounds, was living and in Ireland, although she was dead, and this with an intent to deceive Mr. Sainthill, the treasurer of the King's bounty for officers' widows; and also for publishing a false, forged and counterfeit certificate, knowing it to be so, purporting it to be signed by the parson and church wardens of D., the contents of which were that Mrs. A. B. was alive and dwelling in the same parish of D. in Ireland, although she was dead; and that one Burrough, by virtue of the said forged affidavit and certificate, received of the said Mr.

Sainthill the sum of eight pounds ten shillings, part of the same pension.

"O'Brian was found guilty upon this indictment, and being brought up from Newgate to the King's Bench, and the Attorney-General demanding judgment against him, it was moved by Sergeant Hayward and Mr. Kettleby to arrest it.

"The Court—This is an indictment at common law upon which the prisoner stands convicted; and, among others, the two principal reasons given to arrest judgment in this case are, first, that even the forgery of such an affidavit and certificate is no offence at common law, and should have been proceeded upon on the statute 33 *Hen.* 8, or some subsequent statute upon forgery. Secondly, that if such forgery be an offence at common law, yet the bare publication, of which O'Brian is only guilty, is not so. But we take this forgery to be an offence at common law, as it is to the prejudice of the King and subject, in causing a misapplication of the public money; and we are justified in our opinion by the resolution of Lord Chief Justice Raymond and the rest of the judges, in the case of *King v. Ward*, where after conviction it was moved in arrest of judgment, and the same exception taken as here, that it was a charge upon which an indictment would not lie at common law, it being only a forged indorsement upon paper, whereby Ward had entitled himself to a large quantity of alum; that it was a false token, and the indictment should have been upon the statute of 33 *Hen.* 8; but the court overruled the exception, and were of the opinion that the indorsement was to be considered as a writing upon which Ward was indictable at common law, it being of such a nature whereby another person might be prejudiced; but if upon such forged indorsement no prejudice could have

arisen to anybody, then it would have been no crime and not indictable. The statute of 33 *Hen.* 8 made no new offence but only added a greater degree of punishment to the old ones, and this statute as well as several others that have created superior kinds of punishment to offences that were such at common law, have still left the prosecutor the election of proceeding either upon those statutes or upon common law. This was the resolution in the case of *King v. Ward*, and is ours in the present case. It has indeed been determined that where a person got goods from a person on Ludgate Hill by a false verbal message from the Duke of Buckingham that he was not indictable at common law, for people must not be so imprudent as to credit messages or affirmations by word of mouth. *But when such a fact as this of O'Brian's appears upon an indictment, which is not the case of words, but is a matter in writing, which bears the greatest probability of being true, and against which it is not in the power of a person to defend himself, it is indictable at common law; and it would be a reflection on the common justice of the nation to say it could overlook such an offence as this.*

“As to the latter objection we are also of opinion that the publication of such a forgery as this is indictable at common law. Indeed if O'Brian had not known the affidavit and certificate to be forged, and had innocently published and delivered them to Burroughs as authentic ones, and Burroughs had thereupon received part of the pension, O'Brian had not been guilty of any offence; but the indictment charges, and it was proved upon evidence, that O'Brian knew them to be forged when he published them; so the intention and knowledge plainly constitute the offence, and make it punishable at common law;

and it is clear that the publisher of a libel is punishable as well as the author.

"There was another objection, that the publishing the affidavit and certificate are several offenses, and should not have been charged in one and the same indictment. This objection would have been of weight if the affidavit and certificate had been several offenses, and could have had independent punishments. But we are of opinion that no part of the pension could have been received without both an affidavit and a certificate of the widow's being alive, both being required by the treasurer of the King's bounty; if so, these are not several independent offenses but are only two different facts that are constituent parts of one and the same crime."

In *King v. Mawbey et al.*, reported in 6 *Term Rep.* 619, and in Vol. 101 of the English Reprinted Reports at page 736, Lord Chief Justice Kenyon, in his opinion (which sufficiently states the facts of the case) said:

"Notwithstanding the arguments that have been urged on behalf of the defendants, it appears to me that the conspiracy is sufficiently charged in the indictment. The first count alleges that, pending the prosecution against the inhabitants of the parish of Windlesham for not repairing a road, these two defendants together with two other persons conspired to obstruct the due course of justice, that after the parish had pleaded not guilty and before they had withdrawn that plea the defendants conspired and agreed to produce in evidence a certain paper writing as and for a true certificate under the hands and seals of these two defendants as justices, stating that the road was in repair, that afterwards in pursuance of this conspiracy, they produced to the court, &c., the said paper writing as and for a true certificate, but that in truth the road was out of repair, and so the defendants knew at the time of producing

it in evidence. It has been ingeniously argued that the indictment should have alleged that at the time of the conspiracy the defendants knew that the road was out of repair. But I think that they should have known that the road was in repair before they agreed to certify that it was so. If at that time they did not know whether or not the road was in repair, and yet agreed to certify to the court that it was, that is sufficient to constitute the delinquency of the defendants. Therefore, it seems to me that the conspiracy is properly charged in the indictment.

"I cannot adopt the argument used by the defendants' counsel that these two defendants were not competent to conspire on the ground that this must be taken only to be the act of one person. It is widely different from the instance put of husband and wife, to which it was compared, where the wife is not supposed to have an opinion of her own; but here neither of these magistrates was so subjected to the other as to be incapable of acting and judging for himself; they were free agents, independent the one of the other, and consequently were in a condition to conspire.

"Another objection was that it does not belong to the situation of these defendants as justices to certify that the road was in repair, and that such a certificate is not a legal instrument of which a court of law can take cognizance. How or when these certificates originated it may perhaps be difficult to ascertain; but it is not necessary now to trace their origin. The practice of receiving these certificates is now become too inveterate to be overturned. Perhaps they are received as coming from persons who are considered in the law *fide digni*; though I am not sure that it would not be an indictable offense in other persons, not justices of the peace to take upon themselves to make a false certificate under an agreement and con-

spiracy to mislead a court by giving them false information. I admit that it is a voluntary act in the magistrate to certify; but if they do undertake to make a certificate they ought to know that its contents are true. Therefore, on the best consideration that I have been able to give to the case, I am of the opinion that this is an indictable offense, and that it is sufficiently charged in the indictment."

Justices Ashhurst, Grose and Lawrence concurred with Chief Justice Kenyon in his opinion, and the opinions of each of the associate justices are worthy of consideration on the question of the elements involved in the commission of the crime charged in the indictments now under consideration.

It is therefore respectfully submitted that a mere inspection of the indictments returned will show that they contain averments which charge both the common law and statutory offense.

SECOND.

That the counts in the indictment are incongruous, in that they join misdemeanor with felony, and join offenses calling for judgments differing in character, and that they charge different offenses of different natures, and are incognate and cannot merge in the other, and are multifarious.

It can be readily seen by reference to the indictments that the counts are not inconsistent or incongruous, but that the offense charged in each count of the indictments is in substance the same offense, and that each count imports according to its terms a charge of a distinct offense, all arising out of the same act.

In the case of *Hunter v. State*, 11 *Vroom* (at page 533), Chief Justice Beasley says:

"These several counts are mere formularies, having a fixed and certain legal efficacy. Each

several count, in a well drawn indictment, imports, according to its terms, a charge of a distinct offense, and there is no interdependence exhibited, in anywise, between the several counts. Thus, in charging a homicide, one count may lay the killing to have been done with an axe; another may allege that the instrument used was a knife, and a third may describe it as a sword. The act of killing is thus differentiated by descriptive *indicia*, so that, read literally, such counts are always incongruous but their literal sense is not their legal sense. They are regarded in law as charging, in substance, the same offense, the incidents only being varied for the technical purpose of harmonizing, even in details, the described crime with the possible proofs."

It is submitted that the same evidence will support all the counts in the indictment, and that at the trial, when technical form is discarded, and the substance alone is recognized, all the counts will merge, and the proof be the same.

Donnelly v. State, 2 Dutch. 463.

In *Stevens v. State, 24 Vroom 245*, Chief Justice Beasley, in delivering the opinion of the Supreme Court, said:

"The indictment in this case contained two counts, the first laying a charge of embezzlement, the second of larceny. The language of the jury in announcing their verdict was 'that they find the defendant guilty of larceny and embezzlement as he stands charged in the indictment.'

"From this statement two things are obvious, viz., that the jury convicted the defendant of two distinct offenses, and that the court has punished such offenses conjointly and not separately.

"It will be noticed that the case does not belong to the class that is so common, in which one and the same crime is laid, with a variety of circum-

stances in different counts. Of this description was the instance in *Donnelly v. State*, reported in 2 *Dutcher* 463, the indictment charging in four independent counts the homicide to have been committed in a variant way with respect to the weapon used. * * * The court decided (in *Donnelly* case) that such pleading and finding were right and in consonance with the common law practice, as it was the legal intendment that but a single offense was charged by this form of pleading. But in the case at bar the two counts in question cannot be so construed, for each plainly describes a distinct misdemeanor, for the statutory crime of embezzlement is unlike that of larceny. Their penal consequences according to our laws are dissimilar, for while the perpetrator of the former is subject, as a maximum punishment, to a fine of \$500, or imprisonment for three years, the latter may be punished by a fine 'not exceeding five hundred dollars, or imprisonment at hard labor, not exceeding ten years, or both.' The result is that in this case the defendant stands convicted by the finding of the jury of both of these distinct transgressions, and an indiscriminate judgment, based on that verdict, has passed against him. Two questions thence arise, the first relating to the action of the jury in the particular just stated, and the second with respect to the judicial course thus taken.

"There seems to be no doubt that, according to the legal practice in this state, these two various offenses, as they are of the same general nature, and are triable in the same mode, may be united as the subjects of a single indictment, each of them being charged in a separate count. When misdemeanors are thus conjoined, they may be tried together or separately, at the discretion of the court before which the trial takes place."

In *State v. Middlesex and Somerset Traction Company*, 38 *Vroom* 15, Mr. Justice Dixon, speaking for the Supreme Court, said:

"When a single offense may be committed by many means, or in one or another of several ways, then a count which charges its commission by several means or in several ways, which are not repugnant, is not double. If a count attempts to charge two or more offenses, but charges only one of them sufficiently, it is not double."

In this case the court gave judgment for the defendant on the first count, and the State on the second and third counts.

In *Stone v. State*, 20 N. J. L. 404 (at page 407), Mr. Justice Carpenter, speaking for the Supreme Court, said:

"Another objection taken to this indictment is that of misjoinder. Indictments for misdemeanors may contain several counts for different offenses, provided the judgment upon each be the same, but not otherwise. *Arch. Cr. L.* 62, and cases cited. That is, as the rule is to be understood, *necessarily* different, the judgment being of a different character. In this case under the 42d section, the offender being convicted shall be deemed guilty of a high misdemeanor, and punished by fine and imprisonment, or both; the word *and* being evidently a misprint or other mistake. The punishment to which an offender convicted under the 72d section of the offense charged in the third count, may be subjected, is fine or imprisonment or both, and in each case not to exceed a certain time, and amount, at the discretion of the court. The offense charged in each count of this indictment is a misdemeanor, and the punishment in each case the same; that is to say of the same character, fine and imprisonment, and does not come within the rule with regard to different judgments. It is no objection to an indictment that the punishment for one of the offenses is positive and for the others discretionary. 1 *Chit. Cr. Law* 255, and cases cited. *The People v. Rynders*, 12 *Wendell* 425; *Kane v. The People*, 9 *Ib.* 203."

In *Cook v. State*, 4 Zab. 846, Chief Justice Green, speaking for the Court of Errors and Appeals, said:

"It is usual to charge in the same indictment, and sometimes in the same count, a defendant with breaking and entering a dwelling by night, with intent to steal, and there stealing—thus uniting a charge for burglary with a charge for larceny. And in such case he may be convicted of the larceny only, or of the burglary. But if it be proved that he actually committed the larceny, as well as the burglary, he will not be convicted of both offenses, although he is found guilty, as he stands charged in the indictment. In such case two punishments would not be inflicted. Upon a general conviction, the jury finding all the averments true, the charge of larceny is considered as embraced in the charge of burglary, and one punishment is imposed as upon one combined offense."

Mr. Justice Reed, speaking for the Supreme Court, in *State v. Hill*, 44 Vroom (at page 81), says:

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

See, also, 12 Cyc. 692-695.

In 22 Cyc., title *Indictments and Informations*, page 390, it is said:

"It is proper to charge in various counts of an indictment the same offense as committed in various ways in order to meet the evidence which may possibly be adduced at the trial. * * *

An indictment so framed to meet the evidence may be sustained as against an objection made in any form, and whether the statute does or does not permit more than one offense to be charged

in the indictment, and the State will not be compelled to elect between the various counts before proceeding to trial, nor will the indictment be quashed. For example a murder may be charged in separate counts to have been committed with different instruments, or by different wounds or methods. So an election will not be compelled when in separate counts a burglarious entry with intent to commit different felonies is charged, or a conspiracy to accuse of different felonies, or shooting with different intents, or assault with intent to commit distinct degrees of murder."

In 22 *Cyc.* 394 it is said:

"Separate counts of an indictment may charge the same transaction as constituting different offenses, and if the counts in fact relate to the same transaction the indictment will not be quashed, nor will an election be compelled
* * * Under this rule a count for stealing and a count for receiving stolen goods may be joined when they relate to the same goods
* * * or burglary and larceny may be joined * * * So also an offense included in another, or incidental thereto may be charged in conjunction with it. The same act may be alleged to have been actuated by different intents. So in an indictment for burglary, it may be charged that the breaking and entering was with intent to commit distinct felonies, such as larceny and murder."

In 22 *Cyc.* 398, it is said:

"While at common law there can be no joinder of separate and distinct felonies in the same indictment such a joinder does not render the indictment bad as a matter of law, or furnish a ground for demurrer, arrest of judgment or writ of error. The rule now generally accepted is that, subject in most instances to the discretion of the trial court to compel an election, separate felonies of

the same general nature may be charged in separate counts of the same indictment, in case they are triable in the same manner and punishable similarly. If of the same nature a joinder is permitted, although the offenses differ in degree. It is proper to join offenses which are established by the same evidence, or which grow out of the same transaction. For example, counts for larceny and embezzlement; or larceny and false pretences, or riot and assault and battery, or a felonious taking and a felonious conversion, may be joined. In case, however, felonies of a distinct nature which do not arise from the same transaction are joined, an election must as a general rule be compelled, or the indictment quashed. The compelling of an election between felonies of the same general nature rests within the sound discretion of the trial court, under the special circumstances of the case in which the question arises. * * * An election should not be compelled in a case in which it is apparent that it will be difficult for the State to decide as to which of the counts it will be able to establish."

In 22 *Cyc.* page 402, it is said:

"In some jurisdictions it has been held that a felony cannot be joined with a misdemeanor, the rule arising from a practice which forbids a conviction for a misdemeanor on an indictment for felony, or from the reason that it might embarrass defendant in the selection of a jury. In some jurisdictions the indictment is demurrable, or is bad on a motion in arrest of judgment. But in those states where there can be a conviction for a misdemeanor upon an indictment for felony, cognate offenses of the different characters may in some instances be joined, as where the charges relate to the same transaction, except where the offenses are repugnant in their nature and the trial and judgment so incongruous as to tend to deprive defendant of some legal advantage."

"The distinction between felonies and misdemeanors is not observed in our criminal code. Statutory offenses, if designated at all are called 'misdemeanors' or 'high misdemeanors.' The grade of the offense in our criminal code is determined by the character and degree of the punishment prescribed rather than upon the common-law classification of felonies and misdemeanors."

Brown v. State, 33 *Vroom* 666.

Jackson v. State, 20 *Vroom* 252.

"The proper practice is to indict and try for the higher crime, and if part of the offense which is peculiar to that is not proved, while all that is necessary to constitute the inferior one is, the verdict should convict of the inferior felony, and acquit as to the residue of the charge."

State v. Cooper, 1 *Green* 361.

In 22 *Cyc.* 404, it is said:

"Between offenses charged in same count. Duplicity in an indictment may be cured where the offenses charged are similar and the only objection to their joinder is the embarrassment which will be caused the accused in his defense, by an election by the prosecution to proceed on one charge only and entering a *nolle prosequi* as to the others."

"*Between Counts*.—1. In general. As a general rule an indictment is not, as a matter of law, invalid because of a misjoinder of counts, and is, therefore, not subject to demurrer or arrest of judgment, nor is the objection available on writ of error. The usual effect of a misjoinder is merely to render the indictment or the objectionable portions thereof subject to *quashal* upon a timely motion, or to authorize the court in its discretion to compel the State to elect as to which charge it will rely upon."

"*Time for Election*.—In some of the state courts a motion to compel an election is too late

when made after plea, but in the federal courts it may be made at any time before the conclusion of the trial. According to the weight of authority, where distinct and separate felonies of the same character, punishable in the same manner, and to be established by the same evidence, are charged together, the court may, in its discretion, refuse to compel an election before the introduction of evidence by the State, but may reserve its decision until the close of the State's evidence, and before the accused is placed upon his defense.

"3. *Discretion of Trial Court.*—The granting or refusal of a motion to compel the prosecution to elect as to which of several counts it will proceed is within the sound discretion of the trial court, and the ruling thereon will not be reviewed, except in a clear case of abuse of such discretion."

In *State v. Terry*, 43 *Vroom* 375 (at page 380), Mr. Justice Pitney, in delivering the opinion of the court, said:

"In our opinion, therefore, assuming the defendant was entitled to acquittal on the first three counts, he was not so entitled on the fourth count, but remained punishable by indictment for repeated unlawful sales of liquor, notwithstanding anything contained in the act of March 26th, 1874 (*Pamph. L.*, p. 93; *Gen. Stat.*, p. 1795), or in the ordinances of Millville that were introduced in evidence. His motion for direction of a verdict in his favor was therefore broader than his right. His case stood no better than if the first three counts of the indictment had been bad in substance and his proper motion would have been to require the prosecutor to elect upon which count he would rely, or to call for instructions to the jury to disregard the first three counts. *Hunter v. State*, 11 *Vroom* 495, 532; *Parker v. State*, 32 *Id.* 308, 309. The conviction being based upon a general verdict of guilty, and that verdict being supportable at least upon the fourth count and

the evidence given thereunder will not now be disturbed for denial of defendant's motion for direction of a verdict."

In the case of *Hunter v. State*, reported in 11 *Vroom* 495 (at page 531), Chief Justice Beasley, delivering the opinion of the court, said:

"The first and second of the objections thus made to these proceedings are of the same character and rest on the same ground, and may be disposed of conjointly and in a word. They relate to alleged defects in the fifth and sixth counts of the indictment, but as there is and can be no pretense that some of the other counts are not good, it would be useless for the present purposes to consider what weight there is in such exceptions, for it has long since been authoritatively established by judicial decision in this state that a single good count in an indictment is sufficient to sustain the judgment."

In *State v. Ham*, 36 *Vroom* 465, Mr. Justice Dixon, speaking for the Supreme Court upon removal of an indictment from the Monmouth Quarter Sessions, said:

"They should, therefore, not be decided adversely to the State on a motion to quash, for the general rule is that courts will refuse to quash unless upon the clearest and plainest ground, but will leave the defendant to a demurrer, or motion in arrest of judgment, or writ of error."

Proctor v. State, 26 *Vroom* 472.

In *State v. Norton et al.*, 3 *Zab.* 33, Mr. Justice Green, speaking for the Supreme Court, at page 48, said:

"It is not, however, the practice of the court to strike vicious counts out of an indictment. If any count of the indictment be valid, the court will neither strike out nor quash, but permit the State to go to trial upon the indictment, as it is presented by the grand jury, without alteration."

See, also, *State v. Startup*, 10 Vroom 423, on *certiorari* to the Hudson Oyer and Terminer to remove indictments found against the defendant. Mr. Justice Scudder, following *State v. Norton*, *supra*, said:

"If either count be good, the indictment will not be quashed."

In *Stevens v. State*, *supra*, Chief Justice Beasley, in delivering his opinion (at page 250) said:

"It has always been the rule of criminal procedure to sustain a judgment on error where there has been one good count on which it could rest, no matter to what extent it was associated with bad ones."

It is, therefore, respectfully submitted that there is no misjoinder of the counts in the indictments; that the offense charged in each count is the same, and that a conviction based upon the indictments would be supportable, and that the judgments that could be rendered upon any of the counts in the indictment would not necessarily be different in character. In any event, if the indictments should be held to contain good and bad counts, the indictments should be returned for trial to the trial court, and the trial court could compel an election by the State, if, in its sound discretion, that course should be deemed advisable. If it should be concluded that the above quoted 18th and 197th sections of our "Crimes Act" are not broad enough to define the offense alleged to have been committed by the prosecutors, then it is urged that there can be no question, under the rulings of the common law cases above cited, that the first count of the indictment defines and charges the common law offense of obstructing justice, and which, by virtue of the 215th section of the Crimes act, is indictable, that section providing that

"all other offenses of an indictable nature at common law and not provided for in or by this or some other act of the Legislature shall be misdemeanors and be punishable accordingly."

Both sections 18 and 197, *supra*, pronounce the crimes therein mentioned as "high misdemeanors," and section 215 providing for offenses of an indictable nature at com-

mon law describes the same as "misdemeanors." The penalty for a high misdemeanor (provided by section 217 of the "Crimes act"), is

"a fine not exceeding two thousand dollars, or by imprisonment with or without hard labor, as the court may direct, for any term not exceeding seven years, or both,"

and the penalty for a misdemeanor (provided by section 218 of the "Crimes act"), is

"a fine of not exceeding one thousand dollars, or by imprisonment with or without hard labor as the court may direct, for any term not exceeding three years, or both."

Therefore, the punishment, provided either by the statute or the common law, denounced upon a conviction of the prosecutors on any of the counts in the indictment would be a fine or imprisonment, or both, in the discretion of the court, and, to use the language of Mr. Justice Carpenter in *Stone v. State, supra*:

"The offense charged in each count of this indictment is a misdemeanor, and the punishment in each case the same, that is to say, *of the same character, fine and imprisonment, and does not come within the rule with regard to different judgments.*"

THIRD.

The point is made by both prosecutors that the indictments charge them with making, publishing and uttering, and causing to be made, published and uttered a false, forged and counterfeit affidavit, being a record and an authentic matter of a public nature, when the said indictments on their face show that there was no affidavit, and fail to show that the said affidavit was either a record or an authentic matter of a public nature.

It will be observed that section 18 of our "Crimes act," *supra*, provides "any person who shall use or offer for use for any purpose whatever, any oath or deposition,

* * * knowing the same to be untrue," &c. The prosecutors contend that because the indictments charge they did not administer any oath to the alleged affiants, the crime denounced by the above section is not made out; the statute providing "oath or deposition," and hence, if no oath was administered by the prosecutors, the paper was not an "oath" within the meaning of the statute. We respectfully submit, however, that so far as the prosecutors are concerned, when they respectively certified to the alleged oath "Sworn to and subscribed before me," &c., and added their official seal, and signed the same as justices of the peace, they were each uttering a false oath. We do not think the Legislature intended to circumscribe the offense denounced in this section by limiting it to the cases where the falsity consisted in the use of a perjured oath, and if, as charged in the indictments, the prosecutors "used or offered for use" a paper which had been certified to by them respectively as "Sworn to and subscribed," &c., they are just as amenable to the provisions of this section as if the affiant had sworn to the paper before them, and they each had known that the affiant had, in so doing, committed perjury. It is not contended that the alleged affiants could be prosecuted for perjury, because, in fact, no oath was administered to them. We contend that a proper construction of the words in the statute "knowing the same to be untrue" is that if the paper writing, which purports to be an oath, is false in the particular alleged against the prosecutors, they are indictable under that section. At the time the alleged oath was presented and read before the Vice Chancellor, he acted upon it as being an oath. It is argued that such an oath was neither a record nor an authentic matter of a public nature. It would seem that the bare allegation that such an instrument was presented and read before the court would be a sufficient answer to show that it was a record and an authentic matter of a public nature, and to use the language of the court in *King v. O'Brian*, *supra*:

"When such facts as these appear upon an indictment, which is not the case of words, but is a

matter in writing, which bears the greatest probability of being true, and against which it is not in the power of a person to defend himself."

FOURTH.

That the third and fourth counts fail to charge a crime.

The third count charges the crime of forgery under the first part of the 197th section, *supra*, and the fifth count charges the crime of uttering a forged instrument under the last part of the 197th section. Both the fourth and fifth counts charge each offense in the exact language of the statute, and in addition thereto each count is prefaced by the preliminary statements as already referred to, and a mere inspection of both counts will show that they both charge a crime as denounced in that section.

FIFTH.

That each of the counts fail to connect the defendant with any of the offenses charged therein.

This objection can be best answered by a like reference to the counts of the indictments where each count charges that the affidavit set out *in extenso* in each count "was presented and read upon the said hearing of the said order to show cause before the said Vice Chancellor * * * and the said (prosecutor) did * * * willfully and feloniously publish the said affidavit * * * well knowing the same to be false * * * with intent to prejudice * * * the complainant, the Peoples Brewing Company," &c., and the affidavit set out in each count of the indictment has attached the usual jurat: "Sworn to and subscribed," &c., with the signature of the prosecutor together with his description as justice of the peace, and his seal impressed.

"Identity of name is *prima facie* identity of person."

Green v. Heritage, 34 Vroom 455.

In the case of *State v. Hill*, *supra* (at page 80), Mr. Justice Reed, speaking for the Supreme Court, dealing with the question of uttering a forged paper says:

"It is true that there may be an uttering of forged paper or counterfeit money without an actual tradition of the paper or the money. Such an uttering rests upon a fact which cannot exist in connection with the subject matter of the present statute (dealing with section 53 of the 'Crimes act' of 1898). The fact upon which an uttering without delivery may exist respecting spurious money or paper is that the money or paper may be asserted to be genuine when in fact false. When the assertion is made for the purpose of deception and to gain something by leading another to believe in the genuineness of the paper or money, it amounts to an uttering."

Applying that principle to the question of uttering charged against the prosecutors, it is contended that the moment the prosecutors subscribed their names, in their official capacity as justices of the peace, to the jurat of the affidavits certifying that the same were true, they were uttering false documents.

SIXTH.

That each and every of said counts are bad because each and every of them fails to charge intent or does not charge intent as required by law.

An examination of each of the counts of the indictments returned, and as above set forth, will show that a specific intent is charged in each count, and with respect to the second, third and fourth counts the intent is charged in the exact language of the statute.

It is, therefore, respectfully submitted that the indictments should be sustained, and that they should be remitted to the Court of Quarter Sessions of the county of Mercer for trial.

WILLIAM J. CROSSLEY,
Prosecutor of the Pleas.

ALEXANDER TRAPP,
Assistant Prosecutor.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,

Plaintiff and Defendant in Error,

vs.

DAVID L. KELSEY,

Defendant and Plaintiff in Error.

In Error to Supreme Court.

BRIEF OF MARTIN P. DEVLIN, ATTORNEY AND OF COUNSEL WITH PLAINTIFF IN ERROR.

This writ of certiorari removes an indictment against David L. Kelsey, containing four counts. The first count charged (a) that the defendant, David L. Kelsey, who was then and there a Justice of the Peace of the County of Mercer, intending to pervert and obstruct justice and the due administration of the law, and to cause the Honorable Edwin Robert Walker, Vice Chancellor, wrongfully to give judgment in behalf of certain defendants in a suit pending in the Court of Chancery, did, at the City of Trenton, County of Mercer, willfully and feloniously publish a certain false, forged and counterfeit affidavit therein set forth, well knowing the same to be false, forged and counterfeited, and purporting to have been sworn to by the said affiant,

Polli Tratrai, before the said Justice, whereas the said affidavit was only signed and not sworn to by the said Polli Tratrai; and (b) that the said David L. Kelsey did not administer any oath to the said Polli Tratrai of and concerning the said false, forged and counterfeited affidavit, and of and concerning the matters and things therein set forth, with intent thereby to prejudice, defeat and impair the rights and remedies of the complainant in the Chancery cause, and to obstruct justice.

FIRST.

The first count should be quashed because it does not plainly set forth the nature and cause of the accusation against the accused.

It is the constitutional right of this defendant that the indictment contain the charge against him. The count sets forth that the defendant did publish a certain forged and counterfeited affidavit, well knowing the same to be false. I assume that the Grand Jury meant by "affidavit" that the affiant was duly sworn and on her oath deposed and said. There is no other meaning or significatlon to the word "affidavit," than that it is a written declaration upon oath; a statement of fact signed by the affiant and sworn to.

See Century Dictionary and 2 Cyc. 4, for meaning of "Affidavit."

The charge that the affidavit was false, forged and counterfeited is neutralized by the subsequent pleaded allegation that no oath was in fact administered to the affiant.

To spell out of these contradictory allegations just

what is the nature and cause of the accusation in this count is at best a guess.

Suppose the trial jury should say "guilty." For what would he be punished? For the crime contained in Section 18, page 798 of the Laws of 1898, or for some other misdemeanor.

In *State vs. Drake*, 1 Vr. 422 (at 427), the indictment contained allegations in the alternative, that the defendant administered "poison, or drugs, or medicine, or noxious thing." The Supreme Court held it did not apprise the defendant against what he was to defend himself, and that the indictment meant nothing and so should be quashed.

In *Evans vs. United States*, 153 U. S. 584 (at 587), the reason for this rule is given thus—

"The indictment must be free from all ambiguity, "and leave no doubt in the minds of the accused "and the court of the exact offense intended to be "charged; not only that the former may know "what he is called upon to meet, but upon a plea "of former acquittal or conviction, that the record "may show with accuracy the exact offense to "which the plea related."

In *Ledbetter vs. United States*, 170 U. S. 606, it is again emphasized that the indictment must be free from ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged.

In *Linden Park Horse Association vs. The State*, 26 Vr. 557, Chief Justice Beasley forcibly stated the rule thus—

"It is the primary rule respecting indictments, "that they should be framed with sufficient cer- "tainty. For this purpose, the charge must contain "a certain description of the crime of which the

“defendant is accused, and a statement of the facts
“by which it is constituted, so as to identify the
“accusation, lest the grand jury should find a bill
“for one offense and the defendant be put upon
“his trial in chief for another, without any au-
“thority.

“By the constitution of our State, no person can
“be held to answer for a criminal offense ‘unless
“upon the presentment or indictment of a grand
“jury,’ and, in order to effectuate this provision,
“it is indispensable that the charge preferred by
“that body should be sufficiently descriptive, so
“as to clearly show a specific crimination.”

At page 560, it is further stated that when a descrip-
tion is appended to such general charge, so as to partic-
ularize it, thereby such general charge would become
specific. “If a man be indicted for the theft of a white
horse—” (citing the well known illustration).

See also the case of *The State vs. Flynn*, 47 Vr. 473,
for the same proposition, in an opinion by the Chan-
cellor, and further holding that the allegations in the
indictment are, in case of doubt, construed favorably
to the accused.

The allegations in this first count leave me in a state
of uncertainty of just what offense is imputed to the
accused.

SECOND.

The things alleged in the first count to have been
done by the accused were a nullity and not adapted to
do the things alleged to have been intended by him.

For exposition of this doctrine see *Marley vs. The
State*, 29 Vr. 207.

Affidavits can be used in Chancery cases only in cer-

tain junctures which this indictment omits to state existed.

Quod non apparet non est. "An indictment that charges perjury by taking a false affidavit with respect to a material question in a pending action describes no offense, inasmuch as, under the circumstances, an affidavit could have no probative force."

Braeutigam vs. The State, 34 Vr. 38, per Mr. Justice Garrison.

This defendant, by the non-swearing of the affiant, could not have obstructed justice or impaired any rights of the complainant, and therefore the omission was not adapted to do the things alleged to have been intended by the defendant.

Affidavits must be entitled in the cause in which they are to be used, or perjury cannot be committed. An affidavit made in one cause cannot be used to obtain an order in another cause.

In Hawley vs. Donnelly, 8 Paige, 415, it is held that mis-entitling an affidavit will exempt the defendant from the punishment of perjury, although the oath be false.

See also 1 Daniel Chancery Practice (star) 893.

It is an every-day practice to swear a witness in each cause when several are tried together. It seems to me the non-entitling of this affidavit is an important factor which disimpugns the defendant.

Chief Justice Hornblower, in Dunham vs. Rappelyea, 1 Harrison 77, said—

"We cannot reject the title of the action, nor
"could the party be convicted of perjury upon the
"affidavit. (2 Cowen 509)."

THIRD.

That the affidavit was presented and read to the Vice Chancellor in the cause then pending before him is a negligible factor in the process of crimination, because **there is no allegation that the defendant in any way participated in the presentation of this affidavit to the Court of Chancery.**

In *Heintz vs. Union Quarter Sessions*, 16 Vr. 525, the affidavit was presented to the court verifying the property status of signers for a hotel license, and it was false. The court held that if the affidavit be included in the terms of the "Act concerning oaths" (Gen. Stat. 2334, Sec. 19), the indictment should have alleged that it was necessary or proper to be made, taken or used for a lawful purpose.

Unless, therefore, it appears from the pleaded allegations in the first count that this affidavit was taken to be used in this very cause, or for "some other lawful purpose" within the purview of the "Act concerning oaths," the nugatoriness of the acts to accomplish the criminal purpose is manifest, for the affidavit would not be one upon which an indictment for perjury would lie if it were false.

See *State vs. Dayton*, 3 Zab. 54.

In *People vs. Fox*, 25 Mich. 492 (at 496), Chief Justice Cooley said—

"If it is claimed that this is a statutory perjury, 'the information is not aided, for by the statute 'it must appear that the oath is one required or 'authorized by law.'"

See also *People vs. Titmus*, 102 Mich. 318.

Kerfoot vs. Commonwealth, 89 Ky. 174, holds that—

“One cannot be punished for false swearing unless the oath was taken upon a subject on which he could be legally sworn.”

See also Commonwealth vs. Powell, 2 Met. (Ky.) 10.

In People vs. Sutherland, 81 N. Y. 6, Chief Justice Folger said—

“The decisions have been exacting that the title of the cause in which it purported to have been taken should be precisely and minutely set forth. This was to establish that it was not a voluntary affidavit.”

It is submitted that the count lacks any allegation that this oath was taken to be used for “**any lawful purpose,**” as required by the “Act concerning oaths” (supra), or that the affidavit was taken to be used in the Court of Chancery, and an affidavit lacking these attributes, upon the maxim “quod non apparet non est,” is purely voluntary and outside of any statute of this State.

The Supreme Court sustained this count on the ground that it was for obstructing justice by offering to the Vice Chancellor as evidence a paper containing facts which the defendant represented had been verified by the oath of the affiant, when he knew that this was not true.

The answer to this is that the defendant was in no way concerned in the offering of this to the Vice Chancellor, and the information is not imparted by this count that the defendant took it to be so used, or that there was any relationship between what the defendant did and the presentation of it to the Vice Chancellor.

The defendant is not indicted for the willfull omis-

sion to swear the affiant, but the Supreme Court said it was for the obstruction of justice. Therefore, unless the defendant presented it to the Vice Chancellor, or took it for presentation to him, or participated in some way in the presentation of it to the Vice Chancellor, he is guiltless of the offense set forth in the indictment from any point of view.

I repeat that the defendant is not indicted for the mere alleged non-swearing of the affiant.

FOURTH.

The second count charges that the defendant used and offered for use a certain oath and deposition in certain Chancery proceedings, the defendant well knowing the oath and deposition to be untrue, with intent to prejudice the complainant and pervert justice and the administration of the law.

This count charges that he used and offered for use both an oath and a deposition. That "oath" and "deposition" mean different things is settled by the case of *The State vs. Dayton*, 3 Zab. 54.

The count violates the rule of pleading, that the particulars in which the oath or deposition is false must be specified in the indictment.

See *Heintz vs. Union Quarter Sessions*, 16 Vr. 523 (at 525), which holds that a general averment that the defendant swore falsely of the whole matter will not be sufficient. The indictment must proceed by particular averment to negative that which is false.

This count is also fatally defective for failing to show that the oath and deposition was one taken in any cause pending, or that the oath was administered within the purview of the "Act concerning oaths."

I submit that the case of *Heintz vs. Union Quarter Sessions* (supra) requires this count to be quashed.

FIFTH.

The third count charges the forging, and the fourth count the uttering, of a false, forged and counterfeit affidavit, being a record and authentic matter of public nature.

The objections to these counts are, first, that it does not appear that the forged paper was a subject of forgery. Such a paper as is described in these two counts is valueless in a court of justice and cannot be a subject of forgery, it being alleged in those counts that the affidavit was not sworn to.

See *State vs. Redstrake*, 10 Vr. 365 (at 367), and 2 Bishop's New Criminal Law, Sec. 531.

It is further submitted that these two counts are quashable for being double. They charge that the defendant made, forged and counterfeited, and counselled, hired, commanded and procured to be made, and did willingly act and assist, etc.

See *Larison vs. State*, 20 Vr. 258.

SIXTH.

The indictment should be quashed because, further, the counts are repugnant and cannot be joined. It is submitted that a count for forgery and a count for subornation of perjury should not be joined because the penalty which is attached to those crimes is different. I respectfully submit, therefore, that for this reason the indictment should be quashed.

Stone vs. State, Spencer (20 N. J. L.) 404.

We submit that for the above reasons the indictment should be quashed.

Respectfully submitted,

MARTIN P. DEVLIN,
Attorney and of Counsel with Plaintiff in Error.

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, Plaintiff and Defendant in Error, vs. DAVID L. KELSEY, Defendant and Plaintiff in Error.	}	In Error to Su- preme Court.
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WRIT OF ERROR.

(Filed February 21, 1911.)

NEW JERSEY, ss.:—

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

[L. S.] Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court before you, between the State of New Jersey, Defendant in Error, and David L. Kelsey, Plaintiff in Error, upon a writ of certiorari to quash an indictment found by the Grand Inquest in and for the County of Mercer and reported into the Mercer County Court of Oyer and Terminer, manifest error hath intervened to the great damage of the said David L. Kelsey, as it is said, we being willing that the error, if any there be,

should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given and confirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of said Court of Errors and Appeals in the last resort in all causes, at Trenton, aforesaid, on the ninth day of March, 1911, together with this writ, that
10 the record and proceedings aforesaid being inspected we may cause to be further done thereupon for correcting that error what of right and according to the constitution and the laws of the State of New Jersey ought to be done.

Witness: Honorable Mahlon Pitney, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, this seventeenth day of February, nineteen hundred and eleven.

S. D. DICKINSON.

20 MARTIN P. DEVLIN, Clerk.
Attorney.

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, [L. S.]
C. J.

30

PETITION FOR WRIT OF CERTIORARI.

(Filed March 2, 1911.)

To the Judges of our said New Jersey Court of Errors and Appeals:

Your petitioner, David L. Kelsey, respectfully shows that he has taken out a writ of error in the above-entitled cause, directed to the Supreme Court of the State of New Jersey, and that in compliance therewith the said Supreme Court has returned on the twenty-first day of February, nineteen hundred and ten, the rule for judgment in the above-entitled cause. 10

Your petitioner respectfully shows that this is in diminution, and that it is necessary to bring up the indictment of the Court of Oyer and Terminer of the County of Mercer, together with the writ of certiorari issued out of the Supreme Court, and the reasons alleged for quashing and setting aside the said indictment, and the opinion of the Supreme Court concerning the same, all of which, with the exception of the opinion, are embraced in the printed state of the case. 20

Your petitioner therefore prays that a writ of certiorari be issued out of this honorable court, directed to the Justices of the Supreme Court of the State of New Jersey, directing them to send up to this court the above-described papers.

Your petitioner will ever pray, etc.,

MARTIN P. DEVLIN,

Attorney for and of Counsel with Plaintiff
in Error.

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

Martin P. Devlin, being duly sworn according to law, on his oath, deposes and says, that he is counsel for David L. Kelsey, the plaintiff in error, and has read the foregoing petition, and that the same is true.

MARTIN P. DEVLIN.

Sworn and subscribed before me this second day of March, A. D. 1911.

10

J. IRVING DAVIDSON,
Commissioner of Deeds for State N. J.

WRIT OF CERTIORARI.

(Filed March 6, 1911.)

STATE OF NEW JERSEY, ss:

The State of New Jersey to our Justices of
[L. S.] our Supreme Court, Greeting:

We being willing, for certain reasons, to be certified of a certain judgment of the New Jersey Supreme Court rendered at the November term, in the
20 year nineteen hundred and ten, of said Supreme Court of the State of New Jersey, whereby a certain indictment found by the Grand Inquest of the State of New Jersey, in and for the County of Mercer, and returned into the Court of Oyer and Terminer of said County of Mercer, against David L. Kelsey, was brought up for review to the said New Jersey Supreme Court by a writ of certiorari issued out of that court, but the said Supreme Court sustained the said indictment by its said judgment and refused to set aside and quash the same:

30 We do command you, that a transcript of the said

indictment returned into the Court of Oyer and Terminer of the County of Mercer by the Grand Inquest of the State of New Jersey, in and for the County of Mercer, against the said David L. Kelsey, together with the writ of certiorari issued out of the Supreme Court, and the reasons alleged for quashing and setting aside the said indictment, and the opinion of the Supreme Court concerning the same (all of which, with the exception of the opinion, are embraced in the printed state of the case), together with all things touching and concerning the same, as fully and entirely as before you they remain, to our Judges of the said Court of Errors and Appeals, at Trenton, on the fourth day of March, nineteen hundred and eleven, you certify and send together with this writ, that therein may be done what of right and according to the laws of this State, should be done. 10

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, this second day of March, nineteen hundred and eleven. 20

S. D. DICKINSON,

Clerk.

I do herewith send to the Court of Errors and Appeals the proceedings as within commanded under the seal of the Supreme Court and my hand.

WM. RIKER, JR.

Dated, March 3, 1911.

Clerk.

NEW JERSEY SUPREME COURT.

THE STATE

vs.

DAVID L. KELSEY,

Defendant.

} Certiorari on In-
dictment Writ.

WRIT.

(Filed March 14, 1910. Wm. Riker, Jr., Clerk.)

NEW JERSEY, ss

10 [L. S.] The State of New Jersey, to Honorable
Frederick W. Gnichtel, Judge of the Court
of Quarter Sessions in and for the County
of Mercer, Greeting:

20 We, being willing for divers causes to be certified
of a certain indictment number 97 before you lately
found against David L. Kelsey, containing four
counts, for perverting justice and the administration
of law, subornation of perjury, forgery, uttering and
publishing a court record, as is said, do command
you that said indcement, together with all things
touching and concerning the same, as fully and en-
tirely before you remains, distinctly and openly
under your seal, you send to our justices of our Su-
preme Court of Judicature, at Trenton, on the six-
teenth day of March, nineteen hundred and ten, to-
gether with this, our writ, that we may further cause
to be done thereupon what of right and according to
law ought to be done.

Witness William S. Gummere, Esquire, Chief Justice
of our said Supreme Court, at Trenton, etc.

30

JOS. E. HUNT,
MARTIN P. DEVLIN,
Attorneys.

WM. RIKER, JR.,
Clerk.

Let the writ be allowed, and a Supreme Court Examiner take bail in the sum of three hundred dollars.

ALFRED REED,

Jus. Sup. Ct.

INDICTMENT.

MERCER OYER AND TERMINER.

January Term, A. D. 1910.

MERCER COUNTY TO WIT:—The Grand Inquest of the State of New Jersey, in and for the body of the County of Mercer, upon their respective oath, present, that heretofore, to wit, on the ninth day of October, nineteen hundred and nine, a bill of complaint was filed in the Court of Chancery of the State of New Jersey, and in which said bill the People's Brewing Company of Trenton, a corporation existing under and by virtue of the laws of the State of New Jersey, was complainant, and Harris Levine and Samuel Levine were defendants, and in which said bill the said complainant amongst other things set forth and alleged that on the seventeenth day of December, nineteen hundred and six, the said Harris Levine and Samuel Levine, defendants therein named, in consideration of the premises related in said bill of complaint executed and delivered to the said complainant, the said People's Brewing Company of Trenton, an agreement in writing wherein and whereby the said Harris Levine and Samuel Levine, the parties of the second part mentioned in said agreement, did, amongst other things, agree to and with the said complainant, the said People's Brewing Company of Trenton, the party of the first part, as follows, viz.: 10 20 30

10 "The said party of the first part hereby
"agrees to sell to said party of the second part,
"its beer, ale, and porter, for use and sale in the
"the business conducted by said party of the second
"part at No. 167 So. Broad Street, in the City of
"Trenton, County of Mercer and State of New
"Jersey, or at any other place to which they
"may remove their business, in such quantities
"and at such times and for such prices as may
"be mutually agreed upon between said parties.

"Said party of the second part agrees to pur-
"chase from said party of the first part, and to
"use and sell exclusively the beer, ale, and por-
"ter brewed, manufactured, controlled and sold
"by it, from the date hereof, for a period of five
"years, at their said place of business aforesaid,
"or in any other place to which they may remove
"their said saloon business.

20 "And the said party of the second part further
"agrees that if they sell or dispose of said business
"as above, they will sell or dispose of the same only
"to such party or parties who will execute an
"agreement such as the foregoing."

"This agreement shall bind the executors, suc-
"cessors, administrators and assigns of the respec-
"tive parties hereto."

30 That after the making of the said agreement the said
complainant, the People's Brewing Company of
Trenton, and the said defendants, Harris Levine and
Samuel Levine, agreed on the price of lager beer, ale,
and porter, upon the terms more particularly men-
tioned and set out in said bill; that thereupon and
from the making of said agreement and until the
twenty-fifth day of September, nineteen hundred and
nine, the said defendants, Harris Levine and Samuel
Levine, purchased weekly from the said complain-
ant, the People's Brewing Company of Trenton, and

used exclusively in the carrying on of their business, on the premises aforesaid, large and valuable quantities of lager beer, ale and porter, brewed, manufactured, controlled and sold by the said complainant, at the price mentioned and set out in said bill of complaint, and that on the said twenty-fifth day of September, nineteen hundred and nine, the said Harris Levine and Samuel Levine, gave notice to the said complainant, the People's Brewing Company of Trenton, that they would not further purchase from the said complainant the said merchandise aforementioned, nor sell the same exclusively or otherwise in refused to further purchase from the said complainant, the People's Brewing Company of Trenton, or sell in the carrying on of their said business, upon the said premises, the products of the said complainant, the People's Brewing Company of Trenton, and that, although said defendants have ever since, and now are carrying on the said business of wholesale and retail dealers in lager beer, ale, porter and malt liquors generally upon the said premises, they have at all times during that time been and now are purchasing and selling similar wares and merchandise, the product of another dealer and brewer, notwithstanding that the said complainant, the People's Brewing Company of Trenton, was at all time during that time ready and willing to sell to the said defendants, the said Harris Levine and Samuel Levine, for the use aforesaid, its lager beer, ale and porter, as it had always done prior to that time, at the prices theretofore agreed upon, and that the said defendants, Harris Levine and Samuel Levine, have at all times during that time refused and still refuse to comply with their said agreement, and have willfully and deliberately violated the terms of said agreement; and in and by the said bill of complaint

- the said complainant, the People's Brewing Company of Trenton, did amongst other things pray that the said defendants, Harris Levine and Samuel Levine, and each of them might be restrained and enjoined from, in the carrying on of their said business of wholesale and retail dealers in lager beer, ale, porter and malt liquors generally, upon the premises known as 167 South Broad Street, in the City of Trenton, New Jersey, selling for the said period
- 10 of five years any lager beer, ale, or porter, except those brewed, manufactured, controlled and sold to them by the said complainant, the People's Brewing Company of Trenton, and that they, the said Harris Levine and Samuel Levine, might likewise be restrained and enjoined during said period of five years from purchasing any lager beer, ale or porter, from any person or corporation whatsoever, other than the said complainant, the People's Brewing Company of Trenton, for the purpose of selling the
- 20 same in the carrying on of their said business at the place aforementioned, and which said bill of complaint was duly verified by John L. Kuser, the secretary and treasurer of the said complainant, and by David Scott.

- And the Grand Inquest aforesaid, upon their respective oath aforesaid do further present that upon reading the bill of complaint duly verified as aforesaid, it was on the eighth day of October, nineteen hundred and nine, amongst other things ordered by
- 30 the Chancellor of the State of New Jersey that the said defendants, Harris Levine and Samuel Levine, show cause before the Chancellor, sitting at the State House, in the City of Trenton, New Jersey, on Wednesday, the thirteenth day of October, nineteen hundred and nine, at the hour of ten o'clock in the forenoon, why an injunction should not issue according to the prayer of the said bill of complaint.

And the Grand Inquest aforesaid, upon their respective oath aforesaid, do further present that the said order to show cause, thereafter, to wit, on the thirteenth day of October, nineteen hundred and nine, at the place aforesaid, came on for hearing upon the said bill of complaint and the affidavits thereto annexed and among others of the affidavit of Polli Tatrai in this count hereinafter mentioned and set out, before the Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, 10 then and there sitting and acting for and on behalf of the Chancellor of the State of New Jersey, and among others the affidavit of the said Polli Tatrai was presented and read upon the said hearing of the said order to show cause before the said Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, and it then and there became and was a material question before the said Edwin Robert Walker, Vice Chancellor of the State of New Jersey as aforesaid, to ascertain and advise the Chancellor 20 of the State of New Jersey to determine whether the defendants, Harris Levine and Samuel Levine, had violated the terms of their aforesaid agreement, and whether they had any matter, cause or defense to the violation of their said agreement as alleged in the said bill of complaint, and it then and there became and was a material question before the said Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, as aforesaid, to ascertain and advise the Chancellor of the State of New Jersey to determine 30 whether or not the lager beer theretofore supplied by the said complainant, the People's Brewing Company of Trenton, to the said defendants, Harris Levine and Samuel Levine, was a good and wholesome product. And the said David L. Kelsey, willfully contriving and intending to pervert and obstruct justice and the due administration of the law, and to cause the said Hon-

orable Edwin Robert Walker, one of the Vice Chancellors of the State of New Jersey, as aforesaid, (then and there sitting and acting for and on behalf of the Chancellor of the State of New Jersey to determine the matters and things set forth in the said bill of complaint and whether the said defendants, Harris Levine and Samuel Levine, had violated the terms of their said agreement, and whether an injunction should issue against them, pursuant to the
 10 prayer of the said bill of complaint, or whether they had any matter, cause or thing to discharge them of and from their said agreement), wrongfully to give judgment in behalf of the said defendants, Harris Levine and Samuel Levine, did, at the City of Trenton, in the County of Mercer aforesaid, on the eleventh day of October, nineteen hundred and nine, willfully and feloniously publish a certain false, forged and counterfeit affidavit, of the tenor and purport following, to wit:

20 STATE OF NEW JERSEY, }
 COUNTY OF MERCER, } ss.

PAULINA TATRAY, of full age, being duly sworn according to law, on her oath says, that he resides at No. 9 Cummins Avenue, in the City of Trenton, County of Mercer, and State of New Jersey; that he has been a customer of Samuel Levin for four years last past, buying bottled beer for her personal use and the use of her family; that between August, 1906, and October, 1909, the beer purchased
 30 by deponent from said Levin was the beer known as "Hill's Beer"; that deponent purchased an average of twenty-four bottles per week; that the said beer was very poor and became sour, spoiled and totally unfit for use within two or three days after deponent received the same; so that unless drunk up within said

period of time deponent could not use it and returned it; that the beer was always of this character and condition; that deponent has many times been compelled, for the reasons above set forth, to return large quantities of the "Hill's Beer" so purchased by deponent from said Samuel Levin, to said Samuel Levin; that for the reasons above set forth deponent was compelled to cease purchasing beer from said Levin; that deponent has since October 1st, 1909, purchased bottled beer from said Samuel Levin 10 known as "Pabst Beer" which keeps perfectly and has not in any case spoiled or become unfit for use; that prior to December, 1906, deponent purchased "Poth's Beer" in bottles from Levin Brothers, which beer was entirely satisfactory in every way and would keep good indefinitely.

(Signed) POLLI TATRAI.

Sworn to and subscribed before me this 11th day of October, A. D. 1909.

(Signed) DAVID L. KELSEY, 20
(Seal of Justice impressed.) Justice of the Peace.

said affidavit being a record and an authentic matter of a public nature, for use before the said Honorable Edwin Robert Walker, Vice Chancellor as aforesaid, for the purpose aforesaid, he, the said David L. Kelsey, well knowing the same to be false, forged and counterfeited, and purporting it to be sworn to before him, the said David L. Kelsey, by the said Polli Tatrai (he, the said David L. Kelsey,) then and still being one of the Justices of the Peace 30 in and for the County of Mercer aforesaid, and being commissioned and sworn, and duly authorized under the laws of the State of New Jersey to administer oaths and affirmations,); whereas in truth and in fact the said false, forged and counterfeit affidavit

- was only signed, but not sworn to by the said Polli Tatrai, the purporting affiant, before the said David L. Kelsey, Justice of the Peace as aforesaid; and whereas in truth and in fact he, the said David L. Kelsey, Justice of the Peace as aforesaid, did not administer any oath to the said Polli Tatrai of and concerning the said false, forged and counterfeit affidavit, and of and concerning any of the matters and things therein stated and set forth, with intent then and there to prejudice, defeat, impair and impede the rights and remedies of the said complainant, the People's Brewing Company, of Trenton, a corporation of the State of New Jersey, as aforesaid, and with intent then and there to pervert justice and the administration of the law; to the evil example of all others in the like case offending, 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.
- 10
- 20 And the Grand Inquest aforesaid, in and for the body of the County of Mercer aforesaid, upon their respective oath aforesaid, do further present, that heretofore, to wit, on the ninth day of October, nineteen hundred and nine, a bill of complaint was filed in the Court of Chancery of the State of New Jersey, and in which said bill the People's Brewing Company of Trenton, a corporation existing under and by virtue of the laws of the State of New Jersey, was complainant, and Harris Levine and Samuel Levine were defendants, and in which said bill (amongst other things) the said complainant alleged that the said defendants had violated the terms of a certain agreement in writing, and bearing date the seventeenth day of December, nineteen hundred and six, wherein and whereby the said defendants had agreed to sell exclusively the beer, ale and porter brewed, manufactured and controlled by the said
- 30

complainant, for a period of five years from the date of said agreement, and praying in said bill that the said defendants might be restrained and enjoined from the further alleged violation of said agreement.

And the Grand Inquest aforesaid, upon their respective oath aforesaid, do further present, that upon a reading of said bill, and the affidavits thereto annexed, it was ordered by the Chancellor of the State of New Jersey, that the said defendants, Harris Levine and Samuel Levine, show cause before him, 10 at the State House, in the City of Trenton aforesaid, on Wednesday, the thirteenth day of October, nineteen hundred and nine, at the hour of ten o'clock in the forenoon, why an injunction should not issue according to the prayer of said bill.

And the Grand Inquest aforesaid, upon their respective oath aforesaid, do further present that the said order to show cause came on for a hearing and determination upon the said bill of complaint, and the affidavits thereto annexed, and among others of 20 the oath and deposition of Polli Tatrai in this count hereinafter mentioned, before the Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, then and there sitting and acting for and on behalf of the Chancellor of the State of New Jersey, and among others, the affidavit of the said Polli Tatrai was presented and read upon the said hearing of the said order to show cause before the said Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, and it then and there became 30 and was a material question before the said Edwin Robert Walker, Vice Chancellor of the State of New Jersey as aforesaid, to ascertain and advise the Chancellor of the State of New Jersey to determine whether the defendants, Harris Levine and Samuel Levine, had violated the terms of their aforesaid agreement, and whether they had any matter, cause

or defense to the violation of their said agreement, as alleged in the said bill of complaint, and it then and there became and was a material question before the said Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, as aforesaid, to ascertain and advise the Chancellor of the State of New Jersey to determine whether or not the lager beer theretofore supplied by the said complainant, the People's Brewing Company of Trenton, to the
10 said defendants, Harris Levine and Samuel Levine, was a good and wholesome product. And the said David L. Kelsey, willfully contriving and intending to pervert justice and the due administration of the law, and to cause the said Honorable Edwin Robert Walker, one of the Vice Chancellors of the State of New Jersey, as aforesaid, then and there sitting and acting for and on behalf of the Chancellor of the State of New Jersey, to advise the Chancellor of the State of New Jersey to determine the matters and
20 things set forth in the said bill of complaint, and whether the said defendants, Harris Levine and Samuel Levine, had violated the terms of their said agreement, and whether an injunction should issue against them, pursuant to the prayer of the said bill of complaint, or whether they had any matter, cause or thing to discharge them of and from their said agreement, wrongfully to give judgment in behalf of the said defendants, Harris Levine and Samuel Levine, did, at the City of Trenton, in the
30 County of Mercer aforesaid, on the eleventh day of October, nineteen hundred and nine, feloniously use, and offer for use, before the said Honorable Edwin Robert Walker, Vice Chancellor as aforesaid, for the purpose aforesaid, knowing the same to be untrue, a certain oath and deposition required and authorized to be taken in the aforementioned proceedings, then and there pending, and to be determined as afore-

said, he, the said David L. Kelsey, then and there knowing the said oath and deposition to be untrue, and which said oath and deposition is of the tenor and purport following, to wit:

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

PAULINA TATRAY, of full age, being duly sworn according to law, on her oath says, that she resides at No. 9 Cummins Avenue, in the City of Trenton, County of Mercer, and State of New Jersey; that she has been a customer of Samuel Levin for four years last past, buying bottled beer for her personal use and the use of her family; that between August, 1906, and October, 1909, the beer purchased by deponent from said Levin was the beer known as "Hill's Beer"; that deponent purchased an average of twenty-four bottles per week; that the said beer was very poor beer and became sour, spoiled and totally unfit for use within two or three days after deponent received the same; so that unless drunk up within said period of time deponent could not use it and returned it; that the beer was always of this character and condition; that deponent has many times been compelled, for the reasons above set forth, to return large quantities of the "Hill's Beer" so purchased by deponent from said Samuel Levin, to said Samuel Levin; that for the reasons above set forth deponent was compelled to cease purchasing beer from said Levin; that deponent has since October 1st, 1909, purchased bottled beer from said Samuel Levin known as "Pabst Beer" which keeps perfectly and has not in any case spoiled or become unfit for use; that prior to December, 1906, deponent purchased "Poth's Beer" in bottles from Levin Brothers, which

beer was entirely satisfactory in every way and would keep indefinitely.

(Signed) POLLI TATRAI.

Sworn to and subscribed before me this 11th day of October, A. D. 1909.

(Signed) DAVID L. KELSEY,
(Seal of Justice impressed.) Justice of the Peace.

10 with intent then and there to prejudice, defeat, impair and impede the rights or remedies of the said complainant, the People's Brewing Company of Trenton, a corporation of the State of New Jersey, as aforesaid, and with intent then and there to pervert justice and the administration of the law, to the evil example of all others in the like manner offending 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.

20 And the Grand Inquest aforesaid, in and for the body of the County of Mercer aforesaid, upon their respective oath aforesaid, do further present, that heretofore, to wit, on the ninth day of October, nineteen hundred and nine, a bill of complaint was filed in the Court of Chancery of the State of New Jersey, and in which said bill the People's Brewing Company of Trenton, a corporation existing under and by virtue of the laws of the State of New Jersey, was complainant, and Harris Levine and Samuel Levine were defendants, and in which said bill (amongst other things) the said complainant alleged that the
30 said defendants had violated the terms of a certain agreement in writing, and bearing date the seventeenth day of December, nineteen hundred and six, wherein and whereby the said defendants had agreed to sell exclusively the beer, ale and porter brewed, manufactured and controlled by the said complain-

ant, for a period of five years from the date of said agreement, and praying in said bill that the said defendants might be restrained and enjoined from the further alleged violation of said agreement.

And the Grand Inquest aforesaid, upon their respective oath aforesaid, do further present, that upon a reading of said bill, and the affidavits thereto annexed, it was ordered by the Chancellor of the State of New Jersey, that the said defendants, Harris Levine and Samuel Levine, show cause before him, at 10 the State House, in the City of Trenton aforesaid, on Wednesday, the thirteenth day of October, nineteen hundred and nine, at the hour of ten o'clock in the forenoon, why an injunction should not issue according to the prayer of said bill.

And the Grand Inquest aforesaid, upon their respective oath aforesaid, do further present, that the said order to show cause came on for a hearing and determination upon the said bill of complaint and the affidavits thereto annexed, and among others of 20 the oath and deposition of Polli Tatrai in this court hereinafter mentioned, before the Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, then and there sitting and acting for and on behalf of the Chancellor of the State of New Jersey, and among others the affidavit of the said Polli Tatrai was presented and read upon the said hearing of the said order to show cause, before the said Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, and it then and there became 30 and was a material question before the said Edwin Robert Walker, Vice Chancellor of the State of New Jersey as aforesaid, to ascertain and advise the Chancellor of the State of New Jersey to determine whether the defendants, Harris Levine and Samuel Levine, had violated the terms of their aforesaid agreement, and whether they had any matter, cause

or defense to the violation of their said agreement as alleged in the said bill of complaint, and it then and there became and was a material question before the said Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey as aforesaid, to ascertain and advise the Chancellor of the State of New Jersey to determine whether or not the said lager beer theretofore supplied by the said complainant, the People's Brwing Company of Trenton, to the said defendants, Harris Levine and Samuel Levine, was a good and wholesome product. And the said David L. Kelsey, willfully contriving and intending to pervert justice and the due administration of the law, and to cause the said Honorable Edwin Robert Walker, one of the Vice Chancellors of the State of New Jersey as aforesaid, then and there sitting and acting for and on behalf of the Chancellor of the State of New Jersey, to advise the Chancellor of the State of New Jersey to determine the matters and things set forth in the said bill of complaint and whether the said defendants, Harris Levine and Samuel Levine, had violated the terms of their said agreement, and whether an injunction should issue against them, pursuant to the prayer of the said bill of complaint, or whether they had any matter, cause or thing to discharge them of and from their said agreement, wrongfully to give judgment in behalf of the said defendants, Harris Levine and Samuel Levine, did, at the City of Trenton, in the County of Mercer, aforesaid, on the eleventh day of October, nineteen hundred and nine, feloniously and falsely make, forge and counterfeit, and did cause, counsel, hire, command and procure to be falsely made, forged and counterfeited, and did willingly act and assist in the false making, forging and counterfeiting of a certain affidavit, being a record and an authentic matter of public nature, purporting to have been sworn to before him, by the said Polli Tatrai (he, the said

David L. Kelsey, then and still being one of the Justices of the Peace in and for the County of Mercer aforesaid, and being commissioned and sworn, and duly authorized under the laws of the State of New Jersey, to administer oaths and affirmations) and which said falsely made, forged and counterfeited affidavit, being a record, and an authentic matter of a public nature, is in manner and form following, to wit:

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss. 10

PAULINA TATRAY, of full age, being duly sworn according to law, on her oath says, that she resides at No. 9 Cummins Avenue, in the City of Trenton, County of Mercer, and State of New Jersey; that she has been a customer of Samuel Levin for four years last past, buying bottled beer for her personal use and the use of her family; that between August, 1906, and October, 1909, the beer purchased by deponent from said Levin was the beer known as "Hill's Beer"; that deponent purchased an average 20 of twenty-four bottles per week; that the said beer was very poor beer and became sour, spoiled and totally unfit for use within two or three days after deponent received the same; so that unless drunk up within said period of time deponent could not use it and returned it; that the beer was always of this character and condition; that deponent has many times been compelled, for the reasons above set forth, to return large quantities of the "Hill's Beer" so purchased by deponent from said Samuel Levin, to said Samuel 30 Levin; that for the reasons above set forth deponent was compelled to cease purchasing beer from said Levin; that deponent has since October 1st, 1909, purchased bottled beer from said Samuel Levin known as "Pabst Beer" which keeps perfectly and

has not in any case spoiled or become unfit for use; that prior to December, 1906, deponent purchased "Poth's Beer" in bottles from Levin Brothers, which beer was entirely satisfactory in every way and would keep indefinitely.

(Signed) POLLI TATRAI.

Sworn to and subscribed before me this 11th day of October, A. D. 1909.

(Signed) DAVID L. KELSEY,

10 (Seal of Justice impressed.) Justice of the Peace.

whereas in truth and in fact the said falsely made, forged and counterfeited affidavit was only signed and not sworn to by the said Polli Tatrai, the purporting affiant, before the said David L. Kelsey, Justice of the Peace as aforesaid; and whereas in truth and in fact, he, the said David L. Kelsey, Justice of the Peace as aforesaid, did not administer any oath to the said Polli Tatrai, of and concerning the said false, forged and counterfeited affidavit, and of and
20 concerning any of the matters and things therein stated and set forth, with intent then and there to prejudice, injure, damage and defraud the said, the People's Brewing Company of Trenton, a corporation existing under and by virtue of the laws of the State of New Jersey, contrary to the form of the statute in such case made and provided and against the peace of this State and the government and dignity of the same.

And the Grand Inquest aforesaid, in and for the
30 body of the County of Mercer aforesaid, upon their respective oath aforesaid, do further present, that heretofore, to wit, on the ninth day of October, nineteen hundred and nine, a bill of complaint was filed in the Court of Chancery of the State of New Jersey, and in which said bill the People's Brewing Com-

pany of Trenton, a corporation existing under and by virtue of the laws of the State of New Jersey, was complainant, and Harris Levine and Samuel Levine were defendants and in which said bill (amongst other things) the said complainant alleged that the said defendants had violated the terms of a certain agreement in writing, and bearing date the seventeenth day of December, nineteen hundred and six, wherein and whereby the said defendants had agreed to sell exclusively the beer, ale and porter brewed, manufactured and controlled by the said complainant, for a period of five years from the date of said agreement, and praying in said bill that the said defendants might be restrained and enjoined from the further alleged violation of said agreement. 10

And the Grand Inquest aforesaid, upon their respective oath aforesaid, do further present, that upon a reading of said bill, and the affidavits thereto annexed, it was ordered by the Chancellor of the State of New Jersey, that the said defendants, Harris Levine and Samuel Levine, show cause before him, at the State House, in the City of Trenton, aforesaid, on Wednesday, the thirteenth day of October, nineteen hundred and nine, at the hour of ten o'clock in the forenoon, why an injunction should not issue according to the prayer of said bill. 20

And the Grand Inquest aforesaid, upon their respective oath aforesaid, do further present that the said order to show cause came on for a hearing and determination upon the said bill of complaint and the affidavits thereto annexed and among others of the oath and deposition of Polli Tatrai in this count hereinafter mentioned, before the Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, then and there sitting and acting for and on behalf of the Chancellor of the State of New Jersey, and among others the affidavit of the said Polli Tat- 30

rai, was presented and read upon the said hearing of the said order to show cause before the said Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey, and it then and there became and was a material question before the said Edwin Robert Walker, Vice Chancellor of the State of New Jersey as aforesaid, to ascertain and advise the Chancellor of the State of New Jersey, to determine whether the defendants, Harris Levine and Samuel Levine, had
10 violated the terms of their aforesaid agreement, and and whether they had any matter, cause or defense to the violation of their said agreement as alleged in the said bill of complaint, and it then and there became and was a material question before the said Honorable Edwin Robert Walker, Vice Chancellor of the State of New Jersey as aforesaid, to ascertain and advise the Chancellor of the State of New Jersey to determine whether or not the lager beer theretofore supplied by the said complainant, the People's Brewing Company
20 of Trenton, to the said defendants, Harris Levine and Samuel Levine, was a good and wholesome product. And the said David L. Kelsey, willfully contriving and intending to pervert justice and the due administration of the law, and to cause the said Honorable Edwin Robert Walker, one of the Vice Chancellors of the State of New Jersey, as aforesaid, then and there sitting and acting for and on behalf of the Chancellor of the State of New Jersey to ascertain and advise the Chancellor of the State of New Jersey to determine
30 the matters and things set forth in the said bill of complaint and whether the said defendants, Harris Levine and Samuel Levine, had violated the terms of their said agreement, and whether an injunction should issue against them, pursuant to the prayer of the said bill of complaint, or whether they had any matter, cause or thing to discharge them of and from their said agreement, wrongfully to give judgment

in behalf of the said defendants, Harris Levine and Samuel Levine, did, at the City of Trenton, in the County of Mercer aforesaid, on the eleventh day of October, nineteen hundred and nine, feloniously utter and publish as true, and did cause, counsel, hire, command and procure to be uttered and published as true a certain false, altered, forged and counterfeit affidavit, being a record and an authentic matter of a public nature, purporting to have been sworn to before him by the said Polli Tatrai (he, the said David L. Kelsey, then and still being one of the Justices of the Peace in and for the County of Mercer, and being commissioned and sworn, and duly authorized under the laws of the State of New Jersey, to administer oaths and affirmations) and which said false, altered, forged and counterfeit affidavit, being a record and an authentic matter of a public nature as aforesaid, is in manner and form following, to wit:

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss. 20

PAULINA TATRAY, of full age, being duly sworn according to law, on her oath says, that she resides at No. 9 Cummins Avenue, in the City of Trenton, County of Mercer, and State of New Jersey; that she has been a customer of Samuel Levin for four years last past, buying bottled beer for her personal use and the use of her family; that between August, 1906, and October, 1909, the beer purchased by deponent from said Levin was the beer known as "Hill's Beer"; that deponent purchased an average 30 of twenty-four bottles per week; that the said beer was very poor beer and became sour, spoiled and totally unfit for use within two or three days after deponent received the same; so that unless drunk up within said period of time deponent could not use it and returned

it; that the beer was always of this character and condition; that deponent has many times been compelled, for the reasons above set forth, to return large quantities of the "Hill's Beer" so purchased by deponent from said Samuel Levin, to said Samuel Levin; that for the reasons above set forth deponent was compelled to cease purchasing beer from said Levin; that deponent has since October 1st, 1909, purchased bottled beer from said Samuel Levin known as "Pabst Beer" which keeps perfectly and has not in any case spoiled or become unfit for use; that prior to December, 1906, deponent purchased "Poth's Beer" in bottles from Levin Brothers, which beer was entirely satisfactory in every way and would keep good indefinitely.

(Signed) POLLI TATRAI.

Sworn to and subscribed before me this 11th day of October, A. D. 1909.

(Signed) DAVID L. KELSEY,

20 (Seal of Justice impressed.) Justice of the Peace.

whereas in truth and in fact, the said false, altered, forged and counterfeited affidavit, was only signed, and not sworn to by the said Polli Tatrai, the purporting affiant, before the said David L. Kelsey, Justice of the Peace as aforesaid; and whereas in truth and in fact he, the said David L. Kelsey, Justice of the Peace as aforesaid, did not administer any oath to the said Polli Tatrai, of and concerning the said false, altered, forged and counterfeit affidavit, and
30 of and concerning any of the matters and things therein stated and set forth; he the said David L. Kelsey, having then and there feloniously uttered and published as true the said affidavit, being a record and an authentic matter of a public nature as aforesaid, knowing the said affidavit, being a record

and an authentic matter of a public nature, to be false, altered, forged and counterfeited, with intent then and there to prejudice, injure, damage and defraud the said the People's Brewing Company of Trenton, a corporation existing under and by virtue of the laws of the State of New Jersey, 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.

WILLIAM J. CROSSLEY, 10
Prosecutor of the Pleas.

In obedience to the command of the within writ the indictment against David L. Kelsey, whereof mention is made within, and all things touching and concerning the same to the Justices of the Supreme Court, at Trenton, within specified, at the time and place within mentioned, I, the Judge of the Court of Quarter Sessions, within mentioned, under my seal and hereunto annexed send, as within I am commanded.

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F. W. GNICHTEL, [L. S.]
Judge.

In testimony whereof, I, George R. Robbins, Clerk of the Court of Quarter Sessions of the County of Mercer, have hereunto subscribed my name and affixed the seal of the said Court the eleventh day of March, A. D. 1910.

[L. S.] GEO. R. ROBBINS,
Clerk.

REASONS FOR QUASHING.

On Certiorari to Frederick W. Gnichtel, Judge of the Court of Quarter Sessions in and for the County of Mercer.

David L. Kelsey, the above named defendant and prosecutor of the above writ of certiorari by Martin P. Devlin and Joseph Hunt, his attorneys, comes and prays that the indictment found against him for making, publishing and uttering, and causing to be made,
10 published and uttered, a false, forged and counterfeit affidavit, which indictment was found by the grand jury of the County of Mercer, for the October term, nineteen hundred and ten, may be quashed, set aside, and for nothing holden for the following reasons, namely:

First—That there are four separate offenses joined in the said indictment

Second—That the mode of proof in each of the offenses is of a different nature.

20 Third—That the judgment in each of the offenses is of a different character.

Fourth—That the indictment charges making, publishing, and uttering and causing to be made, published and uttered, a false, forged and counterfeit affidavit, and showson its face that there was no affidavit made.

Fifth—That the indictment charges that the defendant, the said David L. Kelsey, forged and counterfeited an affidavit, being a record and an authentic matter of a public nature, when the said indictment
30 on its face shows that there was no affidavit

and fails to show that the said affidavit was either a record or an authentic matter of a public nature.

Sixth—That each of the several counts fails to connect the defendant with any of the offenses charged in each of the counts of the said indictment.

Seventh—That the defendant is prejudiced by being placed on trial on the four offenses charged in the said indictment at the same time before one jury.

Eighth—That the defendant is entitled to have each offense in each count charged in a separate indictment, when any or each of the offenses carries a different judgment. 10

Ninth—That the judgment and sentence in the second count of the indictment carries with it infamy, which judgment is different from any judgment and sentence accompanying the other counts.

Tenth—That the third count of the said indictment fails to charge a crime under the statute in such case made and provided.

Eleventh—That the fourth count of the said indictment fails to charge a crime under the statute in such case made and provided. 20

Twelfth—Because the said indictment is in divers and other ways illegal and unjust.

MARTIN P. DEVLIN,
JOSEPH HUNT,

Attorneys for and of counsel with defendant.

Filed March 26, 1910,

WM. RIKER, JR., Clerk.

OPINION.

BERGEN, J.—This is a motion to quash an indictment brought here from the Mercer Oyer and Terminer by certiorari for that purpose. The first count in the indictment charges that upon a hearing had in a certain cause before Vice Chancellor Walker, sitting for the Chancellor, the defendant, willfully contriving and intending to pervert and obstruct justice and the due administration of the law and to cause the said Vice
10 Chancellor wrongfully to give judgment, willfully and feloniously published a certain false, forged and counterfeit affidavit, and averred that the affidavit contained facts material to the issue being heard before the said Vice Chancellor. This count further charges that the affidavit purported to be that of Paulina Tatrai (signed Polli Tratai), and that it was certified by the defendant as a justice of the peace, that it had been sworn to by her before him, the defendant well knowing that it was signed but that no oath had been administered
20 to the affiant. The argument of the defendant in favor of a motion to quash this count is that it charges inconsistent offenses: (a) Publishing a false affidavit; (b) omitting to administer the oath. This argument has no merit. The offense charged is the obstruction of justice in publishing a false and counterfeit affidavit—counterfeit and false because it had not been sworn to, and therefore was not the affidavit or sworn statement of the affiant as it was represented to be, or, to put it another way, the obstruction of justice by offering
30 to the Vice Chancellor as evidence a paper containing facts which the defendant represented had been verified by the oath of the affiant, when he knew that this was not true. It is also claimed that it was improperly called an affidavit in the indictment because it was not sworn to. This is equally without merit, for it was

published as an affidavit duly sworn to. It purported to be an affidavit and was published as such for the purpose of perverting the due administration of justice, and it was a false affidavit because this was untrue. The crime charged is not that the affidavit was false, but that, being false, it was used to pervert and obstruct justice and the due administration of the law. Defendant's counsel misapprehends the crime charged. It is not, as he urges in his brief, that there are two crimes charged in this count: First, publishing a false affidavit; second, omission to administer an oath to the affiant. These are merely facts which if sustained by proof will establish the crime charged. It is argued on behalf of the defendant that a conviction, "if it should be based only on the non-swearing of the affiant, might entail the same consequences as a conviction for subornation of perjury." But this ignores the crime charged, and assumes that the different ingredients of the crime charged are independent crimes. The indictment bears no such meaning, and is not subject to any such construction. The defendant is clearly informed of the acts which it is charged he committed in the execution of the crime set out in the indictment. 10 20

The second count charges that for the purpose of obstructing justice the defendant feloniously offered and used before the said Vice Chancellor the same oath, knowing it to be untrue. The objection which the defendant urges to this count is that it charges that the defendant used and offered for use a certain oath and deposition in certain Chancery proceedings, well knowing it to be untrue, with intent to prejudice the complainant in the Chancery proceedings, and to pervert justice and the administration of the law, without specifying in what particulars the oath or deposition is false, and in support of this claim cites *Heintz vs. Union Quarter Sessions*, 45 N. J. Law, 523. In that case the defendant was charged with the crime of per- 30

jury in swearing that certain persons named in the petition and recommendation for a license to keep an inn and tavern were all freeholders, and it was held that the indictment was defective because it did not charge who, among the persons that had signed the recommendation, were not freeholders. But the count now under consideration charges that the material question to be determined by the Vice Chancellor was whether certain beer supplied by the complainant in the Chancery proceedings to the defendants therein "was a good and wholesome product," and that the defendant, for the purpose of perverting the due administration of the law, did offer for use before the said Vice Chancellor for the said purpose, knowing the same to be untrue, a certain oath and deposition, recited at length, which sets out, among other things, "that the said beer was very poor beer and became sour, spoilt and totally unfit for use within two or three days after deponent received the same." This sufficiently points out to the

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20 defendant, if it be necessary, in what particular the affidavit is charged to be untrue. The crime charged against him is not false swearing, but using as an affidavit a writing which he knew was not an affidavit in committing the crime of obstructing justice. The latter is the crime charged; the former, one of the methods of perpetrating the crime.

The objection urged against the third and fourth counts is that the third count charges the forging, and the fourth count the uttering, of a false, forged

30 counterfeit affidavit "being a record and authentic matter of a public nature," while it is not alleged how the affidavit became a public record. The indictment charges that this affidavit was presented and read to the court in a proceeding in which the matters set out in the affidavit were material to the issue, and the reading of an affidavit upon a rule to show cause why an injunction should not issue, as set out in the

indictment, makes it a record and authentic matter of public nature, and it is not, as urged by the defendant, "valueless in a court of justice." It at once becomes a record of the court, and upon it is based the judgment of the court.

This disposes of all the questions raised against the indictment, and the motion to quash is refused. The indictment will be returned to the Court of Oyer and Terminer of the County of Mercer, there to be proceeded with as if this writ of certiorari had not 10
been allowed.

RULE ON AFFIRMANCE.

This cause having been duly argued at the June term, nineteen hundred and ten, of this court, by William J. Crossley, of Counsel for the Defendant in certiorari, and Martin P. Devlin, of Counsel for the Prosecutor, and the court having inspected the indictment returned with the writ of certiorari issued in the above-stated cause, and having considered the same, and finding no error in the record or proceedings therein— 20

It is thereupon ordered and adjudged that the said Writ of Certiorari be dismissed, with costs; and that the indictment removed into this court by the writ of certiorari in the above-stated cause, be returned to the Court of Oyer and Terminer of the County of Mercer, there to be proceeded with as if the said writ of certiorari had not been allowed.

Entered November 15, 1910.

On motion of

WILLIAM J. CROSSLEY,

Prosecutor of the Pleas.

Attorney of Defendant in Certiorari. 30

I, William Riker, Jr., Clerk of the Supreme Court

of the State of New Jersey, do certify that the foregoing is a true copy of a rule entered in the minutes of the court in the above-stated cause.

In testimony whereof I have set my hand and the seal of said court at Trenton, this twentieth day of February, A. D. nineteen hundred and eleven.

WM. RIKER, JR.,

[L. S.]

Clerk.

ASSIGNMENT OF ERRORS.

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(Filed March 2, 1911.)

Afterwards, that is to say, on the twenty-seventh day of February, nineteen hundred and eleven, in the Court of Errors and Appeals in the last resort in all causes, comes the said David L. Kelsey, by Martin P. Devlin, his attorney, and says that in the said judgment of the Supreme Court brought up by the writ of certiorari to review the indictment found against the defendant and plaintiff in error by the Grand Inquest of the State of New Jersey, in and for the County of Mercer, there is manifest error in that the said Supreme Court sustained the indictment found as aforesaid against the said David L. Kelsey by the Grand Inquest of the State of New Jersey, in and for the County of Mercer; whereas, because of the reasons assigned in the said Supreme Court, or some or one of them, or by reason of the causes for quashing the said indictment specified in said Supreme Court, or some one of them, the said Supreme Court should have quashed, set aside and for nothing holden the said indictment found as aforesaid by the Grand Inquest of the State of New Jersey, in and for the said County of Mercer.

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Wherefore, the said David L. Kelsey prays that said

judgment of the said Supreme Court may be reversed, annulled and for nothing holden, and the said indictment found by the Grand Inquest of the State of New Jersey, in and for the County of Mercer, may be quashed, set aside and for nothing holden, and the said David L. Kelsey may be restored to all things that he has lost on the occasion of the said judgment, etc.

MARTIN P. DEVLIN,

Attorney for and of Counsel with Plaintiff in Error.

True and legal service of the within argument is hereby acknowledged this first day of March, 1911. 10

WILLIAM J. CROSSLEY,

Prosecutor of the Pleas,

Attorney of the State.

JOINDER.

(Filed March 2, 1911.)

And hereupon, afterwards, the said State of New Jersey, defendant in error, by William J. Crossley, Prosecutor of the Pleas of the State of New Jersey, of the said County of Mercer, its attorney, comes into court and says that there is no error either in the record and proceedings aforesaid, or in the indictment aforesaid, and prays here that the court may here proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned as reasons for quashing and setting aside the said indictment, and that the judgment aforesaid in manner aforesaid given may in all things be affirmed, etc. 20

WILLIAM J. CROSSLEY,

Attorney of Defendant in Error. 30

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