

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY
DEFENDANT-IN-ERROR

VS.

LOUIS KISH

PLAINTIFF-IN-ERROR

ON INDICTMENT
FOR UNLAWFUL 10
SALE AND UN-
LAWFUL POS-
SESSION OF IN-
TOXICATING
LIQUOR.

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CASE AND RECORD

WILLIAM A. STRYKER, 30
Attorney of and Counsel with Plaintiff-in-Error.

SYLVESTER C. SMITH, JR.,
Assistant Attorney General to
Prosecute the Pleas.
Attorney of Defendant in Error.

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WRIT OF ERROR FROM COURT OF ERRORS
AND APPEALS

Filed April 26, 1926

NEW JERSEY, SS.

(L. S.) The State of New Jersey to the 10
 Chief Justice and other Justices of
 our Supreme Court of Judicature.
 Greeting:

Because in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between the State of New Jersey and Louis Kish, defendant, upon an indictment, manifest errors hath intervened to the great damage of the said defendant as by his complaint 20 we are informed; we being willing that the error if any there be should in due manner be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, that you distinctly and openly send under your seal the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the fifteenth day of May, A. D. 1926, together with this writ, that the record and 30 proceedings aforesaid being inspected, we may cause to be done thereupon for correcting that error what of right and according to the law and custom of the State of New Jersey, ought to be done. Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the twenty-sixth day of April, A. D. 1926.

WM. A. STRYKER,
Attorney.

THOMAS F. MARTIN,
Clerk. 40

RETURN

Filed May 1, 1926

The answer of the Justice 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 hereby certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are
10 commanded.

WM. S. GUMMERE, (Seal)
C. J.

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WRIT OF ERROR FROM SUPREME COURT

NEW JERSEY, SS.

(SEAL)

The State of New Jersey to Harry Runyon, Esquire, Judge of the Court of Quarter Sessions of the County of Warren:

Because in the record and proceedings, and also in giving the judgment upon a certain indictment against Louis Kish, late of the town of Phillipsburg, in the county of Warren, for the unlawful sale and possession of intoxicating liquor. 10

Pro ut the said indictment and several counts therein, whereof, before you, he hath been indicted, and is thereof convicted by a certain jury of the said County, taken between the State of New Jersey and the said Louis Kish, as is said, manifest error hath intervened to the great damage of the said Louis Kish, as from the complaint we have received information, we being willing in this behalf to correct the error in due manner if any there shall be, and that speedy justice be done to him, the said Louis Kish, command you, that if judgment be thereon given then that you distinctly and openly send under your seal the record and proceedings aforesaid, with all things touching the same, to our Justices of our Supreme Court of the State of New Jersey on the fifteenth day of June, next, and this writ, with all the proceedings thereon had as aforesaid, that the records and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error what of right and according to law ought to be done. 20 30

WITNESS, WILLIAM S. GUMMERE, ESQ., Our Chief Justice, at Trenton, aforesaid, this 26th day of May, A. D., nineteen hundred and twenty-five.

WM. A. STRYKER,
Attorney.

EDWARD J. KELLEHER,
Clerk. 40

RETURN TO WRIT OF ERROR

10 The answer of Harry Runyon, Esquire, Judge of the Court of Quarter Sessions, holden in and for the County of Warren, and whereof mention is within made, the record and proceedings of the indictment and the record of the proceedings on the trial within named, with all things touching and concerning the same, I send to the Justices of our Supreme Court of Judicature of the State of New Jersey, at Trenton, the day and year within mentioned, in a certain schedule to this writ annexed, as within I am commanded.

HARRY RUNYON, (Seal)
Judge.

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SCHEDULE

Formal Record of Judgment and Conviction.

Warren Court of Oyer and Terminer

APRIL TERM, 1925

CAPTION

STATE OF NEW JERSEY, WARREN COUNTY, TO WIT:

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BE IT REMEMBERED, That at a Court of Oyer and Terminer, held at Belvidere, in and for the County of Warren, on the fourth Tuesday in April, in the year of our Lord One Thousand Nine Hundred and Twenty-five, before the Honorable Thomas W. Trenchard, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and Honorable Harry Runyon, Esquire, Judge of the Court of Common Pleas, in and for the County of Warren, assigned to take cognizance of all crimes and offences whatsoever, which by law are of an indictable or presentable nature, and which have been committed, done, or attempted within the said County of Warren, according to the form of the statute in such cases made and provided, on the oath of Sarah E. Halpin, Georgine Pursell, James Hallet, Helen S. Hildebrand, Frank G. Brink, Elwood W. Gruendyke, Alexander Malloy, Isaac H. Snyder, William H. Grover, Lillie Beatty, Kate F. Fulmer, Luther Hughes, William S. Ferguson, Samuel T. Geis, Lucy Walker, Josie S. Sidner, Sadie Hamlen, Alanson Cable, George M. Hoagland, Ethel H. Wilkinson, William A. George, William L. McConville and William J. Bounds, good and lawful men and women of the said County of Warren, duly summoned and then and there sworn, and charged to inquire in behalf of the State of New Jersey, and for the County of Warren.

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It is presented in manner and form following, to wit:

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INDICTMENT

Filed May 13, 1925

Presented and handed down to the Court of Quarter Sessions, Warren County, to wit:

10 THE GRAND INQUEST for the State of New Jersey, and for the body of the County of Warren, upon their oaths Present, That Louis Kish late of the Town of Phillipsburg in the said County of Warren, on the twenty-seventh day of April in the year of our Lord Nineteen Hundred and Twenty-five at the Town aforesaid, in the County aforesaid, and within the jurisdiction of this Court, having previously and prior thereto, to wit:—
20 October 9, 1922, in the Warren Court of Quarter Sessions been convicted of unlawful selling of intoxicating liquor contrary to provisions of Section 10 of the Prohibition Enforcement Act and judgment having been pronounced on said conviction did unlawfully sell intoxicating liquor to wit:—whiskey, containing more than one-half of one percent of alcohol per volume which said act was then and there prohibited and unlawful and contrary to the provisions of Section 10 of an Act of the Legislature entitled, "An Act concerning intoxicating liquor, used or to be used for beverage purposes," approved March 17, 1922, and known as the Prohibition Enforcement Act.

30 And the Grand Inquest on their oaths further present that on January twenty-third, 1925, at the said Town of Phillipsburg, said Louis Kish did unlawfully sell intoxicating liquor, to wit: Whiskey, containing more than one-half of one percent of alcohol by volume, which said act is contrary to the provisions of Section 10 of an Act of the Legislature entitled, "An Act concerning the use of intoxicating liquor used or to be used for beverage purposes," approved March 17, 1922, and known as the Prohibition Enforcement Act.

40 And the Grand Inquest on their oaths further present that on April 18, 1925, at the said Town of Phillipsburg, said Louis Kish did unlawfully sell intoxicating liquor, to wit: Whiskey, containing more than one-half of one per-

INDICTMENT

cent of alcohol by volume, which said act is contrary to the provisions of Section 10 of an Act of the Legislature entitled, "An Act concerning the use of intoxicating liquor used or to be used for beverage purposes," approved March 17, 1922, and known as the Prohibition Enforcement Act.

And the Grand Inquest on their oaths further present that on January 31, 1925, at the Town aforesaid and within the jurisdiction of this Court the said Louis Kish having previously and prior thereto on October —, 1922, been convicted in the Warren Court of Quarter Sessions of unlawfully possessing intoxicating liquor in violation of Section 10 of the Prohibition Enforcement Act and judgment having been pronounced on said conviction, did unlawfully possess intoxicating liquor, to wit:—whiskey containing more than one-half of one percent of alcohol in volume, which said act was prohibited and contrary to the provisions of Section 10 of an Act of the Legislature entitled, "An Act concerning intoxicating liquor, used or to be used for beverage purposes," approved March 17, 1922, and known as the Prohibition Enforcement Act, 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.

Filed May 13, 1925
A true bill

SYLVESTER C. SMITH, JR.,
Prosecutor of the Pleas.

WILLIAM A. GEORGE, Foreman

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Warren Oyer and Terminer

APRIL TERM 1925

ORDER

10 And in order to expedite the business of the Court it is ordered by the Court that the above stated indictment, together with all other indictments presented by the Grand Inquest of said County of Warren at said term, except the two indictments for murder, be received and tried in the Court of Quarter Sessions of said County of Warren, according to the form of the statute in such case made and provided.

PLEA

20 And afterwards that is to say, at a Court of Quarter Sessions, held at the Court House, in the town of Belvidere, in and for the said County of Warren, on Friday, the 15th day of May, in the year of our Lord one thousand and nine hundred and twenty-five, before the Honorable Harry Runyon, Judge of the Court of Quarter Sessions of said County, the said Louis Kish cometh, by Wm. A. Stryker, his attorney for the purpose of appearance, and forthwith being demanded of and concerning the premises in the said indictment above specified and charged upon him, how the said defendant will acquit himself thereof, the said Louis Kish, by his attorney aforesaid, protesting that he is not guilty of the premises charged in the said indictment; and afterwards, that is to say, at
30 a Court of Quarter Sessions, held at the Court House, in the town of Belvidere, in and for the said County of Warren, on Monday, the 25th day of May, in the year of our Lord one thousand nine hundred and twenty-five, before the Honorable Harry Runyon, Judge of the Quarter Sessions of the said County, the said Louis Kish, cometh by Wm. A. Stryker, his attorney for the purpose of appearance, and forthwith being demanded of and concerning the premises in the said indictment above specified
40 and charged upon him, how the said defendant will acquit

PLEA—VENIRE—RECORD

himself thereof, the said Louis Kish aforesaid, withdrew his former plea or not guilty and made a motion to quash the indictment, which said motion was denied; therefore, Louis Kish, by his attorney, prays for an exception which said exception was allowed.

And the said exception is allowed, signed and sealed.

HARRY RUNYON, (Seal) 10
Judge.

Whereof the said Louis Kish, through his said attorney again protesting that he is not guilty of the premises charged in the said indictment and of this he puts himself upon the country, and Sylvester C. Smith, Jr., Prosecutor of the Pleas of the said County, who prosecutes for the State of New Jersey in this behalf, doth the like.

VENIRE

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Wherefore let a jury come, to wit on Monday, the 25th day of May, in the year of our Lord One Thousand Nine Hundred and Twenty-five, to which day the trial of the above stated indictment had been continued from day to day, before the Honorable Harry Runyon, Judge of the Court of Quarter Sessions of said County of Warren, of good and lawful men of said County, by whom the truth of the matter may be better known, to recognize upon their oaths whether the said Louis Kish be guilty of the premises aforesaid or not, because as well the said Sylvester C. Smith, Jr., Prosecutor of the Pleas aforesaid, as the said Louis Kish has put himself upon the said jury, and the same day is given as well to the said Sylvester C. Smith, Jr., Prosecutor of the Pleas as aforesaid, as to the said Louis Kish. 30

RECORD OF TRIAL AND VERDICT

At which time, to wit on Monday, the 25th day of May, in the year of our Lord one thousand nine hundred and 40

RECORD AND JUDGMENT

twenty-five, at the said Court of Quarter Sessions for the said County of Warren, before the Honorable Harry Runyon, Judge of the Court of Quarter Sessions of said County, cometh as well the said Sylvester C. Smith, Jr., Prosecutor of the Pleas as aforesaid, as the said Louis Kish, by Wm. A. Stryker his attorney, and the jurors of the jury, by William Jones, Esquire, Sheriff of said County of Warren, for this purpose empanelled and returned, agreeably to the statute in such case made and provided, to wit: Russell W. Shields, Charles G. Edgerton, James F. Richey, Edna Opdyke, Floyd E. Dreisbach, Frank Aber, Rudolph Mack, Samuel T. Beatty, Hilton Butler, George C. Bescherer, Cleveland M. Rhen, and Otto K. Zehner, being called, who being chosen, tried and sworn to speak the truth of and concerning the premises in the indictment above specified, do say, upon their oath, that the said Louis Kish is guilty of the premises in the said indictment on him above charged, in manner and form as in and by the indictment aforesaid is alleged against him.

JUDGMENT

And afterwards, to wit: on the 26th day of May, in the year of our Lord one thousand nine hundred and twenty-five, at a Court of Quarter Sessions of the County of Warren, before the Honorable Harry Runyon, Judge of the Court of Quarter Sessions of said County of Warren, cometh as well the said Sylvester C. Smith, Prosecutor of the Pleas of said County of Warren, as the said Louis Kish, by Wm. A. Stryker, his attorney as aforesaid, and all and singular the premises being seen and by the Court as aforesaid fully understood, the Court doth order and adjudge that the said Louis Kish, on the second count in the indictment, pay a fine of One Thousand Dollars (\$1.000) and stand committed at the State Prison, Trenton, N. J., for a minimum term or not less than one (1) year and for a maximum term or not more than five (5)

JUDGMENT

years; and that sentence be suspended on the first, third and fourth counts in the indictment.

Judgment signed the twenty-sixth day of May, nineteen hundred and twenty-five.

HARRY RUNYON,
Judge.

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CASE

Warren County Court of Quarter Sessions
 APRIL TERM, 1925

10	THE STATE vs. LOUIS KISH	}	Cn Indictment for Unlawful Sale and Possession of Intoxicating Liquor.
			Belvidere, N. J., May 25, 1925.

Before Hon. Harry Runyon, Judge, and a Jury.

Appearances:

Sylvester C. Smith, Jr., Prosecutor of the Pleas, for the State.

William A. Stryker, for the Defendant.

20 MR. STRYKER: I will move to quash this indictment upon the ground that it does not inform the defendant or give notice of the nature of cause of the accusation in that it does not set forth that the liquor was sold or held or in the possession of the defendant for beverage purposes.

The indictment is defective in that it is a violation of Article One, Sections eight and nine of the constitution of this state; that the defendant is not informed of the crime charged against him.

30 In support of my motion I cite the case of the State vs. James Freulli, in the New Jersey Supreme Court, 98 Law, 395, etc.

MR. SMITH: For the State I oppose on the ground that the indictment is different from that in the case cited, and specifically refers to a violation of Section Ten of the Prohibition Enforcement Act, and fully informs the defendant in the words of the statute of the offense charged.

40 As to the contention that it was necessary to allege that the liquor was to be used for beverage purposes I cite 96 New Jersey Law, page 124, State vs. Salomon.

CASE

THE COURT: The motion is denied.

MR. STRYKER: I pray an exception.

THE COURT: Let the exception be allowed, and the same is signed and sealed accordingly.

HARRY RUNYON, (Seal)
Judge.

The Jury was then empanelled and sworn and the Prosecutor opened the State's case.

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CERTIFICATE

STATE OF NEW JERSEY
WARREN COUNTY CLERK'S OFFICE } ss.

I, Ramsey Reese, Clerk of the County of Warren, and also Clerk of the Court of Quarter Sessions in and for said County, said Court being a Court of Record,

Do HEREBY CERTIFY, That the foregoing is a full and correct copy of the record, indictment, judgment and proceedings of said Court in the case of the State of New Jersey against Louis Kish, on indictment for Unlawful Sale and Possession of Intoxicating Liquor, as the same is taken from and compared with the record thereof, in Book of Warren Quarter Sessions.

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(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, at Belvidere, this eleventh day of June, in the year of our Lord one thousand nine hundred and twenty-five.

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RAMSEY REESE,
Clerk.

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ASSIGNMENTS OF ERROR

Filed June 29, 1925

New Jersey Supreme Court

10	THE STATE OF NEW JERSEY DEFENDANT-IN-ERROR VS. LOUIS KISH PLAINTIFF-IN-ERROR	ON INDICTMENT FOR UNLAWFUL SALE AND UN- LAWFUL POS- SESSION OF IN- TOXICATING LIQUOR. ASSIGNMENTS OF ERROR.
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20 Afterwards, that is to say, on the Fifteenth day of June, 1925, in the Supreme Court of Judicature of the State of New Jersey, comes the said Louis Kish, by William A. Stryker, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in the giving of the judgment aforesaid, there is manifest error in this, to wit:

30 1. That at the opening of the trial of the said cause, the said court denied the motion of the plaintiff in error, by his attorney, William A. Stryker, to quash the indictment herein, made on the ground that the said indictment did not specify or charge a crime or inform the defendant, or give notice of the nature or cause of the accusation, in that it did not set forth that the liquor was sold by or held in the possession of the defendant for beverage purposes.

40 2. That the said court denied the motion of the plaintiff in error, by his attorney, William A. Stryker, to quash the indictment herein, made on the ground that the indictment is in violation of Article I, Sections 8 and 9 of the constitution of this state in that the defendant was not by the said indictment informed of the crime charged against him.

3. That the said court denied the motion of the plain-

ASSIGNMENT OF ERRORS

tiff in error, by his attorney, William A. Stryker, to quash the indictment herein, on the ground that the said indictment does not aver or charge that the defendant therein, the plaintiff in error, had in his possession or that he sold intoxicating liquor used or to be used for beverage purposes, and the said indictment should have so charged.

4. That the said court denied the motion of the said plaintiff in error, the defendant named in the said indictment, by William A. Stryker, his attorney, to quash the said indictment on the ground that it set forth that the defendant did unlawfully sell and did unlawfully have in his possession intoxicating liquor, to wit: whiskey or moonshine containing more than one-half of one percent of alcohol by volume, in violation of and contrary to Section 10 of the Prohibition Enforcement Act, entitled, "An Act concerning intoxicating liquor, used or to be used for beverage purposes," approved March 17, 1922, and known as the Prohibition Enforcement Act, and does not aver that the said liquor was either sold or possessed by the defendant, the plaintiff in error, for beverage purposes.

Wherefore, defendant prays judgment of the court here in the premises and that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings found and being, may be reversed, annulled, and for nothing holden, and that the court may proceed to the examination as well of the record and proceedings aforesaid, as the matters for errors above assigned, etc.

Filed June 29, 1925.

WILLIAM A. STRYKER,
Attorney of and Counsel for Plaintiff-in-Error.

JOINDER IN ERROR

Filed July 7, 1925

New Jersey Supreme Court

10	THE STATE OF NEW JERSEY DEFENDANT-IN-ERROR	}	IN ERROR
	VS.		JOINDER IN
20	LOUIS KISH PLAINTIFF-IN-ERROR	}	ERROR.

Afterwards, that is to say, on the third day of July, 1925, the said State of New Jersey, by Sylvester C. Smith, Jr., Prosecutor of the Pleas of the County of Warren, comes into court and says that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and he prays that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error; and that the judgment aforesaid, in manner aforesaid given, may in all things be adjourned, etc.

Filed July 7, 1925.

SYLVESTER C. SMITH, JR.,
 Prosecutor of the Pleas.

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OPINION OF SUPREME COURT

Filed February 17, 1926

New Jersey Supreme Court

No. 11, October, 1925.

THE STATE OF NEW JERSEY

DEFENDANT-IN-ERROR

VS.

LOUIS KISH

PLAINTIFF-IN-ERROR

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On writ of error to Warren County Quarter Sessions Court.

Before Gummere, Chief Justice, Justices Kalisch and Campbell. For the plaintiff in error, William A. Stryker. For the defendant in error, Sylvester C. Smith, Jr. Per curiam: The legal situation in this case is like unto the case of State vs. George Stasak, and for the reasons stated in the *per curiam* opinion filed in that case, the judgment on review is affirmed.

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OPINION STASAK CASE
 OPINION—STATE vs. GEORGE STASAK

Filed February 17, 1926.

New Jersey Supreme Court

No. 10, October, 1925.

10	THE STATE OF NEW JERSEY DEFENDANT-IN-ERROR	}
	VS.	
	GEORGE STASAK PLAINTIFF-IN-ERROR	}

20 On writ of error to Warren County Quarter Sessions Court. Before Gummere, Chief Justice, and Justices Kalisch and Campbell. For the plaintiff in error, William A. Stryker. For the defendant in error, Sylvester C. Smith, Jr., Prosecutor of the Pleas.

30 Fer curiam: The plaintiff in error was convicted in the Warren Quarter Sessions Court on an indictment containing two counts, the first of which charged him with a second offense of unlawful sale of intoxicating liquor, and the second charged him with unlawful possession of intoxicating liquor as a second offense contrary to Section ten of an Act of the Legislature entitled, "An Act concerning intoxicating liquor used or to be used for beverage purposes."

There was a trial, a verdict and judgment. The assignments of error relate solely to the refusal of the trial judge to quash the indictment.

40 A motion to quash an indictment is a motion addressed to the descretion of the court, and not *ex debite justitae*. State vs. Hagerman 1 Green, 314; States vs. Dayton, 3 Zab, 49; Proctor vs. State, 55, N. J. L. 472; Parks vs. State, 62, N. J. L. 664. In order for a defendant to avail himself of a defect in the indictment a motion to quash must be made before the jury is sworn. State vs. Mead, 53, N.

OPINION—Continued

J. L. 511. It was there held that if no objection has been made to an indictment before the trial jury is sworn, the indictment cannot be questioned upon a motion in arrest of judgment.

In the present case there was a motion to quash the indictment before the trial jury was sworn, but the matter was pursued no farther. There was no motion made in arrest of judgment or for a direction of a verdict upon the ground that the indictment was defective in that it failed to charge a crime. It is firmly settled by the decisions in this state that the motion to quash is one addressed to the discretion of the court, and therefore, the denial of such a motion *ipso facto* furnishes no legal basis for the support of an assignment of error. 10

State vs. Pisaniello, 88 N. J. L. 262; State vs. Rubin, 91 Id, 368; State vs. Rosenberg, 92 Id. 525; State vs. Riggs, 92 Id. 575; State vs. Fischer, 94 Id. 11; State vs. Grossman, 94 Id. 303. 20

Judgment is affirmed.

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RULE OF AFFIRMANCE

Entered February 23, 1926

New Jersey Supreme Court

THE STATE OF NEW JERSEY
 DEFENDANT-IN-ERROR

vs.

10 LOUIS KISH

PLAINTIFF-IN-ERROR

ON WRIT OF ER-
 ROR IN THE WAR-
 REN QUARTER
 SESSIONS.

RULE FOR AFFIR-
 MATION AND RE-
 MITTITUR.

20 This cause having been heard before the Court at the October term, 1925, and the Court having considered the reasons for reversing the judgment of the Warren Quarter Session, removed by the Writ of Error in this cause, and having duly considered the argument of counsel of the respective parties, being of the opinion that the judgment of the Warren Quarter Sessions removed by the Writ of Error in this cause, should be affirmed.

It is ordered that the judgment of the Warren Quarter Sessions, removed by the Writ of Error in this cause, be and the same is hereby affirmed and the record remitted to the lower Court to be proceeded with according to the law.

On motion of

SYLVESTER C. SMITH, JR.,
 Prosecutor of the Pleas.

30 I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do hereby certify that the foregoing is a true copy of a rule entered in the minutes of the Court in the above stated cause.

(L. S.)

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-ninth day of April, A. D. nineteen hundred and twenty-six.

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EDWARD KELLEHER,
 Clerk.

ASSIGNMENT OF ERRORS IN COURT OF ERRORS
ASSIGNMENT OF ERRORS

Filed June 8, 1926

NEW JERSEY COURT OF ERRORS AND APPEALS

THE STATE OF NEW JERSEY
DEFENDANT-IN-ERROR

VS.

LOUIS KISH

PLAINTIFF-IN-ERROR

ON INDICTMENT
FOR UNLAWFUL
SALE AND UN-
LAWFUL POSSES-
SION OF INTOXI-
CATING LIQUOR.
ASSIGNMENTS OF
ERROR. 10

Afterwards, that is to say, on the return of the Writ of Error in the above cause, in the New Jersey Court of Errors and Appeals, comes the said Louis Kish, by William A Stryker, his attorney, and says that in the record and proceedings aforesaid and also in the matters recited and contained in the bill of exceptions, and also in the giving of judgment aforesaid there is manifest error in this, to-wit: 20

1. That the Supreme Court of Judicature of the State of New Jersey, erred in giving judgment for the defendant in error instead of for the plaintiff in error, and that it so erred for one or more of the assignments of error, filed in the Supreme Court and returned with the record. 30

WILLIAM A. STRYKER,
Attorney for Plaintiff in Error.

ACKNOWLEDGMENT OF SERVICE

Service of a copy of this Assignment of Errors is acknowledged this 8th day of June, 1926.

SYLVESTER C. SMITH, JR., 40
Assistant Attorney General to Prosecute the Pleas

JCINDER IN ERROR

Filed June 12, 1926

NEW JERSEY COURT OF ERRORS AND APPEALS

THE STATE OF NEW JERSEY DEFENDANT-IN-ERROR	}	ON INDICTMENTS FOR UNLAWFUL SALE AND UN- LAWFUL POSSES- SION OF INTOXI- CATING LIQUOR. JOINDER IN ERROR.
vs.		
10 LOUIS KISH PLAINTIFF-IN-ERROR	}	

Thereupon, afterwards, to wit:—On the 10th day of June, 1926, the said State of New Jersey by Sylvester C. Smith, Jr., Assistant Attorney General to Prosecute the Pleas in the County of Warren, comes into court and says that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and he prays that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters assigned for error, and the judgment aforesaid in the manner aforesaid, may in all things be affirmed, etc.

SYLVESTER C. SMITH, JR.,
 Assistant Attorney General to Prosecute the Pleas in Warren County.

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New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY
DEFENDANT-IN-ERROR

VS.

LOUIS KISH

PLAINTIFF-IN-ERROR

ON INDICTMENT
FOR UNLAWFUL
SALE AND UN-
LAWFUL POS-
SESSION OF IN-
TOXICATING
LIQUOR.

Brief of Plaintiff-in-Error

The indictment in this case challenged was found at the April Term 1925 of the Warren Court of Oyer and Terminer. It consists of four counts, the first three counts charging an unlawful sale of intoxicating liquor, to-wit, whiskey containing more than one-half of one per cent of alcohol in volume. The fourth count, charges that defendant did unlawfully possess intoxicating liquor.

The acts of criminality charged in this indictment are expressly stated to be unlawful and contrary to the pro-

visions of Section 10 of an act of the legislature entitled, "An Act concerning intoxicating liquor, used or to be used for beverage purposes." Approved March 17, 1922, and known as The Prohibition Enforcement Act. The Enforcement Act is Chapter 255 of the Laws of 1922.

See Pamph. Laws of 1922, page 615.

It is to be observed that the title of the act is—"An Act concerning intoxicating liquor, used or **to be used for beverage purposes.**"

It is nowhere charged that the liquor, either sold or possessed was to be used for beverage purposes.

In *State vs. Freulli*, 98 N. J. L., on page 399, it was said by Mr. Justice Kalisch:—

It is quite clear that chapter 255, (Pamph. L. 1922, p. 615), makes the sale of liquor containing more than one-half of one percentum of alcohol, by volume for **beverage purposes** an indictable offence.

It is also equally clear that chapter 241 (Pamph. L. 1922, p. 24), the Non-Beverage act, among other things, permits the sale of liquor containing more than the one-half per centum of alcohol for certain purposes, and likewise makes a violation of the act an indictable offence.

Thus it is quite obvious that a sale of liquor, authorized under the Non-Beverage act, may be unlawful by reason of a violation of some provision in the act regarding the making of such sale, and, nevertheless, not be unlawful under the act relating to the sale of liquor for beverage purposes.

Both acts contain like provisions, couched in the same language regarding indictments for violation of them. The clause of Section 59 of the Non-Beverage act, and pertinent to the subject under discussion is identical in form and substance with the clause of section 36 of the Beverage act, and which reads: "It shall not be necessary in any affidavit, indictment or information to give the name of the purchaser or

to include any defensive negative averments but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful."

We cannot, properly, put the construction upon this clause, as suggested by counsel of the state, namely, that the legislature, by the use of the language "that it shall be sufficient to state that the act complained of was then and there prohibited and unlawful," relieved the pleader from setting out the facts which constituted the "act complained of"—that is, that the defendant sold the liquor for beverage purposes, the very essence of the offense, without being driven to the necessity to declare the clause to be unconstitutional, in that it deprives the defendant of the constitutional right to be "informed of the nature and cause of the accusation."

By employing the term "the act complained of," the legislature obviously intended that the pleader should set forth in the indictment the facts which constituted "the act complained of," which was not only the sale of liquor but that such sale was for beverage purposes. For chapter 255 makes the sale only unlawful when it is made for beverage purposes.

That it was the legislative intent by the use of the words "the act complained of" that the indictment shall set forth the facts constituting such act is strongly enforced by the circumstances that under the Non-Beverage act, which contains a like provision, there may be a sale in violation of one of its provisions other than that of a sale for beverage purposes.

Now in such a situation it is quite manifest that a defendant, charged in the language contained in the present indictment, would be unable to determine the nature or cause of the accusation and for violation of which statute he was indicted by the grand jury.

The opinion of this court in the case just cited, on page 400, proceeds to declare the remarks of Mr. Justice

Garrison, in a case cited, as preeminently appropriate. And the learned Justice then stated the grounds upon which his opinion in the case cited rested, following, at length, to the end of the opinion.

It is in the indictment in this case expressly stated that the "act complained of" was contrary to the provisions of Section 10 of the act entitled—"An act concerning the use of intoxicating liquor, used or to be used for beverage purposes." Approved March 17, 1922, and known as the Prohibition Enforcement Act.

The title of the act clearly expresses its purpose and that purpose was to regulate, or, really, to prohibit the possession of intoxicating liquor, used or to be used for beverage purposes.

That is the act beginning on page 615, and Section 10 thereof declares that its provision shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Now, I beg to say that prior to the adoption of the Eighteenth Amendment, it was not unlawful, much less criminal, for any person to have in his possession intoxicating liquors for beverage purposes.

It was not unlawful to sell liquor for beverage purposes except when the act was denounced by specific legislation, which has no relevancy to the issue here.

The two acts of the New Jersey Legislature, dealing with the same subject and approved or passed within a few days of each other must be construed together; they are **in Pari Materi**; and they together contain the legislation on the subject of the possession and sale of liquors for beverage purposes.

The case cited by the Prosecutor, *State vs. Solomon*, 96 N. J. L., p. 124, is not pertinent, as a reading of the case will show.

There are two reasons for this position.

First—The legislation referred to in the opinion, page 125, quotes the act of the legislature of 1898, page , as recited in the Compiled Statutes, page 1777, paragraph 99, which provides that any person who shall manufacture, or import already manufactured, or barter or sell, or keep in his possession for barter or sale, any rum, brandy, wine, or spirits of any kind, or any other liquid of which distilled spirits of any kind, shall form a component part that shall be used as a beverage, that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor.

That act does not in any wise denounce the sale of intoxicating liquors; it denounces only the sale of any liquid of which distilled spirits of any kind form a component part to be used as a beverage—"that shall be adulterated or manufactured with spurious or poisonous ingredients of any description."

I think the restrictive character of this act, which makes it inapplicable to the provision of the beverage or non-beverage acts of 1922 must have been in some way overlooked in the consideration of the case in error.

Secondly—There is a difference in the title of the two acts, and the purpose of the act is to be derived in large measure from the title of the act. No occasion to cite authorities to sustain this proposition.

The title of the Non-Beverage act, found on page 420 of the Act of 1922, is—

"An act to amend an act entitled—'An act concerning intoxicating liquors used or to be used for non-beverage purposes'," passed April 6, 1921.

The title of the Beverage act as found on page 615 of the Act of 1922 is—

"An Act concerning intoxicating liquor used or to be used for beverage purposes."

And this latter act is the one upon which this indictment is supposed to rest.

The Act of 1898 denounces a specific act, to wit—the mixing of poisons with spirituous liquors and selling the same. Neither the Beverage or Non-Beverage Acts relate to any admixture or mixing of poisonous ingredients with distilled liquors.

I submit therefore that the decision in the case of *State vs. Solomon*, 96 New Jersey Law, 124, does not apply to this case. And it is further to be noted that Mr. Justice Katzenbach who wrote the opinion in *State vs. Solomon* concurred in the opinion of this court in *State vs. Freulli*, 96 Law, page 399, etc.

But I do not really think there is any contradiction in the two decisions because each is founded upon a wholly separate state of facts.

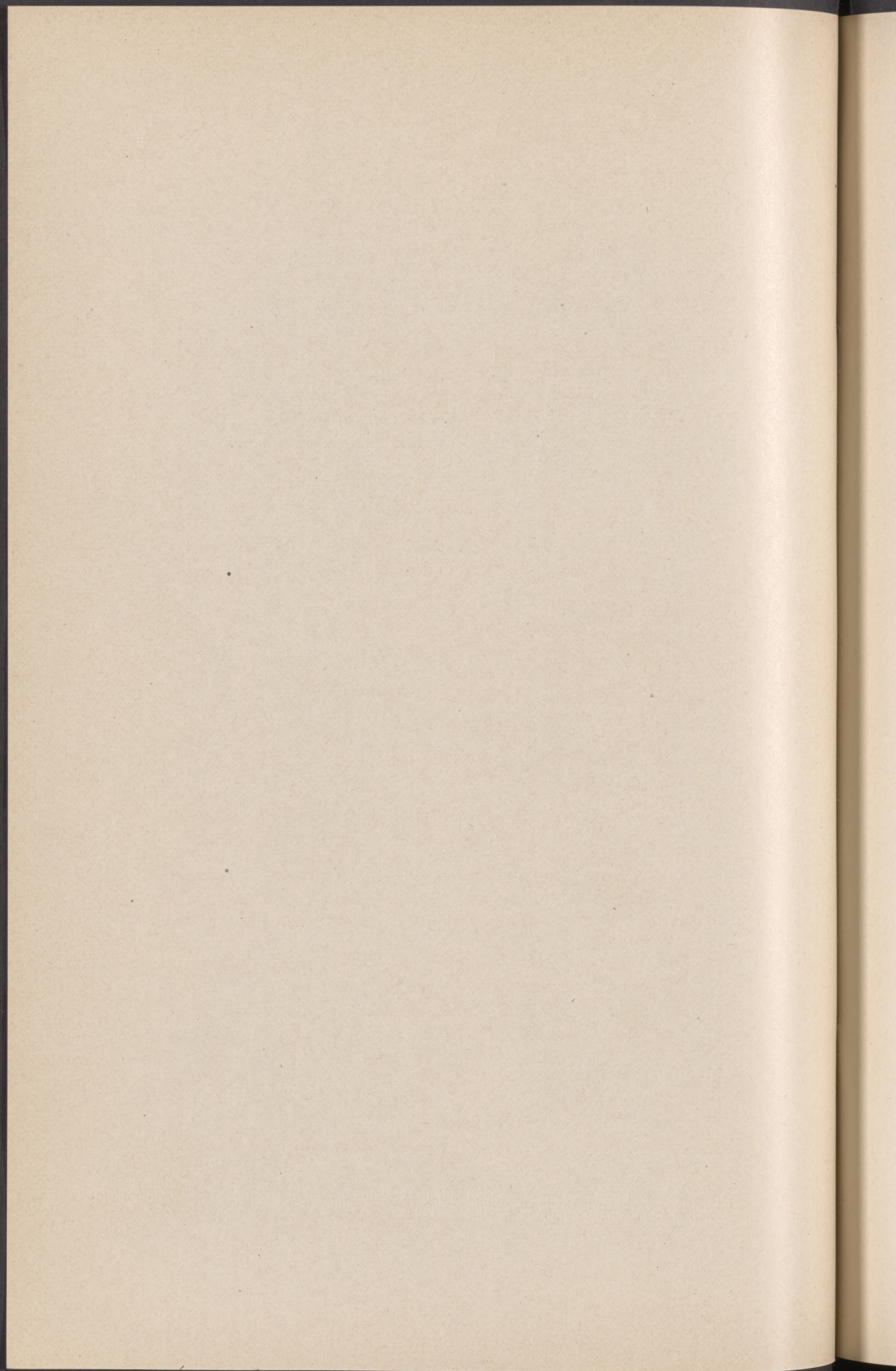
A motion was made to quash this indictment in the court below before the jury was sworn, and while such motion, as a general rule, is addressed to the discretion of the court and not reviewable on writ of error, that rule is not applied when the motion is rested upon the failure of the indictment to charge a crime, and the alleged error appears upon the face of the record, and this motion was within the exception to the rule. The defendant was not charged with any criminal offense, and having pleaded not guilty to any criminal offense, had he thereafter remained silent how would it have been possible to have convicted him of crime, and follow such conviction by sentence of imprisonment? The court below passed upon the validity of the indictment and denied motion to quash, in violation of settled legal principles that an indictment must charge the commission of a crime. *State vs. Mandeville* N. J. L. 88, page 420, and cases there cited. *Mead vs. State* 53 N. J. L., page 601.

Under the law and the facts as they appear in this case, the court of Quarter Sessions erred in refusing the motion to quash the indictment, and the Supreme Court

erred in affirming the action of the court below, and for this error the judgment of the Supreme Court should be reversed and the conviction and sentence held illegal and the indictment quashed.

Respectfully submitted.

WM. A. STRYKER,
of Counsel with Plaintiff-in-Error.



New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY	}	POINTS FOR PLAINTIFF-IN ERROR
DEFENDANT-IN-ERROR		
VS.		
LOUIS KISH		
PLAINTIFF-IN-ERROR		

PRELIMINARY

The first three counts in this indictment charges the defendant with unlawfully selling intoxicating liquor, to-wit, whiskey containing more than one-half per cent of alcohol per volume. The fourth count charges the unlawful possession of intoxicating liquor, to-wit: whiskey containing more than one-half of one per cent of alcohol in volume. 10

No count of this indictment charges that the liquor was sold or possessed for beverage purposes.

Motion to quash the indictment was made before the jury was sworn, alleging the omission to so charge and the motion was denied. The indictment is printed in full in the printed case, pages 8 and 9, and the motion to quash on page 14. 20

POINT 1.

The indictment and the several counts thereof are

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faulty in not charging a crime to have been committed against the statute. The statute makes the possession and sale of spiritous liquors, for beverage purposes, criminal. Laws 1922, page 255 etc. Sec. 10.

POINT II.

The indictment and the several counts thereof do not inform the defendant of the nature of the accusation and are therefore in violation of Article 1, Sections 8 and 9 of the constitution of this state.

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POINT 111.

The indictment and the several counts thereof fail to charge a violation of either the Beverage Act (Laws 1922, Chapter 255) or of the Non-Beverage Act (Laws 1922, Chapter 241).

POINT IV.

The defendant was put on trial upon an indictment which did not charge any crime or offense against him, after objection and motion to quash.

POINT V.

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The indictment and the several counts thereof do not set forth "the acts complained of," omitting in each instance to charge that the liquors possessed, or the liquors sold, were possessed or sold for beverage purposes. And the "for beverage purposes" is an essential part of the offense. In support of the above points, I refer in my brief to State vs. Freulli, 96 N. J. Law, page 399. Bishop on Criminal Procedure, Volume 1, pages 331, 514 and 598.

POINT VI

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The indictment failed to charge a crime against Plaintiff-in-Error, and the alleged error appeared upon the face of the record, hence this action of the court below is reviewable, the motion to quash the indictment having been made before the jury was sworn. Mayer vs. State, 63 N. J. L. 35; S. C. on Error, 64 Id. 323. State vs. Mandeville, N. J. L. 88, page 420.

WM. A. STRYKER,
of Counsel with Plaintiff-in-Error.

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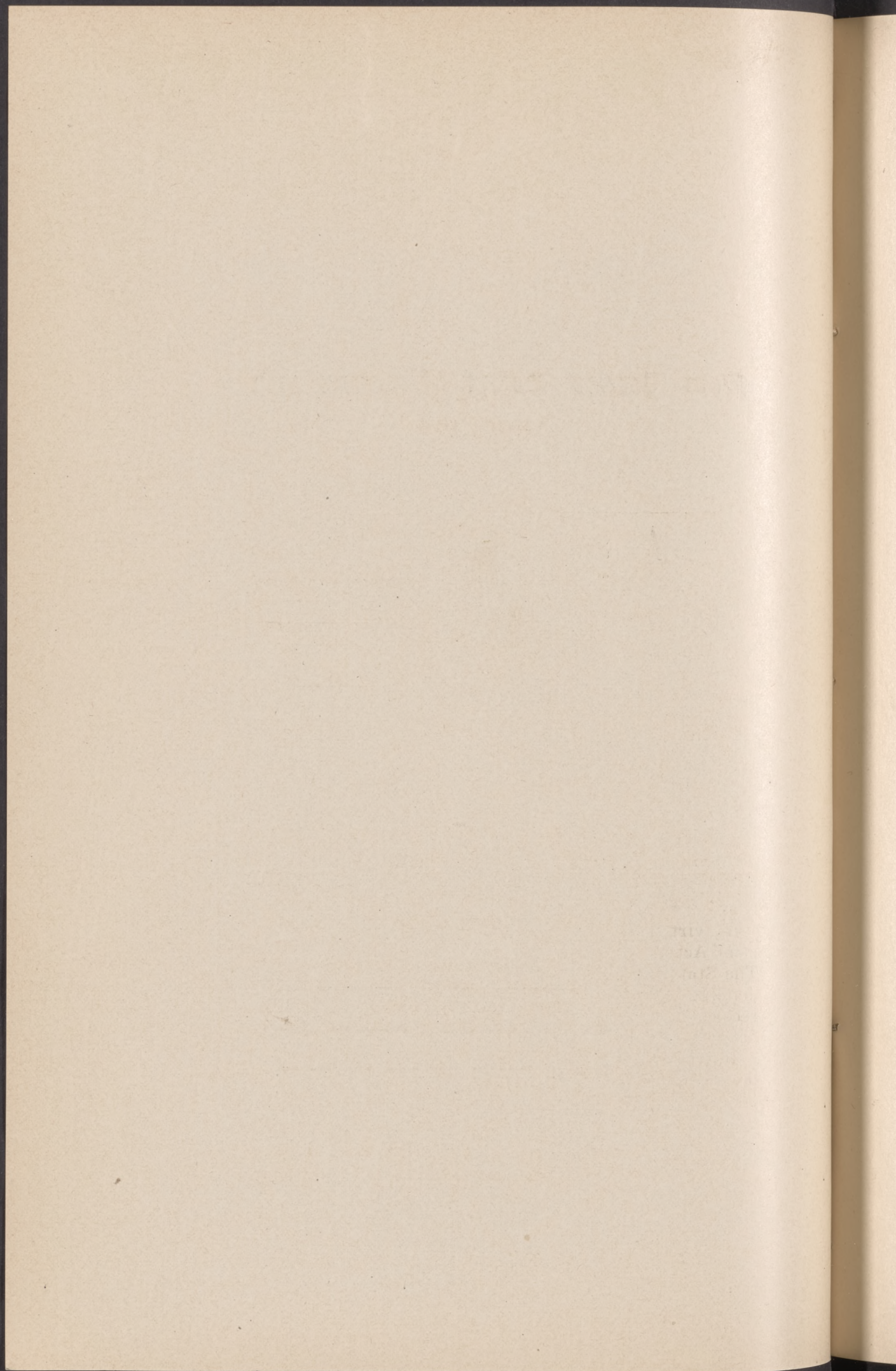
New Jersey Court of Error and Appeals

THE STATE OF NEW JERSEY
 DEFENDANT-IN-ERROR
 VS.
 LOUIS KISH
 PLAINTIFF-IN-ERROR

ON WRIT OF
 ERROR TO
 NEW JERSEY
 SUPREME COURT
 SUR INDICT-
 MENT FOR SALE
 AND POSSESSION
 OF INTOXICATING
 LIQUOR
 BEVERAGE
 PURPOSES

BRIEF OF THE STATE, DEFENDANT-IN-ERROR

SYLVESTER C. SMITH, JR.,
 Assistant Attorney General to Prosecute
 the Pleas in the County of Warren.
 Counsel for the Defendant-in-Error.



New Jersey Court of Error and Appeals

THE STATE OF NEW JERSEY

DEFENDANT-IN-ERROR

vs.

LOUIS KISH

PLAINTIFF-IN-ERROR

ON WRIT OF
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BRIEF OF THE STATE, DEFENDANT-IN-ERROR

(1)

The defendant in this case was convicted in the Warren Quarter Sessions on indictment containing four counts, the first count charging him with second offense of unlawful sale of intoxicating liquor, the second and third counts charging him with unlawful possession of intoxicating liquor, in violation of the Prohibition Enforcement Act, and the fourth count charging him with unlawful sale of intoxicating liquor. Assignment of error relates to only one matter: the denial by the trial Judge of a motion to quash the indictment. The Supreme Court in *per curiam* opinion, affirmed the conviction based upon the case of the *State vs. George Stasak*, reported in *IV. N. J. Misc. Rep., March 6, 1926, p. 129.* 20

II.

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THE STATE CONTENDS THAT THERE WAS NO ERROR IN THE JUDGMENT OF THE SUPREME COURT.

III.

MOTION TO QUASH AN INDICTMENT IS ORDINARILY ADDRESSED TO THE DISCRETION OF THE COURT. *State vs. Plough*, 88 N. J. L. 425. *State vs. Rubin*, 91 N. J. L. 368. *State vs. Riggs*, 92 N. J. L. 575.

IT IS ALSO AN ACCEPTED GENERAL RULE THAT THE DISCRETION OF A CRIMINAL COURT WILL NOT BE REVIEWED ON STRICT WRIT OF
10 ERROR. *State vs. Riggs*, 92 N. J. L. 575, cases cited on p. 576.

In this case, Mr. Justice Parker points out that Section 136 of the criminal procedure act gives a right of review to the defendant of discretionary rulings at the trial. This case is brought up by strict writ of error.

It will be noted from the record in the case that there was no motion in arrest of judgment. The State contends therefore that the denial of motion to quash the indictment is not reviewable on a strict writ of error.

20 The plaintiff in error, in his brief, relies upon the case of the *State vs. Mandeville*, 88 N. J. L. 418, 420, and attempts to point out that the motion to quash was not addressed in this case to the discretion of the Court. In that case, Chief Justice Gummere said:

“A motion to quash, as a general rule, is addressed to the discretion of the court and is not reviewable on writ or error. *State v. Siciliano*, 85 N. J. L. 389.

30 It would seem, however, that the rule is not applied when the motion is based upon the failure of the indictment to charge a crime and the alleged error appears on the face of the record.”

The State points out that the motion to quash, p. 14, was not based upon the ground that the indictment did not, on its face, charge a crime, but upon the ground that the indictment does not inform the defendant or give notice of the nature of the cause of accusation in that it did not set forth that the liquor was sold or held in the possession of the defendant for beverage purposes.

IV.

THE INDICTMENT IN EACH COUNT INFORMS THE DEFENDANT OF THE CRIME OF WHICH HE IS CHARGED.

The motion to quash the indictment will be found on p. 11 of the State of the Case. It is based solely on the fact that the indictment does not set forth the words, "For beverage purposes." At the time, the plaintiff relied solely on the case of the *State vs. Freulli*, 98 N. J. L. 395. Indictment in that case will be found in full on p. 10 396 and it sets forth the following:

"The grand jurors of the State of New Jersey, in and for the body of the County of Essex, present on their oath that James Freulli, late of the City of Newark, in the County of Essex, aforesaid, on the eighteenth day of March, 1922, with force and arms, at the city aforesaid, in the county aforesaid, did sell liquor, the said act of selling liquor being then and there prohibited and unlawful, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same." 20

The indictment in the present case, however, differs materially in each count as will be found on referring to the indictment on p. 8 of the State of the Case. In the present case the indictment sets forth in the first count, that the defendant having previously been convicted of unlawful sale of intoxicating liquor contrary to the provisions of Section 10 of the *Prohibition Enforcement Act*, did unlawfully sell intoxicating liquor, to wit: whiskey, containing more than one-half of one percent of alcohol by volume, which said act was then and there prohibited and unlawful and contrary to the provisions of Section 10 of an act of the Legislature entitled: "An Act concerning intoxicating liquor, used or to be used for beverage purposes," approved March 17, 1922, and known as the "Prohibition Enforcement Act." The other count is drawn in the same manner. 30

In the *Freulli* case, Mr. Justice Kalisch pointed out that the defendant could not determine whether the crime 40 charged was a violation of the "Prohibition Enforcement Act" or the "Non-Beverage Act." In the present

case the indictment particularly sets forth the act alleged to be violated as the "Prohibition Enforcement Act," giving its title in detail.

Section 10 of that act provides:—

10 "On and after the date when this act goes into effect, no person shall manufacture, sell, barter, transport, import, export, deliver, furnish, or possess, any intoxicating liquor, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented * * *."

The State insists that the indictment clearly charges this defendant with the violation of this particular section.

In charging a statutory offense it is sufficient to lay the charge in the words of the act without a statement of fact bringing the accused within its operation. *State vs. Brand*, 76 N. J. L. 267 aff. 77 N. J. L. 486.

20 Furthermore, Section 36 of the Prohibition Enforcement Act provides that

"* * It shall not be necessary in any affidavit, information or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful * * * *"

30 And Section 37 of the Act, directly provides that the "* * liquor or liquors mentioned in paragraph 'A' of section two shall be presumed to be for beverage purposes * * * *"

If an indictment presents, with reasonable certainty, all the facts necessary to render the offense judicially apparent, it should not be quashed. *State vs. Haase*, 53 N. J. L. 34.

40 In the *Freulli* case, relied upon by the Plaintiff-in-Error, it is to be noted that there is no reference in the indictment to the Prohibition Enforcement Act either by its short title or by its full title, and in view of the fact that the provisions of the Prohibition Enforcement Act and Non-Beverage Act both deal with the crime of sale

of intoxicating liquor, the court, in that case, was correct in quashing the indictment.

In the present case, however, it is respectfully urged that there is only one crime charged and that is a violation of the Prohibition Enforcement Act which relates solely to the sale of intoxicating liquor used or to be used for beverage purposes.

The court, in the *State vs. Solomon*, 96 N. J. L. 124, has already passed upon a case very similar in facts to the present. The defendant in that case was charged with selling adulterated whiskey contrary to Section 98 of the Crimes Act. That section provided that any person who shall manufacture

“* * * or sell, rum, brandy, wine or spirits of any kind or any other liquid of which the adulterated part of spirit of any kind shall form a component part *to be used as a beverage* that shall be adulterated or manufactured with spurious or poisonous ingredients of any description, shall be guilty of a misdemeanor * * * *”

The indictment omitted any averment that the alleged adulterated spirits were to be used as a beverage. The court said, in that case:

“* * * We think the defendant’s position in this respect is untenable where rum, brandy, wine or spirits of any kind is kept for barter or sale, we are of the opinion that it is presumed to be so kept for beverage purposes * * * *”

By virtue of Section 37 of the Prohibition Enforcement Act this presumption is given legislative authority. The State contends that the ruling of the trial Judge in denying the motion to quash was proper and that the record of its face shows no legal error prejudicial to the defendant.

It is urged the judgment of the Supreme Court should be affirmed.

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Counsel for the Defendant-in-Error.

