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# Supreme Court

OF THE

## State of New Jersey

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### **Writ of Error**

*(Filed, March 22, 1915)*

New Jersey, ss:

The State of New Jersey, to William P. 20  
Martin, Esq., presiding Judge of the  
(Seal of Court of Quarter Sessions of the Peace,  
Supreme holden at Newark in and for the County  
Court.) of Essex.

Because in the record and proceedings, and also  
in giving of judgment upon a certain indictment  
against Mollie Monetti, late of the City of Newark  
in the County of Essex for the crime of perjury  
(*Pro ut* the said indictment and the several counts 30  
therein) whereof, before you; she hath been in-  
dicted and is therefore convicted by a certain jury  
of the county, taken between the State of New Jer-  
sey and the said Mollie Monetti, as it is said, man-  
ifest error hath intervened to the great damage of  
the said Mollie Monetti as from her complaint we  
have received information; we being willing, in  
her behalf, to correct the error in due manner, if  
any there shall be, and that speedy justice be done 40

## Return

her, the said Mollie Monetti, command you that if judgment be thereon given, then that you distinctly and openly send under your seal, the records and proceedings aforesaid, with all things touching the same, to our Supreme Court of Judicature, to be held at Trenton, on or before the tenth day of March, next, and this writ, that the  
 10 record and proceedings aforesaid being inspected, we may further cause to be done thereupon, for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

Witness, William S. Gummere, Chief Justice of our Supreme Court, at Trenton, this nineteenth day of February, Nineteen hundred and fifteen.

WM. C. GEBHARDT,  
 Clerk.

20

ANTHONY R. FINELLI,  
 Attorney.

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**Return**

*(Filed March 22d, 1915)*

State of New Jersey, }  
 30 County of Essex. } ss:

I, William P. Martin, Judge of the Court of Quarter Sessions in and for Essex County, New Jersey, do hereby certify and return to the Supreme Court of Judicature of the State of New Jersey the judgment record and proceedings together with all things touching and concerning the same together with the entire record, as by the  
 40 within Writ to me directed, I am commanded.

## Record and Judgment

In Witness whereof, I have hereunto set my  
hand, and the official seal of said Court  
and County at Newark, N. J. this 22d day  
(L.S.) of March A. D., 1915.

WM. P. MARTIN,  
P. J.

10

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**Record and Judgment**

*(Filed March 22d, 1915)*

State of New Jersey, }  
County of Essex. } ss:

BE IT REMEMBERED that at a Court of Oyer and  
Terminer, holden at Newark, in and for the  
County of Essex, on the first Tuesday of April, in 20  
the year of Our Lord one thousand nine hundred  
and thirteen, by the Honorable William S. Gum-  
mere, Chief Justice of the Supreme Court of Ju-  
dicature, of the State of New Jersey, and holding  
the said Court of Oyer and Terminer, in and for  
the County of Essex, New Jersey, by the oaths of  
James E. Bathgate, Charles S. Dodd, Stephen H.  
Granberry, William Mendel, Clarence Rostow,  
George Martin, Edward M. Minion, Frank Wint-  
ers, C. Wildrick Lentz, Horace B. Welshman, Ed- 30  
gar E. Lethbridge, Fayette S. Simonson, Percy H.  
Johnson, William J. Bahrs, Frank Schmitz,  
Thomas E. Curran, August Loehnberg, Frederick  
Wolfarth, Harry H. Hyams, Samuel Nadel, Henry  
Haeberle, Henry J. Gottlob, Charles E. Hetzel,  
good and lawful men of the said County of Essex,  
duly commissioned and then and there duly sworn  
and charged to enquire in behalf of The State of 40

## Record and Judgment

New Jersey, in and for the said County of Essex it is presented in manner and form following, to wit:

ESSEX OYER AND TERMINER.

April Term, A. D. 1913.

- 10 ESSEX COUNTY, to wit: the Grand Jurors of the State of New Jersey, in and for the body of the County of Essex, upon their oaths PRESENT that heretofore, to wit, at the Court of Oyer and Terminer, held in and for the County of Essex for the April Term, 1913, before the Honorable William S. Gummere, Chief Justice of the New Jersey Supreme Court, sitting for the Essex Circuit, and William P. Martin and Harry Osborne, Esquires, Judges of the Court of Common Pleas for the
- 20 County of Essex, to wit: On the first Tuesday of the said month of April, Timonthy F. Foyle, William H. Rose, J. George Schwarzkopf, Louis M. DeForge, A. Plume Gifford, Joseph F. Vinson, John L. Reid, Daniel L. Mc Cormick, Edward T. Lonergan, August H. Winters, Michael Fitzsimmons, Richard C. Coe, Patrick J. O'Connor, Henry Forbell, George J. Wolf, William R. Banks, Charles H. Smith, Henry T. Meyer, Isaac Schlesinger, William H. Mulker, Edward Hughes,
- 30 Stephen L. Stetson and Filippo A. Sacchetti, good and lawful men of the said County of Essex, were then and there duly impanelled and sworn pursuant to law as Grand Jurors and as Grand Jury of the said County of Essex for the April Term aforesaid; and that the said Timothy F. Foyle was then and there sworn in as foreman of the said Grand Jury, and that the said Grand Jury was so
- 40 impanelled and sworn to diligently inquire and

## Record and Judgment

true presentment make of all matters and things given to them in charge and which in any way shall come to their knowledge, touching their service; and that among the matters and things so given to the Grand Jury aforesaid in charge and which came to their knowledge touching their service was the matter of a certain complaint of one Mollie Monetti, now the wife of Joseph Caprio, 10  
for an assault and battery upon her committed by one Francis A. Fiore, on the twentieth day of February, Nineteen hundred and thirteen, at the City of Newark, in the County of Essex aforesaid; and that said Grand Jury so impanelled and sworn as aforesaid, at the City of Newark, in the County of Essex aforesaid, on the sixth day of May, Nineteen hundred thirteen, did diligently inquire into the said complaint of the said Mollie Monetti, for the said offense alleged to have been committed 20  
upon her by the said Francis A. Fiore, at the said City of Newark, in the County of Essex aforesaid, and within the jurisdiction of this Court, on the said twentieth day of February, nineteen hundred and thirteen, and at said inquiry on the sixth day of May aforesaid, the said Mollie Monetti appeared before the said good and lawful men aforesaid, sitting as the Grand Jury for the Essex County aforesaid, as a witness in support of the said assault and battery and then and there was 30  
duly sworn by the said Timothy F. Foyle, the foreman of the Grand Jury aforesaid, and took her corporal oath that the evidence she, the said Mollie Monetti, should give before the Grand Jury (meaning before the said good and lawful men so impanelled and sworn as aforesaid) should be the whole truth and nothing but the truth, the said Timothy F. Foyle, the foreman as 40

## Record and Judgment

aforesaid, then and there having sufficient and competent authority to administer the said oath to the said Mollie Monetti in that behalf. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that afterwards, to wit, on the day and year last aforesaid, upon said inquiry it became and was a material question

10 whether on a certain day between the second day of February, and the twentieth day of February, nineteen hundred and thirteen, the said Mollie Monetti was alone with one Francis A. Fiore, in a certain office at the corner of High Street and Springfield Avenue, in the City of Newark, aforesaid, and that the said Francis A. Fiore did then and there catch hold of the said Mollie Monetti and attempt to throw her on the floor, and that he did make the said attempt with an intent to have

20 connection with the said Mollie Monetti; and that thereupon the said Mollie Monetti, now the wife of Joseph Caprio, having been there and then sworn as aforesaid; did then and there, to wit, at the said inquiry before the Grand Jury on the said sixth day of May, nineteen hundred thirteen, at the City of Newark, in the County of Essex aforesaid, and within the jurisdiction of this Court, wilfully, maliciously, feloniously, wickedly and corruptly falsely swear and give evidence among

30 other things in substance, as follows, to wit: that on one day between February second and February twentieth, nineteen hundred and thirteen, she was alone with Francis Fiore, at an office in a building at the Corner of High Street and Springfield Avenue, and that the said Francis A. Fiore caught hold of her and did try to throw her on the floor and that she fought him and that the said

40 Francis A. Fiore did not succeed; and that the

## Record and Judgment

said Francis A. Fiore did take hold of her and say that she was a nice kid and wanted to have connection with her; whereas in truth and fact the said Francis A. Fiore did not, on the said second day of February, nor on the said twentieth day of February, nor on any day between the second and twentieth days of February aforesaid nor on any other day, catch hold of the said Mollie Monetti 10 and attempt to throw her on the floor; and whereas in truth and fact the said Mollie Monetti did not on the second day of February aforesaid, nor on the twentieth day of February aforesaid, nor on any day between the second day of February and the twentieth day of February aforesaid, nor on any other day, fight him, the said Francis A. Fiore; and whereas in truth and fact the said Francis A. Fiore did not on the said second day of February, nor on the said twentieth day of February, nor on any day between the said second day February, nor on the said twentieth day of February, nor on any other day, take hold of the said Mollie Monetti and say she was a nice kid and that he wanted to have connection with her; as she the said Mollie Monetti then and there well knew: 20

And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Mollie Monetti, now the wife of Joseph Caprio, did on the sixth 30 day of May, in the year of Our Lord one thousand nine hundred thirteen, before the Grand Jury aforesaid, their said Foreman, Timonthy F. Foyle aforesaid, having lawful power and authority as aforesaid, by her own act and consent and of her own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, feloniously, maliciously and corruptly commit wilful and corrupt 40

## Record and Judgment

perjury, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

LOUIS HOOD,  
Prosecutor of the Pleas.

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

And afterwards, that is to say, on the twenty-sixth day of August, Nineteen hundred and thirteen, at the Court of General Quarter Sessions, holden at Newark, in and for the County of Essex, before the Honorable William P. Martin, presiding judge of the Court of Common Pleas, Mollie  
30 Monetti, in the custody of John F. Monahan, Sheriff of the County of Essex aforesaid, and the said Mollie Monetti being brought before the bar in her own proper person and forthwith being demanded of and concerning the premises in the above indictment specified and charged upon her, how she would acquit herself says that she is not guilty thereof, and therefore for good and evil she puts herself upon the country, etc., and Louis  
40 Hood Prosecutor of the Pleas of said State, for

## Record and Judgment

said County of Essex in this behalf doth the like.

Therefore, let a jury thereupon come before the Court of General Quarter Sessions to be holden at Newark, in and for the County of Essex, on the first day of October, A. D. Nineteen hundred and thirteen, then next ensuing twelve free and lawful men, each of whom shall be a citizen of this State and resident within the County of Essex 10  
 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 Mollie Monetti to recognize upon their oath whether the said Mollie Monetti is guilty of the premises in the said indictment specified or not guilty because the said Louis Hood Esq., prosecutor, etc., as the said Mollie Monetti puts herself upon the jury, and the same time is given to the parties aforesaid at the same 20  
 place.

And now, that is to say, the eight day of October, Nineteen hundred and thirteen, to which date the trial of said issue was postponed, at the same Court of General Quarter Sessions holden before the Hon. William P. Martin, Judge of the Court of Common Pleas, comes the said Louis Hood, who prosecutes as aforesaid, and the said Mollie Monetti, and the jury of whom mention is before made, 30  
 and by the said John F. Monahan, Sheriff of the County of Essex, for this purpose empanelled and returned, to wit: (Jury drawn from Special Panel)—Patrick Leavens, Charles H. Van Riper, Louis Sacks, John Shaffrey, John Sandford, George W. Jones, John Phillips, Samuel S. Yardly, Frank A. Rall, L. W. Jacobus, Herman Beisler and Andrew T. Naegelbaum, who, being called, were sworn upon that jury who to speak the 40

## Testimony

truth of and concerning the premises and thereupon the trial of said issue was commenced and continued, when the jury returned into Court in charge of the officer sworn to attend them, and then and there in the presence of the Prosecutor, defendant and Court do say upon their oaths they find the said defendant Mollie Monetti guilty and  
10 so they say all.

Whereupon, all the singular, the premises being seen and by the Court now here fully understood, it is, on the first day of February, Nineteen hundred and fifteen, ordered and adjudged that the said Mollie Monetti be committed to the State Home for Girls.

Judgm't Signed Feb. 1st., 1915.

WM. P. MARTIN,  
Judge.

20

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**Testimony**

ESSEX COUNTY COURT OF GENERAL  
QUARTER SESSIONS

*October 8, 1915*

30

STATE

vs.

MOLLIE MONETTI.

} Indictment No.  
50. Perjury.

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor William P. Martin, Judge, and a jury, at the  
40 Court house in the City of Newark, New Jersey, in

## Timothy E. Scales—Direct

the presence of Assistant Prosecutor, Wilbur A. Mott, Esq., for the State, and Frederick H. Lehlbach, Esq., for the defendant.

Mr. Lehlbach: I waive the reading of the special panel.

Before the prosecutor opens I would like to suggest a formal amendment in the indictment. The indictment reads against "Mollie Monetti." 10  
Since the beginning of these proceedings she has married and her name is "Mollie Caprio."

Mr. Mott: The indictment is against the name of the party at the time it was found. If the name has been changed since then, that question better be postponed. I do not question counsel's statement.

The Court: That course will be followed.

Mr. Mott opens for the State. 20

TIMOTHY E. SCALES, sworn for the State:

Direct-examination by Mr. Mott:

Q. Mr. Scales, you are the clerk of the Essex County Grand Jury, are you? A. I am.

Q. And as clerk when you are present do you take stenographic notes of the evidence given before the Grand Jury? A. Yes, sir. 30

Q. Do you recall whether or not the Grand Jury had before it, some time in February, 1913, a complaint of Mollie Monetti against Joseph Caprio?

Mr. Lehlbach: I object to the question because it is leading. That is a good ground for objection, but as a matter of fact I think the question incorporates what is not a fact. There is no complaint by Mollie Monetti against Joseph Caprio. 40

Timothy E. Scales—Direct

The Court: Why can he not answer it and then that will settle the question?

Mr. Mott: Counsel is right. I misread it. I meant against Francis A. Fiore.

A. There was no written complaint against Francis A. Fiore.

Q. Did Mollie Monetti appear as a witness before the Grand Jury? A. She did, but not in the month of February.

Q. I was going to ask you when she appeared.

A. Sixth day of May, 1913.

Q. And was she duly sworn before the Grand Jury to tell the truth, the whole truth and nothing but the truth? A. She was.

Q. And did she testify before the Grand Jury at that time? A. She did.

Q. And did she testify to certain matters involving Francis A. Fiore? A. She did.

Q. Have you with you your stenographic notes of her testimony at that time? A. Yes, sir.

Q. From your notes can you tell—what are your notes? A record of what? A. I would have to make a little explanation. These notes are divided into two parts. Mollie Monetti was a witness in the case of the State against Joseph Caprio and gave testimony against Joseph Caprio, and later was asked a question and gave testimony against one Francis A. Fiore. I presume it is the Fiore testimony that is asked for.

The Court: With reference to the Fiore matter that was then under the investigation of the Grand Jury.

Witness: There was no complaint against Francis Fiore.

The Court: Under the investigation of the Grand Jury?

Timothy E. Scales—Direct

Witness: It was brought out in the testimony.

The Court: Did it result in an indictment against him?

Witness: It resulted in an indictment against Francis A. Fiore.

The Court: Now ask the question.

Q. What are your—what do your stenographic notes—what are your stenographic notes that you have here? A. The witness is asked to tell— 10

Q. No. I want first what are they, Mr. Scales—your notes? What do they contain? A. They contain the testimony of Rose Monetti and Mollie Monetti as witnesses in the case of the State against Joseph Caprio and then the testimony of Mollie Monetti as to actions of one Francis A. Fiore.

Q. And was the testimony as to Fiore one of the incidents to the testimony as to Caprio, or was it an independent investigation? A. An independent investigation. 20

Q. Well, now, will you tell us what she said at that time about Mr. Fiore? A. Question was asked to tell about Fiore.

Mr. Lehlbach: Is that what the notes say?

Witness: Yes, sir. "Tell us about Fiore." That is the question.

The Court: These questions are asked by the foreman, are they? 30

Witness: I couldn't tell who this question was asked by, your Honor.

The Court: They are asked by one of the Grand Jury?

Witness: By one of the Grand Jury. My thought is this was asked by a juror. "I went to Fiore's office. It was between February 2d and February 20. Caprio took me there and left me. 40

## Timothy E. Scales—Cross

There was no one in the office but Fiore at the time. He caught hold of me and tried to throw me on the floor. I fought and he didn't succeed. He didn't raise my clothing because I fought him. When he had hold of me he said I was a nice kid and wanted to have something to do with me. He told me he wanted to have connection with me. He let me  
 10 alone and then Joe Caprio came in. I told Joe what Fiore had tried to do to me and he said he didn't believe me.

Q. This is the whole of her testimony? A. That is the testimony as I have it reported.

## CROSS-EXAMINATION by Mr. Lehlbach:

Q. Mr. Scales, there was something said about the complaint against Fiore being under investi-  
 20 gation. What, either in the business committee of the grand jury or in the shape of a complaint or in the shape of a suggestion from the prosecutor or in the shape of anything, was there before the Grand Jury concerning Francis A. Fiore? A. There was no complaint to my knowledge against Francis A. Fiore.

Q. You would have knowledge of the complaint if there were a complaint? A. If there was a complaint against Francis A. Fiore I would know it—  
 30 that is a written complaint—or if complaint had been made by the business committee—I attend the sessions of the business committee and I would have known it.

Q. If there is a request to have a matter investigated to the Grand Jury without a formal complaint would that not be within your knowledge as clerk of the Grand Jury, if it were made to any-  
 one.

40 The Court: How can he answer ques-

## Timothy E. Scales—Cross

tions of law? The oath of a Grand Juror is to truly present all matters which shall come to his knowledge. Now, perhaps a juror alone might get information and ask questions and Mr. Scales, the clerk of the Grand Jury, obviously would not know anything about it. You are asking him to determine a question of law. He can say 10 whether or not he knew anything about any complaint, but you are asking him to testify to a matter of law.

Mr. Lehlbach: I am asking him would it be within his knowledge if there was any kind of complaint to anyone in authority from outside, whether in writing or whether to the prosecutor, to take up an investigation.

Mr. Mott: He answered that. 20

The Court: He said it would be if it were in writing, but there is another way to get a matter before the Grand Jury, and that is to tell a Grand Juror and that he wouldn't know—or perhaps there are other ways which the Court has not mentioned.

The Court: How are matters, that are, so to speak on the calendar, before the Grand Jury brought before it?

Mr. Mott: I desire to enter an objection 30 to this, your Honor. I think it is perfectly immaterial how this matter was brought before the Grand Jury. The witness testified under oath to certain things. It doesn't make any difference how it came there.

Mr. Lehlbach: It may be material.

The Court: Of course if this were not a statement under oath in a legal proceeding 40

## Timothy E. Scales—Cross

perjury could not be predicated upon it. Perhaps it is. I am not sure that it is. I am inclined to think that you are right, Mr. Prosecutor, but there is a possibility that this particular question tends to elicit whether or not this was an actual proceeding before the Grand Jury.

10 Q. Has the Grand Jury a business committee?

A. It has. Each Grand Jury has a business committee.

Q. What is the function of the business committee among other things? A. The functions of the business committee are to arrange the business, to go over the complaints and lay out the work for the following week of the written—that is the written complaints.

20 Q. Of course. Pursuant to this duty in that behalf did the business committee lay out for the 6th day of May a series of matters to be investigated? A. Well, I presume it did.

The Court: He cannot presume. You have got to state whether or not you know.

Q. You are the clerk? A. I couldn't say positive whether all the business—this case was a case that would pass through the hands of the business committee. I can speak of this one case—

30 The Court: When you say this one case what do you mean?

Witness: I mean the case of the State against Joseph Caprio.

The Court: You do not mean the special investigation then and there instituted by the Grand Jury which resulted in the indictment of Francis A. Fiore?

Witness: Yes, sir.

The Court: You do not mean that?

40 Witness: I do not.

## Timothy E. Scales—Cross

Q. Mollie Monetti was subpoenaed before the Grand Jury? A. She was.

Q. From where was she subpoenaed? A. From where?

Q. Yes. A. From the office. The subpoena was made out for her and served by one of the officers.

Q. Where did she come from to the Grand Jury?

A. I couldn't tell.

10

Mr. Mott: Pardon me, your Honor, I object. How, in the first place, can this witness know, and, in the second place, what possible difference can it make where she came from?

The Court: Under coercion of some character, you see, the question might be relevant. If you don't know say so, Mr. Scales.

Witness: I think she was in the House—

The Court: You don't know. You didn't see 20 her there, did you?

Witness: No, sir; I don't know positively.

The Court: Why don't you say you don't know.

Witness: I don't know where she was.

Q. Did you direct the issuance of the subpoena to her? A. Yes, sir.

Q. Also instruct whoever was to have charge of its service where the address— A. No, no. The subpoena is made out, and the address, if known, is written on the subpoena, and the officer takes 30 it. Sometimes the party lives there and some times they do not. Chase them up and try to find them.

Q. But the names of the witnesses are endorsed on the complaint, aren't they? A. I beg pardon!

Q. But the names of the witnesses are endorsed on the complaint, aren't they, sometimes? A. Not always.

40

## Timothy E. Scales—Cross

Q. You had charge of the complaint against Joseph Caprio as clerk of the Grand Jury? A. I did.

Q. Was the name Mollie Monetti endorsed on that particular complaint? A. Mollie Monetti's name was endorsed.

Q. Address what?

10 The Court: Is that the original instrument?

Witness: Written in pencil.

The Court: He cannot describe the instrument unless it is produced.

Witness: It isn't my writing.

Q. Is that the complaint against Joseph Caprio? (Indicating.) A. That is the complaint against Joseph Caprio.

Mr. Lehlbach: I ask that it be marked for identification.

20 Paper marked Exhibit D-1 for identification.

Q. Now, the testimony that you have read, given—or supposed to be given by Mollie Caprio—is in narrative form? A. In narrative form.

The Court: Why do you say that? Obviously it is not. It is question and answer.

30 Witness: It is question and answer in that case. There is question and answer to it, yes, sir. That is question and answer. I will correct that answer.

Q. Do you know who asked the question? A. I do not.

Q. Do you know whether or not it was the foreman of the jury? A. I do not.

Q. Do you know it was not the foreman of the jury? A. I do not. My recollection is that it was not.

40 Q. Anybody else ask any questions? A. Oh, jurors were asking questions all the time.

## Timothy E. Scales—Cross

Q. Concerning this Fiore matter? A. No doubt.

The Court: What is the answer?

Witness: That question was asked and the answer given. The question was asked by a juror as my recollection serves me.

Q. Now, weren't there other questions asked in the course of this answer that you have given us and to which part of the answer was a response? 10

A. Well, that might be. That might possibly be. I wouldn't say. I think she went right along and told the story.

Q. Now you haven't those other questions incorporated in your minutes, have you? A. No. I write my minutes—the essential parts.

Q. As a matter of fact what purports to be Mollie Caprio's testimony was in the shape of leading questions by certain members of the Grand Jury and the faltering "Yes" by Mollie? 20

A. No, sir. No, no; no evidence of it, no.

Q. Any other testimony concerning Fiore before the Grand Jury?

Mr. Mott: I object.

The Court: By this witness? By Mollie Monetti?

Q. Any other testimony by—I will ask that question suggested by the Court first. By Mollie Monetti, except as you have read? A. No.

Q. Any cross-examination of her? A. No. I 30  
might have cross-examined her but it doesn't appear in the minutes. Probably did.

Q. If you did cross-examine her neither your questions nor her answers appear? A. My questions I believe were principally to confirm the date.

Q. Did Mollie state her age when she was examined before the Grand Jury? A. Well, I will refer to my notes. 40

## Timothy E Scales—Cross

Q. Will you refer to your notes? A. The age of Mollie Monetti does not appear in her testimony.

Q. Does it appear from your minutes? A. Yes, sir.

Q. What is it? A. Appears in the testimony of Rose Monetti.

Q. What is her age?

10 Mr. Mott: I object.

The Court: What is the purpose of that, counsel?

Mr. Lehlbach: Why, as the Court has already suggested that duress might be a defense in this case and in that a foundation can be laid by cross-examination.

20 The Court: The Court has not suggested that might be a defense. The Court has suggested that if it were the questions on cross-examination might be relevant. The question that must be determined here is whether or not this testimony was testimony given in an indictment or complaint or controversy or matter lawfully pending before the Grand Jury at the time, and secondly, if it was given, is it false and did this defendant wilfully and corruptly swear to the falsity of the same. Now, how is it material as to what other witnesses may have done or said. It may have been the only evidence before the Grand Jury. It may have been a part of a large mass of evidence. What difference does it make as to what the other witnesses said.

30

Mr. Lehlbach: The question asked of this witness is what is Mollie Monetti's age?

40 The Court: He obviously doesn't know. You are asking him to read hearsay evidence.

## Francis A. Fiore—Direct

Mr. Lehlbach: If it please the Court age is one thing that anyone is competent to testify to that has acquired that information by hearsay. Otherwise nobody could—

The Court: Can Mr. Mott testify to your age?

Mr. Lehlbach: Why certainly, if he knows it. If I told him or if my mother has told him, anything of that sort. 10

The Court: Objection sustained.

Defendant's counsel prays an exception to this ruling of the Court, the same is allowed and it is sealed accordingly.

N. P. MARTIN, (Seal.)  
Judge.

20

## FRANCIS A. FIORE sworn for the State:

Direct-examination by Mr. Mott:

Q. Mr. Fiore, where do you live? A. One hundred thirty-nine eighth Avenue, Newark New Jersey.

Q. How old are you? A. Forty-two years.

Q. How long have you lived in this city? A. Seventeen years.

Q. Are you a single or married man? A. I am married, with a family. 30

Q. What does your family consist of? A. Of five children.

Q. Your wife living? A. Yes, sir.

Q. You are living with your wife and family? A. Yes, sir. Of course.

Q. Do you hold any public office or position? A. Yes, sir; I do. 40

## Francis A. Fiore—Direct

Q. What is that? A. I am special deputy clerk for Essex County attached to the naturalization bureau of this county.

Q. And previous to your holding this official position what was your business or occupation?

A. I was a newspaper man. I was editing a newspaper, and I am still editing the newspaper.

10 Q. You are still editing the newspaper? A. Yes, sir.

Q. What is the paper you are editor of? A. La Montagna.

Q. That is an Italian weekly paper? A. Yes, sir.

Q. You were indicted in this county some time ago for an assault on Mollie Monetti, were you not? A. Yes, sir; I was.

Q. You were tried? A. I was tried and ac-  
20 quitted.

Q. Tried in this Court before a jury? A. Yes, sir; in this Court.

Q. Mr. Fiore, is it or is it not true that one day between February 2d and February 20th, 1913, Caprio took Mollie Monetti to your office at the corner of High Street and Springfield Avenue and left her there? A. Absolutely untrue.

Q. Was she alone with you in your office? A. Never.

30 Q. Did you take hold of her and try to throw her on the floor? A. Never.

Q. Did she fight and did you fail to succeed? A. No, sir; absolutely not.

Q. Did you fail to raise her clothing because she fought you? A. I never tried.

Q. Did you catch hold of her and say she was a nice kid? A. I never thought of her—never thought to say such a thing to her.

40 Q. Did you say it? A. Never.

Francis A. Fiore—Cross

Q. And did you say you wanted to have connection with her? A. Absolutely not. I never said such things.

CROSS-EXAMINATION by Mr. Lehlbach:

Q. You know Mollie Monetti? A. Yes, sir; I do.

Q. How old is she? 10

Mr. Mott: If you know.

A. Well, by hearsay—

Mr. Mott: I object.

Q. How long have you known her, Mr. Fiore?

A. About eight months up to date.

Q. Did you know her family? A. I know her mother.

Q. Now, do you know her age? A. Well—

Q. One moment. I am not asking how you learned it. I say, do you know her age? A. Yes, 20 sir; I do.

Q. What is it?

Mr. Mott: One minute. The witness says he knows her age. I would like to find out whether he knows or whether he means by that somebody simply told him.

The Court: You may cross-examine him.

By Mr. Mott: Q. How do you know her age, Mr. Fiore? A. Not the legal age—the official age, I don't know, but approximately I can say how old 30 she is.

Q. How do you know that? A. She was an orphan and she was enclosed in an asylum down in Mulberry Street—

Q. And you had some knowledge— A. At that time I knew it because there was some charity for these poor people and I know that that girl was enclosed in that asylum at the age of sixteen—at the age of six and this was about ten years ago. That is all I know. 40

## Thomas McClelland—Direct

The Court: Answer the question, what is her age?

Further CROSS:

Q. What was her age on the 6th day of May?

A. About sixteen, more or less.

Q. What do you mean by more or less? A.

10 Maybe she was a few months more—maybe a few months less.

Q. You don't mean by that seventeen, maybe?

A. No.

Q. She might have been between fifteen and sixteen or a few months over sixteen? A. A few months over sixteen.

The Court: What May 6th do you mean, this year?

Mr. Lehlbach: 1913.

20 Witness: This year.

Q. Now, you say you are a newspaper publisher? A. Yes, sir.

Q. Do you know Mollie's husband, Joe Caprio? A. Yes, sir.

Q. Is he associated with you in the newspaper work? A. Not associated. He worked. He did work—

Q. He works for you? A. He was employed.

30 Q. Was he employed by you before and after May 6th? A. Not after May 6th. He was discharged after May 6th.

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THOMAS McCLELLAND sworn for the State:

Direct-examination by Mr. Mott:

40 Q. Mr. McClelland, you are clerk of this Court, are you? A. Yes, sir.

## Thomas McClland—Direct

The Court: The clerk of this Court is the county clerk. You are deputy clerk assigned to this Court, aren't you?

Witness: I am assistant to the county clerk. I am not deputy county clerk.

Q. And as such you keep the records and proceedings of this Court, do you? A. Yes, sir.

Q. Can you tell me the date of the trial of Francis A. Fiore? A. I can. 10

Q. What was the date? A. May 19th, 1913.

Q. And on an indictment for what? A. Assault and battery.

Q. Can you tell me whether a witness by the name of Mollie Caprio then testified? A. According to the records in the minutes of that day Mollie Caprio was sworn as a witness.

Q. And did she testify? A. She testified.

The Court: He has stated the contents of the indictment which is a written instrument. The indictment itself ought to be produced. 20

Mr. Mott: I think that may be so but I think I might well insist that the official records stated what an indictment was. He was not giving that from memory. He was giving it from the record.

The Court: He stated that from memory because he said it was for assault and battery. The indictment shows with intent to ravish. 30

Witness: All the record shows is assault and battery.

Not cross-examined.

Fred L. Salmon—Direct

JAMES F. MASON sworn for the State:

Direct-examination by Mr. Mott:

Q. Mr. Mason, you are one of the prosecutor's officers, are you? A. Yes, sir.

Q. And did you have charge of the case of the State against Francis A. Fiore? A. I did.

10 Q. Were you present in Court during the trial of that case? A. I was.

Q. Were you present when a witness by the name of Mollie Caprio testified? A. I was.

Q. Did you see her? A. I did.

Q. Is she in Court now? A. She is.

Q. Where is she? A. The young lady sitting there.

Q. Is that— A. That is Mrs. Caprio; yes, sir.

20 Q. And she is the woman who testified in that case? A. Yes, sir.

Q. Under the name of Caprio? That is all.

Not cross-examined.

Indictment offered in evidence and marked Exhibit 1.

FRED L. SALMON sworn for the State:

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Direct-examination by Mr. Mott:

Q. Mr. Salmon, what position do you hold? A. I am the official stenographer for this Court.

Q. Did you take the testimony in the case of the State vs. Francis A. Fiore on a trial of an indictment for assault and battery? A. I did.

40 Q. Among other testimony, did you take the testimony of Mollie Caprio? A. She was the only witness, yes, sir.

## Mollie Caprio—Direct

The Court: When was that Mr. Salmon?

Witness: May 19, 1913.

Mr. Mott: Have you with you the stenographic notes of her testimony at that time?

Witness: I have.

Q. I show you a typewritten document and ask you what it is. (Hands witness document.) A. It is a transcript of the testimony taken on that day in the case of the State vs. Francis A. Fiore as transcribed from my shorthand notes. 10

Q. It is the testimony of whom? A. Mollie Caprio.

Q. Is this a correct transcription of your stenographic notes? A. Yes, sir.

The Court: Were your notes a correct statement of the testimony given? 20

Witness: Yes, sir.

(Prosecutor reads testimony to jury.)

MOLLIE CAPRIO, sworn on the part of the State:

Direct examination by Mr. Mott:

Q. Mollie, how old are you? A. I was sixteen years old January 9, 1913. 30

Q. You are now married? A. Yes, sir.

Q. When were you married? A. May 12th.

The Court: This year? Witness: Yes, sir.

Q. And you were held as a witness up in the House of detention, were you? A. Yes, sir.

Q. And where were you married? A. Where was I married?

Q. Where? A. Where? In the House of Detention. 40

## Mollie Caprio—Direct

Q. How long had you know your husband, Caprio, before you married him? A. About two years.

Q. Do you know the defendant, here, Mr. Fiore? A. Yes, sir.

10a Q. Do you know where his office is? A. Yes, sir.

Q. Where is it? A. On High Street and Springfield Avenue.

Q. Did you ever go to his office? A. Yes, sir; I went up there two times, and once I went up—I went up to see Joe—and Joe wasn't there once and I walked out again.

Q. How did you come to go to his office to see Joe? A. I was supposed to meet him up there.

20a Q. You mean Joe Caprio, your present husband? A. Yes, sir.

Q. And did you meet him there? A. Well, he wasn't there the last time I went, so I walked right down again.

Q. When you went there when Joe wasn't there did you see Mr. Fiore there? A. I seen him. I only asked him if Joe was there. He told me he wasn't there so I went home again.

30a Q. While you were there did Mr. Fiore do any thing to you? A. No, sir.

Q. Haven't you said that he did? A. I said in the Grand Jury room.

Q. Why did you say it in the Grand Jury room if it isn't true?

The Court: Answer the question, Mrs. Caprio.

A. I was told to say it.

40a Q. Who told you to say it? I want you to tell the whole story, Mollie. You were under oath

## Mollie Caprio—Direct

when you were before the Grand Jury, just as you are under oath now, and I want you to tell us why you say you made the statement before the Grand Jury that wasn't true. A. Well, just to marry Joe. I said all I could to get him. If I wouldn't said that against him I couldn't marry Joe. 10b

Q. Is that the reason you said that before the Grand Jury? A. Yes, sir.

Q. Now, Mollie, haven't you given another reason for saying that you made a false statement before the Grand Jury? A. Yes, sir.

Q. What was the other reason?

The Court: Answer the question.

Mr. Lehlbach: Answer the question.

A. Well, my mother come over there one day— 20b

Q. What? What is that? What did you say, Mollie? A. I said because—I said that I was told to say it.

Q. Who told you to say it? A. My mother told me to say it.

Q. And who else told you to say it? A. My sister.

Q. And who else, if anybody? A. My uncle.

Q. Who is your uncle? A. Uncle Mike.

Q. What is your Uncle Mike's name? A. 30b  
Mike Tellone.

Q. What did your Uncle Mike say to you, Mollie? A. Well, I was in jail,—in the House of Detention—so I thought I could get out. Says if I would do that he would give me a job and make me live always to his house. I would have done anything to get out of jail. That is why I said it.

Q. You mean to say your uncle Michael Tel- 40b

## Mollie Caprio—Direct

lone, told you if you would go before the Grand Jury and make a false statement that you would get out of jail? A. Yes, sir.

Q. Didn't somebody else tell you to make that statement? A. No, sir.

10c Q. Well, are you sure, Mollie, that there wasn't somebody else? A. Yes, sir.

Q. Just after you got out of the House of Detention did somebody else tell you? A. No, sir.

Q. Somebody else? A. No, sir.

Q. Didn't some police officer—did some police officer speak to you as you came from the Grand Jury room? A. No, sir. In the Grand Jury room.

c20 Q. Just after you you came out of there? A. Some man was speaking to my mother. I don't know who he is though. And he asked me if I went against Fiore. I told him yes. And then they called me in again. Then when I came out again he asked me the same thing and then this fellow took me up to the House of Detention.

c30 Q. Mollie, let me tell you. You committed a crime either before the Grand Jury or where you are sitting now. It was a crime it you testified falsely before the Grand Jury against this man. You could be sent to State Prison for it if you were convicted. I am now asking you to tell frankly the Court and jury why you did that thing and I expect you if you do not want any trouble to tell the whole truth? A. Well, I did that just to get out of the House of Detention.

The Court: How did you figure you were going to get out.

Witness: I thought by saying that I would get out.

c40 The Court: Who told you to say that?

## Mollie Caprio—Cross

Witness: My mother told me to say it and my uncle.

Q. Did they tell you why you were to say it?

A. So I would get out, but I didn't know they were going to make any charge against Fiore. I didn't make that to make no charge against him. 10d

Q. Did they tell you to say that Fiore had made this attack on you? A. Yes, sir.

Q. You said before the Grand Jury that he made an attack on you and tried to have connection with you, didn't you? A. I only said—

Q. Didn't you say that before the Grand Jury?

Mr. Lehlbach: Let her answer it. What were you going to say?

Witness: I only said that he put his hand around my shoulder and walked in the other room. That is all I said. 20d

Q. Now who told you to say that? A. My mother did before I went in the Grand Jury.

CROSS-EXAMINATION by Mr. Lehlbach:

Q. Now, Mollie, did anybody give you a piece of paper to take into the Grand Jury? A. Yes, sir.

Q. Who gave you the paper? A. My sister gave it to my mother. My mother gave it to me. 30d

Q. In whose writing was the paper? A. My sister's writing.

Q. Now, when you got in the Grand Jury how did the name of Fiore happen to be mentioned? Did you mention it or did somebody ask you? A. It was written there. Before I went in the Grand Jury they had it on the paper.

Q. You knew one of the members that was sitting in the Grand Jury? A. Yes, sir.

Q. And he asked you about Mr. Fiore? A. Yes, sir. 40d

## Mollie Caprio—Cross

Q. Before you mentioned Mr. Fiore's name?

A. Yes, sir.

Q. And saw him reading from a piece of paper that he had there? A. Yes, sir.

10e Q. Now, were you in the Grand Jury once or twice? A. Twice.

Q. The same afternoon? A. The same day.

Q. Now, when you came to the Grand Jury room with whom did you come, your mother and sister? A. I came with Miss Bell.

Q. You came from the House of Detention with Miss Bell? A. Yes, sir.

Q. Now, when you came out of the Grand Jury room, before you were recalled, did you see your mother? A. Yes, sir.

20e Q. And was she talking with a man? A. Yes, sir.

Q. And have you learned that man's name? A. I don't know just who the man is.

Q. Have you heard his name mentioned? A. No, sir.

Q. Do you know what his name is? A. No, sir.

Q. Do you know Mr. Finelli, the lawyer? A. Yes, sir; I don't know just who he is though.

30e The Court: The question is do you know him or not? Do you?

Witness: I don't know who Mr. Finelli is.

Q. This is your name, isn't it, Mollie? (showing witness paper) A. Yes, sir.

Q. And you read this or had this read to you before you signed it, this paper with your name written on it? You know what is in that paper?

A. Have I read it?

40e Q. Yes. A. Yes, sir.

## Mollie Caprio—Re-direct

Q. You said this, "then when I went to the Court house to go before the grand jury a policeman told me and my mother in the witness room of the court house to go against Joe and Mr. Fiore because they had tried to make him lose his job." You said that, didn't you? A. Yes, sir. 10f

## RE-DIRECT:

Q. Do you know who that policeman was? A. No, sir.

Q. Did you hear his name mentioned? A. No, sir.

Q. At any time? A. No, sir.

By the Court: Q. Would you know him if you saw him? A. No, sir; I don't just remember how he looked.

Q. You saw your mother talking to a policeman, didn't you? A. Yes, sir. 20f

Q. Would you remember him if you saw him? A. No, sir.

Q. Well, were you lying then or are you lying now? A. I was lying then because I was in jail, but now I am not afraid.

Q. Now, you are not in jail and you are willing to tell the truth, is that so? A. Yes, sir.

Q. Well, why did you bring in Mr. Fiore, an innocent man, into this thing? Who told you to bring his name into this thing? Have you got any grudge against Mr. Fiore? A. No, sir. 30f

Q. Why did you say that he made an assault and battery on you in the office of the Naturalization Bureau? A. I didn't say he hit me in there.

Q. You said that he took hold of your clothes and tried to reach your person, didn't he? A. I didn't say that.

Q. Didn't you say that? A. No, sir. 40f

Mollie Caprio—Direct

Further DIRECT:

Q. You say Mollie, that you signed your name to this paper? A. Yes, sir.

Q. And Mr. Lehlbach there is your counsel, is he?

10g Mr. Lehlbach: No; I wasn't her counsel.

Q. And this paper that you signed is a true statement of what took place, isn't it? A. Yes, sir.

Mr. Mott: I offer the statement in evidence.

Mr. Lehlbach: No objection.

Paper marked Exhibit S-I.

Mr. Mott: That is the case of the State. I think there ought to be a direction of not guilty.

20g

The Court: Under the circumstances, gentlemen of the jury, it is your plain duty to render a verdict of not guilty.

Mr. Mott: That is all.

State rests.

Defendant rests.

30g

Mr. Lehlbach: I move for a direction of a verdict in favor of the defendant on the ground, first, that in order to convict one of perjury it must be shown that the statement made in writing or verbally was after an oath had been administered by one competent to administer an oath. The law distinctly says you need not prove the competency of the person who administered the oath. You do not have to exhibit the commission of a notary public or you do not have to prove that the man was a clerk of the grand jury or the foreman, but there is

40g

## Timothy E. Scales—Re-cross

no evidence that in the grand jury there was an oath administered to Mollie Caprio by anyone competent to administer an oath. On that ground I ask for a direction of a verdict. Here you are charging a person with a crime and you have got to prove every element of it. 10

The Court: She says she swore before the grand jury. In her own testimony she admits that.

Mr. Lehlbach: She says she swore. Her conclusion. As to whether the statement was an oath or not is of no probative force.

The Court: The clerk says she was duly sworn.

Mr. Mott: If there is any doubt in your Honor's mind I would ask your Honor to exercise your discretion, as you have a right to do it at this stage of the proceedings and supply that testimony. 20

The Court: On your motion I will reopen the case in order to supply that evidence.

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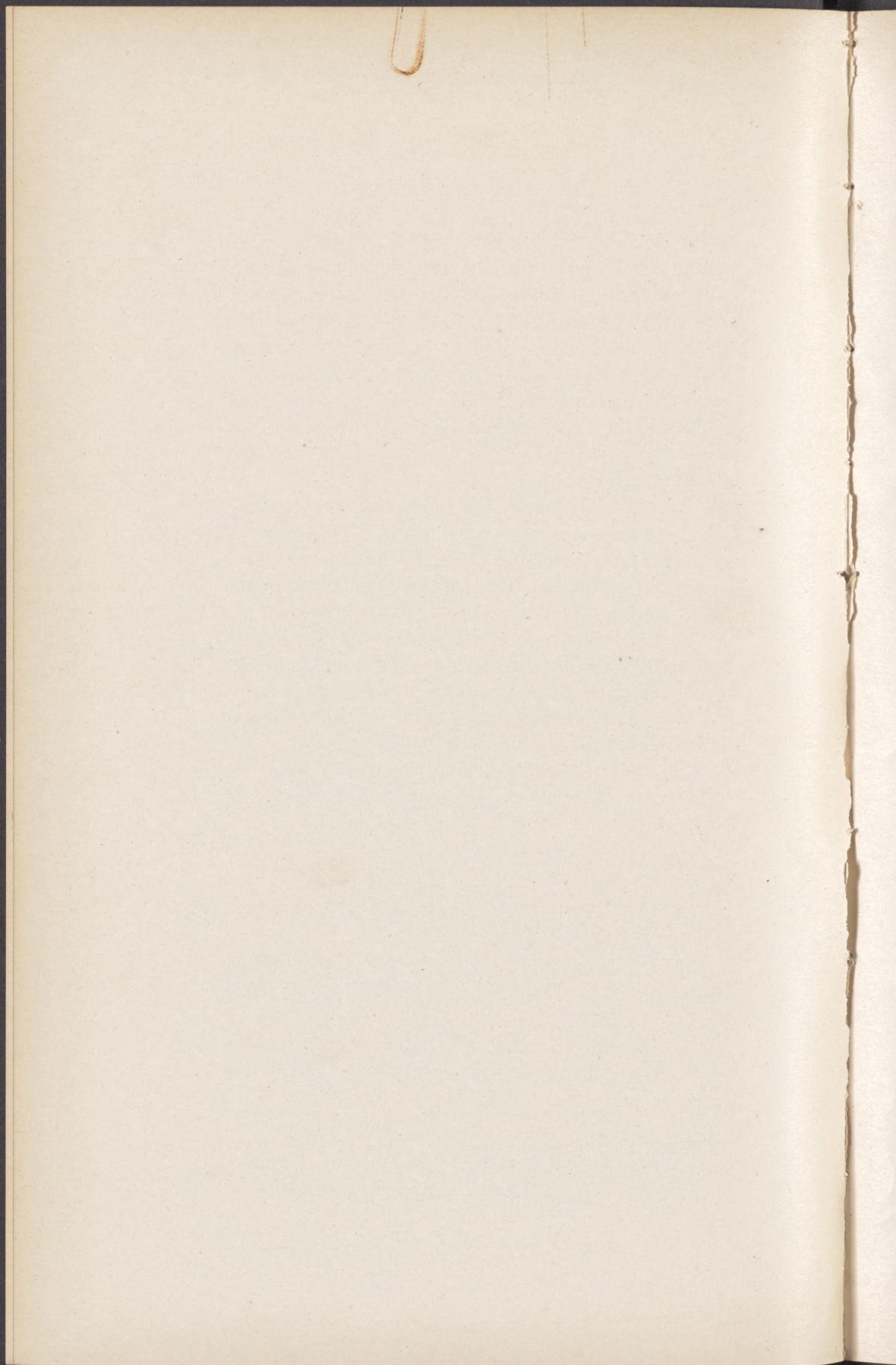
TIMOTHY E. SCALES, re-called for further direct-examination by Mr. Mott: 30

Q. Mr. Scales, you testified that when Mollie Monetti was before the grand jury she was duly sworn? A. She was.

Q. How and by whom? A. She was sworn by—the oath was administered by the foreman of the grand jury.

RE-CROSS:

Q. What was that oath? A. "You solemnly swear that the evidence you will give before this 40



## Timothy E. Scales—Re-cross

grand inquest now sitting for the body of the County of Essex, shall be the truth, the whole truth and nothing but the truth, so help you God.” That oath was administered by Timothy F. Foyle. At that time he was foreman of the grand jury.

Q. And she was there in pursuance of a subpoena in the matter of the investigation of Joseph Caprio? A. She was there as a witness before the grand jury. 10

Q. In the matter of Joseph Caprio? A. Joseph Caprio.

The Court: You have been all over that. He said distinctly that she testified as to the specific investigation before the grand jury because of some knowledge of somebody touching the matter as to one Francis A. Fiore. Isn't that so? A. Yes, sir. 20

The Court: Mr. Mason said she was duly sworn in this Court. Mr. Salmon testified that she was the only witness in the case. Do you rest, Mr. Prosecutor?

Mr. Mott: Yes, sir.

The Court: Do you rest, Mr. Lehlbach?

Mr. Lehlbach: Yes, sir. I renew the motion that I made for the ground stated before the case was reopened.

The Court: That is upon the ground that there is no evidence to show that the oath was duly and properly administered. 30

Mr. Lehlbach: By one competent to administer it.

The Court: Motion denied.

Defendant's counsel prays an exception to this ruling of the Court, the same is allowed and it is sealed accordingly.

(Seal)

WM. P. MARTIN,  
Judge. 40

## Timothy E. Scales—Re-cross

Mr. Lehlbach: Also at this point to form a part of the record under an exception, if I may be permitted to do so, to the reopening of the case.

The Court: It is pretty late. Why shouldn't the Court in its discretion reopen the case?

Mr. Lehlbach: I do not see why it should not. I merely want my objection.

10 The Court: I want to know what your objection is.

Mr. Lehlbach: I objected.

The Court: You did not object at that time, and you did not take an exception.

Mr. Lehlbach: I am asking for an exception at the present time.

The Court: You are not entitled to an exception on a matter which is entirely within the discretion of the Court: You will be allowed an exception to the refusal of the Court to give you an  
20 exception as requested.

Defendant's counsel prays an exception to this ruling of the Court, the same is allowed and it is sealed accordingly.

WM. P. MARTIN,  
Judge.

The Court: What is the other ground of your motion?

30 Mr. Lehlbach: Now I move for a direction of a verdict on the ground that perjury must be in a matter material to the issue in which the witness was sworn. The witness was brought before the grand jury under subpoena as a witness in an investigation concerning one Joseph Caprio and was subsequently questioned in an impromptu investigation concerning one Francis A. Fiore, and therefore, whatever was said in the Francis A. Fiore matter was not material to the issue as  
40 to whether Joseph Caprio should be presented or

## Timothy E. Scales—Re-cross

not, and therefore whatever she did say does not constitute perjury.

The Court: The testimony is that she was sworn by a certain oath by the foreman which was general in its character, swearing her to testify to the truth, the whole truth and nothing but the truth as to any matters concerning which she is requested to testify before the grand inquest, 10 and the oath as given by Mr. Scales which she took on that occasion is not confined to the Caprio case. Then too, there is some evidence that the grand jury found an indictment, and it is impossible to believe that the grand jury would find an indictment without any evidence. The motion is denied upon that ground and exception specifically allowed to the ruling of the Court in connection therewith.

Defendant's counsel prays an exception to this 20 ruling of the Court, the same is allowed and it is sealed accordingly.

WM. P. MARTIN,  
Judge.

(Seal)

Mr. Lehlbach: No further grounds for the motion.

The Court: Do you wish to reopen the case and introduce the testimony of Mollie Caprio?

Mr. Lehlbach: No.

A Juror: May I ask a question? Mr. Fiore, 30 when he was testifying, didn't he say that he had met this girl when she was an orphan?

The Court: He said he met the family and knew something about the defendant.

A Juror: Didn't he say he knew something about the age?

The Court: He said he knew the family and knew something about it. You will have to rely 40

## Charge

on your recollection of the evidence and not the Court's recollection of what the evidence shows.

Counsel summed up.

**Charge**

10 MARTIN, J.

Gentlemen of the Jury: The duty of the Court is to instruct the jury in reference to the principles of law governing the case. The principles of law as charged by the Court should be accepted by the jury as a correct statement of law, but the jury are the sole judges of the facts, the weight and the sufficiency of the testimony, the credibility of the witnesses and the inferences to be drawn  
20 from the evidence. The Court in referring to the testimony is not to be understood as finding any facts, but merely as illustrating or explaining the application of principles of law. If the Court errs in its statement of any of the testimony you are to rely upon your own recollection and not upon the recollection of the Court. If the Court refers to certain parts of the evidence, seemingly giving them particular emphasis, you are not to disregard other evidence which you may deem of equal  
30 or greater importance. It is your duty to consider and weigh all the evidence and pertinent proof bearing upon the question of the guilt of this defendant; not only the evidence that is mentioned by the Court but also all of the facts which may appear by the testimony.

The law presumes that this defendant is innocent. This presumption of innocence can only be overcome by evidence showing beyond a reasonable  
40 doubt the guilt of the defendant. The bur-

## Charge

den of proving the guilt of this defendant beyond a reasonable doubt is on the State, and does not shift from the State throughout the case.

“Reasonable doubt is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is on the prosecution. If upon such proof there be reasonable doubt remaining, the defendant is entitled to the benefit of it by an acquittal. The evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This is taken to be proof beyond a reasonable doubt; because if the law should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.”

This defendant is presented here upon an indictment of the grand jury of Essex County containing one count, which is very long in statement, but which in substance is, that at the Court of Oyer and Terminer held in and for the County of Essex in the April Term, before the judges

## Charge

(naming them), a grand jury was duly sworn, (naming the members of the grand jury)—that they were sworn in pursuance to law as grand jurors of the County of Essex, and Timothy F. Foyle was then and there sworn as foreman; that the said grand jury was so empanelled and sworn diligently to inquire and true presentment make  
10 of all matters and things given to them in charge and which in any way shall come to their knowledge touching their service; that amongst the matters that came before them is the complaint of one Mollie Monetti, now the wife of Joseph Caprio, for an assault and battery upon her committed by Francis A. Fiore on the 20th day of February, 1913, and that she was then and there sworn and that upon being sworn she testified in support of the said assault and battery, and that  
20 her testimony was material in connection with the investigation then pending before the grand jury, and that Mollie Monetti swore that she was alone with one Francis A. Fiore in a certain office at the corner of High Street and Springfield Avenue, that the said Francis A. Fiore did then and there catch hold of the said Mollie Monetti and attempt to throw her on the floor and that he did make the said attempt with intent to have connection with the said Mollie Monetti; that there-  
30 upon the said Mollie Monetti, having then and there sworn as aforesaid, and within the jurisdiction of the Court, did wilfully, maliciously, feloniously, wickedly and corruptly, falsely swear in giving her said evidence (which is repeated), that therefore the grand jury presents her for having committed the crime of wilful and corrupt perjury contrary to the form of the statute and against  
40 the peace and good order of the state.

## Charge

That is a charge of having committed perjury, and the statute which governs in this state, in so far as it is necessary to inform you at this time, is Section 18 of the Crimes Act, which in part is as follows: "Any person who shall wilfully and corruptly commit perjury on his oath or affirmation in any action, complaint, indictment, controversy, matter or cause depending or which may 10 depend in any of the Courts of this state, before any officer duly authorized to take such oath, shall be guilty of a high misdemeanor and punished accordingly." Perjury at common law was defined to be a crime committed when a lawful oath was administered in some judicial proceeding to a person who swore wilfully, absolutely and falsely in a matter material to the issue or point in question.

In order to convict for perjury the law requires 20 the testimony of one witness supported by proof of strong corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of her innocence.

The testimony introduced by the State is that this woman was duly sworn, on her oath, before the grand jury, touching an investigation as to whether or not one Francis A. Fiore had committed a crime, then and there depending before 30 the grand jury, and that she then stated that he had taken hold of her and tried to have connection with her, and other details were given with respect to an alleged assault and battery. This testimony is given by defendant herself in her own admissions here in Court made on the 19th day of May, 1913. It is also given by the clerk of the grand jury, Mr. Timothy E. Scales. And the fact that it was false testimony is also indirectly shown 40

## Charge

by the evidence—is directly shown—by the evidence of Mr. Francis A. Fiore, who testified that nothing of any such character as that ever happened and that he never made any assault or attempted any battery upon this woman, or tried to have connection with her at Springfield Avenue and High Street or in any other place or at  
10 any other time. In other words, he made a complete, absolute denial of the whole matter. So that you have the woman's admission and the testimony of Mr. Scales on the point that the testimony was given. That the testimony was relevant, that an oath was administered and that it was in a judicial proceeding, seems to be perfectly clear upon the testimony presented here by the State. That she made the oath is shown by the  
20 testimony of Mr. Scales and by her own admission, and that it was false is shown by her own admission and the testimony of Mr. Fiore. So that you have the testimony of one witness—in fact two—or at all events proof of strong corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of her innocence. And here, at this trial, you do not have the oath of this defendant before you that she did not wilfully and corruptly falsely swear before  
30 the grand jury except the inference you will draw from her original testimony before the grand jury. If you believe this testimony upon the principles of law stated, it then becomes undoubtedly your duty to bring in a verdict of guilty.

The defense is that there was coercion brought upon the mind of this girl or woman, so that if she did falsely swear she did not do it wilfully  
40 or corruptly, and the nature of the coercion, as

## Charge

the Court gathers it, from the statements of counsel and otherwise, is, that she was compelled by some overwhelming force to testify falsely because she wanted to get out of jail. It is not an excuse in law and surely cannot be in fact a sound and proper defense for testifying falsely that one did so for the purpose of getting out of jail. If that is so, then, of course, the whole fabric of the administration of justice must fall, because if there is no sanction or punishment to follow false swearing done for the purpose of getting out of jail, there will be absolutely no protection in the administration of justice. Then it is suggested that she was coerced by her mother and by her uncle and by her sister. With respect to that, there does not seem to be any testimony that anything that they said, or did, amounted to the presentation to her mind of anything showing some 10  
overwhelming force placing her under duress so that she was compelled to act as she did. Mere exhortation, of course, is not duress or coercion. 20

Then the other suggestion is, as the Court gathers it, that she wanted to marry Caprio. Now a desire to marry is not a sufficient excuse for false swearing. If she did it with the object of marrying Joe—if you believe her in that respect—your duty is to consider whether or not she did not swear falsely, wilfully intending to make a 30  
false oath. Whether the purpose was to marry Joe or get out of jail or otherwise, if it was her own free will and voluntary action, that element of the crime is sufficiently supplied by the testimony.

In this testimony before you, gentlemen of the jury, and as has been argued by some of the counsel, you may reach the conclusion that it is perfectly apparent that this woman either testified 40

## Charge

falsely before the grand jury sometime in May, or whatever date it was, or she testified falsely here on May 19th, and the defendant would have you believe that because you are not absolutely sure as to which day she did testify falsely, that, therefore, she is entitled to the benefit of the doubt and is to be acquitted. That is so, if you do not  
10 know which day she did testify falsely, and is a proper defense to be urged upon your consideration, but you have a right to consider the testimony in this connection, of her own admissions, after the object which she apparently had in mind of marrying Joe, was accomplished; you have the right to consider the testimony of Mr. Fiore, and then too you have the right to consider that she failed to make any explanation upon the witness stand of the testimony given here on May 19, and  
20 before the grand jury at a prior date. The accused is competent but not compellable to be a witness in her own behalf, but her failure to do so raises no presumption of her guilt. Where, however, there is direct evidence to connect the accused with the crime and by her own testimony she could have established an alibi or denied the allegation, her failure to do so may be considered by the jury as an inference against her and the Court is warranted in calling to the attention of  
30 the jury her failure to do so. Now whether she committed perjury before the grand jury and swore falsely, or whether she swore falsely before us here in this Court on May 19th, is a matter which the testimony apparently shows—but that is for you to consider and decide—plainly shows that she knows something about it, and if she fails, when the testimony directly connects her in the manner I have described, to take the  
40 stand and explain, then you have a right to con-

## Charge

sider whether or not she has any explanation to make to the jury of the facts which have been presented here before you.

Now, gentlemen of the jury, some appeal has been made to sympathy—some suggestion has been of sympathy—that this is a young woman or that she has recently married, and she ought to be allowed to go and live with her husband, 10 or some other appeal to sympathy. Of course you have a right to decide cases on the basis of sympathy if you want to, but sympathy has nothing to do with your oath as jurors. Your oath requires you to decide this case upon the evidence before you and sympathy has no proper place in the consideration of the testimony by the jury.

Now, gentlemen, if you believe, upon the evidence in the case, that this woman has been shown beyond a reasonable doubt to have committed the 20 crime as charged in this indictment under the principles of law stated to you by the Court, then your verdict should be guilty. If the testimony falls short of this she is entitled to the benefit of any doubt upon the principles stated—then your verdict, of course, must be not guilty.

Defendant's counsel prays an exception to that part of the charge wherein the Court said that the testimony of Mr. Scales that she was sworn by 30 the foreman or that she was duly sworn was corroborated by her admission, the same is allowed and it is sealed accordingly.

(Seal)

WM. P. MARTIN,  
Judge.

Defendant's counsel also prays an exception to that part of the charge of the Court wherein the Court defined what constituted duress or coer- 40

On Indictment for Perjury, Certificate of Entric  
 cion, the same is allowed and it is sealed accord-  
 ingly.

(Seal) WM. P. MARTIN,  
 Judge.

Defendant's counsel also prays an exception to  
 that part of the charge of the Court wherein the  
 Court referred to the accused not taking the stand,  
 10 the same is allowed and it is sealed accordingly.

(Seal) WM. P. MARTIN,  
 Judge.

Defendant's counsel also prays a general ex-  
 ception to the charge of the Court, the same is  
 allowed and it is sealed accordingly.

(Seal) WM. P. MARTIN,  
 Judge.

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20 **On Indictment for Perjury, Certi-  
 cate of Entire Record**

ESSEX COUNTY COURT OF GENERAL  
 QUARTER SESSIONS

STATE OF NEW JERSEY,  
 vs.  
 MOLLIE MONETTI.

30 I, William P. Martin, Judge of the Essex  
 County Court of General Quarter Sessions, be-  
 fore whom the above stated indictment was tried,  
 do hereby certify that the foregoing is the entire  
 record of the proceeding had upon the trial of the  
 indictment in the above said cause, in the State  
 of New Jersey vs. Mollie Monetti.

Dated, March 22d, 1915.

WM. P. MARTIN,  
 Presiding Judge.

### Stenographer's Certificate

STATE OF NEW JERSEY,  
 vs.  
 MOLLIE MONETTI.

I, F. J. Salmon, official stenographer, Essex County Court of General Quarter Sessions, Part I, do hereby certify that the foregoing testimony and proceedings was taken by me stenographically and thereafter reduced to typewriting, and that the same is an accurate transcript of said shorthand notes. 10

Dated March 22, 1915.

F. L. SALMON.

20

### Assignment of Error

*(Filed March 23d, 1915)*

NEW JERSEY SUPREME COURT

THE STATE,  
 Defendant in Error,  
 vs.  
 MOLLIE MONETTI,  
 Plaintiff in Error.

30

Afterwards, before our said Supreme Court of the State of New Jersey, comes the said Mollie Monetti by Anthony R. Finelli, her attorney, and says, that in the record and proceeding aforesaid 40

## Assignment of Error

and also in the matter recited and contained in the said Bill of Exceptions, and also in giving the judgment aforesaid, there is manifest error in this, to wit:

10 1. That the said Court refused to direct a verdict of acquittal upon the ground: That there was no evidence to show that an oath was duly and properly administered by some person competent to administer an oath, to the manifest prejudice and injury of the defendant in maintaining her defense on the merits of the case.

20 2. There is also error in this, that on the trial of the said cause, the Court before whom it was tried refused to grant a motion for a direction of verdict on the ground that perjury must be committed concerning a matter material to the issue in which the witness was sworn. It appearing that defendant was brought before the grand jury as a witness in an investigation concerning a certain person and was subsequently questioned in an impromptu investigation concerning a certain other person to the manifest prejudice, wrong and injury of the defendant in maintaining her defense on the merits of the case.

30 3. There is also error in this, that the said Court charged the jury as follows:

40 "You have the woman's admission and the testimony of Mr. Scales on the point that the testimony was given. That the testimony was relevant, that an oath was administered and that it was in a judicial proceeding, seems to be perfectly clear upon the testimony presented here by the State."

## Assignment of Error

To the manifest prejudice, wrong and injury of the defendant in maintaining her defense on the merits of the case.

4. There is also error in this, that the said Court charged the jury as follows:

“That she made the oath is shown by the testimony of Mr. Scales and by her own admission, and that it was false is shown by her own admission and the testimony of Mr. Fiore. So that you have the testimony of one witness—in fact two—or at all events proof of strong corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of her innocence. And here, at this trial, you do not have the oath of this defendant before you that she did not wilfully and corruptly falsely swear before the grand jury except the inference you will draw from her original testimony before the grand jury. If you believe this testimony upon the principles of law states, it then becomes undoubtedly your duty to bring in a verdict of guilty.”

To the manifest prejudice, wrong and injury of the defendant in maintaining her defense upon the merits of the case.

There is also error in this, that the said Court charged the jury as follows:

“Now whether she committed perjury before the grand jury and swore falsely, or whether she swore falsely before us here in this Court on May 19th, is a matter which

## Assignment of Error

10 the testimony apparently shows—but that is for you to consider and decide—plainly shows that she knows something about it, and if she fails, when the testimony directly connects her in the manner I described, to take the stand and explain, then you have a right to consider whether or not she has any explanation to make to the jury of the facts which have been presented here before you.”

To the manifest prejudice and injury of the defendant in maintaining her defense upon the merits of the case.

6. There is also error in this, that the said Court entered judgment and pronounced sentence according to law that the plaintiff in error, Mollie  
20 Monetti, be committed to the State Home for Girls, without any showing that the accused was under the age of nineteen (19) years, contrary to the statute in such case made and provided.

Wherefore the said plaintiff in error, Mollie Monetti, prays that the judgment and sentence aforesaid, by reason of the aforesaid errors, and all other errors appearing in the record and proceeding aforesaid, and in giving judgment and passing of sentence aforesaid, be reversed, an-  
30 nulled and held for nothing, and that the said Mollie Monetti may be restored to all things she has lost on occasion thereof.

ANTHONY R. FINELLI,  
Attorney of Plaintiff in Error.

**Specification of Causes for Reversal**

NEW JERSEY SUPREME COURT

THE STATE, Defendant in Error, vs. MOLLIE MONETTI, Plaintiff in Error.	}	10
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PLEASE TAKE NOTICE that in addition to the errors assigned in the Bill of Exceptions, as filed and served in this cause, the plaintiff in error (on the argument of this cause) will also urge and insist that said judgment should be reversed for the reasons and causes herein assigned: 20

1. There was no legal evidence presented to the Court and jury showing that the grand jury before whom the alleged false matter was sworn, was a grand jury duly summoned, impanelled and sworn.

2. The Court erroneously charged the jury in substance that if plaintiff in error gave the false testimony at a time and place other than that specified in the indictment, she was nevertheless guilty. 30

3. The Court further erroneously charged the jury that the testimony showed that plaintiff in error was duly sworn before the grand jury touching an investigation concerning one Francis A. Fiore.

ANTHONY R. FINELLI,  
 Attorney of Plaintiff in Error.

To:

Honorable Frederick F. Guild,  
 Prosecutor of the Pleas. 40

**Writ of Error***(Filed, November 29th, 1916)*NEW JERSEY COURT OF ERRORS AND  
APPEALS

10 New Jersey. ss:

The State of New Jersey to the Chief  
Justice and other Justices of Our  
(Seal) Supreme Court of Judicature,  
GREETING:

For as much as in the record and proceedings,  
and also in the giving of judgment in a certain  
20 plaintiff, which was in our said Supreme Court of  
Judicature before you, between the State of New  
Jersey, Defendant in Error and Mollie Monetti,  
Plaintiff in Error, manifest error hath intervened  
to the great damage of the said Mollie Monetti, as  
it is said; we being willing that the error if any  
there be, should in due manner be corrected, and  
full and speedy justice done to the party afore-  
said, in this behalf, do command you, that if judg-  
ment be thereupon given and affirmed, that you  
30 distinctly and openly send, under your seal, the  
record and proceedings aforesaid, with all things  
touching the same, to our judges of our Court of  
Errors and Appeals in the last resort in all causes,  
at Trenton, on the Eighteenth day of December  
next, together with this writ, that the record and  
proceedings aforesaid being inspected, we may  
cause to be further done thereupon, for correcting  
that error, what of right and according to the law  
and custom of the State of New Jersey ought to  
40 be done.

## Return

*Witness*, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the 29th day of November, One Thousand Nine Hundred and Sixteen.

THOMAS F. MARTIN,

Clerk. 10

Anthony R. Finelli,  
Attorney.

**Return**

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commended. 20

WM. S. GUMMERE,  
C. J.

(Rule joining error, entered January 30th, 1917.)

## Assignments of Error

*(Served and filed December 15, 1916)*

### NEW JERSEY COURT OF ERRORS AND AP- PEALS

10

<p style="margin: 0;">THE STATE,  <span style="margin-left: 100px;">Defendant in Error,</span>  <span style="margin-left: 120px;">vs.</span>  MOLLIE MONETTI,  <span style="margin-left: 100px;">Plaintiff in Error.</span></p>	}
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20 Afterwards, before the said Court of Errors and Appeals of the State of New Jersey, comes the said Mollie Monetti by Anthony R. Finelli, her Attorney and says that in the record and proceedings, aforesaid and also in the matters recited and contained in the said Bill of Exceptions, there is manifest error in this, to wit:

30 1. Said Court refused to reverse the Quarter Sessions on the ground advanced that there was no proof offered on the trial that the grand jury before whom the false swearing was said to have taken place, had been legally impanelled, and sworn; holding that such question was not submitted to the Trial Court for its ruling. To the manifest prejudice, wrong and injury of the plaintiff in error.

40 2. The said Supreme Court refused to reverse the Quarter Sessions upon the ground that there was no evidence to show that an oath was duly and properly administered to the plaintiff in error

## Assignments of Error

before the Grand Jury by some person competent to do so; to her manifest prejudice and injury.

3. There is also error in this, said Court refused to reverse the Quarter Sessions on the ground that the offense of the witness was only a moral one, and did not constitute perjury, because her testimony before the Grand Jury, related to an immaterial matter. 10

4. There is also error in this, that said Court refused to consider and did not reverse the Quarter Sessions after that Court arbitrarily, and contrary to the evidence, charged the jury to bring in a verdict of guilty stating that the trial jury did not have before them the oath of the plaintiff in error that she did not wilfully and corruptly falsely swear before the Grand Jury; to her manifest prejudice, wrong and injury. 20

Wherefore the said plaintiff in error, Mollie Monetti, prays that the judgment aforesaid, by reason of the aforesaid errors, and all other errors appearing in the record be reversed, annulled and held for nothing, and that the said Mollie Monetti may be restored to all things she has lost on occasion thereof.

ANTHONY R. FINELLI,  
Attorney of Plaintiff in Error. 30

**Opinion***(Filed, November 22d, 1916)*

## NEW JERSEY SUPREME COURT

JUNE T., 1916

10

<p>THE STATE, vs. MOLLIE MONETTI.</p>
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Error to Essex Quarter Sessions.  
Argued before GUMMERE, Chief Justice, and  
Justices TRENCHARD and BLACK.

20

For plaintiff in error, Anthony R. Finelli.  
For the State, Frederick F. Guild, Prosecutor  
of the Pleas, and Wilbur A. Mott, Assistant  
Prosecutor.

## PER CURIAM:

The defendant was convicted upon an indictment charging her with perjury committed before the Grand Jury of Essex County, while being examined as a witness upon a charge made against one Fiori of assault committed upon her with intent to rape. The result of the investigation was the presentment of an indictment against Fiori, but he was acquitted by the jury upon the trial thereon.

The grounds upon which a reversal of her conviction is sought will be dealt with in the order in which they are presented by her counsel.

40

## Opinion

The first contention is that the Trial Court erroneously refused to direct a verdict in favor of the defendant, upon the ground that it had not been shown by the proofs that the oath taken by her before the Grand Jury was administered by any person competent to do so. There is nothing in this contention. The State proved by the testimony of the clerk of the Grand Jury, who was present at the time the defendant was examined before that body, that the oath was administered to her by the foreman. That this officer had authority to administer the oath is elementary law. It is argued that it was incompetent to prove by parol the official position of the man who was acting as foreman, the only legal method of proof being the production of the record of the impanelling of the grand jury. This contention is unsound. If the oath was administered by a person who was at the time acting as foreman, the presumption is that he was properly acting in that capacity, either as such duly appointed officer, or as the *pro tempore* substitute in the absence of the duly selected appointee.

The next contention is that the conviction under review should be set aside because there is no proof that the Grand Jury before whom the false swearing was said to have taken place had been legally impanelled. But, assuming that such fact should have been proved, it can avail the defendant nothing upon this review, for no such question was submitted to the Trial Court for its ruling, and, consequently, no assignment of error, or cause for reversal, can properly be predicated upon it.

## Opinion

The next point raised is that the offense of the witness was only a moral one, and did not constitute perjury, because her testimony before the Grand Jury related to an immaterial matter. But this assertion is contrary to the fact. What the defendant swore to before the Grand Jury was that the man Fiori had committed a criminal assault upon her, and that was the particular matter then under investigation by that body. The idea of counsel seems to be that the false swearing was upon an immaterial matter, because of the fact that no complaint had been made before a committing magistrate as a preliminary to the Grand Jury investigation. But inquisition by that body is not limited to alleged violations of the criminal law which have been made the subject of complaint before a magistrate, but embraces all matters which are brought to its knowledge.

It is next argued that mere proof that the defendant had on another occasion given testimony which was absolutely contradictory of that given by her before the Grand Jury, did not prove the offense charged against her in the indictment; the argument being that it might very well be that the testimony given before the Grand Jury was true, and that given on another occasion was false. This is just what the Trial Court instructed the jury in the charge delivered to it, and left it to them to determine on which of the two occasions perjury was committed.

It is lastly contended that the sentence pronounced by the Court was not justified by law. The language of the sentence was it is

“Ordered and adjudged that the said Mollie Monetti be committed to the State Home for girls.”

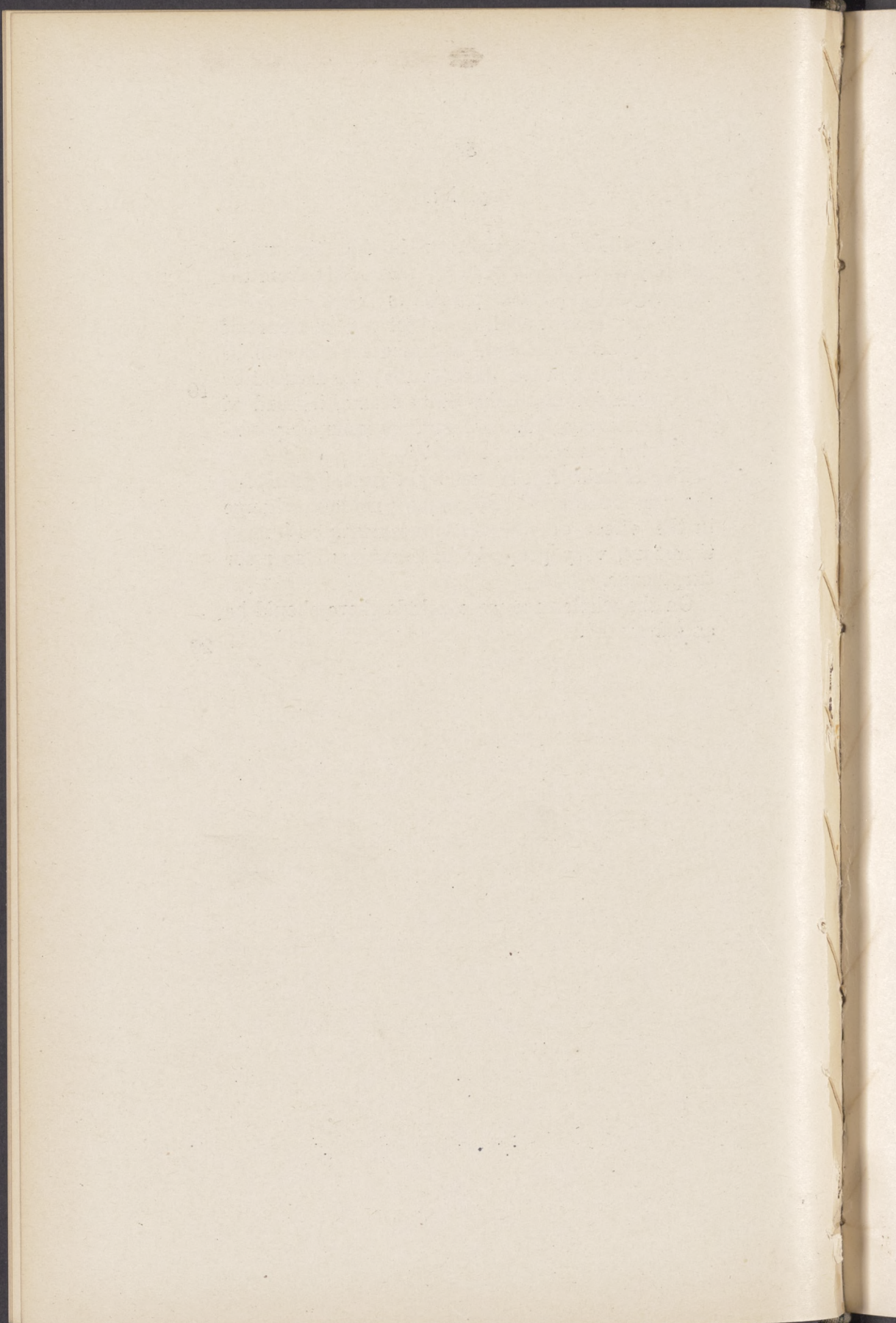
## Opinion

The pith of this contention is that the words used by the Trial Court vary materially from the language of the statute, which is

“That it shall be lawful for the Court of Quarter Sessions to cause an order to be entered in the minutes that the accused be committed to the State Home, instead of entering judgment and pronouncing sentence according to law.” 10

The mistake, if it be one, is, at most, formal, for the use of the word “adjudged” made no change in the effect of the pronouncement, and may, therefore, very properly be considered as mere surplusage.

On the whole case we conclude there should be an affirmance. 20



## New Jersey Court of Errors and Appeals

THE STATE,

Defendant in Error,

vs.

MOLLIE MONETTI,

Plaintiff in Error.

On Writ of  
Error to Su-  
preme Court.

### BRIEF FOR APPELLANT

This writ of error brings up the record of a judgment in a criminal case, pursuant to Sec. 136 of the Criminal Procedure Act, Comp. Statutes, Vol. 2, page 1863.

The indictment charges perjury committed before a grand jury. Defendant while being examined as a witness upon a charge made against one Caprio for assault committed upon her, was also examined as a witness upon a similar charge made against one Fiori. The result of the investigation was the presentment of an indictment in both cases. She married Caprio and the charge fell, while Fiori's acquittal was directed, owing to a failure of proof.

New Jersey State Library

The Supreme Court holds in the memorandum opinion filed in this case, that the testimony of the clerk of the grand jury, who was present at the time the defendant was examined before that body, that the oath was administered to her by the foreman, such evidence was sufficient; but we insist that inasmuch as the authority of the person who administered the oath was questioned at the trial, it was the duty of the State to offer the proof of the foreman's certificate in conformity with the statute, relating to juries.

Again, if the record of the impaneling of the certain persons named in the indictment as grand jurors had been put in evidence, then the inference that the foreman was properly acting in his capacity, either as such duly appointed officer or as the *pro tempore* substitute, in the absence of the duly selected appointee, could be drawn, but there was no such proof.

While in the absence of any motion to quash the indictment it will be presumed that the grand jury who found the indictment against the defendant, at the head of which was James E. Bathgate, Esq., (Record of Judgment, p. 3), had ample authority to act; such a presumption does not exist in favor of the other body of persons at the head of which was Timothy F. Foyle, Esq., (35), before whom the alleged false statement was made, because the defendant by her plea of not guilty has imposed upon the State the burden of proving every essential element of the offense contained in the indictment.

#### POINT ONE

**It was not competent to prove by parol the official position of the man who was act-**

**ing as foreman, the only legal method of proof being the production of the record of impaneling the grand jury.**

This question is presented upon the motion to direct the verdict and acquittal. (Motion, p. 27, l. 25, assignment No. 1, p. 42; exception to charge, p. 39, l. 28).

An "Act concerning juries," says:

"12. That the foreman of the grand jury shall from the time of his appointment until his discharge, have power to administer the usual oath or affirmation to such witness as shall give evidence before the grand jury, whereof he is foreman; *and it shall be the duty of such foreman, before he is discharged, to certify to the Court, under his head, the names of such witnesses as shall have been by him so sworn or affirmed* (Comp. Statutes of N. J., Vol. 3, p. 2967)."

The mere fact that an indictment was presented by certain persons therein named as "good and lawful men of Essex County, sworn and charged to inquire for the state and for the body of said county," does not make such a body a grand jury because, unless legally impaneled, such a body has no right to present, *Nichols vs. State*, 5 N. J. L., 621.

In *Regina vs. Rowland*, 1 Foster, 72, Branwell, held that:

"On an indictment for perjury, in order to prove the proceedings of the County Court, it was necessary to produce either the clerk's minutes or a copy thereof, bearing the seal of the Court."

Where the oath has been administered by a Master of Chancery, Surrogate, or commissioner

having a general authority for that purpose, it is not necessary to prove his appointment; it being sufficient to show that he has acted in that character. But where the party administering the oath derives his authority from a special commission directed to him for that purpose, it is necessary to prove the authority by the production and proof of the commission which creates the special authority, 2 Stark. Evidence, 622.

*Morrell vs. The People*, (32 Ill., 499) an indictment was found for perjury before the Clerk of the Circuit Court, one of the grounds of error alleged was that, there was no proof that the person who administered the oath was clerk as alleged. It was held that it was requisite that it should be proved that the person before whom the oath was taken was authorized by law to administer it.

One of the earliest definitions was given by Lord Ellenborough, as "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law" (*King v. Bedford Level*, 6 East, 368). It seems to have originally been held that there must be color of title for the appointment; but Throop, in his work on Public Officers, at Sec. 626, says that the more recent decisions recognize a broader rule, and hold that actual possession of the office, without regard to the mode in which possession was acquired, unless, perhaps, where it was by forcible usurpation, suffices to constitute the incumbent an officer *de facto*; and he collates the cases conflicting with the doctrine that color of title is needed, at page 589 of that work, and maintains that it is color of authority, instead of color of title, which distinguishes a *de facto* officer from a mere intruder,

and says that color of title is a very different thing from color of authority, and that the former expression implies that the person must be in by virtue of an election or appointment which is at least colorable.

The leading American case on the subject of *de facto* officers, containing a definition of that officer which has been almost universally accepted as the most accurate and comprehensive of any given, is *State v. Carroll*, 38 Conn., 449, 9 Am. Rep., 409; and in the opinion in that case the authorities are reviewed. Chief Justice Butler furnishes a definition which he says is sufficiently accurate and comprehensive to cover the whole ground.

“An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and of third persons, where the duties of the office are exercised \* \* \* under color of an election or an appointment by, or pursuant to, a public unconstitutional law before the same is adjudged to be such.”

The Court below ~~has~~ held that if the oath was administered by a person who was at the time acting as foreman, the presumption is that he was properly acting in that capacity.

We respectfully submit that this case should be distinguished from the cases holding that the acts of *de facto* officers of a municipal corporation cannot be collaterally drawn in question by private parties, *Lang vs. Bayonne*, 74 N. J. L., 455.

In *Rex and Verelst* (3 Camp., 432), an indictment was found for perjury committed before one

acting as surrogate in the ecclesiastical Court, in making oath to an answer in a cause there pending for a divorce. The surrogate having acted in that capacity, it was held that it was *prima facie* evidence of his appointment, and that he had authority to administer the oath. It appeared after, from the register's book containing the appointment that it was irregularly made, for the reason that instead of being authenticated in the usual manner, no notary public, nor the registrar, nor his deputy, had been present at the time for the purpose of authenticating the act in accordance to the rule of the ancient common law; and it was claimed that the appointment was a nullity. In opposition to this view it was contended by the prosecution that the officer appointed having acted over twenty years in the capacity of surrogate, a judge and a jury at *nisi prius* ought not to inquire to the manner of his appointment, and even if they did; they might presume that an officer was present at the entry, and the appointment might be regular, although the entry was deficient Lord Ellenborough held that the presumption arising from the acting as surrogate only stands until the contrary is proved; and after reviewing the facts decided that the allegation that Dr. Parsons, who acted as surrogate, had authority to administer the oath was negative, and the defendant was acquitted.

There is a striking analogy between the case cited and the one at bar, for in both of them the question related to the validity of the appointment; and if it was illegal in the one case the application of the same principle would render it equally so in the other. The case referred to, is a *nisi prius* decision, but it has been cited in the

elementary books approvingly, as well as in the several reported cases in the Courts.

In *Hawk, P. C.*, Vol. 2, (7th London ed.,) p. 86, it is laid down that;

“it seemeth clear that no oath whatsoever, taken before a person acting merely in a private capacity or before those who take them upon to administer oaths of a public nature without legal authority for their so doing or before those who are legally authorized to administer some kind of oaths, but not those which happen to be before them or even before those who take upon them to administer oaths of public nature without legal authority for their so doing or before those who are legally authorized to administer some kind of oaths, but not those which happen to be before them or even before those who take upon them to administer justice by virtue of an authority seemingly colorable, but in truth unwarranted and merely void can never amount to perjury in the eye of the law, because they are of no manner of force, but are altogether idle.”

It is also said in the same section, by the same author that

“no false oath in an affidavit, made before persons falsely pretending to be authorized by a Court of justice to take affidavits in relation to matters depending before such Court, can properly be called perjury because no affidavit is in any way regarded, unless it be made before persons legally intrusted with power to take it,”

etc.

In *Archb. Cr. Pl.*, (7th G. & B. ed.) pp. 573 and 538, it is stated, that the oath

“must be taken before a competent jurisdiction. For if it appear to have been taken before a person who had no lawful authority to administer it (3 Inst., 163, 166); or who had no jurisdiction of the cause; (3 Inst., 166 Yelv; 111); the defendant must be acquitted,”

and numerous authorities are cited to sustain this position.

As we have seen, the power, the authority and the right of the officer to administer the oath is the very foundation of the charge, and the basis upon which the offense rests and hence is a matter which must be lawfully proved. Without testimony to establish this important fact the indictment cannot be upheld, and the whole charge must fail.

## POINT TWO

**Defendant had a right to submit her case upon the testimony produced by the State.**

The Court charged that:

“The testimony introduced by the State is that the woman was duly sworn on her oath before the grand jury, touching an investigation as to whether or not one Francis A. Fiore had committed a crime, then and there depending before the grand jury, and that she then stated that he had taken hold of her and tried to have connection with her, and other details were given with respect to an alleged assault and battery. This testimony is given by defendant her-

self in her admission here in Court made on the 19th day of May 1913. It is also given by the clerk of the grand jury, Mr. Timothy E. Scales, and the fact it was false testimony, is also indirectly shown by the evidence—is directly shown—by the evidence of Mr. Francis A. Fiore.”

Examining the evidence of the defendant in the aforesaid statement, we find at page 27 F. in line 25:

“Q. Why did you say that he made an assault and battery on you in the office of the Naturalization Bureau? A. I didn't say he hit me in there.

“Q. You said that he took hold of your clothes and tried to reach your person, didn't he? A. I didn't say that.

“Q. Didn't you say that? A. No, sir.”  
(Mollie Caprio re-direct.)

The testimony was, therefore, misquoted and the defendant was prejudiced in maintaining her defense when the Court charged about her admission and the testimony of Mr. Scales showing that the false testimony was given.

Further examining the case (Mollie Caprio cross-examination, p. 27-d, l. 12):

“Q. You said before the grand jury that he (Fiore) made an attack on you and tried to have connection with you, didn't you?

A. I only said—

“Q. Didn't you say that before the grand jury?

“Mr. Lehlbach: Let her answer it.

“Q. What are you going to say?

“Witness: I only said that he put his

hand around my shoulder and walked into the room. That is all I said.”

It is error to charge that an incriminating fact has been proved, when such fact has neither testimony nor the color of testimony to support it.

The jury was not asked to weigh the evidence of the defendant, but were clearly invited to discard her evidence.

It was the duty of the Court to instruct the jury to weigh her statement because upon the whole circumstances of the case it appeared clearly that it was owing rather to the weakness than the perverseness of the defendant that the testimony was given before the so-called grand jury.

“The false oath must be lawful, and taken with some degree of deliberation, for if upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than the perverseness of the party, as whether it was occasioned by surprise or inadvertence, it cannot be hard to make it amount to voluntary and corrupt perjury, which is, of all crimes whatsoever, the most infamous and detestable.”

1 Hawk., P. C., Chap. 69, Sec. 2.

If the statement of the defendant serves the purpose of corroborating the fact that she made the oath, it should likewise serve the defendant in permitting the jury to weigh her explanation of the circumstances and her denial.

The charge, as delivered, instead of being a comment upon testimony, made for the benefit of the jury, was an elimination of testimony from the consideration of the jury.

In the case of *Smith and Bennett vs. State*, 41 N. J. L., 370, it was held error for the trial judge, to tell the jury that a material fact was in proof when it was not testified to upon any view of the evidence. The rule stated is applicable to the case on review.

Respectfully submitted,  
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