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NEW JERSEY
Court of Errors and Appeals.

DAVID H. GORDON,
Plaintiff in Error,
v.
THE STATE OF NEW JERSEY,
Defendant in Error.

On Writ of Error to Supreme Court.

Brief for Plaintiff in Error.

The defendant below was convicted of the crime of perjury in the Monmouth Quarter Sessions at the May Term, 1882. The testimony on which perjury was charged is alleged to have been given by him as witness and defendant in a suit in the Monmouth Circuit, tried January 19, 1876.

The indictment properly charges that the testimony then given was material to the issue then being tried in the suit wherein John S. Longstreet was plaintiff and the said Gordon was defendant. To show what that issue was, and as a necessary step in establishing the materiality of such testimony, the record of the suit in the Circuit was produced in the Quarter Sessions and offered in evidence. Upon inspection it was discovered that the record did not show, nor could the Court of Quarter Sessions upon such inspection ascertain what the issue (if any) tried in the Circuit was. *There was no declaration*

which alone could inform the court what the issue was. The plea of general issue in an action of trespass on the case was in the record, but that gave no information upon which the court, if it had the power, could amend the record, or supply its deficiencies. Its admission was objected to.

Against the objection of the defendant the Court of Quarter Sessions then permitted the State to offer proof:

1. To show by parol that a declaration had been duly filed in the office of the county clerk, in the suit of *Longstreet v. Gordon.*

2. To show by parol what the claim or charge made in the declaration was, and thus, with the general issues of the plea, show what the issue in that suit was.

No copy of the declaration alleged to have been filed was produced at the trial of the indictment.

The Court of Quarter Sessions then admitted the record in evidence. Out of this admission several interesting questions arise.

I. Was the declaration in *Longstreet v. Gordon* a lost record?

This the Court of Quarter Sessions (supposing it had power to decide the question) must have adjudged in the affirmative before secondary proof of its contents could be admitted. But as that cannot be a *lost* record, which has never been a record, the court admitted testimony tending to show that a declaration in *Longstreet v. Gordon* had been duly filed. This was one, and a necessary step to the admission of the record, and the establishing of the issue in that case, which is claimed to be error. Was there evidence to show that a declaration had ever been filed?

The county clerk in his cross-examination says: "I have no positive recollection of filing a declaration in that case; I have no positive recollection that one was filed; my knowledge is entirely from the register." *Case, p. 17.*

Of course the clerk's register is not evidence.

Mr. Trafford, who was attorney for Longstreet, says,

case, p. 19: "I have no recollection of mailing or filing it."

The testimony of Gen. Haight explains what declaration was used at the trial, and we submit, shows that *it was not on file.* He says: "There was a declaration in that case; I had it in my possession and read it through carefully. *Case, p. 19.* * * Mr. Trafford opened the case, and read the declaration to the jury. *Case, p. 20.* * * *The attorney had the declaration that I saw read; I saw it at the trial; I think I saw it at* MY OFFICE *when Mr. Trafford called on me.*" *Case, p. 21.*

Upon this evidence the declaration cannot be considered a *lost record*, for it never was recorded, and before a record can be supplied, it must be shown to have been lost.

Before the record can be supplied there must be an adjudging by the court that the original was lost.

State v. Harrison, 10 Yerg., 542.

What is the power of the Quarter Sessions to make such adjudication?

Yet the court held that this testimony showed that the record as to the declaration was lost, and then permitted oral proof of its contents.

II. The record of *Longstreet v. Gordon* did not show what the issue in that case was, nor was there anything in it to suggest what was to be supplied. The suit was *in case* and the plea was *not guilty.* Out of the multitudinous subjects to which that form of action is applicable, the court permitted the State to select the charge of seduction, and make up a case, partly by parol and partly by record, to suit the subject selected. There was nothing in the record to show what the charge was, or what the issue was. How then could it be said that certain testimony was material to the issue? If not material to the issue there could be no perjury. To make an issue the contents of the narr. were proved by parol and the plea by record. So that, instead of the question being, was the testimony material to the issue, the State

was permitted to make an issue material to the testimony.

Under such a system of criminal practice, who could be safe from a charge of perjury? Under such a rule, malice or revenge could always manufacture an issue which would suit the testimony already given, and make it, when applied to such issue, material and false.

To meet such issue the defendant could not be prepared, nor, we respectfully submit, was the Quarter Sessions competent to try it, nor competent to amend or supply a record in the Circuit.

Parol testimony is not admissible to explain a record, or to show upon what grounds a judge decided.

Hickman v. McCurdy, 7 J. J. Marsh, 555.

If it cannot be *explained*, how can it be *supplied* by parol?

After a record has been clearly shown to be lost, "the manner of correcting the loss appears to be to show by affidavits what the record contained, the loss of which is to be supplied. This, after personal notice of the intention to move the court, and this notice should be sufficiently explicit to advise the opposite party of what is intended; and such as will enable him to controvert the affidavits submitted in support of the motion. If the affidavits are met with denials by the counter affidavits, it will obviously be necessary to proceed with the utmost caution, and when the evidence leaves the matter doubtful, or uncertain, the motion ought to be denied."

McLendon v. Jones, 8 Ala., 298;
Adkinson v. Keel, 25 Ala., 551.

This proceeding should be had in the court having control of the records.

When the records of a court are made up, no power but the court itself can touch them or alter them.

Otey v. Rogers, 4 Ired., 534.

The power of courts to substitute or supply their own lost records is inherent and exists independent of any

statute. This right exists, however, only in the court whose record or papers it is proposed to restore.

Canneen v. Block, 65 Ala., 236;
Perry v. Adams, 83 N. C., 266.

Courts of record speak only in their records. They preserve written memorials of their proceedings, which are exclusively the evidence of those proceedings. If they chose to keep minutes which they can understand and can act on to their own satisfaction, it is well. But until the record be so framed, *another court cannot know more than the words of the minutes in themselves import.* The records may be identified by testimony, but their contents cannot be altered, nor their meaning explained by parol. The acts of the court cannot thus be established.

Wade v. Odeneal, 3 Dev., 423.

The attention of the court is respectfully asked to the case of *State v. Harrison, 10 Yerg., 542*, as to the power of a court to supply lost records in criminal cases. In this case the court was not permitted to supply a lost indictment.

In *Cole v. Hanks, 3 T. B. Mon., 208*, the plaintiff brought suit for malicious prosecution. The determination of the prosecution was sufficiently stated in the declaration, but the plaintiff attempted to show an acquittal by parol, "which is wholly inadmissible. For if the bill of indictment was returned by the grand jury not a true bill, or if the plaintiff was acquitted on the trial of the prosecution, these facts can only be proved by the original record, or by an examined copy of the record."

In an indictment for perjury at *nisi prius* the *postea* must be produced.

Resp. v. Goss, 2 Yeates, 479.

As to the inability of one court to change the records of another, see *Den v. Hull, 4 Halst., 277.*

In Tennessee it has been held that an indictment for perjury committed on the trial of a former indictment

must set forth the finding of the former in the proper court of the proper county; also *the indictment itself*, or so much of it as to show an offence committed within the county, of which the court had jurisdiction; and the traverse, or plea of the defendant, on which issue was joined. *The State v. Gallimon, 2 Ired., 372.* So in Virginia, in the absence of Stat. 23 Geo. 2, c. 11, passed in 1750, it was held that an indictment for perjury committed in swearing to an answer in chancery should set out the entire bill and answer. *Lodge v. Com., 2 Gratt., 579.*

This was evidently upon the ground that it was proper for the court to know *from the record* what the issue was to which the alleged false testimony was given, and to make it clear whether or not such testimony was material to the issue. Our practice may not require more than the substance of the record to be set out in the indictment, but we apprehend that this practice does not do away with the necessity of proving that issue from the record the same as if fully set forth.

As to the necessity of producing the *record* to show what the issue in *Longstreet v. Gordon* was, we respectfully refer the court to *2 Chit. Cr. L., 312b.*

That author says:

"In an indictment for perjury in an answer to a bill in equity, the bill itself must be produced and proved. So if the perjury assigned be in an affidavit, or other proceeding, subsequent or in answer to some prior one, the prior affidavit or proceeding should be produced and proved; as, for instance, the rule nisi of the court in answer to which the defendant's affidavit was made. If the assignment be on evidence on the trial of a cause, *in addition to the production of the record*, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material. When the perjury is committed in an snswer to a bill in equity, or in answer to affidavits in a rule to show cause, the materiality of the matter sworn to in such answer, and on which perjury is assigned, necessarily appear from *the documents themselves.* For this pur-

pose it is not only *necessary to show by the record what issues were joined between the parties*, but also to prove so much of what occurred at the trial as shows the bearing and materiality of the defendant's evidence."

The indictment in this case appeals to the record in *Longstreet v. Gordon*, and the record does not show anything to support the indictment.

The indictment is based upon it as a record. The issue in that case was as much a part of the alleged perjury as the testimony of the defendant. *False testimony* and *an issue* to which it is material are the necessary ingredients of perjury. This is embodied in its definition. Perjury is the taking of a willful, false oath by one, who, being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears absolutely and falsely in a matter material to the point in question.

Com. v. Powell, 2 Met. (Ky.), 12;
Quoting Whart. Am. Cr. L., 746.

Had his oath been in writing, or in answer to interrogatories in writing, such writing would have been required to be produced, and its place could not have been supplied by parol.

Com. v. Stone, Thatcher, 604.

The oath not being perjury without an issue in a judicial proceeding, and such a judicial proceeding being a matter of record, without a declaration in the record there can be no issue, and hence no perjury.

The testimony given in *Longstreet v. Gordon* could only become material when connected with proof of the existence of an issue in certain judicial proceedings. The existence of such issue, or, as the indictment puts it, "the matters in difference" was a matter of record, and could only be proved by the record. If the record was faulty or lost it did not lie with the Quarter Sessions, but with the Circuit, to amend or supply. Until the Circuit had supplied the record, the Quarter Sessions was bound to take it as it was, with all its imperfections on its head.

Again: a complete record of a judgment in this State must contain the declaration; without it, there is no record.

Revision, page 877, Sec. 192, Practice Act.

In this case the State was bound to produce and prove the record called for by the indictment. If the Sessions, for the purpose of making a record, could inject into the entry on Book Q of Judgments of the Circuit a declaration, it must be a declaration fitted to the case—otherwise the entry remained an incomplete record—no record.

The declaration injected into the entry did not fit any record.

1. The cause referred to in the indictment, and of which the State was bound to bring the record, was a cause in which it was, as alleged in the indictment, a material question whether the said David H. Gordon ever had sexual intercourse with one Ellen H. Longstreet.

The declaration offered did not fit that record, because, as proved, it was a declaration in a suit in which the material question was whether said Gordon ever had sexual intercourse with one Eleanor H. Longstreet, a different person from the person named in the indictment.

2. The declaration offered does not fit the entry in Book Q of Judgments and, therefore, leaves the record incomplete—no record—because it was a declaration for a tort, and the entry on its face is of a judgment *in assumpsit* or contract. See the entry.

3. The offered record was incomplete, not fitted to the case on trial, or to the record called for, because the entry shows that judgment in the cause of which it pretends to be the record was entered and signed on the eighteenth day of January, A. D. 1876, and the alleged perjury assigned in the indictment was therein averred to have been made in a cause tried on the nineteenth day of January, A. D. 1876, after the suit of which the entry in Book Q of Judgments is said to be the record, had been determined and ended.

Wharton on Crim. Law, ed. 1852, page 220;
United States v. Bowman, 2 Wash. C. C. Rep., 328;
United States v. McNeal, 1 Gallison, 387.

In these cases it is established that, in an indictment for perjury the day on which the offence was committed must be precisely stated,—and, of course, proved as laid.

By admitting the declaration for the seduction of Eleanor H. Longstreet, as the missing narr. in the case, referred to in the entry in Book Q of Judgments, and by admitting as a complete record the entry in Book Q of 10 Judgments, the jury were misled, and, in the absence of any explanation, were permitted to infer and conclude that the entry offered was a record and a complete record of the cause referred to in the indictment, whereas no record was ever produced of the cause referred to in the indictment in which the alleged perjury was charged to have been committed.

III. The court erred in charging the jury "we now say that the swearing was upon a matter material to the point in question in the judicial proceeding referred to." 20

Its materiality was a necessary averment in the indictment. It must be established by evidence, the same as any other ingredient of the crime, and cannot be left to presumption or inference to be exercised by the court or jury.

State v. Aikens, 32 Iowa, 403.

It lies on the prosecutor to prove its materiality.

Com. v. Pollard, 12 Met., 225.

We submit that the materiality of the testimony to the issue in *Longstreet v. Gordon* was a question for the jury 30 under the instruction of the court, and not exclusively for the court. This seems to be the conclusion of Mr. Bishop, although there may be a case or two to the contrary.

2 Bish. on Cr. Proc., § 874.

Such also appears to be the doctrine held in *Rex. v. Dunstan, Ry. & Mood., 109.* In that case the jury were *instructed* by the court that the fact sworn to and complained of was immaterial and irrelevant, and therefore the defendant was acquitted.

In *Com. v. Farley, Thatcher 667*, on a preliminary motion in which the materiality of the evidence complained of was raised upon the record, the court held the same doctrine and said: "For these reasons I am prepared to say that the evidence complained of was irrelevant and immaterial to the matter, which was then pending before the court in a course of law. Its materiality remains to be settled by the verdict of the jury. They are the constitutional and legal judges of the matter, and to them the whole subject will be fresh. *It would be an act of usurpation in this court to presume, under the circumstances, to take the case from their cognizance.*

2. The material question in the cause referred to in the indictment was whether David H. Gordon ever had sexual intercourse with one Ellen H. Longstreet.

And the perjury is assigned on his swearing that he never had sexual intercourse with her.

By the evidence it nowhere appears that David H. Gordon was asked in the trial shown whether he ever had sexual intercourse with Ellen H. Longstreet, and it is nowhere proved that he *falsely* swore that he never had sexual intercourse with her.

So there was no proof whatever that the defendant ever swore falsely as stated in the indictment.

No perjury, as charged in the indictment, was proved.

It will be noticed that the evidence on the trial of the indictment was as to a suit for the seduction of one Eleanor H. Longstreet, in which Gordon had sworn that he never had sexual intercourse with her, Eleanor H. Longstreet.

It was not proved; in fact, it was not attempted to be proved, that he ever falsely swore that he never had sexual intercourse with one Ellen H. Longstreet, as charged in the indictment.

And it nowhere appears in the evidence, either directly or indirectly, how it could be or was material to the matter in difference in the action by Longstreet against Gordon for the seduction of his daughter, Eleanor H. Longstreet, that he had ever had sexual intercourse with Ellen H. Longstreet, another person.

After trying the defendant on the indictment upon the issue raised by the alleged lost declaration—ignoring the indictment and the charges and averments which it contained, the court charged the jury as follows:

"Next, the swearing must have been upon a matter material to the point in question in such proceeding. This part of the definition of this crime introduces us into the regions of debate in this case. The debatable questions in this part, however, are, under the circumstances of this case, *for the court to determine rather than the jury.* Some of these questions have already been indirectly determined by the court during the trial. We now say, that the swearing was upon a matter material to the point in question in the judicial proceedings referred to."

There was no proof whatever of the charge against him as alleged in the indictment; the false swearing (if any) in the trial of the indictment was different from the alleged perjury assigned in the indictment, but, notwithstanding all this, when the court charged the jury, they seem to have inferred that Eleanor H. Longstreet and Ellen H. Longstreet were one and the same person, and, without any evidence, they assumed it to be so.

And without any proof as to the alleged false swearing being material to the matter in difference referred to in the indictment (whatever words were used in the alleged false swearing), the court withdrew from the jury all matters of fact involved in the question of materiality, instructing them that all such matters of fact belong to the court only, and also charging them that the swearing (meaning the swearing set out in the indictment) was upon a matter material to the point in question in the judicial proceedings referred to (meaning, of course, the judicial proceeding referred to in the indictment.)

The question whether Eleanor H. Longstreet and Ellen H. Longstreet were one and the same person was a pure question of fact for the jury, and not for the court only.

By the charge the court took this question of fact away from the jury.

The question of materiality in this case involved the question of the identity of the persons of Eleanor H. and Ellen H., which matter of identity ought to have been left to the jury.

It cannot be pretended that Eleanor H. Longstreet and Ellen H. Longstreet are the same names.

If it should be contended that there was such similarity in the names that they sounded alike when used by people, and that the difference in spelling did not amount to anything, and that the point *idem sonans* applied. Still the court was clearly in error.

Because it is well settled that whether names are sounded alike is a question of fact for the jury only, and not of law for the court.

Commonwealth v. Mehan, 11 Gray 321, and cases cited by the court in opinion.

See also to same point,

Commonwealth v. Stone, 103 Mass., 421;
Commonwealth v. Donovan, 13 Allen, 571.

But in this case the court seems to have assumed the whole matter of materiality to be a matter for the court only, and without any proof upon that point at all—although it involved the indentity of persons, which was a question for the jury only—they decided the whole matter, both of law and fact, regardless of any right of defendant to have the questions of fact submitted to the jury.

In this it is claimed serious wrong was done the defendant. As the case stood, the court ought to have instructed the jury to acquit the defendant and he had a right to expect such instruction.

It is respectfully submitted that the judgment of the Supreme Court and the judgment of the Sessions ought to be reversed.

RENS. W. DAYTON,
Attorney of Plaintiff in Error.

G. C. LUDLOW,
Of Counsel.

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Court of Errors and Appeals.

DAVID H. GORDON,
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THE STATE,
Defendant in Error.
} *In Error.*

BRIEF FOR STATE BY CHARLES HAIGHT, PROS.

The assignment of errors in this case will be found on page 26 of the printed book.

As to the first assignment it is sufficient to say that it nowhere appears in the record that any motion to quash was made, or any exception for refusal to quash taken; therefore the presumption is conclusive that no such motion was made or refused.

Upon a writ of error this court can only look at the record and bill of exceptions: *State vs. Wheeler*, 15 *Vr.*, 88. *D. L. & W. R. R. Co. vs. Dailey*, 8 *Vr.*, 527. *Oliver vs. Phelps*, *Spenc.*, 180. *Durant vs. Palmer*, 5 *Dutch.*, 544. *Perrine vs. Serrell*, 1 *Vr.*, 454. *Associates vs. Davison*, 5 *Dutch.*, 544. *State vs. Fox*, 1 *Dutch.*, 566. *Penna. R. R. Co. vs. Page*, 12 *Vroom*, 183.

Without waiving the foregoing point, I respectfully submit that the indictment is in due form and sufficient in all respects.

The second, third, fourth and fifth assignments all go to one point and may be considered together.

The exceptions on which these assignments are founded will appear by reference to pages 11, 12, 14 and 19 of the printed book.

The point to be decided is whether the Court of Quarter Sessions did right in admitting secondary proof of the

contents of the declaration in Longstreet vs. Gordon, under the facts shown.

It appeared,

I. That a declaration was filed in the case; see evidence of

1. Joseph C. Arrowsmith, Clerk, p. 10.
2. Charles H. Trafford, pp. 12, 13.
3. Charles Haight, pp. 13, 14, 15, also,
4. Register of case referred to by Joseph C. Arrowsmith, p. 10.
5. Minutes of Court, referred to on pp. 10, 11, 19, 21. See copy of same in brief of the other counsel for the State.
6. Judgment Book 2, pp. 10, 11. See copy of judgment in Longstreet vs. Gordon, p. 23.
7. The summons (pp. 12, 21), plea (pp. 10, 11, 21, 23), taxed costs (pp. 10, 11, 21), *Ca. Sa.* (pp. 12, 21) were found.
8. There was a trial and also a verdict, so there undoubtedly was a declaration duly filed.

II. That the declaration was lost; see the evidence of

1. Joseph C. Arrowsmith, Clerk, pp. 10, 11, 12, who says: "I have made search in my office for papers in the case of John S. Longstreet against David H. Gordon for seduction of his daughter; *I could never find the warrant in that case.* I did not look for the summons, all the other papers are gone. *I did not find any declaration; I made search; I looked two hours.* The plea I found, and costs. I can remember that a *narr.* was filed in that case," etc. "Mr. Schanck, who writes in the office, made the pencil marks '*narr.* missing' in Book of Judgments."
2. It appears by an entry on the judgment record that the declaration was then missing in these words, "*narr.* missing," p. 23, line 30. The search was made by the proper officer and was sufficient. *Johnson vs. Arwine*, 13 *Vroom*, 451, *and authorities cited.*

III. There was no evidence that any copy of the lost declaration was in existence.

The only reference to a copy was made by Mr. Trafford, (p. 13), where he says, "I sent a copy of declaration to Mr. Dayton in the case of Longstreet vs. Gordon. I read it in the case; I saw it at the trial."

The trial of the Longstreet-Gordon case took place January term, 1876, six years and a half before the trial for perjury. Mr. Dayton was the attorney of Gordon then, and also in the trial of the perjury case. No copy was produced or mentioned by him, and no evidence was offered or statement made that that, or any other copy of the declaration was in existence.

And even if there had been a copy of the declaration extant, it would have been secondary evidence only, and no better than the oral proof submitted. —2 *Best Ev.*, *Sec.* 483.

The existence at one time and loss of the declaration being established, the authorities are clear that secondary evidence may be used to supply its place in the record and show its contents. *Johnson vs. Arwine*, 13 *Vroom*, 451, *and cases cited. Cook vs. Wood*, 1 *McCord*, 139. *Rochell vs. Holmes*, 2 *Bay*, 487. *Hargett & Wife vs.* ———, 2 *Hayw.*, (*N. C.*), 76 *and cases cited. People vs. Burdick*, 3 *Caines*, 104. *Tuberville vs. Long*, 3 *Hen. & Munf.* 309. *Jackson vs. Todd*, 3 *Johns*, 297. *Jackson vs. Lucett*, 2 *Caines*, 363. *White vs. Lovejoy*, 3 *Johns* 498. *Jones vs. Walker*, 2 *Hayw.*, 291. *Buchanon vs. Moore*, 10 *S. & R.*, 275. *Stockbridge vs. West Stockbridge*, 12 *Mass.*, 400. *Hills vs. Colvin*, 14 *Johns*, 182. *Harvey vs. Thomas*, 10 *Watts*, 63. *Pruden vs. Alden*, 23 *Pick.*, 184. *Evans vs. Thomas*, 2 *Strange*, 833. *Dazrell vs. Bridge*, 2 *Strange*, 1264. *Thurston vs. Slatford*, 1 *Salk*, 284. *Comyn's Dig. Tit. Testmoigne*, *A* 3, *where it is said*, "*So, if a record be lost, or consumed by fire, it may be proved by collateral evidence*," *etc. See also Starkie on Ev.*, 246, 247 *Swift's Evidence*, 3. *Norris & Peake*, 59, *and note* (*f*). *Wharton Cr. Ev. Sec.* 204. *Hoffman vs. Rodman*, 10 *Vroom*, 252.

The last positively known of the declaration was when

Mr. Trafford read it to the jury in opening the case, p. 14.

The proper custodian of it at that, and all other times after it was filed, was the County Clerk, whose chief clerk was called as a witness and declared that the paper could not be found, (see above).—*See Johnson vs. Arwine, sup.*

It already appears that the summons, plea, taxed costs, execution, minutes of the court and judgment record, (except the lost declaration), being all of the papers and records in the case in existence, were offered in evidence.

I submit that there was no error in the action of the Quarter Sessions in admitting secondary proof concerning the missing declaration.

It would open a short and easy defence against the charge of perjury to say that the loss of a paper used in the proceeding in which the false oath was taken could not be supplied by proof of its existence and loss, and secondary evidence of its contents.

It seems pretty safe to say that a man who would commit perjury would dispose of the evidence of his crime, if opportunity offered, and especially when such evidence consisted of a single paper like that declaration.

The materiality of the issue upon which Gordon swore falsely was as distinctly shown by the parol proof as it could have been by the paper.

We also submit that the falsity and materiality of his statement might be shown outside of the record.

That is to say, by the oral evidence upon the point of his having had criminal intercourse with Miss Longstreet.

Taking the evidence of Eleanor H. Longstreet, Edward Brannin and John S. Longstreet on the one side, and the evidence of Gordon on the other side :

He undoubtedly swore on the trial of the seduction case that he had not had sexual intercourse with Miss

Longstreet, and adhered to the same statement on the trial of the perjury case.

The truth or falsity of this statement could be tried without the declaration, and a conviction outside of the record, under such circumstances, ought to be valid.

The sixth assignment of error is based on the exceptions found on pages 13, 15, 16, 20.

The point is that the stenographer's notes should have been produced to show what was sworn to by Gordon at the trial of the seduction case instead of parol evidence.

The answer to this is that the notes mentioned would not have been legal evidence even if they had been produced.

Standing alone they are of no more validity as proof than the notes of the court or counsel.

The stenographer, if sworn, might have used them to refresh his memory, but standing as independent and substantive evidence they were utterly worthless.

It will not be contended that a stenographer's notes were evidence at common law; such things were unknown formerly.

There is nothing in the statutes of N. J. changing the common law in this respect.

For the law authorizing the appointment of stenographers and regulating their fees and duties, see *Rev.* 887, 888, §§ 250, 251, 252.

No error is assigned upon the exception found on page 23.

I submit that no error appears in this case and that the judgment below should be affirmed with costs.

CHAS. HAIGHT,

Pros. of Pleas for State.

BRIEF OF JOHN W. SWARTZ FOR STATE.

The defendant, David H. Gordon, stands indicted, tried, convicted and sentenced for the crime of perjury.

The trial at which the alleged perjury was committed occurred at the Monmouth Circuit Court, in January, 1876.

The indictment against Gordon for the alleged crime of perjury was found by the Grand Jury of Monmouth County, at the May term of the Monmouth Oyer and Terminer, A. D. 1876.

From January, 1876, until May, A. D. 1882, it was not known to the State authorities that Gordon was in the State of New Jersey.

The trial and conviction of Gordon upon the indictment for perjury took place in the Monmouth Quarter Sessions, in June, A. D. 1882.

Six errors, to be found on page 26 of the printed state of the case, are assigned as reasons why this Court should reverse the said judgment and sentence of the Monmouth Quarter Sessions.

Let us look first at the most unimportant errors assigned:

The first error, viz.: "Because the court refused to quash the indictment" is not good because it is not supported by an exception to any ruling of the Judge or proceeding at the trial. Every error assigned must be based upon an exception, and where no exception is taken no error can be assigned. It nowhere appears in the printed state of the case that a motion to quash was made, or that the Court refused to quash the indictment.

In the case of the *Penna. R. R. Co. vs. Page*, 12 *Vroom*, *page* 184, Chief Justice Beasley says:

"But there was no exception taken that embraces the point, and it is impossible for this court to consider or decide it."

In the case of the *State vs. Donnelly*, 2 *Dutcher*, *page* 512, it was held by Chief Justice Green, "In the assignment the ground of error should be specified. The adverse counsel are entitled to know what the exception is, and

the Court is not required to search for errors not definitely pointed out."

The next unimportant error assigned is the sixth, viz: "Because the Court erred in admitting parol testimony to show what was sworn to by David H. Gordon in the suit in the Monmouth County Circuit Court, in the case of John S. Longstreet vs. David H. Gordon."

This error is founded upon the exception taken to the evidence of Charles H. Trafford, on pages 12 and 13; the evidence of Charles Haight, pages 14 and 15; the evidence of Eleanor H. Longstreet, page 16, and the evidence of John S. Longstreet, page 20, of the printed state of the case, which was that Gordon, at the trial of the action for seduction, tried January term, 1876, swore, "He (Gordon) had never had any sexual intercourse with Eleanor H. Longstreet."

The defendant, Gordon, insists that the official stenographer should have been called to prove what Gordon swore to at that trial.

The fact that an official stenographer took down the evidence of Gordon at the trial of the civil suit for seduction cannot exclude the evidence of any one who heard his testimony at that trial from being received on the trial of the indictment for perjury, for the reason that the stenographer's notes taken at the trial of the civil suit are not and cannot be used as evidence at the criminal trial on the indictment, but only to refresh the memory of the stenographer, if he is called as a witness. The stenographer might speak more fully and accurately as to what Gordon swore to at the civil trial, if his memory was refreshed by his notes, than a witness who heard Gordon testify but did not take notes; but that would only go to the weight and credibility to be attached to the stenographer's evidence as compared with the other witnesses' evidence, who testified from memory, but would not in law be a reason against the admissibility of the testimony of those witnesses who swore from recollection. I take the ground that any one who knows what Gordon swore to on the civil trial can narrate it under oath at the subsequent criminal trial, provided it be pertinent to the perjury charged in the indictment.

If that position be false then the logical conclusion is, a stenographer being present at the trial and taking official notes, is the only person competent to swear to the testimony taken at that trial, and all other witnesses are excluded.

Gordon, in his cross-examination, page 22 of the printed pamphlet, referring to his evidence at the former civil trial in January, 1876, says, "I swore on that trial that I never had sexual intercourse with Ella Longstreet." Now if no one but the stenographer could testify on the criminal trial of what Gordon swore to on the previous civil suit, then it logically follows the evidence of Gordon himself would be clearly incompetent to contradict any evidence that a stenographer might give, and a defendant might thus be deprived of his whole defense in a case of this kind. This is an argument *reductio ad absurdam.*

In Wharton's Criminal Evidence, page 227, and section 227, Chief Justice Mansfield, referring to the manner of proving the testimony of a deceased witness in a former proceeding, says: "What a witness since dead has sworn upon a trial between the same parties may be given in evidence either from the Judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given."

I will now pass back to the second, third, fourth and fifth errors assigned, found on page 26 of printed pamphlet.

All these errors shoot at the same target from different standpoints, and I will therefore consider them together.

The second error assigned is based upon the exception to the admission of the judgment record, (to be found on page 23 of printed state of the case), because the *narr.* is missing. The third and fourth errors are founded upon an exception to testimony because the *narr* is absent; and the fifth error assigned is based upon an exception to testimony, and says we *must* look to the already rejected record for the *narr.* It means this: the State must prove the *narr.* by the judgment record; the *narr.* as therein re-

corded must prove the issue, and that that is the ONLY legal way to prove the contents of that *narr.* which was filed in the civil suit between Longstreet and Gordon, tried January, 1876.

Now I refer the Court to the direct testimony of Joseph C. Arrowsmith, on page 10 of the printed state of the case. He says, am Deputy-clerk; I have made search in my office for papers in the case of John S. Longstreet against David H. Gordon for seduction of his daughter; I could never find the *narr.* in that case; I found plea and costs; all the other papers are gone; I did not find any declaration; I made search; I looked two hours," and "this is Judgment Book letter Q; I find in this book a reference to Longstreet vs. Gordon; I find it on page 424; I made search about this time that it was entered; this is signed by Judge Scudder;" and "this book contains the minutes of the Monmouth Circuit Court;" and on page 11, same pamphlet, he says, "I have made search for the papers in this case of Longstreet vs. Gordon since I was on the stand; I find the summons and execution."

From this testimony it appears, as well from the Judgment Book, letter Q, p. 424, that the *narr.* filed in the civil suit for seduction, of Longstreet vs. Gordon, was lost *before* the record was made up; and that a judgment record of the *narr.*, as a matter of fact, never existed. The *narr.* itself is also gone, and was lost before the record was made up. The only reference to the possible existence of any *narr.* whatever is found in Trafford's testimony, on page 13 of the printed state of the case, where he says, "I sent a copy of declaration to Mr. Dayton; I read it in the case; I saw it at the trial."

The one Trafford saw at the trial, if the one on file as appears from what he says, is lost, and never has been known to exist since he read it at the trial, the copy sent to Mr. Dayton may or may not have been received by him. Dayton is the attorney of record for the defendant Gordon, and it was not within the power of the State to produce that copy at the trial of the indictment; and we may reasonably conclude that as no knowledge of the existence of that copy was brought out at the trial of the

indictment by either Dayton, the attorney for Gordon, or by the State, that alleged copy is also lost and not in Dayton's possession.

The facts being as stated, the State was compelled to go into the region of secondary evidence to establish the contents of the "missing *narr.*" and prove its contents by oral testimony, or give up the case as it then stood.

The decisive and all-important question is in this case, then, was the Court below right when it permitted the State to introduce oral testimony to prove the contents of that "missing *narr.*" as to the issuable facts therein charged?

Records, when lost or destroyed, may be proved either by copy or by the recollection of witnesses. *See Wharton on Criminal Evidence*, § 204 *and note* 6, *and cases there referred to. State vs. Hare*, 70, *N. C.*, 658. *Johnson vs. Arnwine*, 13 *Vroom, page* 451, *and case there referred to.* In the same section of Wharton's Criminal Evidence, viz: section 204, it is further laid down:

"But parol evidence will not be received of a record of which only part is lost. That which still exists must be produced or exemplified." See, also, *Starkie on Evidence*, 246, 247. All the papers filed in the civil case of Longstreet vs. Gordon, for seduction of his daughter, and the judgment record are complete except the "missing *narr.*" The following are copies of the papers that were filed and made a part of this brief to show and prove the existence of the civil suit, Longstreet vs. Gordon, and to complete the proof mentioned on page 21 of printed state of the case, viz:

COPY OF SUMMONS.

Circuit Court Summons.

Monmouth County, ss: The State of New Jersey, to the Sheriff of the County of Monmouth, aforesaid, [L.S.] greeting: *You are hereby commanded* to summon David H. Gordon, if in your county he may be found, so that he be and appear before our Circuit Court, to be holden at Freehold, in and for the said County of

Monmouth, on the first day of July next, to answer unto John S. Longstreet of a plea of trespass on the case, to his damage ten thousand dollars, as is said; and have you then there this writ. Witness, Edward W. Scudder, Esq., a judge of our said Circuit Court at Freehold, aforesaid, the twenty-first day of June, in the year one thousand eight hundred and seventy-five.

CHARLES H. TRAFFORD, *Attorney.* THOS. V. ARROWSMITH, *Clerk.*

Endorsed:

MONMOUTH CIRCUIT COURT.

John S. Longstreet, *Plaintiff*,
vs.
David H. Gordon, *Defendant.* } *In Case.*

Returnable July 1st, 1875,

CHARLES H. TRAFFORD, Attorney.

Duly served,

GEO. W. BROWN, Sheriff.

Duly served,

C. E. APPLEGATE.

I hereby depute and appoint C. E. Applegate my special deputy to serve and return the within writ. Given under my hand and seal this twenty-first day of June, A. D. 1875.

GEO. W. BROWN, Sheriff, [L.S.]

COPY OF MONMOUTH CIRCUIT MINUTES.

MONMOUTH CIRCUIT, JANUARY TERM, 1876.

John S. Longstreet,
vs.
David H. Gordon, } *In Case.*

January 18th, 1876.

On motion of Charles H. Trafford, attorney for the plaintiff, it is ordered that the Sheriff return the *venire* in this case, and that the trial come on; whereupon, return being

made, the following persons were duly sworn as jurors, as follows, viz.:

1. Alfred M. Johnson.
2. James C. Whitmore.
3. John D. Vanderveer.
4. John H. Buck.
5. Job S. Barkalow.
6. Cornelius Britton, Jr.
7. James Holloway.
8. Charles Butcher.
9. George T. Smith.
10. John W. Hulse.
11. Chapman Marcellus.
12. Denise Conover.

For Plaintiff.

Charles H. Trafford, *Atty.*
Charles Haight, *Counsel.*

For Defendant.

Dayton & Taylor, *Attys.*
George C. Beekman, *Counsel.*

Evidence for Plaintiff.

1. John S. Longstreet, sw.
2. Dr. Henry G. Cook, sw.
3. Ella Longstreet, sw.
4. William Hendrickson, sw
5. Mary Brown, Jr., sw.
6. Robert Carson, sw.
8. Wm. D. Hendrickson, sw.
9. Cath. Ann Gocherm, sw.
10. Aaron Longstreet, sw.
11. Elizabeth Gocherm, sw.

Evidence for Defendant.

1. Skate Griffith, sw.
2. Hendrick C. Gordon, sw.
3. Valentine Gordon, sw.
4. Alice Haywood, sw.
5. Mary Brown, sw.
6. James Brown, sw.
7. John H. Wykoff, sw.
8. David H. Gordon, sw.

January 21st, 1876.

The evidence being closed, and counsel heard, the jury retire under charge of the Court with a Constable sworn to attend them, to consider of their verdict; and after a time they return into Court, and all appearing on one call say, on being asked in one form, that they have agreed on their verdict, and by their foreman further say that they find the defendant guilty and assess the plaintiff's damages at eight thousand dollars. Whereupon it is ordered that the verdict and proceedings be recorded and the judgment entered in favor of plaintiff and against the defendant for eight thousand dollars damages, besides costs of suits to be taxed,

On motion of C. H. Trafford,
Plaintiff's Attorney.

Damages	$8,000 00
Costs	122 30
Total	$8,122 30

COPY OF TAXED COSTS.

MONMOUTH CIRCUIT COURT.

John S. Longstreet, vs. David H. Gordon. } *In Case, Costs.* 10

VACATION AND MAY TERM, 1875.	ATTY.	CLK.	CT.	ALS.	
Retaining fee, etc	$1.00	$ .08			
Dr. Summons, sealing, returning and service	.34	.48	$2.00	$3.90	
Mo. for rules arg't fees	2.05	.34			
Term and Crier fee	.80			.09	
Dr. *narr.* copy and filing	2.25	.08			
Search for pleas	.12	.30			20
Copy of plea	.75				
Dr. Replication and filing	1.00	.08			
Breviatt, Att'y & Counsel fee	2.54				

VACATION AND OCT. TERM, 1875.					
Notice of trial, copy & filing	.65	.08			
Dr. venire, sealing, etc	.60	.48		1.25	
Breviatt, Att'y & Counsel fee	2.54				
Stenographer's fee		1.00			
Motion for trial, rule, etc	1.25	.18			30
Mo. for postponement, rule, etc.	1.25	.18			
Term fee and Crier	.80			.09	

VACATION AND JAN. TERM, 1876.					
Notice of trial, copy & filing	.65	.08			
Dr. venire, sealing, etc	.60	.48		1.25	
Breviatt, Att'y & Counsel fee	2.54				
Stenographer's fee		1.00			
Motion for trial, rule, etc	1.25	.18			
Motion for return of panel, etc.	1.25	.18			40

VACATION AND JAN. TERM, 1876.	ATTY.	CLK.	CT.	ALS.
3 sub. & 11 tickets & service...	2.12	.42		3.85
10 witnesses 1 day.....				5.00
1 witness, out of State, 1 day..				3.00
3 sub. & 11 tickets & service again.....	2.12	.42		3.85
10 witnesses 1 day.....				5.00
1 witness, out of State, 1 day..				3.00
10 witnesses 5 days.....				25.00
3 sub. & 11 tickets & service...	2.12	.42		3.85
1 witness, out of State, 5 days.				7.00
Clerk and Crier swearing 11 witnesses.....		1.10		.99
Clerk and Crier swearing jury		.20		.21
" " " " constable to attend jury, and constable's fee.....		.10		.56
Clerk & Crier taking verdict...		.28		.12
Judges' trial fee.....			3.00	
Mo. for judgment final.....	2.05	.18		
Entering, recording and signing judgment.....		1.32	2.00	
Dr. costs, copy, etc.....	.54	.58		
Dr. and recording *fi. fa*.....	.70	.80		
Dr. and recording special *fi. fa.*	.70	.80		
Term fee and crier.....	.80			.09
	$35.38	$11.82	$7.00	$68.10
	11.82			
	7.00			
	68.10			
	$122.30			

I tax costs in above case at one hundred and twenty-two and 30-100 dollars.

March 6, 1876. THOS. V. ARROWSMITH.

Endorsed:

MONMOUTH CIRCUIT.

John S. Longstreet, vs. David H. Gordon. } *In Case, Costs.*

CHARLES H. TRAFFORD, Attorney.

Filed March 9th, 1876,

THOS. V. ARROWSMITH, Clerk.

COPY OF *CA. AD SA.*

Monmouth County, to wit: The State of New Jersey, to our Sheriff of our County of Monmouth, greeting: [L.S.] *We command you that* you take David H. Gordon, if he may be found in your County, and him safely keep, so that you may have his body before our Judge of our Circuit Court, to be held at Freehold, in and for our said county of Monmouth, on the first day of May next, to satisfy John S. Longstreet, plaintiff, of the sum of eight thousand and one hundred and twenty-two dollars and thirty cents, which the said John S. Longstreet, plaintiff, lately in our Circuit Court, holden at Freehold, in and for our said county of Monmouth, before our Judge thereof, recovered against the said David H. Gordon for the damages which he had sustained as well on occasion of a certain grievance then lately committed by the said David H. Gordon against the said John S. Longstreet, plaintiff, as for the costs and charges by the said John S. Longstreet, plaintiff, about his suit in that behalf expended, whereof the said David H. Gordon is convicted, as appears to us of record, and have you then there this writ.

Witness, Edward W. Scudder, Esquire, Judge of our said Circuit Court, at Freehold aforesaid, the ninth day

of March, in the year of our Lord one thousand eight hundred and seventy-six.

CHARLES H. TRAFFORD, Attorney. THOMAS V. ARROWSMITH, Clerk.

Endorsed :

MONMOUTH CIRCUIT COURT.

John S. Longstreet, vs. David H. Gordon, } *In Case, Ca. Sa.*

Returnable May Term, 1876,

CHARLES H. TRAFFORD.

Levy damages.....$8,000 00
Costs..... 122 30

$8,122 30

Int. from Jan. 21, 1876,
Sheriff's fees,
Defendant not to be found,

GEORGE W. BROWN, Sheriff.

Received March 9th, 1876, recorded in the Monmouth County Clerk's Office, at Freehold, in book Y of Executions, page 224.

THOMAS V. ARROWSMITH, Clerk.

All these records of the trial at which the alleged perjury was committed are admissible as inducements though not to prove the perjury. *See Wharton on Criminal Evidence, section* 602 (*a*).

The minutes of a Court are to be regarded as proof of the action of the Court in any matter to which they relate. The object being to show that some proceeding has occurred before the same Court, and are admitted in lieu of the record whenever the formal record cannot be presumed to have been made up. *See Whar. on Crimn. Evidence, section* 604.

The trial and proceedings at which the alleged perjury

was committed are fully established by the minutes of the Monmouth Circuit Court, the summons, plea, judgment record, taxed costs, and *Ca. ad Sa.* In view of all the facts of the case, its importance as a warning to criminals of this class, the impartial trial of defendant, which was had without any prejudice to his defense upon the merits of the case, I most respectfully submit to your Honors that the rulings of the Quarter Sessions were right, and that the judgment below should stand with costs.

JOHN W. SWARTZ,
Counsel for State.

No 45
Clerks Table

NAAR, DAY & NAAR, Printers and Stationers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals.

DAVID H. GORDON,
Plaintiff in Error,
v.
THE STATE OF NEW JERSEY,
Defendant in Error.

On Writ of Error to Supreme Court.

Writ of Error Sur. Indict. for Perjury.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY
v.
DAVID H. GORDON.

Returnable January 22, 1884.

NEW JERSEY, *ss*—The State of New Jersey to the Chief Justice and Associate Justices of the Supreme Court of the State of New Jersey,
[L. S.] GREETING:

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain indictment in our Court of Quarter Sessions, holden in and for our county of Monmouth, made against David H. Gordon, whereby the said David H. Gordon was charged with the crime of perjury, whereof the said David H. Gordon, by a certain jury of the said county of Monmouth, taken thereupon between us, the said David H. Gordon, before the said Court of Quarter Sessions, holden in and for the county of Monmouth aforesaid, is therefore convicted, as it is said, which said record, proceedings and judgment, by reason of error alleged to have happened therein, we caused to be certified and brought into our Supreme Court, before the justices thereof, at Trenton, and the judgment of the said Court of Quarter Sessions thereupon, is in all things affirmed, as is said, and it is alleged that in the giving of said judgment in the Supreme Court, and in the record and proceedings therein manifest error hath intervened to the great damage of the said David H. Gordon, as by his complaint we are informed. We being willing that the said error, if any there be, should be duly corrected and full, speedy justice done to the said David H. Gordon in this behalf, do command you, that if judgment be thereupon given and the said judgment affirmed, then you send distinctly and plainly, under your seals, or the seal of one of you, the record and proceedings aforesaid, as well the record and proceedings in our Supreme Court, as the record and proceedings of the Court of Quarter Sessions aforesaid, with all things touching the same and this writ, to our Court of Errors and Appeals in the last resort in all causes, to be held in Trenton on the third Tuesday of January, inst., before our judges of our said court, in order that our said court may inspect the record, proceedings and judgment aforesaid, and your judgment thereon, and that we may further cause to be done thereupon, for correcting that error, what of right and according to the constitution and laws of the State of New Jersey ought to be done.

Witness the Honorable Theodore Runyon, our Chan-

cellor, at Trenton, the second day of January, in the year of our Lord one thousand eight hundred and eighty-four.

HENRY C. KELSEY,
Clerk.

RENS. W. DAYTON,
Attorney.

A true copy—
BENJ. F. LEE, *Clerk.*

The answer of the Justices of the Supreme Court 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 in a certain schedule to this writ annexed, as within we are commanded.

M. BEASLEY, [L. S.]
C. J.

Writ of Error Sur. Indict. for Perjury.

The State of New Jersey, county of Monmouth, *ss.*— Be it remembered, that at a Court of Oyer and Terminer and General Jail Delivery, held at Freehold, in and for the said county of Monmouth, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and seventy six, before Edward W. Scudder, esquire, one of the associate justices of the Supreme Court of Judicature of the State of New Jersey, and Amzi C. McLean, George W. Shinn, George H. Sickles, and John W. Herbert, esquires, judges of the Inferior Court of Common Pleas, in and for the said county of Monmouth, according to the form of the statute in such case made and provided, by the oaths of John P. Cooper, James Broadmeadow, William Madden, Charles Nelson, Jacob

Sickles, Lafayette Conover, Robert Laird, Garret Van Mater, Tunis Denyse, Samuel R. Wetherill, Arthur Wilson, John W. Barker, Kortenius Wyckoff, Benjamin Hathaway, James Bowne, Thomas E. Snyder, Charles H. Valentine, John W. Hoff, John A. Errickson, Daniel Conover, Charles Allen and Joseph H. Cooper, good and lawful men of the said county of Monmouth, then and there duly summoned, and then and there sworn, and charged to inquire in behalf of the State of New Jersey, in and for the said county of Monmouth, it is presented in manner and form following, to wit.:

Monmouth county, to wit.:

The Grand Inquest of the State of New Jersey, in and for the body of the county of Monmouth, upon their respective oaths, present: That heretofore, to wit., on the nineteenth day of January, in the year of our Lord one thousand eight hundred and seventy six, in a certain cause in a plea of trespass on the case, wherein one John S. Longstreet was plaintiff, and one David H. Gordon was defendant, was depending in the Circuit Court of the county of Monmouth and State of New Jersey, before Edward W. Scudder, esquire, one of the associate justices of the Supreme Court of the State of New Jersey, and such proceedings were thereupon had, that the matters in difference in the said cause then and there came on to be tried in due form of law, and was then and there tried by a jury of the county in that behalf duly sworn and taken between the parties aforesaid in the said Monmouth County Circuit Court, before Edward W. Scudder, esquire, judge as aforesaid, at the court house, in the township of Freehold, in the county of Monmouth and State of New Jersey, and at and upon the said trial of the said matters in difference, the said David H. Gordon, late of the township of Matawan, in the county of Monmouth aforesaid, did then and there, to wit, on the nineteenth day of January, in the year of our Lord one thousand eight hundred and seventy-six, at the court house, in the township of Freehold, in the county of Monmouth aforesaid, and within the jurisdiction of this court appear, and was then and there pro-

duced as a witness for and on behalf of himself, the said David H. Gordon, and the said David H. Gordon then and there before the said Edward W. Scudder, esquire, judge as aforesaid, in the Circuit Court aforesaid, and before the jury aforesaid, did take his corporal oath, and was then and there duly sworn upon the Holy Gospel of God, that the evidence which he, the said David H. Gordon, should give to the said court and jury there, in the said cause wherein John S. Longstreet was plaintiff, and he, the said David H. Gordon, was defendant, touching the matters in difference between the parties, should be the truth, the whole truth, and nothing but the truth; the said court then and there having competent power and authority through the clerk of said court to administer the said oath to the said David H. Gordon in that behalf: and then and there upon the trial of the said matter in difference it became and was a material question, whether the said David H. Gordon ever had sexual intercourse with one Ellen H. Longstreet, and thereupon the said David H. Gordon being so produced and sworn as aforesaid, devising and wickedly intending to cause and procure judgment to pass against the said John S. Longstreet, on the trial of the said matter in difference and contriving and intending to prevent the due course of law and justice, and unjustly to aggrieve the said John S. Longstreet, and to deprive him of the benefit of his suit in question, and to subject him to the payment of sundry heavy costs, charges and expenses, and not having the fear of God before his eyes, and being moved and seduced by the instigation of the devil, did then and there, to wit., on the said nineteenth day of January, in the year of our Lord one thousand eight hundred and seventy-six, at the court house, in the said township of Freehold, and county of Monmouth aforesaid, and within the jurisdiction of this court, before the said Edward W. Scudder, judge as aforesaid, in the said Circuit Court of the county of Monmouth, and before the said jury so produced and sworn in the cause aforesaid, falsely, maliciously, wilfully, wickedly and corruptly, and by his own proper act and consent, did then

and there depose, swear and give evidence amongst other things to the said court and jury in substance, as follows: That he, the said David H. Gordon, never had sexual intercourse with the said Ellen H. Longstreet. Whereas in truth and in fact he, the said David H. Gordon had had sexual intercourse with the said Longstreet.

And so the Grand Inquest aforesaid upon their respective oaths aforesaid do say, that the said David H. Gordon at and upon the said trial of the said cause at the said court house, in the said township of Freehold, in said county of Monmouth, and within the jurisdiction of this court, on the said nineteenth day of January, in the year of our Lord one thousand eight hundred and seventy-six, before the said Edward W. Scudder, esquire, judge as aforesaid, and before the said Circuit Court of the county of Monmouth, said court having sufficient power and authority to administer said oath to the said David H. Gordon through the clerk of said court in that behalf, and before the said jury so produced and sworn, by his own proper act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, did falsely, wickedly, wilfully and corruptly upon his oath aforesaid, commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of the law, to the manifest perversion of justice, to the evil and pernicious example of all others, against 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.

WM. H. CONOVER, JR.,
Prosecutor of the Pleas.

And afterward, to wit, on Monday the eighth day of May, in the year of our Lord one thousand eight hundred and eighty-two, at a session of the Court of Oyer and Terminer and General Jail Delivery, being as yet of the term of May, by the Honorable Edward W. Scudder, esquire, justice as aforesaid, and Alfred Walling, Jr., John L. Wheeler and Charles A. Bennett, esquires, judges of the Inferior Court of Common Pleas,

at Freehold in the county of Monmouth aforesaid: It is ordered that "All indictments be handed down to the Court of General Quarter Sessions."

And afterwards, to wit, on Thursday, the eighteenth day of May, A. D. eighteen hundred and eighty-two, at a Court of General Quarter Sessions of the Peace, at Freehold aforesaid, in the county of Monmouth aforesaid, by the Honorable Alfred Walling, Jr., president judge of the Court of General Quarter Sessions of the Peace aforesaid, and John L. Wheeler and Charles A. Bennett, esquires, judges of the Inferior Court of Common Pleas aforesaid, it is ordered "that the trial of this indictment be set down for Wednesday, the thirty-first day of May, instant, at 10 o'clock in the forenoon."

At which time, that is to say, on Wednesday, the thirty-first day of May, in the year of our Lord one thousand eight hundred and eighty-two, at a Court of General Quarter Sessions of the Peace aforesaid, at Freehold aforesaid, in the county of Monmouih aforesaid, being as yet of the term of May aforesaid, before Alfred Walling, Jr., John L. Wheeler and Charles A. Bennett, esquires, judges as aforesaid, here cometh the said David H. Gordon, who being brought to the bar here in his own proper person by John I. Thompson, esquire, sheriff of the county of Monmouth aforesaid, (he having delivered himself up) and having heard the indictment read, and forthwith being commanded of and concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, "pleads not guilty, whereupon it is ordered that the plea be entered and recorded, and he enters into recognizance with Albro Crawford in the sum of $500, to appear June 8th next, to answer said indictment," and thereof, for good and evil, he puts himself upon the country.

And Charles Haight, esquire, prosecutor of the pleas of said county of Monmouth, who prosecutes for the State of New Jersey in this behalf, doth the like.

Therefore, let the said indictment be continued until and a jury thereupon come here, before the

said judges aforesaid, at Freehold aforesaid, in the county of Monmouth aforesaid, on Thursday, the eighth day of June, in the year of our Lord one thousand eight hundred and eighty-two, as yet of the term of May aforesaid, of twelve good and lawful men, each of whom shall be a citizen of this State and resident within the county of Monmouth aforesaid, above the age of twenty-one years, and under the age of sixty-five years, by whom the truth of the matter may be better known, and who are not of kin to the said David H. Gordon, to recognize upon their oaths, whether the said David H. Gordon be guilty of the perjury in the indictment aforesaid specified, or not guilty, because as well the said Charles Haight, esquire, prosecutor of the pleas for said county of Monmouth aforesaid, who prosecutes for the State of New Jersey aforesaid in that behalf, as the said David H. Gordon hath put himself upon the said jury, and the same day is given to the parties aforesaid at the same place; at which time, that is to say, on Thursday, the eighth day of June, in the year of our Lord one thousand eight hundred and eighty-two, being as yet of the term of May aforesaid, at Freehold aforesaid, before the said judges here cometh, as well the said Charles Haight, prosecutor of the pleas aforesaid, who prosecutes as aforesaid, as the said David H. Gordon, in the custody of the sheriff as aforesaid, being brought to the bar here in his proper person, by the said sheriff of the county aforesaid; and the jurors of the said jury, by the sheriff of the county aforesaid, for this purpose are paneled and returned, that is to say:

1. David D. Williams,
2. William Sutphin,
3. William Cooper,
4. James S. Stillwell,
5. Andrew H. Schanck,
6. Ruibert Ely,
7. William Conover,
8. Charles Peterson,
9. Robert Harris,
10. George C. Gordon,
11. James E. Johnson,
12. Austin Wilson,

being called, come, who being chosen, tried and sworn to speak the truth of and concerning the premises, and thereupon the trial of the said issue commenced before the said court and jury, and was continued before the

said court and jury until the ninth day of June, in the year of our Lord one thousand eight hundred and eighty-two, at Freehold aforesaid, at which last-mentioned day the said issue, after a charge from the said court was submitted to the said jury, and the said jury, in charge of the officers of said court, duly sworn for that purpose, were taken to a private room to consider on their verdict, and afterward, on the day last aforesaid, at Freehold aforesaid, the said jury return into and before said court, in charge of said officers sworn as aforesaid to keep them in charge; and then and there, in the presence of the said prosecutor of the pleas, Charles Haight, esquire, and the said David H. Gordon, do "say, on being asked in due form, that they have agreed on their verdict, and the counsel for the State and counsel for the defendant, agreeing that the judge on the bench receive the verdict, the jury, by their foreman, further say that they find the defendant guilty in manner and form as he stands charged. The plaintiff's counsel requesting the jury to be polled, it is accordingly done, and each juror says he finds the defendant guilty. Whereupon it is ordered that the verdict and proceedings be recorded, and the defendant be remanded;" and thereupon the said David H. Gordon is committed to the custody of the said sheriff, there to remain until , and upon the twelfth day of June, in the year of our Lord one thousand eight hundred and eighty-two, being produced in and before the said court, at Freehold aforesaid, by the said sheriff, and being in his custody, the said David H. Gordon, "again set at the bar, entered into recognizance with Albro Crawford in the sum of fifteen hundred dollars ($1,500), for his appearance before this court on Monday, the 26th of June next, for sentence." At which time, that is to say, on Monday, the twenty-sixth day of June, in the year of our Lord one thousand eight hundred and eighty-two, before the court aforesaid, at Freehold aforesaid, here cometh the said David H. Gordon, who "being set at the bar for sentence," "having been convicted of perjury." And it being further demanded of the said David H. Gordon, if he has or knows anything to say wherefore the court

here ought not to proceed to judgment and execution against him, who nothing further says, unless as he has before said.

Whereupon all and singular the premises being seen, and by the court here understood—

"It is ordered and adjudged by the court that the defendant, David H. Gordon, be imprisoned at hard labor in the state's prison, for the term of two years from this date, and from thence till the costs of prosecution are paid."

Judgment signed this twenty-sixth day of June, A. D. 1882.

A. WALLING, JR., *P. J.*,
JNO. L. WHEELER,
C. A. BENNETT.

NEW JERSEY, *ss.*—The State of New Jersey to the judges of the Court of Common Pleas of the [L. S.] county of Monmouth, constituting the Court of General Quarter Sessions, holden at Freehold, in and for the county of Monmoth, at the term of May, in the year of our Lord one thousand eight hundred and eighty-two.

Because in the record and process, and also in the giving of judgment upon a certain indictment against David H. Gordon, late of the township of Matawan, in the county of Monmouth, for perjury, pro ut. the said indictment and the several counts therein, whereof before you he hath been indicted and is thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said David H. Gordon, as it is said; manifest error hath intervened to the great damage of the said David H. Gordon, as from his complaint we have received information. We being willing in this behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said David H. Gordon, command you that if judgment be thereon given, that you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, and this writ, to our justices

of our Supreme Court of the State of New Jersey, at Trenton, on the third Tuesday of February, in the year of our Lord one thousand eight hundred and eighty-three, in order that the justices of our Supreme Court may inspect the record and process aforesaid, and may further cause to be done thereupon, for correcting the said error, as of right and according to the constitution and laws of this State shall be meet to be done.

Witness Mercer Beasley, esquire, Chief Justice of our Supreme Court, at Trenton, the twenty-ninth day of November, in the year of our Lord one thousand eight hundred and eighty-two.

BENJ. F. LEE,
Clerk.

RENS. W. DAYTON,
Attorney for Plaintiff.

The answer of the judges of the Court of General Quarter Sessions of the Peace of the county of Monmouth within named—

The record and proceedings, and all things touching and concerning the same, whereof mention is within made, to the Supreme Court of the State of New Jersey within specified, at the day and place within named, we certify in a schedule annexed to this writ, as we are within commanded.

A. WALLING, JR., *P. J.*,
[L. S.] JNO. L. WHEELER,
C. A. BENNETT.

A true copy—
BENJ. F. LEE, *Clk.*

Copy of Judgment.

The court having heard the argument of counsel, and inspected the judgment and proceedings removed by the writ in the cause, and duly considered the causes for error assigned—

It is ordered that said judgment be in all things affirmed, with costs.

It is further ordered that case be remitted to the court below to be proceeded in according to the statute in such case made and provided.

Entered November 12, 1883.

On motion of

CHARLES HAIGHT,
Attorney.

I, Benj. F. Lee, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of an order made in above stated cause by said court and entered in the minutes thereof.

In testimony whereof, I have hereto set my [L. S.] hand and the seal of said court, at Trenton, this tenth day of January, A. D. eighteen hundred and eighty-four.

BENJ. F. LEE,
Clerk.

A true copy—
BENJ. F. LEE,
Clerk.

Assignment of Errors and Consent.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

David H. Gordon, Plaintiff in Error, v. The State, Defendant in Error.	On Writ of Error to the Supreme Court.

It is agreed that the printed case as used before the Supreme Court on writ of error in above cause and the assignment of errors hereto annexed, with the addition of the record returned with the writ of error to the Court of Errors and Appeals, shall be the case upon which the above cause shall be argued by counsel in said Court of Errors, &c.; it being understood that no written opinion has ever been rendered or filed in the said Supreme Court in said cause, and that the defendant in error add to the brief already filed with the Court of Errors and Appeals an answer to the additional assignment of errors by the plaintiff in error.

CHAS. HAIGHT,
The State, Defendant in Error.
G. C. LUDLOW,
Of Counsel with Plaintiff in Error.

Assignment of Errors.

Annexed to foregoing agreement.

COURT OF ERRORS AND APPEALS.

David H. Gordon,
Plaintiff in Error,
v.
The State of New Jersey,
Defendant in Error.

And the said David H. Gordon, by Rens. W. Dayton, his attorney, comes and says that in the records and proceedings aforesaid, and also in the giving of judgment, there are manifest errors, as follows—

First. Because the court refused to quash the indictment.

Second. Because the court erred in admitting the record of the suit in the Monmouth County Circuit Court between John S. Longstreet, plaintiff, and David H. Gordon, defendant. (Pro ut. exception No. 7.)

Third. Because the court erred in admitting parol evidence to show the contents of the declaration in the case of John S. Longstreet against David H. Gordon, when no copy of the declaration alleged to have been filed was produced. (Pro ut. exception.)

Fourth. Because the court erred in admitting parol evidence to show what point was raised in the *narr.* or declaration in the case of John S. Longstreet against David H. Gordon. (Pro ut. exceptions 4 and 2.)

Fifth. Because the court erred in admitting parol evidence to show what (was) the issue in the suit in the

Monmouth County Circuit Court, in the case of John S. Longstreet against David H. Gordon. (Pro ut. exceptions 4 and 2.)

Sixth. Because the court erred in admitting parol evidence to show what was sworn to by David H. Gordon in the suit in the Monmouth County Circuit Court, in the case of John S. Longstreet against David H. Gordon. (Pro ut. exceptions 3, 5, 6, 8.)

Seventh. Because the court erred in charging the jury that the alleged perjury was in regard to a matter material to the issue or point in controversy in the cause therein referred to. (Pro ut. the judge's charge and exception thereto, No. 9.)

Eighth. Because the court erred in not submitting the question of whether the said oath and alleged perjury was to, or as to a matter material to the issue or question in controversy in the cause therein referred to, or a matter of fact for the consideration and determination of the jury. (Pro ut. judge's charge and exception 9.)

Ninth. Because the court erred in assuming by the charge of the court that the said question of materiality was purely a question of law, to be determined by the court, and not a question of fact or of mixed law and fact for the consideration and determination of the jury. (Pro ut. the judge's charge, exception 9.)

Tenth. Because the judgment was given against the said David H. Gordon, whereas judgment should have been given in his favor. Wherefore the said David H. Gordon prays judgment, and that the judgment aforesaid and also the said judgment of the General Quarter Sessions of the Peace of the county of Monmouth, for the errors aforesaid and other errors found, and being in the records and proceedings aforesaid, may be reversed, annulled and altogether held for nothing; and that the said David H. Gordon may be restored to all things

which he has lost by reason of the said judgment, and that the court here may proceed to examine the record and proceedings aforesaid.

RENS. W. DAYTON,
Attorney of Plaintiff.

G. C. LUDLOW,
of Counsel.

Evidence.

Joseph C. Arrowsmith, sworn on the part of the State. I reside at Freehold; am deputy clerk; sworn in as such three years ago; have acted as such since 1868; have charge of records, &c.; also act as clerk of Circuit Court of Monmouth county; I have book in my office known as the Register of Cases. [Book shown witness.] This is the Register of Cases from 1874 to 1878; it is not a record book; I have made search in my office for papers in the case of John S. Longstreet against David H. Gordon, for seduction of his daughter; I could never find the *narr.* in that case; I found the plea and costs; I did not look for the summons; all the other papers are gone; I did not find any declaration; I made search; I looked two hours; the plea I found, and costs; I can remember that a *narr.* was filed in that case from my memory being refreshed by this book; a declaration was filed in this case from my recollection. [Book shown witness.] This is Judgment Book, letter Q; I find in this book a reference to Longstreet v. Gordon; I find it on page 424; I made search about this time that it was entered; that is signed by Judge Scudder; I know his handwriting; that is the suit entered of record there that I made search for *narr.* [Book shown witness.] This book contains the minutes of Monmouth Circuit Court; it is in my handwriting, my brother's, and J. L. Howell's; Howell wrote the names of witnesses for defendant; this is book of minutes of Circuit Court, and includes what I have stated.

Cross-examined—

Mr. Schanck, who writes in the office, made the pencil marks, "*narr.* missing," in Book of Judgments; I have no positive recollection of filing declaration in that case; I have no positive recollection that one was filed; my knowledge is supplied entirely from the register; of course I cannot say when it was filed, if ever; what I get from this book purports absolute proof; this book might not tell the truth, after all.

Re-direct—

[Papers shown witness]—These are the costs in that case, in my handwriting; I taxed them; this is plea in case of Gordon ads. Longstreet; these are produced from the clerk's office.

[The above testimony, in reference to the filing of the *narr.*, where the witness says he speaks entirely from the register, and not from his recollection, objected to by counsel for the defendant as incompetent, and because it allows the written memorandum to supply the recollection of the witness.]

But the court overruled said objection, and allowed the testimony to stand, to which decision and ruling of the court, counsel for defendant excepted and prayed a bill of exceptions, and that it be sealed; and it is hereby allowed and sealed accordingly. Exception No. 1.

A. WALLING, JR., *P. J.*, [L. S.]
JNO. L. WHEELER, [L. S.]
C. A. BENNETT. [L. S.]

Joseph C. Arrowsmith, being recalled on the part of the State, says—

I have made search for the papers in this case of Longstreet v. Gordon, since I was on the stand; I found the summons and execution.

Cross-examined—

There never was any replication or *similitur* filed.

Charles H. Trafford, a witness produced on the part of the State, being duly sworn, testifies as follows—

I reside at Red Bank; am a lawyer, and have been since 1868; I remember the suit of Longstreet v. Gordon; I was attorney for Longstreet in that suit; I drew the *narr.*, or one of my men in the office drew it; I think I know what was in that declaration.

Q. Give the contents of that declaration as to the cause of action?

[To which said question, before the same was answered, counsel for defendant objected.]

Exception No. 2. But the court overruled said objection, and permitted said question to be answered, to which decision and ruling of the court counsel for said defendant excepted, and prayed a bill of exceptions, and that it be sealed; and it is hereby allowed and sealed accordingly.

A. WALLING, JR., *P. J.*, [L. S.]
JNO. L. WHEELER, [L. S.]
C. A. BENNETT. [L. S.]

A. The contents of that declaration as to cause of action—it set forth that John S. Longstreet was plaintiff; that David H. Gordon was defendant; that defendant had sexual intercourse with and had seduced his daughter, and by reason thereof her services were lost to him, and that he suffered great loss; it was an action of trespass on the case; her name was Eleanor, I think; I followed Chitty on Pleading as near as possible in drawing the *narr.*; it charged she became pregnant by David H. Gordon, the defendant in this case; I tried the case; I don't remember the term or time; David H. Gordon swore that he had no connection with her—he denied it; I remember he was on the stand swearing in that case; he was called in his own behalf; I have no doubt about it.

[The above testimony in reference to what David H. Gordon testified to in the case of Longstreet v. Gordon, was excepted to by counsel for defendant, because there was an official stenographer who recorded the proceedings and evidence, and that such record or notes of the

stenographer was the best evidence of what was sworn to on that trial; and before the witness gave said testimony, counsel for the defendant asked witness the question if there was an official stenographer at that trial, to which question witness replied there was.]

But ths court overruled said objection and permitted said testimony to be given, to which decision and ruling of the court counsel for said defendant excepted, and prayed a bill of exceptions, and that it be sealed; and it is hereby allowed and sealed accordingly. Exception No. 3.

A. WALLING, JR., *P. J.*, [L. S.]
JNO. L. WHEELER, [L. S.]
C. A. BENNETT. [L. S.]

I sent a copy of declaration to Mr. Dayton in the case of Longstreet v. Gordon; I read it in that case; I saw it at the trial.

Cross-examined—

I saw and read the declaration, or part of it; it was the *narr.* on file; I have no recollection of my mailing or filing it; the one I read to the jury was the one on file, and not an office copy; the one I saw I cannot swear was from the files; I will swear that the declaration was, to the best of my belief, on file during the trial; I have no positive recollection that I filed or mailed it.

Charles Haight, a witness produced on the part of the State, being duly sworn, testified as follows—

I reside at Freehold, am an attorney and counselor-at-law; I know John S. Longstreet and David H. Gordon; I knew the girl [referring to Mr. Longstreet's daughter,] as a witness in a case in which I was counsel for plaintiff; it was tried before Judge Scudder by a jury; I was associated with Charles H. Trafford, of Red Bank; Miss Longstreet was sworn in that case; David H. Gordon was sworn in that case in his own behalf; he was sworn upon the Bible, I think; there was a declaration in that case; I had it in my possession and read it through carefully.

Q. State, if you please, to the best of your recollection, knowledge and belief, the contents of that *narr.* as to cause of action?

[To which said question, before the same was answered, counsel for the defendant objected.]

Exception No. 4. But the court overruled said objection and permitted the same to be answered, to which decision and ruling of the court counsel for said defendant excepted, and prayed a bill of exceptions, and that it be sealed; and it is hereby allowed and sealed accordingly.

A. WALLING, JR., *P. J.*, [L. S.]
JON. L. WHEELER, [L. S.]
C. A. BENNETT. [L. S.]

A. The contents were as follows: It was an action for seduction; the *narr.* set up the charge; R. W. Dayton and Judge Beekman were attorney and counsel in the case for defendant, and conducted the defence; that declaration and plea were in court on the trial; Mr. Dayton was here; Mr. Trafford opened the case and read the declaration to the jury, and charged the defendant, Gordon, with the seduction of the daughter of Mr. Longstreet, who was sworn in the trial, and the same lady I saw in the court room to-day; I cross-examined Mr. Gordon on that trial; I asked him the question whether he ever had sexual intercourse with Eleanor H. Longstreet, the daughter of plaintiff.

[To which testimony counsel for defendant objected and moved that it be stricken out, because the stenographer's record was the best evidence as to what was sworn to on that trial.]

Exception No. 5. But the court overruled said objection and permitted the testimony to stand, to which decision and ruling of the court counsel for said defendant excepted, and prayed a bill of exceptions, and that it be sealed; and it is hereby allowed and sealed accordingly.

A. WALLING, JR., *P. J.*, [L. S.]
JNO. L. WHEELER, [L. S.]
C. A. BENNETT. [L. S.]

He testified that he had never had any sexual intercourse with Eleanor H. Longstreet, and it will appear in the stenographer's notes; I remember it distinctly, as well as if it was yesterday.

Cross-examined—

The attorney had the declaration that I saw read; I saw it at the trial; I think I saw it at my office when Mr. Trafford called on me.

Eleanor H. Longstreet, a witness produced on the part of the State, being duly sworn, testified as follows— 10

I live at Holmdel; am thirty-two years old; my father's name is John S. Longstreet; I live with my father and mother; am single; was never married; that defendant is David H. Gordon; I have known him since 1874, and in 1874, in February, I was introduced to him at Key Port, at my aunt's; he visited me at my place, or house, in about two weeks after my introduction; he visited me two or three times a week, and oftener; he kept my company privately and before my folks; he had criminal intercourse with me twice, on October 15th and 18th, 20 1874, at my father's house; these two occasions were all; I was in the parlor; it was in the evening; I had a child; it was born the 3d day of July, 1875; he continued to visit me the same as usual after the seduction; he did not come so often in December; I informed him of my condition in November; he gave me medicine on four or five times; I threw away what I did not take; Dr. Henry Cooke attended me in my sickness; I remember the trial which was had here with Gordon; I stated at that trial the same things I do now; Mr. Gordon was present; I 30 was sworn on the trial; Mr. Gordon was sworn the same as I was sworn; I put my hand on the book and kissed it; I have no doubt about it; I heard him testify on that occasion before Judge Scudder; he said he had not had sexual intercourse with me; Mr. Haight asked him the question.

[To which testimony counsel for defendant objected, and moved that it be stricken out, because the steno-

grapher's record was the best evidence as to what was sworn to on the trial.]

Exception No. 6. But the court overruled said objection, and permitted the testimony to stand, to which decision and ruling of the court counsel for said defendant excepted, and prayed a bill of exceptions, and that it be sealed; and it is hereby allowed and sealed accordingly.

A. WALLING, JR., *P. J.*, [L. S.]
JNO. L. WHEELER, [L. S.]
C. A. BENNETT. [L. S.]

Cross-examined—

I don't know the exact question—the question as to time in which he may have been with me; he answered he had not been within the time General Haight asked; it was on the 15th and 18th of October he was with me; the dates were fastened in my memory by the act; the date I know; it might have been another day, but it was not; I can't tell what else happened on those days.

Q. Did you not positively swear that it was the 12th and 15th, on the other trial?

A. I made a mistake, and was called back to fix the date; it was after dark it happened; I don't remember what time, exactly; I have every reason to remember the day; I had no interest in remembering the day and not the hour; I don't remember what time he came there; he did not take tea; he went away before twelve o'clock that evening; the second time was three days after, in the evening; I don't remember the day or time; I had been home all the evening; I don't think I went away that evening; I don't remember what time this happened; it was in the parlor; the family was not in the adjoining room; I don't remember if I was making love with him that evening; he had kept company with me since February; he came often; he was there two or three times a week; he never made a proposition like this before or after; he was a steady lover for three months; he never proposed this thing at any other time; never were engaged to be married; he manifested love, not wisely but too well; I suppose he must have held

out some inducements to me; I cannot tell who was the seducer; I am willing to take my share of the blame; Dr. Cooke was my physician; I could not tell him when the child would be born, exactly; in July, some time, I think, I told him; during that time I did not keep company with other men; they called at the house but not on me; Mr. Gordon was sworn the same as I was; I saw him stand there and he was sworn; I don't remember exactly; I think he put his hand on the book.

Re-direct—

Mr. Gordon talked several times about getting married; he kept store at that time; he talked about keeping house with me; he appeared different in the evenings of the trouble from what he did other times; he was more rude.

Re-cross—

I was a little different, too; I don't know who created it; he did, more than I.

Q. Did you swear on the marriage question before?

A. I don't remember; I don't remember about his not speaking about marriage after the winter of 1874 and 1875; I don't recollect testifying that nothing more was said about marriage afterwards; he did speak about marrying; my recollection would be better then than now about it.

Re-direct—

It was before the occurrences of October 15th and 18th that he spoke of marrying.

Edward Brannin, a witness produced on the part of the State, being duly sworn, testified as follows—

I reside in Jersey City; have resided there three months; in 1874 and 1875 I was at Asbury Park; I know David H. Gordon; I have known him about fifteen years; I had a conversation with him at Asbury Park in regard to the seduction of Ella Longstreet; it was in the winter of 1875 or January, 1876, I am not positive;

it was just previous to the trial of the civil suit; he began the conversation; there was no one by; he asked me what I thought about the case, and if I had heard of it; I said I had; he asked me what I thought about it; I told him I thought he was guilty; he says, "You think I have been there, then;" I said, "Yes; haven't you?" he says, "If I have, I haven't been there within the time she claims I have;" that was all the conversation I remember.

Joseph C. Arrowsmith, being recalled on the part of the State, testified as follows—

[Book shown witness, he says]—This is Book Q of Judgments of Monmouth county Circuit Court.

Judgment Record.

[Record of judgment, John S. Longstreet v. David H. Gordon, in Book Q of Judgments of Monmouth county Circuit Court, page 424 to 427, inclusive, offered in evidence on the part of the State.]

To which offer counsel for the defendent objected, upon the ground that an inspection of it shows that the *narr.* is not set out, and that the record is incomplete.]

[The court thereupon admitted the same in evidence.]

Exception No. 7.

To which decision and ruling of the court counsel for defendant excepted and prayed a bill of exceptions, and that it be sealed; and it is hereby allowed and sealed accordingly.

A. WALLING, JR., *P. J.*, [L. S.]
JNO. L. WHEELER, [L. S.]
C. A. BENNETT. [L. S.]

John L. Howell, a witness produced on the part of the State, being duly sworn, testified as follows—

I reside at Freehold; I remember the case of Longstreet v. Gordon; I swore witnesses in that case; I acted for the clerk at the desk; [book shown witness]—this is book of minutes of Monmouth County Circuit Court; I wrote the names of part of the witnesses sworn; I wrote Gordon's name, the defendant in that suit; he was sworn in the ordinary way, I suppose—I cannot recollect; he was sworn in the case; Judge Scudder was presiding

judge; the defendant, Gordon, was here; I identify him now as the man; I recollect that David H. Gordon swore on that trial upon the point that he had had sexual intercourse with John S. Longstreet's daughter—the charge that was brought against him at that time; it was a suit for seduction; I do recollect that he denied the charge, which was for seduction; Gordon was sworn to tell the truth, the whole truth, and nothing but the truth; this is my entry in this book; I made it because I was acting as clerk at the time; the names of witnesses who have been sworn in the case as titled above, we put down there; he was the eighth witness sworn in that case.

Cross-examined—

I don't remember exactly how he was sworn; it is only when they affirm that they are not marked sworn.

John S. Longstreet, a witness produced on the part of the State, being duly sworn, testified as follows—

I live at Holmdel; lived there all my life; my family is there now; I remember of having a suit against David H. Gordon, in January, 1876, I think; the character of the action was for seduction of my daughter; I attended the trial; I was the plaintiff in the case; I was sworn in my own behalf; my daughter was sworn; she was livtng with me at that time; I have known defendant since he came to the house, some time in 1874; he came to see the girls; I don't know who else; he came plenty often enough; he went in my front door; he kept the young folks' company; he has taken tea several times at my place; he was recognized as a steady visitor at my place; I heard David H. Gordon sworn; he was sworn the same as the rest; he was cross-examined by Mr. Haight; he was sworn in his own behalf; I recollect that he said he had never had sexual intercourse with Ellen Longstreet; at the time he said that he was under oath, in this chair, and before the jury; the court was sitting.

[To which testimony as to what was said at former trial counsel for defendant objected, and moved that it

be stricken out, because the stenographer's record was the best evidence as to what was sworn to on that trial.]

Exception No. 8. But the court overruled said objection, and permitted the testimony to stand; to which decision and ruling of the court counsel for defendant excepted, and prayed a bill of exceptions, and that it be sealed; and it is hereby allowed and sealed accordingly.

A. WALLING, JR., *P. J.*, [L. S.]
JNO. L. WHEELER, [L. S.]
C. A. BENNETT. [L. S.]

Cross-examined—

I can't say how old my daughter is—about twenty eight or twenty-nine years; have five children, none older than she; I cannot say that she was born in 1849; have four daughters; two of them were small; it is about five miles from the house to Key Port.

The following records and papers were offered in evidence on the part of the State:

Minutes of Monmouth Circuit Court, January Term, 1876, pages 544 and 545.

Summons plea, taxed costs and *capias ad satisfaciendum* in case of John S. Longstreet v. David H. Gordon.

David H. Gordon, a witness produced on the part of the defendant, testified as follows—

I have been in the western country; I know Ed. Brannin; I had a talk with him about the time of this difficulty; it was at Asbury Park; the conversation was about this matter; he knew the young lady; he said, you had better go and marry the young girl; I said, the day she swore this on me I was not there, and I could prove it; I used no such language as counsel puts and Brannin swore to; I was in the grocery business in 1874; this is a book used in connection with that firm; on the night of October 15th I was at the grocery store; I closed on the 15th between nine and half-past nine—after nine—o'clock; I went home after I closed; on the 18th I was at Mr. Bell's; I went up after tea; I took tea

at home; my mother and sister were home; I left Mr. Bell's about ten o'clock at night; I went home; on the 15th and 18th of October I was not at John S. Longstreet's house; I never had carnal or sexual intercourse with Ellen Longstreet.

Cross-examined—

I have been in the western country since 1876; I went from here in January; I went there in February; I left when the trial was being summed up; I left because I thought it was prudent; the prejudice was very high at that time; the case was for the seduction of his daughter by me; I left before the jury came in; I returned in January, 1876; I came in 1876, across the ferry; I came out two or three weeks ago to Freehold; before that time I have been in the State and out; I showed myself about; I have been to Matawan within six years, but not publicly; I stayed away from the matter of fact that there was a judgment against me I could not pay; I knew there was an indictment against me all the time; the trial was put off and I sold out the store between those times; I sold out prior to the trial; on the trial I was sworn the same as I was to-day; I was sworn before the jury and Judge Scudder; I swore on that trial I never had sexual intercourse with Ella Longstreet; I first went to Longstreet's, as near as I can remember, in 1874; was there, off and on, about a year; I stopped going, I think previous to January, 1875, frequently; I went there once or twice after that, January, 1875; I believe I went there to see her; I knew about the trouble; I visited her in October, 1874; I was attending quite regularly then; was there as often as two or three times a week; on Sunday nights was with her all alone till eleven and twelve o'clock, in the parlor, doors open; I was there with her at different times alone; several young men visited there from Red Bank and Key Port; I sat on the sofa by her side, with my arm around her; I have kissed her; I think I have kissed her one hundred times; I have been with my arms around her dozens of times; I never took any other liberties with her; I went that far

and no farther; I have hugged her and kissed her and fumbled around, not very often; my courting was no higher in October than any other time; I stopped my visits, I think, in October and November; she told me she was in trouble two months after that.

Q. After what?

A. After she told me she was in the family-way; she told me she was gone two months at the time she told me; I recollect that John S. Longstreet was to see me; I heard of it; my clerk told me; was not at the store when he called; I did not go away when saw him coming; I think not; I think I did not see Longstreet coming; I don't remember.

In charging the jury, the court, among other things, charged as follows:

"Next, the swearing must have been upon a matter material to the point in question in such proceeding. This part of the definition of this crime introduces us into the regions of debate in this case. The debatable questions in this part, however, are, under the circumstances of this case, for the court to determine rather than the jury. Some of these questions have already been indirectly determined by the court during the trial. We now say that the swearing was upon a matter material to the point in question, is the judicial proceeding referred to."

Exception No. 9. Whereupon counsel for the defendant took an exception to the ruling of the said judge as to what was said in his charge on that subject, and prayed that a bill of exceptions thereon be sealed; and it is hereby allowed and sealed accordingly.

A. WALLING, JR., *P. J.*, [L. S.]
JNO. L. WHEELER, [L. S.]
C. A. BENNETT. [L. S.]

Monmouth Circuit, January Term, 1876. John S. Longstreet v. David H. Gordon; in case, on verdict. Pleas before the Circuit Court holden at Freehold, in and for the county of Monmouth, of the eighteenth day of January, A. D. eighteen hundred and seventy-six, as yet of the term of January, A. D. eighteen hundred and seventy-six.

THOS. V. ARROWSMITH, *Clerk.*

[*Narr.* missing.]

And the said defendant, by Dayton & Taylor, his attorneys, comes and defends the wrong and injury, when, &c., and says that he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him. And of this he, the said defendant, puts himself upon the country, &c.

Therefore let there come a jury thereof before the said court at Freehold aforesaid, on the first Tuesday of October, A. D. eighteen hundred and seventy-five, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid, at the same time and place.

At which day, before the court aforesaid, at Freehold aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the sheriff hath not sent the writ to him in this behalf directed, nor hath he done anything thereupon. Therefore, as before, the sheriff is commanded that he cause a jury thereof to come before the said court at Freehold, on the first Tuesday of January, A. D. eighteen hundred and seventy-six, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid, at the said time and place.

At which day, before the court aforesaid, at Freehold aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the jurors of that jury whereof mention is within made, who being duly summoned, also come, who to speak the truth of the matters within contained, being

chosen, tried and sworn, say upon their oaths that the said David H. Gordon did undertake, in manner and form as the said plaintiff hath above thereof complained against him, and they assess the damages of the plaintiff, by reason of the non-performing the premises and undertakings, over and above his costs and charges by him about his suit in this behalf expended, to eight thousand dollars.

Therefore it is considered that the said John S. Longstreet do recover against the said David H. Gordon, his said damages to eight thousand dollars, and also one hundred and twenty-two dollars and thirty cents, by the court now here adjudged to the said plaintiff s, for his costs and charges by him about his suit in this behalf expended, which damages, costs and charges in the whole amount to eight thousand one hundred and twenty-two dollars and thirty cents.

And the defendant in mercy, &c.

Judgment signed this eighteenth day of January, A. D. eighteen hundred and seventy-six.

E. W. SCUDDER.

State of New Jersey, Monmouth county, *ss.*—I, Thos. V. Arrowsmith, clerk of said county, and of the Circuit Court in said county, do hereby certify the foregoing copy judgment to be a true copy thereof, as the same remains of record in my office, in Liber Q of Circuit Judgments, page 424, &c. In witness whereof I have hereunto set my hand and affixed the seal of said county, this twenty-eighth day of July, A. D. eighteen hundred and eighty-two.

[L. S.] THOS. V. ARROWSMITH,
Clerk.

Assignment of Errors.

As used in the Supreme Court.

[Filed June 4, 1883.]

And afterwards, to wit, on the twenty-seventh day of February, as yet of the term of February, in the year of our Lord one thousand eight hundred and eighty-three, before the Supreme Court of Judicature of the State of New Jersey, comes the said David H. Gordon, by Rens. W. Dayton, his attorney, and says that as well in the record and proceedings aforesaid, as also in the rendition of the judgment aforesaid, there is manifest error in this:

First. Because the court refused to quash the indictment.

Second. Because the court erred in admitting the record of the suit in the Monmouth County Circuit Court of John S. Longstreet v. David H. Gordon.

Third. Because the court erred in admitting parol evidence to show the contents of the *narr.* in the case of John S. Longstreet v. David H. Gordon, when no copy of the *narr.* alleged to have been filed was produced.

Fourth. Because the court erred in admitting parol evidence to show what point was raised in the *narr.* in the case of John S. Longstreet v. David H. Gordon.

Fifth. Because the court erred in admitting parol evidence to show what was the issue in the suit in the Monmouth County Circuit Court in the case of John S. Longstreet v. David H. Gordon.

Sixth. Because the court erred in admitting parol tes-

timony to show what was sworn to by David H. Gordon in the suit in the Monmouth County Circuit Court in the case of John S. Longstreet v. David H. Gordon.

Seventh. The court erred in charging the jury that the swearing was to a matter material to the point in question in the judicial proceeding referred to.

RENS. W. DAYTON,
Att'y of Defendant.

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Due and legal service of the within notice is hereby acknowledged.