New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,
Plaintiff and Plaintiff in Error,
vs.
FREDERICK HART,
Defendant and Defendant in Error.

On Writ of Error to the Supreme Court.

BRIEF OF PLAINTIFF IN ERROR

The defendant, Frederick Hart, was indicted for seduction and placed on trial on the 9th of March, 1915, before the Quarter Sessions of Mercer County. After the State put in its case, the defendant, without making any answer, moved the Court to direct a verdict of acquittal on the evidence presented by the State. Over the objection of the State, the Court directed the jury to acquit the defendant. The State took a writ or error to the Supreme Court. The Supreme Court dismissed the writ of error for the reason that the State is not entitled to a writ of error for an error in law by the trial judge. From this judgment of dismissal of the writ of error the State takes a writ of error into the Court of Errors and Appeals.

The record of the case, taken from the sessions, shows that no judgment was entered upon the verdict. The Supreme Court waived the technical objection on the authority of West v. The State, 22 N. J. Law, page 212:

> "A verdict without judgment in civil cases cannot be given in evidence; but in criminal

> cases it is otherwise, and on a plea of *autre fois acquit* a verdict of acquittal may be given in evidence without judgment thereon; it is therefore no error in a record of conviction that no formal entry of a judgment of acquittal is entered upon the counts on which the defendant was acquitted. Technical errors in the mere making up the record, even in criminal cases, are not to be received with favor; and the better practice is to remit the record for amendment of such defects, even after errors assigned."

The reason given for this view is contained on page 231 of the opinion, paragraphs 1, 2 and 3. See also Bull v. International Power Company, 84 Equity 209; also page 217, paragraph 2 of the same case. See also Apgar's Administrators v. Hiler, 24 N. J. Law 808; Court of Errors, and see page 219, paragraph 3, of the same case.

The State admits that at common law no person shall, after acquittal, be tried for the same offense, and also that this principle is imbedded in our constitution, but the State insists that this acquittal must be a legal acquittal such as where there as questions of disputed fact, credibility of witnesses and weight of evidence and the other questions which call upon a decision as to facts that are in dispute.

We submit that where an acquittal is due to a misapplication of the law by the Court, or where the acquittal is due to the Court controlling a verdict by directing the jury to find a verdict of acquittal, that this is not such an acquittal as bars the right for a defendant to be tried again, or such as complies with the requirement of the constitution. This question is discussed fully in the case of Smith and Bennett v. State,

41 N. J. Law 598 (C. of E.), on pages 599, 609 and 615.

The Court, in its opinion, state of the case, page 20, lines 10 to 30, discusses the decision of the United States Supreme Court in the case of the United States v. Sanges, 144 U. S. 310, but admits that the authority of the Federal Supreme Court is weakened by the fact that, under the English common law, our Supreme Court has the jurisdiction formerly exercised by the King's Bench, and that the common law practice prevails in New Jersey.

The Prosecutor of the Pleas represents the Attorney-General in the various counties in New Jersey. At common law, the crown, on the application of the Attorney-General, could take a writ of error as a matter of right. A defendant could only receive it as a matter of grace, and then on the application made by the Attorney-General.

In the case of Marquis of Winchester, in which a judgment of guilty was reversed, shows it was the practice of the Attorney-General to apply for writ of error for the defendant as well as for the State. Croke's Reports 504.

The next case is in the Court of King's Bench, 1815, 4 M. & S. 337.

The King on the prosecution of N. P. Wyndham against Mann.

The defendant was acquitted at the last Sulfolk Assizes upon not guilty to an indictment for a nuisance in continuing a hut erected upon the highway.

And now Bosset, Serjt., moved on behalf of the crown for a new trial, on the ground that the verdict was against the evidence.

> But per Lord Ellenborough, C. J., "Unless you can point out some distinction between the case of a nuisance and other criminal cases, the general rule is that we do not grant a new

trial upon an indictment for a misdemeanor, where a verdict has passed for the defendant upon the merits. This is, to be sure, in the nature of a remedy for a civil right; yet it is in the form a criminal proceeding, and may subject the defendant to be punished criminally," and his Lordship referred to Rex. v Meynell.

Dampier, J. "In penal actions, where the verdict is for the defendant, the courts, I believe, do not grant a new trial except for a misdirection of the judge. It was formerly doubted in *quo warranto* information, but this has since been considered as an excepted case."

The case quoted shows that a new trial was not granted at common law when a jury passed on the merits of the case, but makes the plain exception that a new trial is granted for a misdirection by the judge. Besides, this case establishes that when the court controls the verdict by an erroneous application of the law, a writ of error will lie.

In the case of King on the prosecution of Mills against Brice, 1 Chitty 354, decided in 1819, where Mills, a private prosecutor, moved for a rule to show cause why a verdict of acquittal should not be set aside because he, the private prosecutor, was not allowed to address the jury, C. J. Abbott said:

"The prosecutor has now the opinion of all the judges of this court upon this subject, and I was desirous that he should have that opinion for the sake of the public. But there is another decisive objection to this motion, which I did not choose to mention in the first instance, that is that no new trial can be granted after acquittal of the defendant, unless on the grounds of a misdirection of the judge."

The above quoted case again shows that no new trial is granted unless on the grounds of misdirection of the judgment.

In the case of Regina v. Mills, 10 Cl. & F. 534, the defendant was indicted in 1842 and tried by a jury, and a special verdict found. The special verdict was taken into the Queen's Bench in Ireland and argued at the Easter Term, 1843. The Queen's Bench held he was not guilty of felony, and thereupon a writ of error was brought to the House of Lords, and the judgment affirmed.

In the above quoted case, which is nearer in point to the case at bar, shows that the writ of error was taken by the Crown after a verdict of not guilty, and no question was raised of the right of the Crown, at common law, to take a writ of error.

In the case of Regina v. Chadwick, II Q. B. 205, carried to the Court of Errors, on a writ of error on behalf of the Crown, Lord Coleridge said that when the case was before him in the court below, it was intended that the facts should be made the subject of a special verdict with the view to the question being considered by a court of error.

Regina v. Chadwick was as follows: James Chadwick was indicted at the sessions of the Oyer and Terminer and gaol delivery, held at Liverpool, in and for the county of Palentine of Lancaster (Liverpool Assizes, December, 1846), for bigamy. The indictment charged, in the usual form, that "the defendant married one Ann Fisher, and afterwards, and whilst he was so married to the said Ann, feloniously married one Eliza Bostick, his said former wife being then alive." A special verdict was found, in the following words: "That, on the 14th day of September, 1845, the said James Chadwick was married to one Ann Fisher, spinster, at," etc., "according to the rites and ceremonies of the Established Church, and that after-

wards, viz., on the 23d day of March, 1846, the said James Chadwick, was married to one Eliza Bostick, spinster, according to the rites and ceremonies of the Established Church, she the said Ann Fisher being then alive. And that the said Ann Fisher, to whom the said James Chadwick was married, as aforesaid, on the 14th day of September, 1845, was the lawful sister of Hannah Fisher, to whom the said James Chadwick had been lawfully married on the 27th day of June, 1825, and that after marriage of the said James Chadwick, with the said Hannah Fisher, they, the said James Chadwick and Hannah Fisher, lived together as man and wife; and which said Hannah Fisher departed this life before the time when the said James Chadwick was married to the said Ann Fisher, as aforesaid. But whether or not upon the whole matter," etc., "found the said James Chadwick is guilty of felony," etc., "the said jury are altogether ignorant," etc.

Judgment was given at the Assizes by Whightman, J., "That the said James Chadwick is not guilty," etc., "and that he go without a day," etc.

Error was brought on the judgment, the only cause assigned being that "judgment had been given for the defendant on the special verdict, whereas it should by law have been given against him. Prayer of reversal," etc. Joinder.

The writ of error was argued in the Michelmas Term, November 17th and 20th, 1846.

The above quoted case is in point to the case at bar. The defendant was indicted at the Oyer and Terminer and tried in the Liverpool Assizes. When the facts were disclosed, the court decided the defendant is not guilty and entered a judgment "that he go without a day." A writ of error was taken in this case into the Queen's Bench. This case establishes that, under the common law of England, the Crown had a right to

a writ of error without any statutory powers whatever.

Regina v. Houston, 2 Craw. & Dix 191. The defendant in this case demurred to the indictment. The court sustained the demurrer and the crown took a writ of error. The judgment was reversed by the Court of Queen's Bench in Ireland.

The only distinction between this case and the case at bar is that instead of the defendant demurring to the indictment, he demurred to the evidence and obtained a directed verdict, which was a judgment against the state, the same as a judgment on demurrer. In neither case had the jury passed upon the merits.

In the case of State v. Buchanan, 5 Har. and Johns. 317, Buchanan was indicted for conspiracy and demurred to the indictment. The demurrer was held good and the indictment was quashed. From this the state appealed, and Justice Buchanan, after quoting 2 Hale P. C. 247:

> "If A be indicted for murder or other felony, and plead *non cul* and a special verdict found, and the court do erroneously adjudge it to be no felony; yet so long as that judgment stands unreversed by a writ of error, if the prisoner be indicted *de novo,* he may plead *autre fois acquit,* and shall be discharged; but if the judgment be reversed, the party may be indicted *de novo.*"

And in support of the right of the state to a writ of error, says:

> "Hence it is manifest that in the opinion of Lord Hale the King might have a writ of error in a criminal case, since it would be absurd to say that a man who had obtained a judgment of acquittal for a defect in the indictment, or on a special verdict, could never be indicted again for the same offense until the judgment

was reversed by a writ of error, if a writ of error would not lie. Fortified by such authority alone, in the absence of any legislative provision in this state on the subject, we think we might safely say without further inquiry, that a writ of error in this case was properly sued out."

The right for the Crown to take a writ of error is ably and exhaustively discussed in the following cases quoted from Pennsylvania and New York:

1. "A defendant in a criminal case cannot have a writ of error or *certiorari* except by special allowance of the Supreme Court, or a judge thereof, or by the consent of the Attorney-General."

2. "But the commonwealth is not subject to this disability; and her representative, the District Attorney of the proper county, may take out a writ of error or *certiorari* without such allowance or consent." Commonwealth v. Capp, 48 Penn. St. Rep. 53.

In the case cited above the court further said:

"There is nothing in the disabling provisions of the statutes to limit the common law power of the courts, and it would be strange indeed if the state could not appeal to their own tribunals for justice. No restraints have been imposed by the statutes and none should be imposed by judicial interpretation."

1. "The Court of Oyer and Terminer after quashing an indictment may at a subsequent term give leave to the public prosecutor to make up the record as if judgment had been rendered for the defendant on demurrer, for the purpose of enabling him to sue out a writ of error, and

should such leave be refused, the court can award a *mandamus*."

2. "When an indictment has been quashed and the public prosecutor wishes to have the opinion of the court reviewed, it is their duty, if the application is made within a reasonable time, to give their judgment a form which will enable the District Attorney to bring a writ of error." People v. Stone, 9 Wend. 182 (1832).

Also in the case of the People v. Mather, 4 Wend. 229, the court discussed the question of the right of the state to a writ of error, and in effect said that new trials are never granted unless it is clearly evident that the verdict is the result of the misdirection of the judge.

People v. Corning, 2 N. Y. 9, note a, People v. De Bow. In this case the cases are cited and the question very ably discussed in the opinion given by the court.

The next case in our state that touches on the subject is the case of the State v. Zabriskie, 43 N. J. L. 369:

"1. There must be special ground shown to entitle an indicted defendant to an allowance of a writ of *certiorari* to bring the record into this court.

"2. The request of the inferior court will be a strong reason in favor of the allowance of the writ.

"3. The writ is allowable as of course at the instance of the Attorney-General or prosecuting attorney acting for him, to bring up such record even after verdict."

This was a case where the court was unable to agree as to the sentence passed upon the defendant. The Prosecutor took a writ of *certiorari* and brought the case into the Supreme Court.

On page 371 the court says that "the writ of *certiorari* will lie from the inferior court and there are legal questions which it desires this court to solve or entanglements arising from diverse views upon matters of fact, or any other difficulty that is such as has not been solved by the upper court, and that the Prosecutor of the Pleas is the one entitled to the writ."

The same case was taken to the Court of Errors and Appeals and found in 43 N. J. L. 640:

> "After conviction and before judgment in the court below the Supreme Court has power to award a *certiorari* at the instance of the Attorney-General and bring up the proceedings and pass judgment upon the defendant."
>
> "In this state the power of the Supreme Court was recognized as early as the case of State v. Hunt, Coxe 287, where an indictment against the defendant for assault and battery was certified from the Hunterdon Sessions into the Supreme Court on application of the Attorney-General. The power of the court was challenged, and it does not appear by the report of the case what disposition was made of the indictment. A reference, however, to the minutes of the court will show that process was issued to bring the defendant into court, and that the court ordered the proceedings in the sessions, had after *certiorari* issued, to be set aside, and that the defendant be charged on the indictment, whereupon he was sentenced to pay a fine of $30 and stand committed until the fine and fees were paid. See Minutes of September Term, 1795; Minutes of May Term, 1796, p. 79.
>
> "In State v. Webster, 5 Halst. 293, an indictment had been quashed in the Quarter Sessions for insufficiency, whereupon the attorney for the

state certified the indictment into the Supreme Court to review the action of the sessions. The Supreme Court sustained the ruling of the sessions, saying, however, that no opinion was expressed as to the propriety of bringing the case up by *certiorari.*

"I think that by this expression the court intended to intimate that there might be a distinction between cases where judgment had been passed in the court below and where the case had not proceeded to judgment in the inferior tribunal. In the former case a writ of error might be the appropriate remedy.

"That this distinction was supposed to prevail in the practice of the court may be inferred from the fact that in the case cited from Coxe the court ordered the return to the *certiorari* to be amended so as to show whether it was awarded before judgment was rendered in the court below. Minutes of Sup. Ct., April Term, 1796.

"Since the case in Coxe, the power of the Supreme Court to award the writ at the instance of the Attorney-General, before judgment below, has, so far as my information extends, never been denied."

The next case in our State is the case of the State v. Meyer, 65 N. J. L. 233, Court of Errors and Appeals. The court, in its opinion, quotes many of the cases set out in this brief and further sets out the fact that the right to a writ of error by the crown or state is a common law right. No statute was required to give the state the right to a writ of error. At common law the defendant had no right to a writ of error. It was for the benefit of defendants that remedial legislation in the form of a statute making it a legal right for the defendant

to take a writ, so as to place him on the same plane as the crown or state. Because the defendant has acquired his right to a writ by statutory legislation, it does not follow that the state has lost any of is common law rights unless statutory legislation to that effect can be shown.

In the case of the State v. Meyer, the court, in commenting on the cases, says:

> "These decisions are not satisfactory as to the common law of England and should not be followed in this state, where we are accustomed to adhere closely to common law rules which were not obsolete before the Revolution and are not out of harmony with our institutions.
>
> "This issuance of a writ of error should not be confounded with the granting of a new trial, which always rests in the discretion of the court. The rule of the English judges was to refuse a new trial after the acquittal of the accused upon an indictment, and the principle underlying that rule is now imbedded in our constitution."

We do not contend that a writ of error will lie in favor of the state after an acquittal on the merits of a case, but we contend that a defendant is not acquitted on the merits of the case, when the court, on hearing one side of the case, applies the law to the facts as adduced in evidence and directs a jury to find a verdict of acquittal. Such acquittal is not an acquittal as our constitution or the common law intends should prevent a retrial, but it is an acquittal which is due to the application of the law by the judge to the facts in the case and is in substance the same as if the jury found a special verdict in the form of a special set of facts and the court applied the law to the facts and directed that a verdict of guilty or not guilty be entered accordingly.

We contend that the state has a right to have the law interpreted or construed by the upper court just the same as a defendant. When the court below appplies the law in a manner that controls the verdict for the state, the defendant has the right to a writ of error. We contend that when the court directs a verdict, or rules against the state on a demurrer to an indictment, or a demurrer to evidence, that the state has sill the common law right to have the lower court's application of the law reviewed by the upper court. If the verdict of acquittal is such that the common law, or the constitution, prevents a retrial of the case, at least the state should have the right to have the judgment of the upper court as to the interpretation and application of the law.

In the case of the State v. Meyer the court said, on page 237:

> "The question whether, after such an acquittal as will protect the defendant from being tried again, the state may prosecute a writ of error in order to correct a misconstruction of law need not now be, and has not been, considered by the court."

It will be observed that the court, in using the phrase, "after such an acquittal," no doubt implies that every acquittal is not a bar to a new trial, nor is it a compliance with the constitution of the state. But this phrase seems to strongly imply that the acquittal that complies with the constitution and the common law is a legal acquittal on the merits, and no acquittal due to a misapplication or an erroneous construction of the law by the court below.

We contend that the state has, at common law, the right to a writ of error to review the law as laid down by the lower court, particularly when its application of the law controls an acquittal of a defendant. We sub-

mit this right exists at common law and the common law prevails in this state and is imbedded in our constitution.

A close reading of the opinion of Judge Dixon in Meyer v. State and the cases cited therein, are convincing that a writ of error will lie in behalf of the state.

The Supreme Court, in its opinion in the case at bar, page 20, line 5, says:

> "In order to secure a review of a trial error, the state must be able to have a bill of exceptions and a writ of error to remove the case to this court."

I call attention to section 134, page 1862, volume 2, Compiled Statutes, in which it says that writs of error in all criminal cases shall be writs of right, and issue of course. And to the further fact that in this section there is no limitation placed upon the right of the state to a writ of error.

Under section 135, same page and book, relating to bill of exceptions, the defendant only is given a right to a bill of exceptions on a strict writ of error.

Under section 136, under which section the state in this case took its writ of error, the statute distinctly says that the proceedings had upon the trial "may be returned by the plaintiff in error therein with the writ of error," and further states "where a bill of exceptions was settled, signed and sealed thereto, or error assigned thereon, or not, the appellate court shall remedy the defect if it find any."

Under this section there is no limitation on the state but simply states the plaintiff in error, which is as likely to be the state as the defendant; and the only limitation in this section is placed on the defendant.

Under section 137 of the same act it again states that the plaintiff in error taking up the entire record can specify causes for reversal without assigning error or having taken exception and serve the same within ten days on the defendant in error.

It will be noted those sections do not use the word plaintiff or defendant, below, but use the word plaintiff in error and defendant in error, indicating that the parties below may, according to circumstances, occupy either position. We submit, in answer to the Supreme Court's opinion, that we are not required to have a statute to enable us to take an exception. That at common law we have a right to a writ of error and the statute does not deny us the right to a writ of error, but under the 136th section exceptions are not necessary for plaintiffs in error.

We submit that the Supreme Court should be reversed.

Respectfully submitted,
Martin P. Devlin,
Prosecutor.

STATE GAZETTE PUBLISHING CO., Printers, Trenton, N. J.

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Plaintiff and Plaintiff in Error,

vs.

FREDERICK HART,
Defendant and Defendant in Error.

Brief for Defendant in Error.

The defendant was indicted at the October term, 1914, for a violation of section 50 of the Crimes act; seduction under promise of marriage, resulting in pregnancy, the defendant being over the age of eighteen, and the female, Rebecca Miller, under the age of twenty-one. There was a second count charging fornication.

The case was tried before Judge Frederick W. Gnichtel, in the Mercer Quarter Sessions, on the 8th and 9th days of March, 1915.

There was no stenographer in the case. Mr. Crossley, counsel for the defendant, and Mr. Devlin, prosecutor, and the judge agreed on the following state of facts which were established by the state:

That Frederick Hart, the defendant, was a single man over eighteen years and about twenty-five years of age; that he started to keep company with Rebecca Miller, a single female of good repute for chastity, on December 18th, 1912; that about the middle of October, 1913, he had sexual intercourse under promise of marriage with

the said Rebecca Miller; that the said Rebecca Miller was not then twenty-one years old, and would not be until December 12th, 1913.

The intercourse, under the promise of marriage, continued up until the first week in February, 1914, and she became pregnant about the first week in February, 1914. On November 1st, 1914, she gave birth to a fully developed child.

The said Frederick Hart was the only one who ever had any sexual relation with her.

That the evidence to these facts is corroborated to the extent required in cases of indictment for perjury. The evidence as to the pregnancy occurring on or about February 1st, 1914, is also corroborated.

The state rested.

At this point Mr. Crossley opened the defense, and in so doing proceeded to discuss the law, and made the claim that because the girl did not become pregnant until after the age of twenty-one years, the defendant was not guilty of seduction under promise of marriage as charged in the indictment.

At this point the prosecutor objected to Mr. Crossley discussing the law before the jury and urged that if the question was going to be raised at all, the proper time to raise it was now, before the defense proceeded to put evidence in, as the state had put in its full case on the question of age and the time of happening of the different events.

The court then excused the jury and called on counsel to argue the question.

Mr. Crossley submitted to the court that the state's case showed that the evidence of the complaining witness was that the promise of marriage, and the original act of sexual intercourse, took place when she was under twenty-one years of age, and, according to admitted evidence of the state, the pregnancy did not occur until about two months after the complaining witness arrived at the age of twenty-one, as the result of subsequent intercourse after she passed her twenty-first birthday.

Mr. Devlin, prosecutor for the state, urged that the state established all the elements necessary to bring the defendant under the indictment of seduction under promise of marriage, and that he was liable under this section, if it were established, that he was over eighteen years of age, and that he had sexual intercourse with her under promise of marriage, and that she was a single female of good repute for chastity and was under twenty-one years of age. When the state established those facts, that while it was necessary that she should be pregnant to have the crime complete, yet that pregnancy did not have to occur while she was under the age of twenty-one years.

The court stated that in view of the construction given to section 50 (Compiled Statutes, p. 1761) of the Crimes act, by the Supreme Court, he doubted whether the facts in this case constituted a crime.

The testimony of the state established that the sexual intercourse began in October, 1913; that the complaining witness became twenty-one on December 12th, 1913; that at that time she was not pregnant; that the sexual intercourse was continued until early in February, and that at that time she became pregnant. The child was born November 1st, 1914.

State *v.* Zabriskie, 43 L. 640, holds that there are seven essential elements to this offense, and that each and all of them is necessary to convict; that the absence of any one is fatal. One of these elements is the age of the female—she must be under twenty-one when the offense is committed.

The ensuance of pregnancy is stated in State *v.* Price (61 L. 500), to be the essential condition of this legislation. This condition was not present while the complaining witness was under twenty-one, and when that condition was present she had passed the age and was two months older than twenty-one. I hold, therefore, that the evidence in this case does not present all the necessary elements to constitute a crime under section 50 of the Crimes act. That the state must establish

that the pregnancy, with the other elements of the crime, occurred before the girl was twenty-one years of age, before the crime of seduction under promise of marriage could be established.

A recess was taken until two o'clock.

The court reconvened at two o'clock.

Mr. Devlin, Prosecutor, abandoned the count in the indictment for fornication and elected to stand on the count of the indictment for seduction under promise of marriage.

Mr. Crossley moved that the jury be directed to find a verdict of not guilty for the defendant. The court thereupon directed the jury to find a verdict of not guilty of the charge alleged in the indictment. Mr. Devlin, Prosecutor, asked an exception to the court's ruling in directing the jury to find a verdict of not guilty for the defendant.

The Court—It is granted and sealed accordingly.

F. W. GNICHTEL,

[SEAL.] *Judge.*

William J. Crossley, attorney of Frederick Hart, defendant, and Martin P. Devlin, Prosecutor of the Pleas, attorney for the state, hereby stipulate and agree with Judge Frederick W. Gnichtel, that the foregoing is all the facts proved at the trial of the above-stated cause and is a true statement of the case as agreed to by us, and constitutes the entire record of the established facts and proceedings in the above-stated cause.

WILLIAM J. CROSSLEY,
Attorney for Frederick Hart.

MARTIN P. DEVLIN,
Prosecutor of the Pleas,
for the State.

F. W. GNICHTEL,
Judge.

The jury returned a verdict of not guilty pursuant to the direction of the court (p. 8, l. 30, to p. 9, l. 4).

The record of the case, taken from the Sessions, shows that no judgment was entered upon the verdict. The Supreme Court waived the technical objection on the authority of West *v.* The State, 22 N. J. Law 212:

> "A verdict without judgment in civil cases cannot be given in evidence; but in criminal cases it is otherwise, and on a plea of *autre fois acquit* a verdict of acquittal may be given in evidence without judgment thereon; it is therefore no error in a record of conviction that no formal entry of a judgment of acquittal is entered upon the counts on which the defendant was acquitted. Technical errors in the mere making up the record, even in criminal cases, are not to be received with favor; and the better practice is to remit the record for amendment of such defects, even after errors assigned."

Following this acquittal the state, by the prosecutor of the pleas of Mercer county, took a writ of error from the Supreme Court to the Quarter Sessions, to review and reverse the acquittal.

After argument in the Supreme Court, that court held that—

> "Where a trial judge has directed the jury to find a verdict for the defendant, and the jury, in accordance therewith, finds the defendant not guilty, the state is not entitled to a bill of exceptions or to a review by writ of error of an error in law by the trial judge, in the absence of any statute authorizing such procedure,"

and dismissed the writ of error.

A writ of error from this court to the Supreme Court has been taken, by the state, and under that writ the case is now presented for the consideration of this court.

The assignments of error, pp. 21–22, are as follows:

(1) That judgment was given for the defendant, Frederick Hart, against the state, instead of for the state against the said Frederick Hart.

(2) That the Supreme Court dismissed the writ of error and denied the right of the state to maintain a writ of error from the Supreme Court to the Quarter Sessions.

I do not deem it necessary to consume the time of the court, in the discussion of the question, whether the state is entitled to a writ of error from this court to the Supreme Court.

There is no motion to dismiss the writ under which the case has been brought here, upon that or any other ground. There is no contention, on my part, that the state may not, under the common law and our statute, avail itself of a writ from this court to the Supreme Court.

The only question presented for consideration is: Was there error in the Supreme Court's dismissal of the writ of error, taken by the state, after the acquittal of the defendant in the Quarter Sessions, from the Supreme Court, to reverse that acquittal?

Counsel for the state has devoted much space in the citation of English, New Jersey and other cases. After the examination of these authorities, I have been unable to find among them a single case which meets or adjudicates the question raised by the writ.

There is not cited a case where a writ of error to the trial court, from the Supreme Court, presented by the state, after the acquittal of the defendant, has received the sanction and support of the court.

The state relies mainly upon the adjudication of this court in State *v.* Myer, 65 N. J. L. 233, Court of Errors and Appeals. This is a case where there was a conviction removed by the defendant by writ of error to the Supreme Court; which court reversed the conviction, and a writ of error from this court by the state to reverse the judgment of the Supreme Court was upheld.

This, and other cases in this state have, by virtue of the settled rule of the common law, and the New Jersey statutes, providing: "That errors happening in the Supreme Court of this state shall be heard, rectified and determined by the Court of Appeals in the last resort in all causes of law," and that it shall and may be lawful for the attorney-general, in behalf of the state, or, &c., "who may be damnified or aggrieved by any judgment rendered or to be rendered in the Supreme Court, to sue forth a writ of error to be directed to the judges of the said Supreme Court, for the time being, commanding them to cause the record of such judgment, and all things concerning the same, to be brought before the said Court of Appeals," held that the state has the right to a writ of error, from this court to the Supreme Court; that the statute includes criminal cases; and that this right has been delegated to prosecutors of the pleas, but the question at issue was not only not decided by that case, but the court, on the other hand, were careful to say:

> "The question whether, after such an acquittal as will protect the defendant from being tried again, the state may prosecute a writ of error in order to correct a misconstruction of law need not now be, and has not been considered by the court."

THE VERDICT OF ACQUITTAL IN THIS CASE IS SUCH AN ACQUITTAL AS WILL SUSTAIN A PLEA OF AUTREFOIS ACQUIT. IT WAS AN ACQUITTAL ON THE MERITS. THE VERDICT ITSELF CONSTITUTES A BAR TO A SECOND TRIAL.

The determination of this proposition involves, and is based upon the fact that the acquittal was a lawful acquittal.

The evidence in the trial of the case disclosed an utter lack of proof to support a verdict of guilty.

Under these conditions it became the duty of the trial judge, upon request, to direct a verdict of acquittal.

"In criminal cases, in most jurisdictions, the courts have the right to direct a verdict of acquittal, when there is an entire lack of evidence to support a verdict of guilty."

Branson's Instructions to Juries, § 10.

"Where the evidence for the government, if assumed to be true in fact, with all reasonable inferences therefrom, is not legally sufficient to support a verdict of guilty, it is the trial court's duty, on being moved thereto, to direct a verdict of acquittal."

Duff *v.* U. S., 185 Fed. R. 101; Crumpton *v.* U. S., 138 U. S. 361; France *v.* U. S., 164 U. S. 676.

A refusal of the instruction in such case held reversible error.

"If there is no evidence tending to prove the offense charged, and the only issue is one of law, it is the duty of the court to direct an acquittal, and erroneous not to do so."

Underhill on Cr. Ev. (2d ed.), § 279; Burnett *v.* State, 62 N. J. L. 510.

Collins, J., quoting Judge Depue in Apgar *v.* Wolston, 14 Vr. 57–69, relative to the power of the court to order an acquittal for want of evidence, adds:

"The same reason that compels a direction of acquittal where the state refuses to offer any proof, applies where the proof offered is insufficient to warrant a conviction."

It was an acquittal on the merits of the case. "Where the term 'merits' is used in speaking of the determination of a prosecution on the merits, it implies a consideration of substance, not of form; of legal rights, not of mere defects of procedure, or the technicalities thereof."

Words and Phrases; People *v.* Lyman, 65 N. Y. Supp. 1062–1065.

"When a person has been, in due form of law, put upon trial, upon a good and sufficient indictment, and convicted or acquitted, that conviction or acquittal may be pleaded in bar to a subsequent prosecution within the same jurisdiction for the same offense." "So firmly is this doctrine established, that the government will not be allowed to institute a second prosecution, or put the prisoner to a new trial, even though his acquittal is consequent upon the judge's mistake of law," &c.

May Cr. Law (3d ed.), § 117–118.

"A verdict of not guilty, on a direction by the court, which under a statute it was unauthorized to give, is an acquittal and may be pleaded as such."

12 Cyc. 275-E. Cites People *v.* Horn, 70 Cal. 17; People *v.* Webb, 38 Cal. 467; Black *v.* State, 36 Ga. 447; State *v.* Davis, 4 Blackford (Ind.) 345.

I submit that the instruction of the court below to the jury to render a verdict of not guilty was a correct legal instruction and not open to the charge of error.

THE STATE HAD NO RIGHT TO A WRIT OF ERROR.

In addition to the opinion of the learned judge of the Supreme Court, in support of this contention, there seems to be a very general acceptance of this rule throughout the United States as well as in England.

"As a general rule, the state has no right to a writ of error, or to an appeal from a judgment in favor of defendant, whether upon a verdict of acquittal or upon the determination by the court of a question of law, unless it be expressly conferred by statute in the plainest and most unequivocal terms."

12 Cyc. 804 (b).

In the foot-note to this statement of law are cited cases from twenty-three of the United States, besides United States *v.* Sanges, 144 U. S. 310, which is cited and commented upon by Judge Swayze in his opinion of the Supreme Court in this case, page 20.

"The state cannot appeal from a judgment of acquittal," &c., &c., "where the jury is directed to acquit because of the insufficiency of the evidence."

12 Cyc. 806B and 807.

There is no instance of error being brought upon a judgment for a defendant after an acquittal.

1 Arch. Cr. Pr. & Pl., § 199; 3 Coke's Inst. 214.

There is not a reported case in our own state where a writ of error by the state after the acquittal of the defendant has been upheld.

Justice Swayze, deciding this case in the Supreme Court, said: "We find that in the practice in our own state, without question or exception, as far as we know, it has been taken for granted by bench and bar that the state was not entitled to a *bill of exception,* or *to a review, by writ of error, of an error at law by the trial judge.*"

In the State *v.* Dehart, 2 Hal. 172, held:

> "The court will not order a new trial where there has been a verdict of acquittal."

In the State *v.* Kanouse, Spen. 115, this court held:

> "No new trial can be granted after verdict of acquittal, upon the application of the state. There has never been an instance in which it has been done."

We have, therefore, an acquittal, before a competent court, upon an indictment under a constitutional statute, which is sufficient, in substance and form, to sustain a conviction; a jury impanelled and sworn, charged with his deliverance, and a verdict of acquittal, following the lawful direction of the trial court.

We have a writ of error, taken by the state, from the Supreme Court to the Quarter Sessions, which writ of error has been dismissed by the first-named court, upon the grounds that there is no statutory or other authority for the use of the writ by the state under the conditions present; that the state was not entitled to a bill of exceptions, or to a review by writ of error of an error in law by the trial judge; and that after the direction and return of a verdict of not guilty in a criminal case, such an acquittal as will protect defendant from being tried again, the state may not prosecute a writ of error to the Supreme Court for a review of the errors of law by the trial judge.

I have shown that the acquittal considered was such an acquittal, on the merits of the case.

There was no error in the judgment of the Supreme Court, which judgment should be affirmed and the present writ dismissed.

WILLIAM J. CROSSLEY,
Of Counsel with Defendant in Error.

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New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,
Plaintiff and Plaintiff in Error,
vs.
FREDERICK HART,
Defendant and Defendant in Error.

On Error.

WRIT OF ERROR.

(Filed May 11, 1916.)

New Jersey, ss.:

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of
[L. S.] Judicature—Greeting:

Because in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our Supreme Court of Judicature, before you, between the State of New Jersey, plaintiff and plaintiff in error therein, and Frederick Hart, defendant and defendant in error therein, upon a certain indictment against the said Frederick Hart, late of the City of Trenton, County of Mercer and State of New Jersey, for seduction under promise of marriage, manifest error hath intervened, to the great damage of the said State of New Jersey, plaintiff and plaintiff in error, as aforesaid, as by its complaint 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, then you send distinctly and openly, under your seal, the record and proceedings and plaint aforesaid, and also

including the entire record of the proceedings had upon the trial of said cause, with all things touching and concerning the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the ninth day of May next, together with this writ, that the record and proceedings aforesaid being inspected we may cause to be done thereupon for correcting that error, what of right and according to law and custom of the State of New Jersey ought to be done.

Witness Edwin Robert Walker, our Chancellor, and presiding judge of our Court of Errors and Appeals, at Trenton, the nineteenth day of April, nineteen hundred and sixteen.

THOMAS MARTIN,
Clerk.

MARTIN P. DEVLIN,
Attorney.

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

WM. S. GUMMERE, [Seal.]
C. J.

New Jersey Supreme Court.

THE STATE OF NEW JERSEY,
Plaintiff and Plaintiff in Error,
vs.
FREDERICK HART,
Defendant and Defendant in Error.
} In Error.

WRIT OF ERROR.

(Filed March 31, 1915.)

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

Forasmuch as in the record and proceedings and also in the giving of judgment upon a certain indictment against Frederick Hart, for seduction under promise of marriage, which was before you in our said Court of Quarter Session of the Peace in and for the County of Mercer, whereof the said Frederick Hart has been acquitted by a certain jury of the County, taken between the State of New Jersey and the said Frederick Hart, manifest error hath intervened to the great damage of the said State of New Jersey as by its complaint we are informed we being willing that the said error, if any there be, should in due manner be corrected and that full and speedy justice be done to it the said State of New Jersey in this behalf, do command you that if judgment be thereupon given, then you do distinctly and openly send under your seal the record and proceedings aforesaid, and also including the entire record of the proceedings had upon the trial of said cause, with all things touching the same, to our Supreme Court of the State of New Jersey, to be held at Trenton, on the thirty-first day of

March, instant, and this writ, that the entire record and proceedings aforesaid being inspected, we may furher 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, the Honorable William S. Gummere, Chief Justice of the Supreme Court of the State of New Jersey, at Trenton, this eleventh day of March, nineteen hundred and fifteen.

WM. C. GEBHARDT,
Clerk.

MARTIN P. DEVLIN,
Prosecutor of the Pleas of Mercer County.
For the State.

CAPTION TO INDICTMENT.

Mercer Oyer and Terminer—October Term, 1914.

(Filed Nov. 11, 1914.)

MERCER COUNTY, to wit:

BE IT REMEMBERED, That at a Court of Oyer and Terminer, holden at Trenton, in and for the said County of Mercer, on the third Tuesday of October, in the year of our Lord one thousand nine hundred and fourteen, before the Honorable Thomas W. Trenchard, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and the Honorable Frederick W. Gnichtel, Judge of the Court of Common Pleas, in and for the said county, according to the form of the statute in such case made and provided, by the oath of Fred J. Pittenger, Frederick Scott, Elmer Locke, August F. Treptow, Gustav Wagner, Sr., William J. Blackwell, Max K. Bash, John R. Hendrickson, William H. Blackwell, Emanuel Hoffman, Rodman P. Henderson, Isaac Goldberg, Griffith

J. Edwards, James H. Anderson, Herbert Sinclair, Charles P. Field, Harry F. Smith, Frank E. Pierce, Foster C. Griffith, Frank J. Clark, James I. Beatty, Philip Johnson and Carl Smith, good and lawful men of the said County of Mercer, duly summoned, and then and there sworn and charged to inquire for the State of New Jersey, in and for the body of the said County of Mercer.

It is presented in manner and form following, that is to say:

The bills herewith presented are true bills.

HARRY F. SMITH,
Foreman.

ENDORSEMENT OF INDICTMENT

No. 81

MERCER OYER AND TERMINER

October Term, A. D. 1914.

FREDERICK HART
vs.
THE STATE
} Indictment for Seduction.

MARTIN P. DEVLIN,
Prosecutor of the Pleas.

A TRUE BILL.

HARRY F. SMITH,
Foreman.

Plea, N. G., November 16th, 1914. Trial Day, March 8th and 9th, 1915, and acquitted by order of the Court.

INDICTMENT.

Mercer Oyer and Terminer.

October Term, A. D. 1914.

MERCER COUNTY, to wit:

THE GRAND INQUEST of the State of New Jersey, in and for the body of the County of Mercer, upon their respective oath PRESENT, That Frederick Hart, late of the City of Trenton in the said County of Mercer, on the fifteenth day of October, in the year of our Lord nineteen hundred and thirteen, with force and arms, at the City of Trenton aforesaid, in the County aforesaid, and within the jurisdiction of this Court, being a single man over the age of eighteen years, did under promise of marriage, unlawfully have sexual intercourse with one Rebecca Miller, who was then and there a single female of good repute for chastity under the age of twenty-one years, by means of which sexual intercourse she, the said Rebecca Miller, afterwards became pregnant, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

THE GRAND INQUEST aforesaid, upon their oath aforesaid, do further PRESENT, That the said Frederick Hart, on the fifteenth day of October, in the year of our Lord nineteen hundred and thirteen, with force and arms, at the City of Trenton aforesaid, in the County aforesaid, and within the jurisdiction of this Court, unlawfully then and there sexual intercourse did have with one Rebecca Miller, she, the said Rebecca Miller, being then and there a single and unmarried woman, and with the said Rebecca Miller, he, the said Frederick Hart, then and there fornication did commit, 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.

MARTIN P. DEVLIN,
Prosecutor of the Pleas.

JUDGMENT.

And afterwards, to wit: On Wednesday, the eleventh day of November, in the year of our Lord nineteen hundred and fourteen, at a session of the said Court of Oyer and Terminer as aforesaid, being as yet of the Term of October aforesaid, the said indictment was by the said Court of Oyer and Terminer handed, set and transmitted to the Court of Quarter Sessions of the said county for trial according to the form of the statute in such case made and provided, and a rule to that effect then and there duly made and entered upon the record of each of the said courts respectively; and afterwards, to wit, on the sixteenth day of November, in the year of our Lord nineteen hundred and fourteen, at a session of the said Court of Quarter Session in and for the said County of Mercer, of the Term of October, of the year of our Lord nineteen hundred and fourteen, before the Honorable Frederick W. Gnichtel, Judge of the Court of Quarter Sessions, at Trenton, in the County of Mercer aforesaid, cometh the said Frederick Hart in his proper person, according to the conditions of the recognizance by himself and his pledges in that behalf heretofore made and now here touching the premises in the said indictment above specified and charged upon him being asked in what manner he will acquit himself thereof, he says that he is not guilty thereof, and of this he puts himself upon the country, and Martin P. Devlin, Prosecutor of the Pleas of the said County of Mercer, who

prosecutes for the state in this behalf, does likewise the same therefore let, the said indictment be continued until a jury thereupon come here before the said Judge aforesaid, at Trenton, in the County of Mercer. Wherefore let a jury thereupon come, to wit, on Monday, the eighth day of March, in the year of our Lord nineteen hundred and fifteen, of the January Term, nineteen hundred and fifteen, before the said Honorable Frederick W. Gnichtel, Judge of the Court of Quarter Sessions in and for the said county, twelve good and lawful men of the County of Mercer aforesaid, by whom the truth of the matter may be better known, and who are not of kin to the said Frederick Hart, to recognize upon their oaths whether the said Frederick Hart be guilty of the misdemeanor in the indictment aforesaid above specified or not guilty, because as well the said Martin P. Devlin, who prosecutes for the State in this behalf, as the said Frederick Hart have put themselves upon the said jury and the jurors of the said jury by J. Warren Fleming, Sheriff of the said County of Mercer, for this purpose empanelled and returned agreeably to the statute in such case made and provided, to wit: Samuel V. Leigh, Edgar Skillman, Charles Brady, John Ewart, Franklin M. Seeds, Thomas D. Ford, Price Henderson, Lyman B. Stark, Harvey E. Rogers, Collin D. Severns, Jacob Weigel, Frank J. Weaver, who having been elected, tried and sworn to speak the truth of and concerning the premises upon their oath, after evidence from witnesses produced by Martin P. Devlin, the said prosecutor of the pleas, and the case of the State had rested, and arguments presented to the Judge of the said Court by William J. Crossley, the attorney for the defendant herein, as well as by Martin P. Devlin, the prosecutor aforesaid, and in accordance with instructions and by the direction of the Honorable Frederick W. Gnichtel, Judge of the said Court of Quarter Sessions, say that

the said Frederick Hart is not guilty of the misdemeanor aforesaid on him above charged and as by the indictment aforesaid, the above supposed against him.

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

I, GEORGE R. ROBBINS, Clerk of the Court of Oyer and Terminer and Clerk of the Court of Quarter Sessions, do hereby certify that the foregoing are true records of the proceedings and judgment in the case of The State of New Jersey *vs.* Frederick Hart, as the same remains of record in my office.

In tetsimony whereof, I have hereunto set my hand and official seal of said Courts
[L. S.] this thirtieth day of March, A. D. 1915.

GEO. R. ROBBINS,
Clerk.

The record and proceedings of the indictment, plea, trial, acquittal and judgment, including the entire record of the proceedings had upon the trial of said cause, whereof mention is within made, with all things concerning the same, to the Supreme Court of Judicature of New Jersey within specified, at the day and place within contained, we certify, in a certain schedule to this writ annexed, as we are commanded.

F. W. GNICHTEL,
Judge.

BILL OF EXCEPTIONS.

Mercer County Court of Quarter Sessions.

THE STATE
vs.
FREDERICK HART.

On Indictment for Seduction Under Promise of Marriage.

Testimony taken in the trial of the above-stated cause on Monday, the eighth, and Tuesday, the ninth day of March, 1915, before Honorable Frederick W. Gnichtel, Judge of the Court of Quarter Sessions in and for the County of Mercer, and a jury.

Appearances—

For the State appears MARTIN P. DEVLIN, ESQ., Prosecutor of the Pleas of Mercer County.

For defendant appears WILLIAM J. CROSSLEY, ESQ.

The jury sworn.

Mr. Devlin opens for the State.

There was no stenographer in the case. Mr. Crossley, counsel for the defendant, and Mr. Devlin, Prosecutor, and the Judge agreed on the following state of facts which were established by the State:

That Frederick Hart, the defendant, was a single man over eighteen years and about twenty-five years of age. That he started to keep company with Rebecca Miller, a single female of good repute for chastity, on December 18th, 1912. That about the middle of October, 1913, he had sexual intercourse under promise of marriage with the said Rebecca Miller. That the said Rebecca Miller was not then twenty-one

years old and would not be until December 12th, 1913.

The intercourse under the promise of marriage continued up until the first week in February, 1914, and she became pregnant about the first week in February, 1914. On November first, 1914, she gave birth to a fully developed child.

The said Frederick Hart was the only one who ever had any sexual relation with her.

That the evidence to these facts is corroborated to the extent required in cases of indictment for perjury. The evidence as to the pregnancy occurring on or about February first, 1914, is also corroborated.

The State rested.

At this point Mr. Crossley opened the defense, and in so doing proceeded to discuss the law, and made the claim that because the girl did not become pregnant until after the age of twenty-one years, the defendant was not guilty of seduction under promise of marriage as charged in the indictment.

At this point the Prosecutor objected to Mr. Crossley discussing the law before the jury and urged that, if the question was going to be raised at all, the proper time to raise it was now, before the defense proceeded to put evidence in, as the State had put in its full case on the question of age and the time of happening of the different events.

The Court then excused the jury and called on counsel to argue the question.

Mr. Crossley submitted to the Court that the State's case showed that the evidence of the complaining witness was that the promise of marriage and the original act of sexual intercourse took place when she was under twenty-one years of age, and, according to admitted evidence of the State, the pregnancy did not occur until about two months after the complaining witness arrived at the age of twenty-one, as the result of subse-

quent intercourse after she passed her twenty-first birthday.

Mr. Devlin, Prosecutor for the State, urged that the State established all the elements necessary to bring the defendant under the indictment of seduction under promise of marriage, and that he was liable under this section if it were established that he was over eighteen years of age, and that he had sexual intercourse with her under promise of marriage, and that she was a single female of good repute for chastity and was under twenty-one years of age. When the State established those facts, that while it was necessary that she should be pregnant to have the crime complete, yet that pregnancy did not have to occur while she was under the age of twenty-one years.

The Court stated that in view of the construction given to section 50 (Compiled Statutes, p. 1761) of the Crimes act, by the Supreme Court, he doubted whether the facts in this case constituted a crime.

The testimony of the State established that the sexual intercourse began in October, 1913; that the complaining witness became twenty-one on December 12th, 1913; that at that time she was not pregnant; that the sexual intercourse was continued until early in February and that at that time she became pregnant. The child was born November first, 1914.

State *vs.* Zabriskie (43 L. 640) holds that there are seven essential elements to this offense, and that each and all of them is necessary to convict; that the absence of any one is fatal. One of these elements is the age of the female—she must be under twenty-one when the offense is committed.

The ensuance of pregnancy is stated in State *vs.* Price (61 L. 500) to be the essential condition of this legislation. This condition was not present while the complaining witness was under twenty-one, and when that condition was present she had passed the age and was two months older than twenty-one. I hold,

therefore, that the evidence in this case does not present all the necessary elements to constitute a crime under section 50 of the Crimes act. That the State must establish that the pregnancy, with the other elements of the crime, occurred before the girl was twenty-one years of age, before the crime of seduction under promise of marriage could be established.

A recess was taken until two o'clock.

The Court reconvened at two o'clock.

Mr. Devlin, Prosecutor, abandoned the count in the indictment for fornication and elected to stand on the count of the indictment for seduction under promise of marriage.

Mr. Crossley moved that the jury be directed to find a verdict of not guilty for the defendant. The Court thereupon directed the jury to find a verdict of not guilty of the charge alleged in the indictment. Mr. Devlin, Prosecutor, asked an exception to the Court's ruling in directing the jury to find a verdict of not guilty for the defendant.

The Court—It is granted and sealed accordingly.

[SEAL] F. W. GNICHTEL,
Judge.

William J. Crossley, attorney of Frederick Hart, defendant, and Martin P. Devlin, Prosecutor of the Pleas, attorney for the State, hereby stipulate and agree with Judge Frederick W. Gnichtel, that the foregoing is all the facts proved at the trial of the above-stated cause and is a true statement of the case as agreed to by us, and constitutes the entire record of

the established facts and proceedings in the above-stated cause.

WILLIAM J. CROSSLEY,
Attorney for Frederick Hart.

MARTIN P. DEVLIN,
Prosecutor of the Pleas, for the State.

F. W. GNICHTEL,
Judge.

New Jersey Supreme Court.

THE STATE OF NEW JERSEY,
Plaintiff and Plaintiff in Error,
vs.
FREDERICK HART,
Defendant and Defendant in Error.
} In Error.

ASSIGNMENT OF ERRORS AND SPECIFICATIONS OF CAUSES OF REVERSAL.

(Filed April 5, 1915.)

Afterwards, that is to say, on this third day of April 1915, before the above court, comes the plaintiff in error by its counsel, Martin P. Devlin, Prosecutor of the Pleas of Mercer County, 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, and that the said plaintiff in error hereby specifies as the causes relied upon for reversal of this judgment the same matters and things set forth and contained in the assignment of errors, to wit:

First. That, at the close of the State's case, the judge erroneously directed a verdict against the State for the

reason that "there are seven essential elements to the offense of seduction under promise of marriage and that each and all of them is necessary to convict; the absence of any one is fatal. One of these elements is the age of the female—she must be under twenty-one years of age when the offense is committed."

Second. That, at the close of the State's case, the judge erroneously directed a verdict against the State for the reason that "that this condition (pregnancy) was not present while the complaining witness was under twenty-one, and when that condition (pregnancy) was present she had passed the age and was two months older than twenty-one."

Third. That, at the close of the State's case, the judge erroneously directed a verdict against the State for the reason that "that the State must establish that the pregnancy with the other elements of the crime, occurred before the girl was twenty-one years of age, before the crime of seduction under promise of mariage could be established."

Fourth. That, at the close of the State's case, the Court illegally and erroneously instructed and directed the jury to acquit the defendant.

Fifth. That, at the close of the State's case, the Court should not have instructed and directed the jury to acquit the defendant, but should have called on the defendant to answer and have allowed the question of the guilt or innocence of the defendant to be determined by the the jury.

The plaintiff in error prays that the said judgment aforesaid, for the errors and specifications of causes of reversal aforesaid, may be reversed, annulled and altogether for nothing holden, and that the State may be restored to all things which the State has lost by reason of the said judgment.

MARTIN P. DEVLIN,
Prosecutor of the Pleas of
Mercer County, for the State.

Due and legal service of the Assignment of Errors and Specifications of Causes of Reversal is hereby acknowledged this third day of April, 1915.

WILLIAM J. CROSSLEY,
Attorney and of Counsel for Defendant.

New Jersey Supreme Court.

THE STATE OF NEW JERSEY,
Plaintiff and Plaintiff in Error,
vs.
FREDERICK HART,
Defendant and Defendant in Error.
} In Error.

JOINDER.

(Filed May 3, 1915.)

And hereupon, afterwards, the said Frederick Hart, defendant in error, by William J. Crossley, his attorney, comes into court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and prays here that the court here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned and specified for errors, and that the judgment aforesaid, in manner aforesaid, in all things be affirmed.

WILLIAM J. CROSSLEY,
Attorney and of Counsel for
Defendant and Defendant in Error.

RULE DISMISSING WRIT OF ERROR AND REMITTUTUR.

This cause having been duly argued at the June Term, 1915, of this Court by Martin P. Devlin, Attorney of Plaintiff in Error, and William J. Crossley, Attorney of Defendant in Error, and the Court having considered the same, and being of the opinion that the writ of error allowed in the above entitled cause should be dismissed.

It is Ordered that the writ of error allowed in the above entitled cause, be and the same is hereby dismissed, and said record is hereby remitted to the court below to be proceeded with according to law. Entered May 4, 1916,

On motion of

WILLIAM J. CROSSLEY,
Attorney of Defendant in Error.

I, Wm. C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule entered in the minutes of the Court in the above stated cause.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fourth day of May, A. D. nineteen hundred and sixteen.

[L. S.]

WM. C. GEBHARDT,
Clerk.

OPINION.

(Filed Nov. 5th, 1915.)

State vs. *Frederick Hart.*

Where a trial judge has directed the jury to find a verdict for the defendant, and the jury, in accordance therewith, finds the defendant not guilty, the State is not entitled to a bill of exceptions or to a review by writ of error of an error in law by the trial judge, in the absence of any statute authorizing such procedure.

New Jersey Supreme Court,

June Term, 1915.

State of New Jersey,
v.
Frederick Hart. } *Writ of Error.*

Argued, June 1, 1915—*Decided, November* 5, 1915.

Before the Chief Justice, Justices Swayze and Bergen.

Martin P. Devlin, Esq., for the Plaintiff.
William J. Crossley, Esq., for the Defendant.

Swayze, J.—This case presents the question that was expressly reserved by the Court of Errors and Appeals in *Meyer* v. *State*, 65 *N. J. Law* 233, *at page* 237—whether after such an acquittal as will protect the defendant from being tried again, the State may prosecute a writ of error in order to correct a misconstruction of law. The trial judge directed a verdict for the defendant, and the record shows that the jury, in ac-

cordance with that direction, found the defendant not guilty. No judgment was entered upon the verdict, and in strictness this writ of error might be dismissed for that reason. But in view of the laxity in the practice spoken of by Chief Justice Green in *West* v. *State,* 22 *N. J. Law* 231, and of the fact that the question was not raised at the argument, we pass it with the mere remark that it would be better to enter the judgment in proper form. This may hereafter become important if our Legislature should ever pass an act like the Act of Congress of 1907, permitting the State to sue out a writ of error except in cases where there has been a verdict in favor of the defendant (*U. S.* v. *Keitel,* 211 *U. S.* 370, 398), and may become important even under our present legislation where a conviction has been reversed because of a fatal defect in the indictment, and a new indictment is subsequently found, as in *U. S.* v. *Ball,* 163 *U. S.* 662. The form of judgment in case of acquittal on the merits in given in 1 *Chitty Cr. L.* *718-*719, and the importance of having a judgment distinguishing between such an acquittal and a discharge resulting from a defective indictment is sufficiently stated.

It was held, in *West* v. *State,* to be the better opinion that it is not necessary in a criminal case to sustain a plea of *autrefois acquit,* that judgment should be rendered on the former verdict. The reason is that the verdict itself constitutes the bar. Our constitution provides (Art. 1, par. 10), that no person shall, after acquittal, be tried for the same offense. The point made by the State is that an acquittal brought about by an error of the trial judge is not a legal acquittal, and therefore not within the meaning of the constitution. That there are arguments of great weight on both sides of this question is shown by the difference of opinion that arose in the Supreme Court of the United States on a writ of error to the Supreme Court of the Philippine Islands involving the construction

of a somewhat similar provision in the act for the civil government of the Philippines. *Kepner* v. *United States,* 195 *U. S.* 100. We express no opinion on the constitutional question, since this case can be decided on a much narrower ground. In order to secure a review of a trial error, the State must be able to have a bill of exceptions and a writ of error to remove the case to this court. In *Meyer* v. *State,* 65 *N. J. Law* 233, it was decided that the statute provided for such a writ from the Court of Errors and Appeals to the Supreme Court. No statute exists allowing a writ of error from the Supreme Court to the Oyer and Terminer or the Quarter Sessions. It is true that the reasoning of the opinion is that in the absence of such a statute, a writ of error would lie in certain cases under the English practice, but none of those cases were cases of a writ of error sued out after an acquittal, and the Court was careful to say that the question need not be and had not been considered. This is the more noteworthy since the careful judge who spoke for the court must have been aware of the decision of the United States Supreme Court a little more than eight years before, in which Mr. Justice Gray reviewed the cases with his usual thoroughness which leaves nothing to be added, and reached the conclusion that a writ of error would not lie in behalf of the United States, since the Federal statutes did not expressly authorize it. *United States* v. *Sanges,* 144 *U. S.* 310. The weight of this case as an authority with us is of course weakened by the fact that we have the inherent jurisdiction formerly exercised by the King's Bench, and do not depend upon statutory provisions alone. We must therefore be guided by the English common law practice. Justice Gray cites cases from other states supporting the view that a writ of error did not lie in favor of the Crown after an acquittal on the merits. We are referred to no case holding the contrary. Archbold says there is no instance of error being brought upon a judgment for

a defendant after an acquittal. 1 *Archbold Cr. Pr. & Pl.* *199. He cites Coke as his authority. 3 *Inst.* 214 (the citation from Bacon's Abridgment is merely a repetition of Coke). Coke says that no writ of error needeth to be brought by the King, but the offender may be newly indicted; the reason he gives is that the judgment in favor of the defendant is that he go without day which may be given as well for the insufficiency of the indictment, as for the party's innocency, or not guiltiness of the offense. Clearly Coke's remark that no writ of error needeth to be brought by the king applies only to cases where a new indictment could be sustained. That would be impossible when the defendant could plead the former acquittal in bar; the king would need a writ of error to get rid of that judgment; and Coke's statement evidently means what Archbold says. If we look beyond the ancient English practice, we find that in the practice of our own State, without question or exception as far as we know, it has been taken for granted by bench and bar that the State was not entitled to a bill of exceptions or to a review by writ of error of an error in law by the trial judge. Cautious trial judges have always resolved doubtful questions in favor of the State, in order that there might be a review that otherwise could not be had.

For these reasons, we think the present writ should be dismissed.

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Plaintiff and Plaintiff in Error,
vs.
FREDERICK HART,
Defendant and Defendant in Error.
} In Error.

ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the eleventh day of May, in this same term, before the Judges of the said Court

of Errors and Appeals, in the last resort in all causes, comes the said the State of New Jersey by Martin P. Devlin, Prosecutor of the Pleas of the County of Mercer, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment in form aforesaid was given for the said Frederick Hart against the said State of New Jersey, whereas, by the law of the land, judgment ought to have been given for the said State of New Jersey against the said Frederick Hart.

2. There is also error in that the Supreme Court dismissed the Writ of Error and denied the right of the State to maintain a Writ of Error directed from the Supreme Court to the Court of Quarter Sessions of the Peace.

And the said plaintiff in error prays that the judgment aforesaid may be reversed, annulled and for nothing holden, and that the said State of New Jersey may be restored to all things that it has lost by occasion of the said judgment, etc.

MARTIN P. DEVLIN,
Prosecutor of the Pleas of
Mercer County, for the State.

Due and legal service of the Assignment of Errors is hereby acknowledged this eleventh day of May, 1916.

WILLIAM J. CROSSLEY,
Attorney and of Counsel for
Defendant and Defendant in Error.