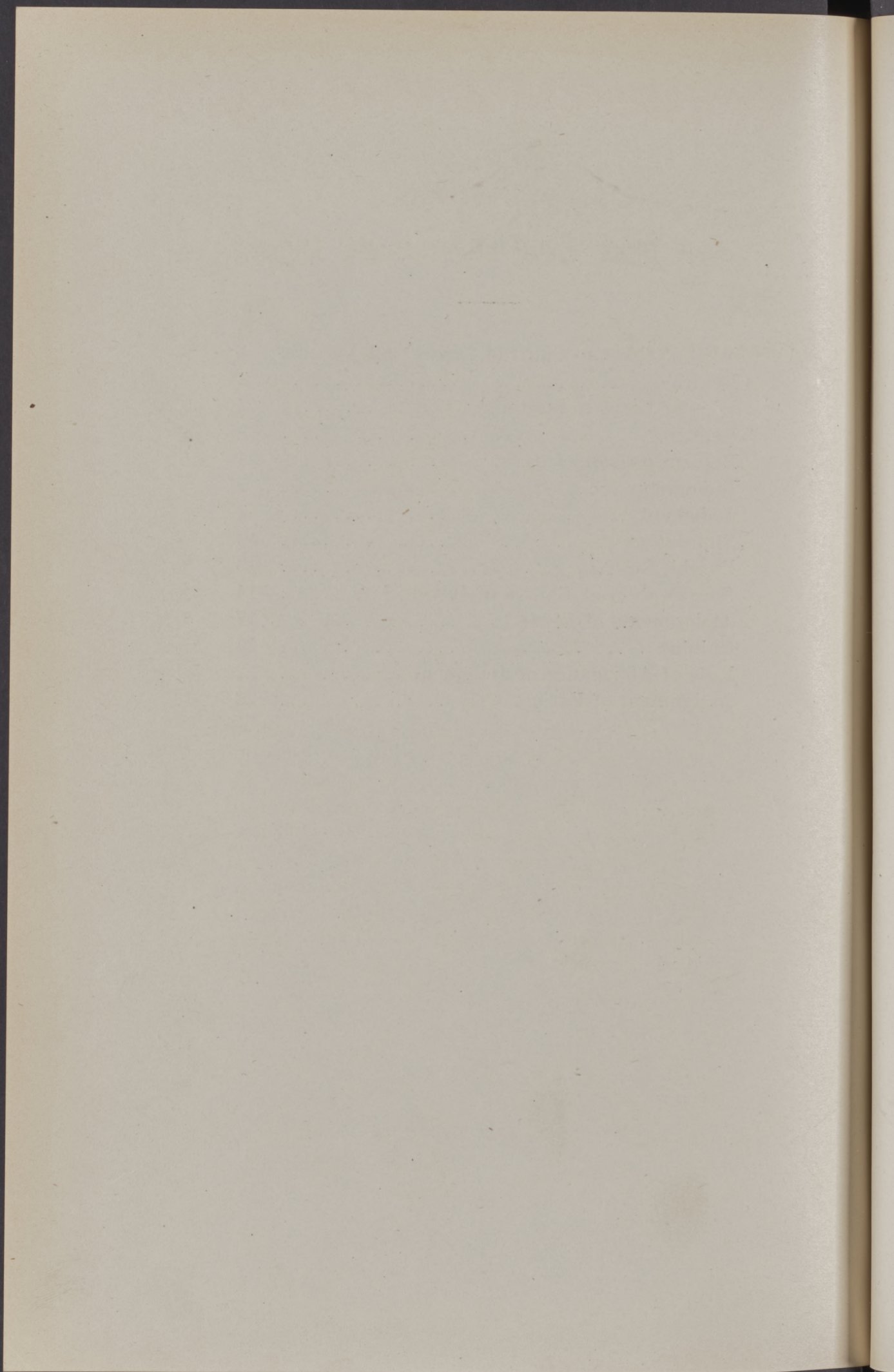


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Writ of Error.

New Jersey Court of Errors and Appeals

The State of New Jersey to the Chief
Justice and other Justices of our Su- 10
preme Court of Judicature:
(Seal)

GREETING: Forasmuch as in the rec-
ords and proceedings and also in the
giving of judgment in a certain
complaint, which was in our said Supreme Court of
Judicature before you, between Paul Wendel,
plaintiff in error and the State of New Jersey, de-
fendant in error, manifest error hath intervened
to the damage of said plaintiff in error, as is said;
and we being willing that the error, if any there be 20
should in due manner, be corrected, and full and
speedy justice be done to the plaintiff in error
aforesaid, in this behalf do command you, that you
distinctly and openly send under your hand and
seal, the record and proceedings aforesaid, with all
things touching and concerning the same, to our
Judges of the Court of Errors and Appeals in the
last resort in all cases in Trenton, on the 28th day of
March next, together with this writ that the rec-
ords and proceedings aforesaid being inspected, 30
we may cause to be further done thereon, for cor-
recting that error, what of right and according to
the laws and the custom of the State of New Jersey
ought to be done.

Return.—Writ of Error.

Witness, Edwin Robert Walker, Esquire, our
chancellor, and president judge of our said Court
of Errors and Appeals, at Trenton aforesaid, the
9th day of March, nineteen hundred and twenty-
one.

THOMAS F. MARTIN,
Clerk.

10

Robert Carey,
Attorney for Plaintiff-in-Error.

Return.

The answer of the justices of the Supreme Court
of the State of New Jersey within named. The rec-
ord 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.

20

WM. GUMMERE,
C. J.

Writ of Error.

NEW JERSEY SUPREME COURT.

New Jersey, ss.:

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To Erwin E. Marshall, Esquire, Judge of the Court
of Quarter Sessions of the County of Mercer
of the January Term in the year one thousand
nine hundred and twenty. Greeting:

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Because in the record and proceedings, and
also in giving of judgment upon a certain indict-
ment against Paul H. Wendel of the City of Tren-
ton in the County of Mercer for perjury the said
indictment whereof before you he has been in-

Return.

dicted, and is thereon convicted by a certain jury of the county taken between the State of New Jersey and the said Paul H. Wendel, as it is said, manifest error hath intervened to the great damage of the said Paul H. Wendel as from his complaint we have received information, we being willing in his behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to him, the said Paul H. Wendel commands 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 Justice of our Supreme Court of the State of New Jersey, on the 8th day of April next, and this writ, that the record and proceedings, aforesaid being inspected, we may further cause to be done thereupon for correcting that error, what of right and according to the laws of New Jersey ought to be done.

Witnesses, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton this nineteenth day of March, in the year of our Lord one thousand nine hundred and twenty.

ROBERT CAREY,

Attorney.

ENOCH L. JOHNSON,

Clerk.

Return.

The entire record and proceedings of the indictment, plea, trial, conviction and judgment, whereof mention is within made, with all things concerning the same, to the Supreme Court of Judicature of New Jersey, within specified at the date and place within contained, we certify in a certain

Return of Grand Jury.

schedule to this writ annexed as we are commanded.

ERWIN E. MARSHALL,
Judge.

Return of Grand Jury.

10 State of New Jersey, Mercer County, to wit:

Be it remembered, that a Court of Oyer and Terminer, holden at Trenton in and for the said County of Mercer, on the third Tuesday of January in the year of our Lord one thousand nine hundred and twenty before the Honorable Thomas W. Tranchard, one of the Justices of the Supreme Court of the Judicature of the State of New Jersey, and the Honorable Erwin E. Marshall, Judge of the Court of Common Pleas, in and for the said

20 county, according to the form of the statute in such case made and provided, by the oaths of Edward W. Lee, John D'Arcy, Jr., Thomas F. Donnigan, Frank Daniels, Andrew Tomko, Morgan D. Blackwell, Elmer Walker, Samuel J. Surtees, Carlman F. Ribsam, Henry Cook, Horace E. Fine, Frank Pierson, Charles Y. Barlow, Virgil W. Willey, Carl Kayser, Edgar E. Tattler, David T. Wittenborn, Solomon H. Vogel, Herbert W. Bradley, Fred

30 Long, David Holzner, Louis R. Vogel and George J. Jammer having first alleged them to be conscientiously scrupulous of taking an oath, 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:

40 The bills herewith presented are true bills.

EDWARD W. LEE.
Foreman.

Indictment.**MERCER OYER AND TERMINER.**

January Term, A. D., 1920.

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 Paul H. Wendel, late of the City of Trenton in the said County of Mercer, on the first day of December in the year of our Lord one thousand nine hundred and nineteen, with force and arms, at the City of Trenton aforesaid, in the County aforesaid, and within the jurisdiction of this Court, before the Court of Chancery of the State of New Jersey, the Honorable Malcolm G. Buchanan, Vice Chancellor, presiding, a certain issue between Joseph Fedorsak, complainant, and Frank Graser, *et al.*, defendants, on bill to set aside a conveyance, which issue involved title to a certain farm situate in the township of West Windsor in the said County of Mercer and State of New Jersey, came on to be tried in due form of law and was then and there tried by the said Honorable Malcolm G. Buchanan, Vice Chancellor as aforesaid, upon which trial the said Paul H. Wendel, then and there appeared as a witness on behalf of the defendant and was then and there duly sworn before the said Honorable Malcolm G. Buchanan, so being Vice Chancellor as aforesaid, that the evidence which he, the said Paul H. Wendel, should give to the Court, touching the matter then in question, should be the truth, the whole truth and nothing but the truth. And that at and upon the trial of the said issue it then and there became and was a material question whether a certain power of attorney, purporting to have been made

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Indictment.

the twenty-fifth day of May, A. D., nineteen hundred and eighteen, and signed by Frank Graser in the presence of Marie H. Frey, was in truth and in fact made on the said twenty-fifth day of May, A. D., nineteen hundred and eighteen. And that the said Paul H. Wendel, being so sworn as aforesaid, then and there on the trial of the said issue, upon his oath as aforesaid, did falsely, corruptly, knowingly, wilfully and maliciously, before the said Honorable Malcolm G. Buchman, Vice Chancellor as aforesaid, depose and swear, amongst other things, in substance and to the effect following, that is to say: I didn't see the power of attorney until shortly before the trial of title in the District Court took place; if this power of attorney was drawn in my office I don't know anything about it; that is just as true as I sit here. I don't think anybody could have done it in my office and if it was drafted in my office it was not done with my knowledge; I know it was not drafted at my direction or by me.

Whereas in truth and in fact the said power of attorney was drawn in the office of the said Paul H. Wendel and was drafted with the knowledge of the said Paul H. Wendel and was drafted at the direction of the said Paul H. Wendel, as he, the said Paul H. Wendel, then and there well knew; contrary to the form of the statute in such cases made and provided, and against the peace of this State, the government and dignity of the same.

A. DAYTON OLIPHANT,
Prosecutor of the Pleas.

ENDORSED: Bill No. 65, Mercer Oyer and

Judgment.

Terminer, Term of January, A. D., 1920, The State
v. Paul H. Wendel, indictment for perjury.

A. DAYTON OLIPHANT,
 Prosecutor of the Pleas.

A true bill.

EDWARD W. LEE, 10
 Foreman.

Judgment.

And afterwards, to wit: on Monday the second
 day of February, in the year of our Lord nineteen
 hundred and twenty, at a session of the said Court
 of Oyer and Terminer as aforesaid, being as yet
 of the Term of January aforesaid, the said indict-
 ment was the said Court of Oyer and Terminer 20
 handed, set and transmitted to the Court of Quar-
 ter 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 fifth day of February, in the year of
 our Lord nineteen hundred and twenty, at a ses-
 sion of the said Court of Quarter Sessions in and
 for the said County of Mercer of the Term of Janu- 30
 ary of the year of our Lord nineteen hundred and
 twenty before the Honorable Erwin E. Marshall,
 Judge of the Court of Quarter Sessions, at Trenton
 in the County of Mercer aforesaid, cometh the said
 Paul H. Wendel, in his proper person, according
 to the conditions of the recognizances by himself
 and his pledges in that behalf heretofore made and
 now here touching the premises in the said in-
 dictment above specified and charged upon being 40

Judgment.

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 A. Dayton Oliphant, Prosecutor of the Pleas of the said County of Mercer, who prosecutes for the State in this behalf, does likewise the same, therefore let
10 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 first day of March, in the year of our Lord nineteen hundred and twenty, of the January Term, nineteen hundred and twenty, before the Honorable Erwin E. Marshall, Judge of the Court of Quarter sessions, in and for the said County, twelve
20 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 Paul H. Wendel, to recognize upon their oaths whether the said Paul H. Wendel, be guilty as charged in the indictment aforesaid above specified, or not guilty, because as well the said A. Dayton Oliphant, who prosecutes for the State in this behalf as the said Paul H. Wendel, have put themselves upon the said jury and the jurors of the said jury by Frederick P. Rees, Sheriff of the said
30 County of Mercer and Joseph H. Moore, Jury Commissioners of the said County of Mercer, for this purpose empaneled and returned agreeably to the statute in such case made and provided to wit, A. Reeder Green, Arch. G. Hulfish, Benjamin R. Dancer, Harry W. Grubb, Alvin A. Nickerson, Richard R. Boss, John E. Little, Harry Levenson, James Brian, Oliver Lindsay, C. Sidney Smith and Caleb T. Houstan who having been elected, tried
40 and sworn to speak the truth of and concerning

Judgment.

the premises upon their oath and after evidence from witnesses produced by A. Dayton Oliphant, Prosecutor of the Pleas and the case of the State had rested and after evidence from witnesses produced by Robert Carey as Attorney for the defendant herein and arguments presented to the judge of the said Court and the Jury by Robert Carey, the Attorney for the defendant herein, as well as by A. Dayton Oliphant, Prosecutor of the Pleas, and after a charge by the Court the Jury retired to consider their verdict and having agreed upon their verdict come again into Court and by their foreman do say they find the defendant guilty as charged in the indictment on him above charged in the form aforesaid and as by the indictment aforesaid is above supposed against him and recommend mercy of the Court and so say they all, and thereupon the said Paul H. Wendel, was remanded for sentence until Friday the nineteenth day of March, nineteen hundred and twenty, at which last mentioned day the said Paul H. Wendel being present before the said Court of Quarter Sessions and it being forthwith demanded of the said Paul H. Wendel if he hath or knoweth of anything to say wherefore the said Judge as aforesaid here ought not upon the premises and verdict aforesaid to proceed to judgment against him, who nothing further saith unless as he before had said, whereupon all and singular the premises being seen and by the said Judge here fully understood, it is considered and adjudged and the Court do order on this conviction that the defendant be confined in the Mercer County Work House for a period of nine months and do pay the costs of his prosecution.

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Stipulation.

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

10 I, John Fetter, Clerk of the Court of Oyer and Terminer and Clerk of the Court of Quarter Sessions, do hereby certify that the foregoing are the entire record and proceedings and judgment in the case of the State of New Jersey *v.* Paul H. Wendel as the same remains of record in my office.

In Testimony Whereof, I have hereunto set my hand and official seal of said Courts this eighth day of April, A. D. 1920.

JOHN FETTER,
 Clerk.

Stipulation.

20 This case was tried before Honorable Erwin E. Marshall, and a jury, in the Mercer County Court of Quarter Sessions, on March 1st, 2nd, 3rd and 4th, 1920. A large volume of testimony was taken, consisting of about one thousand typewritten pages, and large numbers of exhibits were offered and received in evidence supplementing this testimony.

The State produced 15 witnesses, whose testimony constituted the State's case against the defendant.

30 The defendant produced 5 witnesses, in addition to a great many reputation witnesses.

The indictment charged the defendant with the commission of the crime of perjury, which was alleged to have been committed at the trial of a case in the Court of Chancery, in which case title to property was involved. In the course of the trial in the Court of Chancery a paper, purporting to be a power of attorney, which was offered in evidence and marked Exhibit S-2 in this case (a

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Stipulation.

copy of which is attached to and made a part of this stipulation), became a matter of investigation. In the course of this investigation the defendant, Paul H. Wendel, was sworn as a witness in said cause in the Court of Chancery, and there testified before the Vice Chancellor that "if this power of attorney was drawn in my office, I didn't know anything about it. That is just as true as I sit here. I don't think anybody could have done it in my office, and if it was drafted in my office it was not done with my knowledge. I know it was not drafted at my direction or by me."

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The indictment charges that the defendant's testimony was wilfully and corruptly false.

The only issue presented in the trial of this cause was that raised by the charge that the said testimony given by Wendel in the Court of Chancery was wilfully and corruptly false.

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The defense in this case was a complete denial of the charge in the indictment.

The testimony produced by the State presented a clearcut issue of fact for the jury.

The jury, after being charged by the Judge, returned a verdict of guilty with a recommendation for mercy.

Three witnesses, namely, Christian Graser, Marie Graser and Frank Graser, besides several others, were produced by the State to prove that the power of attorney in question was prepared in the office of Paul H. Wendel, the defendant, and was prepared with his full knowledge and at his direction.

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Christian Graser, Marie Graser and Frank Graser, prior to the trial of Wendel, had been indicted for perjury by the Mercer County Grand

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Stipulation.

Jury. Their indictment was predicated upon testimony given by these witnesses in the trial of the Chancery case.

10 Prior to the trial of Wendel, the said Christian Graser, Marie Graser and Frank Graser, were arraigned upon an indictment for perjury in the Mercer County Court of Quarter Sessions and pleaded guilty to the charge of perjury; but were not sentenced by the Court.

20 The testimony of these witnesses was offered by the State and no objection being interposed until the close of their testimony, when counsel for the defense moved to strike the testimony out; it was allowed to go to the jury over said objection. The objection was to the effect that such testimony could not be received and could not go to the jury under and by virtue of the provisions of the statutes which provide that no person convicted of perjury shall be permitted to testify in any Court of this State. The objection in each instance was made as soon as it appeared by cross examination that the witness had been convicted of perjury.

30 It is admitted that the testimony of said witnesses was material to the State's case. The objection of the defendant to the introduction of said testimony was overruled by the trial judge and exceptions were properly allowed.

This stipulation is made by reason of the fact that the printing of the state of the case would involve a very large expenditure of money and would present no facts for the consideration of the Court that are not presented by this statement.

The third, fourth and fifth assignments of error cover the subject matter hereinabove referred to and stipulated.

40 The testimony of the three witnesses who were

Exhibit S-2.

previously convicted of perjury was objected to after it had been received, but as soon as it appeared in the cause that they had been convicted of perjury and said testimony bore directly upon the subject of the alleged knowledge of Wendel of the preparation of the power of attorney in his office.

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ROBERT CAREY,
Attorney for and of counsel with
Defendant below and Pltff. in Error.
A. DAYTON OLIPHANT,
Attorney for and of counsel with
Prosecutor below and Deft. in Error.

Exhibit S-2.

BE IT KNOWN TO ALL MEN BY THESE PRESENTS, that I, the undersigned FRANK GRAUSSER, of R.F.D. #2 in the County of Mercer and State of New Jersey have, made, constituted and appointed my father, Christian Grausser of the same place, my true and lawful attorney, for me and in my name and on my behalf he may ask, demand, recover and receive, any sum or sums of money, debts, dues, merchandise or effects now being on the farm belonging to me and in my possession or any goods that may come into my possession shall be held by the power of attorney by my father, Christian Grausser, with full power to sell, or buy anything for the use of the stock on the farm, which stock is owned by me. I further give my father full power to do anything with the personal property which includes the farm implements, cow, horse, wagons, seeds or anything which may belong on my farm known as the "Old Duncan Farm" to do the same as I

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Specifications of Causes of Reversal.

could personally do if I was present in person. I am giving and granting unto my said attorney full power and all things concerning my property now on the farm and hereby ratifying and confirming whatsoever my said attorney shall do and may do until I revoke this power. The reason for giving my father this power of attorney is because, having been called in to the U. S. Army I am ready to enter the service on the 28th day of May and will be unable to protect my interests while I am away. I am therefore giving my father full power of attorney to do anything in my behalf that may seem to him to be right.

10

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this 25th day of May, A. D., one thousand nine hundred and eighteen.

20

(Signed) FRANK GRAUSSER

Signed, Sealed and delivered
in the presence of
In German
Maria G. Frunz.

Specifications of Causes of Reversal.

The plaintiff in error specifies the following causes upon which he relies for reversal of the judgment in the above-entitled cause:

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1. Because the Court at the trial of the above-entitled cause, erroneously charged the jury as follows:

“At the conclusion of the hearing in the Court of Chancery, the Vice-Chancellor, proceeding on his own motion, ordered that all the exhibits offered in that case be im-

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Specifications of Causes of Reversal.

pounded in the custody of the Clerk of the Court of Chancery, and that they be by him transmitted and delivered to the Prosecutor of the Pleas of this County."

So that gentleman explains how the case comes to reach the Prosecutor of the Pleas.

2. Because the Court at the trial of the above-entitled cause, erroneously charged the jury as follows:

"Now that story as told by Mr. Wendel is also referred to in the testimony of Mr. Grank Graser, who tells it, however, in an entirely different way. Graser says that he did go into Mr. Wendel's office on the 7th of February, because Wendel was his counsel and he had been indicted for perjury; that he went in to see him about coming over to court to plead; and when he went there Wendel said to him: 'Everything will be all right. I have got the thing fixed up so we will get out of this.' He says that then Mr. Wendel told him that he had a plan whereby he could free the Graser, father and mother and Mr. Wendel, and would leave the blame upon the girl, Miss Johnson, and upon Frank Graser; and that plan was that Mr. Frank Wendel's office in Wendel's absence and had had Miss Johnson prepare a power of attorney from a copy which Graser had brought in with him; and that she had prepared such paper, he had paid her for it and that she had then torn up the original copy and given it to him in the envelope and that he had taken it away with him. Graser says

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Specifications of Causes of Reversal.

10 that Wendel told him that if he would tell that story and stick to it, it would clear Wendel and clear the father and mother; that perhaps Graser and Miss Johnson might be convicted but if they were they would only be fined and placed on probation, and that Mr. Wendel would pay the fines as he had paid the costs in the other case. Now, that is the story told by Graser, as I recall it."

3. Because at the trial of the above-entitled cause, testimony was received and admitted and permitted to go to the jury given by one Christian Graser, who had been a short time previously convicted of the crime of perjury, and who was thereby an incompetent witness in the cause.

20 4. Because in the trial of said cause the Court permitted testimony given by Marie S. Graser and Frank Graser, to be accepted and to go to the jury for its consideration, despite the fact that the said persons named had both been shortly previous convicted in the Mercer County Courts for the crime of perjury, and were therefor incompetent witnesses in the cause.

30 5. Because at the trial of the above-entitled cause the Court denied the motion of the defendant to strike out the testimony of three witnesses whose prior conviction for perjury had been established and whose testimony was therefor incompetent.

40 6. Because at the trial of the above-entitled cause the Public Prosecutor did ask the defendant, the witness then on the stand, in the presence of the jury, the following grossly improper question: "Did you ever try to frame another case?" Where-

Assignments of Error.

upon counsel for the defendant, by reason of the prejudice to the defendant's rights by reason of said improper question, asked the Court for a mistrial of the cause, which application was denied by the Court, to the great prejudice and wrong of the defendant.

ROBERT CAREY, 10
Attorney for Plaintiff in Error.

Assignments of Error.

Afterwards, to wit, on the day of May, 1920, at Trenton, comes the said Paul H. Wendel by Robert Carey, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. Because the Court at the trial of the above-entitled cause erroneously charged the jury as follows: 20

“At the conclusion of the hearing in the Court of Chancery, the Vice-Chancellor, proceeding on his own motion, ordered that all the exhibits offered in that case be impounded in the custody of the Clerk of the Court of Chancery, and that they be by him transmitted and delivered to the Prosecutor of the Pleas for this County.” 30

So that gentleman explains how the case comes to reach the Prosecutor of the Pleas.

2. Because the Court at the trial of the above-entitled cause, erroneously charged the jury as follows:

“How that story was told by Mr. Wendel is also referred to in the testimony of Mr. 40

Assignments of Error.

10 Frank Graser, who tells it, however, in an entirely different way. Graser says that he did go into Mr. Wendel's office on the 7th of February, because Wendel was his counsel and he had been indicted for perjury; that he went in to see him about coming over to court to plead; and when he went there Wendel said to him, 'Everything will be all right. I have got the thing fixed up so we will get out of this.' He says that then Mr. Wendel told him that he had a plan where-
20 by he could free the Grasers, father and mother, and Mr. Wendel, and would leave the blame upon the girl, Miss Johnson, and upon Frank Graser; and that plan was that Mr. Frank Graser should say that he had come into Wendel's office in Wendel's absence and had had Miss Johnson prepare a power of attorney from a copy which Graser had brought in with him; and that she had prepared such paper, he had paid her for it and that she had then torn up the original copy and given it to him in the envelope and that he had taken it away with him. Graser says that Wendel told him that if he would tell that story and stick to it it would clear Wendel and clear the father and
30 mother; that perhaps Graser and Miss Johnson might be convicted, but if they were they would only be fined and placed on probation, and that Mr. Wendel would pay the fines as he had paid the costs in the other case. Now that is the story told by Graser, as I recall it."

40 3. Because at the trial of the above entitled cause testimony was received and admitted and

Assignments of Error.

permitted to go to the jury given by one Christian Graser, who had been a short time previously convicted of the crime of perjury, and who was thereby an incompetent witness in the cause.

4. Because in the trial of said cause the Court permitted testimony given by Marie S. Graser and Frank Graser, to be accepted and to go to the jury for its consideration, despite the fact that the said persons named had both been shortly previous convicted in the Mercer County Courts for the crime of perjury, and were therefore incompetent witnesses in the cause. 10

5. Because at the trial of the above entitled cause the Court denied the motion of the defendant to strike out the testimony of three witnesses whose prior conviction for perjury had been established and whose testimony was therefore incompetent. 20

6. Because at the trial of the above entitled cause the Public Prosecutor did ask the defendant, the witness then on the stand, in the presence of the jury, the following grossly improper question: "Did you every try to frame another case?" Whereupon counsel for the defendant, by reason of the prejudice to the defendant's rights by reason of the said improper question, asked the Court for a mistrial of the cause, which application was denied by the Court, to the great prejudice and wrong of the defendant. 30

ROBERT CAREY,
Attorney for Plaintiff-in-Error.

Opinion.

NEW JERSEY SUPREME COURT.

NOVEMBER TERM—1920.

THE STATE,

v.

PAUL H. WENDEL.

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Error to Mercer Oyer and Terminer.

Argued before Gummere, Chief Justice and Justices Bergen and Katzenbach.

For the Plaintiff-in-Error, ROBERT CAREY.

For the State, A. DAYTON OLIPHANT, Prosecutor of the Pleas.

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Per Curiam:

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The plaintiff-in-error was convicted upon an indictment for perjury. The only matter argued before us relates to the admission in evidence of the testimony of three witnesses produced by the State, each one of whom had previously been indicted for the same crime and had been arraigned and pleaded guilty to the charges made against them prior to the trial of the present case. No objection was made to the admission of the testimony of these witnesses until after the close of their examination; and then counsel moved to strike it out upon the ground that it was incompetent for the reason, as appeared on cross examination, that each one of them had been convicted as above recited, and consequently were prohibited

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Opinion.

from testifying under Section 18 of the Crimes Act (C. S., 1748).

We think the motion to strike out was properly refused for two reasons: First, there is nothing in the case to show that the defendant was not fully cognizant of the fact that each one of these witnesses had pleaded guilty to indictments for perjury before they were called as witnesses. It appears in the case that Wendel and the three witnesses were each indicted for false testimony given at the trial of an issue between Joseph Fedosak and Frank Graser tried in the Court of Chancery. In this situation we think it may fairly be assumed that at the trial of the present indictment the plaintiff-in-error was cognizant of the situation; that he had knowledge that these three witnesses had each been indicted for perjury and had pleaded guilty to the indictments. In this situation he was bound, in justice, to interpose his objection to the competency of these witnesses as each one was offered. Good faith required that he should not sit by and take the chance of the testimony given by these witnesses being in his favor, and then, when this chance went against him, claim a right to have it expunged from the record. Second: The refusal of the trial Judge to strike out this testimony can be justified upon a broader ground. The revision of our Evidence Act of 1900 (Comp. Stat., p. 2217) as construed by the Court of Errors and Appeals in the case of *State v. Henson*, 66 N. J. L., 601, makes all persons competent as witnesses, although they have been convicted of crime and without regard to the character of the crime, permitting such conviction to be shown not for the purpose of excluding the witness, but for the purpose of affecting his credit before the jury.

The judgment under review will be affirmed.

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Rule on Affirmance of Judgment.

NEW JERSEY SUPREME COURT.

10	STATE OF NEW JERSEY, Defendant-in-Error, <i>v.</i> PAUL H. WENDEL, Plaintiff-in-Error.	}	In Error to Mercer Quarter Sessions.
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20 This cause being duly argued at the November Term, A. D., 1920, of this Court, by A Dayton Oliphant, Prosecutor of the Pleas of the County of Mercer, counsel for the defendant-in-error, and Robert Carey, counsel for plaintiff-in-error, and this Court having considered the same, and having examined the record and proceedings of the Mercer Quarter Sessions and finding no error therein, it is hereby ordered and adjudged that the judgment of the Mercer Quarter Sessions in the above entitled cause be, and the same is, hereby affirmed with costs.

30 And it is hereby further ordered that the record of the said cause be forthwith remitted to the Mercer Quarter Sessions there to be proceeded with in accordance with this judgment and the practice of the said Court.

Entered March 8, 1921.

On motion of

A. DAYTON OLIPHANT,
 Prosecutor of the Pleas of the County
 of Mercer, Attorney for State of
 New Jersey, Defendant-in-Error.

Assignment of Error.NEW JERSEY COURT OF ERRORS AND
APPEALS.

THE STATE OF NEW JERSEY,
Defendant-in-Error,

v.

PAUL H. WENDEL,
Plaintiff-in-Error.

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Afterwards, to wit: on the 28th day of April, 1921, at Trenton, comes the said Paul Wendel by Robert Carey, his attorney, and says: That in the record and proceedings aforesaid there is manifest error in this, to wit:

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Because the Supreme Court erred in not reversing the judgment of conviction of the defendant as entered in the trial court.

Because the Supreme Court erred in affirming the judgment of conviction brought before it on the writ of error in this cause.

Wherefor the plaintiff-in-error (defendant below prays that the judgment of the Supreme Court may be reversed and that the judgment of the Mercer County Court of Quarter Sessions may be reversed.

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ROBERT CAREY,
Attorney for Plaintiff-in-Error.

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New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,
 Defendant in Error,

 v.

PAUL H. WENDEL,
 Plaintiff in Error.

} On Writ of Error. 10

ARGUMENT FOR PLAINTIFF IN ERROR.

The defendant, Paul H. Wendel, was indicted by the Grand Jury in and for the County of Mercer at the October Term, 1919, for perjury. The indictment was predicated upon testimony given by the said Paul H. Wendel in a cause pending in the Court of Chancery of New Jersey, which cause was heard by Vice-Chancellor Malcolm G. Buchanan. 20

During the course of the trial in the Court of Chancery a power of attorney was introduced in evidence, and in respect to the said power of attorney Paul H. Wendel, the plaintiff in error herein, testified as follows: 30

“I didn’t see the power of attorney until shortly before the trial of title in the District Court took place; if this power of attorney was drawn in my office, I don’t know anything about it; that is

just as true as I sit here. I don't think anybody could have done it in my office, and if it was drafted in my office it was not done with my knowledge; I know it was not drafted at my direction or by me."

The State alleged that the aforesaid testimony was knowingly, willfully and corruptly false, and in support of its contention introduced, amongst others, three witnesses, namely, Christian Graser, Marie Graser and
 10 Frank Graser, to prove the said power of attorney was drawn in the office of Wendel, with his knowledge and consent and at his direction.

These three witnesses had been indicted for perjury and had pleaded guilty thereto previous to the time of their being called as witnesses in the case of the State v. Wendel, *but had not been sentenced by the Court and judgment had not been passed upon them.*

The three witnesses above named were called by the State and testified in the case against Wendel without
 20 objection by counsel for the defense until after their direct examination by the State had been finished though the defendant well knew they had been indicted and had pleaded guilty to indictments for perjury. During the cross-examination of the said witnesses counsel for the defense moved to strike out the testimony upon the ground that a person convicted of perjury in this State is prohibited from testifying in any case by virtue of Section 18 of the Crimes Act. The trial judge overruled the objection and the testimony was allowed to go to the jury.

30 There are two questions presented for the consideration of this Court.

The first as to whether or not it was error for the trial court to refuse to strike out the testimony of the three Grasers after counsel for the defense had allowed the testimony to go in unchallenged, and had not made his objection until the said testimony was before the jury.

The second question is whether or not a person, having

pleaded guilty to a charge of perjury, can testify thereafter in a court of this State.

As to the first question presented, I submit that it was not error for the trial court to refuse to strike out the testimony of the Grasers, inasmuch as counsel for the defense made no objection to the reception of their testimony, but allowed the same to go before the jury, and, after said testimony was in, moved to strike out.

The rule is well established in this State that *counsel cannot take the chance of testimony making in his favor, and if it happens to be adverse, then interpose his objection on motion to strike out.* 10

Counsel well knew that the Grasers had pleaded to indictments for perjury, but allowed their testimony to go in without objection. The Court of Errors and Appeals of this State, in *Clark v. State*, 47 Law 558, said:

“In the first place, the testimony of Carter, so far as the record informs us, was all in before the objection to it was taken. It does not appear that there was not an opportunity afforded to the counsel for the defendant to have made his objection earlier. The rule is established that counsel cannot take the chance of testimony making in his favor, and if it happens to be adverse, then interpose his objection. There is nothing to show that the defense here was not apprised of the point upon which the witness was about to speak, before his testimony relative to the sale to himself was delivered. The testimony being so in without objection, it cannot be said that the court erred in not striking it out.” 20 30

This same rule was applied by the Supreme Court in the case of *Cunningham v. State*, 61 Law 70, in which the Court said:

“Objection on the part of the defendant was interposed after the question had been answered, and, therefore, even if the testimony had been in-

competent, the defendant could not, on writ of error, avail himself of the objection."

This rule was again followed by the Court of Errors in *State v. Hummer*, 73 Law 714, and in *State v. Fiore*, 93 Law 362.

10 As to the second question presented, the Crimes Act, on the 18th section of which the plaintiff in error relies, was enacted by the Legislature in 1898, and provides, as part of the penalty for committing the crime of perjury, that he *shall be thereafter rendered incapable of giving testimony in any court of this State until such time as the judgment so given shall be reversed.*

I respectfully submit in the first place that, assuming one is rendered incapable of testifying under the 18th section of the crimes act, that incapability does not exist or become operative until judgment has been passed by the court.

20 A careful reading of the act discloses that it is after punishment, or, in other words, after judgment has been passed that the incapability arises, and it then remains until that judgment is reversed. This contention is very clearly supported in the opinion of Justice Collins in the case of *State v. Henson*, 66 Law, page 618, in which he says that "the only conviction that excluded a witness was one that was evidenced by judgment"—"until sentence there is no conviction within the meaning of the statute."

30 All the text-book writers agree that judgment is the decision or sentence of the law pronounced by a court on the matter contained in the record, as set forth in *Words and Phrases*, page 3829.

Greenleaf, in his work on evidence, Volume 1, Section 375, says:

"No person is deemed infamous in law until he has been legally found guilty of an infamous crime. But the mere verdict of the jury is not sufficient for this purpose, for it may be set aside,

or the judgment may be arrested on motion for that purpose. It is the *judgment*, and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify."

This question has been settled in New York State in a case practically identical with the one at bar. I refer to *Blaufus v. People*, 69 New York 107. In that case the indictment was for subornation of perjury, and one Vorst was called as a witness for the State. Vorst had 10 been indicted, tried and found guilty of perjury. Counsel objected to his testifying upon the ground that his conviction disqualified him as a witness. The objection was overruled and an exception taken. The New York statute in regard to perjury is practically the same as the 18th section of the crimes act. The New York Court of Appeals, in deciding the case, said:

"We are of the opinion that until a person, found guilty of perjury by a verdict of a jury, has received judgment and sentence from the court, 20 he is not incompetent to speak as a witness."

I submit that the same rule should apply to the case at bar.

The Grasers had not had judgment passed upon them, they had not been convicted within the meaning of the act, and even under the 18th section of the crimes act were not incapable of testifying.

The evidence act was enacted in 1900, two years after the crimes act. The first section of the evidence act provides that *no person* shall be excluded as a witness by 30 reason of his having been convicted of *crime*.

If a person convicted of perjury, and upon whom sentence had been passed, was an incompetent witness under the crimes act, that disability was removed when the act concerning evidence, revision of 1900, was enacted into law. The penalty imposed by the 18th section of the

crimes act was repealed by the first section of the evidence act.

In *Eldridge v. Philadelphia and Reading Railroad Company*, 83 Law, page 463, the Court of Errors and Appeals, in an opinion by Justice Garrison, held that "when the Legislature frames a new and general rule covering an entire subject-matter all earlier and different rules touching the same matter are to be discarded in favor of such later rule."

- 10 This was the rule as laid down in the case of *Harrington's Sons' Co. v. Jersey City*, 49 Vroom 610, which followed the same rule as laid down in *Smith v. Hightstown*, 42 Vroom 536, which, as stated by Chancellor Magie, was:

- 20 "It is the settled doctrine of our courts that general laws, passed in compliance with the constitutional mandate, are to be construed as repealing inconsistent provisions of previous local or special laws, whether they contain an express repealer or not, and if they deal with the subject-matter of such previous laws a legislative intent is disclosed to supersede and abrogate the latter."

The case at bar comes squarely within the opinion of the Court of Errors and Appeals in the case of the State *v. Henson*, 66 Law 601, above cited, and under that decision I submit it is the settled law of this State that a person, convicted of perjury, cannot be excluded from testifying by reason of that conviction, but the conviction may be shown to affect his credibility.

- 30 It is there held that the word *crime*, as used in the first section of the evidence act, includes any crime. To quote the learned Justice who wrote the opinion of the Court, "This is a general act, applying in its terms to all persons without exception."

"The first section of the present act is an independent act and must be construed according to the language em-

ployed by the Legislature to express its purpose in enacting it."

"The language is that no person shall be excluded by reason of his having been convicted of crime, but such conviction may be shown to affect his credit."

"It is the conviction of crime which is to affect credibility. The word "crime" being used without qualification, must be held to be used, in its general sense, to include any crime. It is not a word of doubtful meaning."

This construction of the law is supported by the decisions in other States. 10

The statutes in Minnesota read "conviction of any crime," while ours is "conviction of crime," and as Justice VanSyckel says "the language in the one case is no more comprehensive than in the other." The Minnesota Court held, in *State v. Sauer*, 42 Minn. 258, "The irresistible conclusion is that the Legislature intended just what it said, leaving the whole matter, when evidence of crime is produced, to the judgment of the jury."

The Massachusetts statute reads "any crime" and the Court, in *Commonwealth v. Hall*, 4 Allen 305, said: 20

"It is suggested that, by the true construction of the statute, the crimes which may be proved to impeach a witness are only those which might formerly have been proved to exclude him. The statute says the conviction of any crime may be shown to affect the credibility of any person testifying. This language is clear, and there is no reason to suppose that there was any intent to change the law by the general statutes." 30

This construction is also placed on the Mississippi statute by the Court in *Helm v. State*, 67 Miss. 562.

For the aforesaid reasons I therefore respectfully submit that the plaintiff in error has suffered no injury, but has been legally convicted, and that the judgment of the Supreme Court should be affirmed and the conviction upheld.

I would also respectfully call to the attention of the Court the fact that other witnesses besides the three Grasers, mentioned herein, testified concerning the alleged power of attorney being drawn in Wendel's office, and, assuming that the evidence referred to was incompetent, the admission thereof was not sufficiently prejudicial to the defendant's rights in maintaining his defense upon the merits to justify the conviction being set aside.

Respectfully submitted,

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A. DAYTON OLIPHANT,

Prosecutor of the Pleas.

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New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,
Defendant-in-Error,

v.

PAUL H. WENDEL,
Plaintiff-in-Error.

On Writ
of Error.

ARGUMENT FOR PLAINTIFF-IN-ERROR.

The writ of error in this case brings up the record of the trial of an indictment in the Mercer County Court of Quarter Sessions.

The defendant, Paul H. Wendel, was indicted for perjury, in which indictment the charge substantially is as follows: That in a cause pending in the Court of Chancery of New Jersey, in which the title to some lands was involved, a power of attorney was introduced in evidence, the validity of which became questioned in said proceedings, and that Paul H. Wendel, who was sworn as a witness in the Court of Chancery, knowingly and falsely testified as follows:

“I didn’t see the power of attorney until shortly before the trial of title in the District Court took place; if this power of attorney was drawn in my office I don’t know anything about it; that is just as true as I sit here. I don’t think anybody could have done it in my office and if it was drafted in my office it was not done with my knowledge; I know it was not drafted at my direction or by me.”

At the trial of the indictment it became material

for the State to prove that the testimony of Wendel was knowingly and corruptly false. In support of this contention the State introduced, amongst others, three witnesses—Christian Graser, Marie Graser and Frank Graser, to prove the power of attorney referred to in the Chancery proceedings was prepared in the office of Wendel, with his knowledge and at his direction.

The power of attorney is set forth on page 13 of the printed case. It is signed by Frank Graser.

In the course of their testimony, it appeared that the three Grasers were each convicted of perjury in the Mercer County Court prior to the time of their appearance as witnesses in the Wendel case. When the fact of such convictions became established in each case, objection was made to the receipt and consideration of their testimony, and motion was made to strike the testimony from the record, on the ground that a person convicted of perjury in the State of New Jersey is prohibited from testifying in any case, as set forth and provided by Section 18 of the Crimes Act (C. S. 1748). The trial judge overruled the objections to this testimony, and permitted the testimony of these witnesses to go to the jury. This testimony was material to the State's case, and, of course, if incompetent, was highly prejudicial to the defendant.

The trial of the case consumed several days, and the printing of the entire record would entail an expense of about \$1,000 upon the defendant. The defendant, a young lawyer, had been recently admitted to the Bar, and his practice as a lawyer terminated upon his indictment. In view of his financial condition and the surrounding circumstances, the Prosecutor of the Pleas and the attorney for the defendant, agreed that in lieu of presenting the full record of the case, to present

the testimony in the form of a stipulation, which is set forth on pages 10 to 12 of the printed case, for the purpose of having this court pass upon the question of the competency and legality of the testimony of said three convicted perjurers. counsel for both sides having agreed that this question can be thus fully presented to this Court for its determination. Counsel have agreed, however, that in the event that the Court should find that the question cannot be determined by this form of presentation, in such event, then the entire record shall be printed and submitted to the Court for review; the form of presentation adopted having been adopted in the interest of justice and with regard to the defendant's financial status. We urge that the stipulation presents a sufficient analysis of the testimony to enable the Court to pass upon this point, which is the only point urged by the defendant upon this argument.

It is substantially agreed in the stipulation that if such testimony be incompetent, the conviction was erroneous and should be set aside. The Supreme Court reviewed the case on the stipulation practically as though the entire case had been printed.

The question therefore, flatly presented, is, Does a conviction of perjury operate as provided in Section 18 of the Crimes Act? That is to say, is the convicted to be thereafter rendered incapable of giving testimony in any Court of this State until such time as the judgment so given shall be reversed?

The Crimes Act expressly provides as a part of the penalty for a conviction of perjury, that the convicted person "*shall be guilty of a high misdemeanor and punish accordingly, and be thereafter rendered incapable of giving testimony in*

any court of this State, until such time as the judgment so given shall be reversed."

The Court will certainly take cognizance of the fact that perjury as a crime has been practically placed in a class by itself. From the earliest times it has been considered an infamous crime, and has carried with it the extraordinary penalty set forth and defined in Section 18 of the Crimes Act.

In the early days, perjury was considered a sin rather than a crime, and its punishment was supposed to reside with the offended deity who had been solemnly invoked and the solemn invocation to whom had been disregarded.

30 Cyc., 1459.

For several centuries past, in the English practise, the disability of the defendant to give testimony has been made a part of the sentence. This has been so since the enactment of 5 Eliz., Ch. 9. This has been the law in New Jersey from the beginning of our judicial history.

Berrian v. State, 22 N. J. L., 9.

The peculiarity of the crime of perjury and the attitude of the State toward it is also manifest by a reading of the case of *Dodge v. State*, 24 N. J. L., 455.

The statute of 1779 (June 7, 1779), Pat. L., 401, carried the penalty of incompetency and applied it to several crimes, but the law was changed as to all of these crimes shortly thereafter, leaving the penalty, however, as a constant and permanent incident to perjury. The statute just referred to, however, classified perjury as distinguished from the other offenses, in that in the cases of the other offenses enumerated in the statute, a person could testify after being pardoned, but a person convicted of perjury, as provided in the statute,

could not be permitted to testify, even though pardoned.

I draw attention to this fact to show that it has been the settled policy of this State from its earliest days to consider a perjurer a discredited witness.

The case of *State v. Henson*, 66 N. J. L., 601, deals so fully with the history of perjury and the definition of the offense, that I think it would be superfluous for me to go further. That case did not deal directly with the question as to whether or not a person convicted of perjury could testify; it treated an entirely different problem; but the question as to whether or not a defendant on trial for a crime could be cross examined on the subject matter of prior conviction of crime; yet the discussion of the subject is in far abler form than I could present it, and I ask the Court to read that case in its bearing upon the point at issue here.

Justice Van Syckel, in writing the opinion of the Court in *State v. Henson*, *supra* (p. 602), says:

“Our statute prior to 1874 provided, *as it does now*, that a person convicted of perjury shall not be admitted as a witness even after pardon.”

This opinion was rendered by the Court of Errors and Appeals on June 25, 1901.

It will be argued by the State that while it is true that a person convicted of perjury was an incompetent witness when the Crimes Act was enacted in 1898, the Act Concerning Evidence, Revision of 1900 (P. L. 1900, p. 352), has changed the law in this respect. The provision in question is the first section of the Evidence Act, reading as follows:

“No person offered as a witness in any action or proceeding of a civil or criminal na-

ture shall be excluded by reason of his having been convicted of crime; but such conviction may be shown on the cross examination of the witness, or by the production of the record thereof, for the purpose of affecting his credibility."

The Supreme Court in its opinion adopted this view.

We most respectfully urge that this provision of the Evidence Act is not applicable to a person convicted of the crime of perjury, and in support of this we refer the Court to the argument in the case of *State v. Henson*, 66 N. J. L., 601. The Court was not required in that case, to pass upon the question involved in this case, but in the dissenting opinion of Justice Collins it is made clear and outlined that in the opinion of the Court the Evidence Act did not repeal the penalty provision of the Crimes Act cited (which was the language of the six Judges of our highest court). I quote from the opinion of Justice Collins in that case (pp. 615, 616) :

"Statutes in *pari materia* must be construed together, and one will yield to the other, according to the discernible legislative intent. For example, the Act of 1799 was not the only authority for excluding a witness convicted of perjury or subornation of perjury. For many years, under the Crimes Act, conviction of either of these crimes rendered the convict 'incapable of giving testimony in any of the courts of this State.' Rev. Stat., page 357, s. 23. The revisers of 1874 retained this provision. Gen. Stat., page 1052, s. 17. Will it be argued that their new provision in the first section of the 'Act concerning evidence' permits every such convict to testify, subject only to the discredit of the conviction? On the other hand, will the provision quoted, retained in the latest revision of the Crimes Act (P. L., 1898, p. 798, s., 18), prevent full effect being given to

the fifty-seventh section of the Criminal Procedure Act, approved the same day, which provides that 'upon the trial of any indictment the defendant shall be admitted to testify if he shall offer himself as a witness'? It may be that, under Section 9 (now 7) of the 'Act concerning evidence,' an indicted man may be discredited by proof of his conviction of perjury, but surely he may testify. It may well be argued that the substitute for disability did not embrace accused persons for the reason that they were not under disability. In *Brown v. State, ubi supra*, it was the accused who was cross examined, but it is very suggestive that the learned judge who spoke for this court justified the examination by the ninth (now seventh) section of the 'Act concerning evidence,' ignoring the first section, although the right of indicted defendants to testify then formed (as Section 8) a part of the same statute. It is noteworthy that in the revision of 1900 Section 8 has been omitted from the act, because its provisions had, in the main, been made a part of the Criminal Procedure Act of 1898, P. L., 1898, page 866, s., 57. The care with which the British Parliament, in conferring the right to testify upon accused persons by the Criminal Evidence Act of 1898 (61 & 62 Vict., c., 36), guarded against subjecting them to proof of irrelevant convictions of crime, exemplifies sound policy. So illiberal an effect, as is claimed by the state in this case, should not be attributed to a statute which it is not clear was framed with such persons in the legislative contemplation."

This statement of the law by Justice Collins meets the situation so completely that it is difficult, if not impossible, for me to add to it. I think this recital clearly supports our contention, that the testimony of a convicted perjurer is inadmissible and incompetent, except where such person is the defendant in a criminal proceeding.

The Grasers were not defendants in this case, and were not testifying in their own defense.

By way of analogy, I might suggest this: The Jury Act of this State prescribes the general qualifications of jurors, and Section 17 of the Crimes Act, the section immediately preceding the section relating to perjury, provides that a person who has been convicted of the crime of embracery shall be forever disqualified from acting as a juror in this State. Would it be argued that the Act setting forth the general qualifications for jurors would operate as a repeal of this special penalty?

It may be argued, under the authority laid down in *Eldridge v. Philadelphia & Reading R. R. Co.*, 83 N. J. L., 463, that the Evidence Act of 1900 operated to repeal the penalty expressed in the Crimes Act of 1898. That case sustains the doctrine previously enunciated by Chancellor Magie, in the case of *Smith v. Hightstown*, 71 N. J. L., 536, that:

“It is the settled doctrine of our courts that general laws, passed in compliance with the constitutional mandate, are to be construed as repealing inconsistent provisions of previous local or special laws, whether they contain an express repealer or not, and if they deal with the subject matter of such previous laws a legislative intent is disclosed to supersede and abrogate the latter.”

Justice Garrison, in writing the opinion of the Court in the *Eldridge* case, said, “When the Legislature frames a new and general rule covering an entire subject matter all earlier and different rules touching the same matter are to be discarded in favor of such later rule.” But I respectfully insist that the Evidence Act of 1900 does not cover the entire subject matter involved in the statute of 1898. The provision in the Act of 1898 relating to the competency of a convicted perjurer to tes-

tify is just as substantial a part of the rest of the penalty imposed for the crime of perjury as the imprisonment sentence provided for. Could it be argued under the constitutional provisions of our statute requiring the subject matter of a statute to be embraced in its title, that the provisions of the Crimes Act establishing and fixing the penalty for perjury could be modified and changed by an act entitled "An Act concerning evidence"? The "Act concerning evidence" relates merely to procedure.

The incapacity to testify is a part of the punishment provided by law for a violation of the Crimes Act.

Berrian v. State, 22 N. J. L., 26.

Clearly, the evidence of the Grasers was incompetent unless its incompetency is removed by the Evidence Act of 1900.

Let me quote further from the case of *Berrian v. State*, 22 N. J. L., 26:

"We have seen that Lord C. J. Holt, in the two cases cited from Salkeld, in express words, rules that the incapacity to testify, was and ought to be a part of the judgment; and the reason that he assigns for it, because it is part of the punishment prescribed. I might cite many more cases, but it is surely unnecessary; no authority can be higher than Sir Edward Coke, Sir John Holt and Lord Ellenborough, and they are entirely uncontradicted. A strong line of distinction is very apparent between that incapacity which is part of the punishment, and that which is merely derivative. In the latter case pardon restores the competency; in the former it does not. Perpetual infamy is adjudged; and it is indelible, except by that power which reverses the entire judgment."

In the case of *Loudenslager v. Atlantic City*, 87

Atl., 51, the opinion of Mr. Justice Parker, this doctrine is laid down:

“An intent to repeal will not be implied unless the subsequent enactment is either clearly repugnant to the former, or is manifestly intended to cover the same subject matter, by way of revision furnishing a complete substitute.”

The title of the Evidence Act is clearly not broad enough to permit it to be construed as a repealer of the Crimes Act.

The argument that the Evidence Act is an implied repealer of the section of the Crimes Act referred to carries with it this suggestion, namely, that in order to construe a statute, so as to repeal a former statute by implication, the implication must be a necessary one.

.Naylor *v.* Field, 29 N. J. L., 290.

The Supreme Court in its opinion says the objection to this testimony was untimely. The motion to strike out was made as soon as the fact appeared in the case. Most certainly if the testimony was clearly incompetent and testimony debarred from use by the statute, it should then have been stricken from the record and withdrawn from the jury. Most certainly the Prosecutor was aware of the impropriety of its introduction, and a conviction for this serious crime should not be sustained on the hypothesis that the defendant had prior knowledge of the conviction. There is nothing in the case to warrant any such assumption.

I therefore respectfully urge:

First.—The section of the Evidence Act which is relied upon by the State does not repeal the section of the Crimes Act which creates the penalty for conviction of perjury.

Second.—The title of the Evidence Act is not broad enough to operate and repeal the section of the Crimes Act involved.

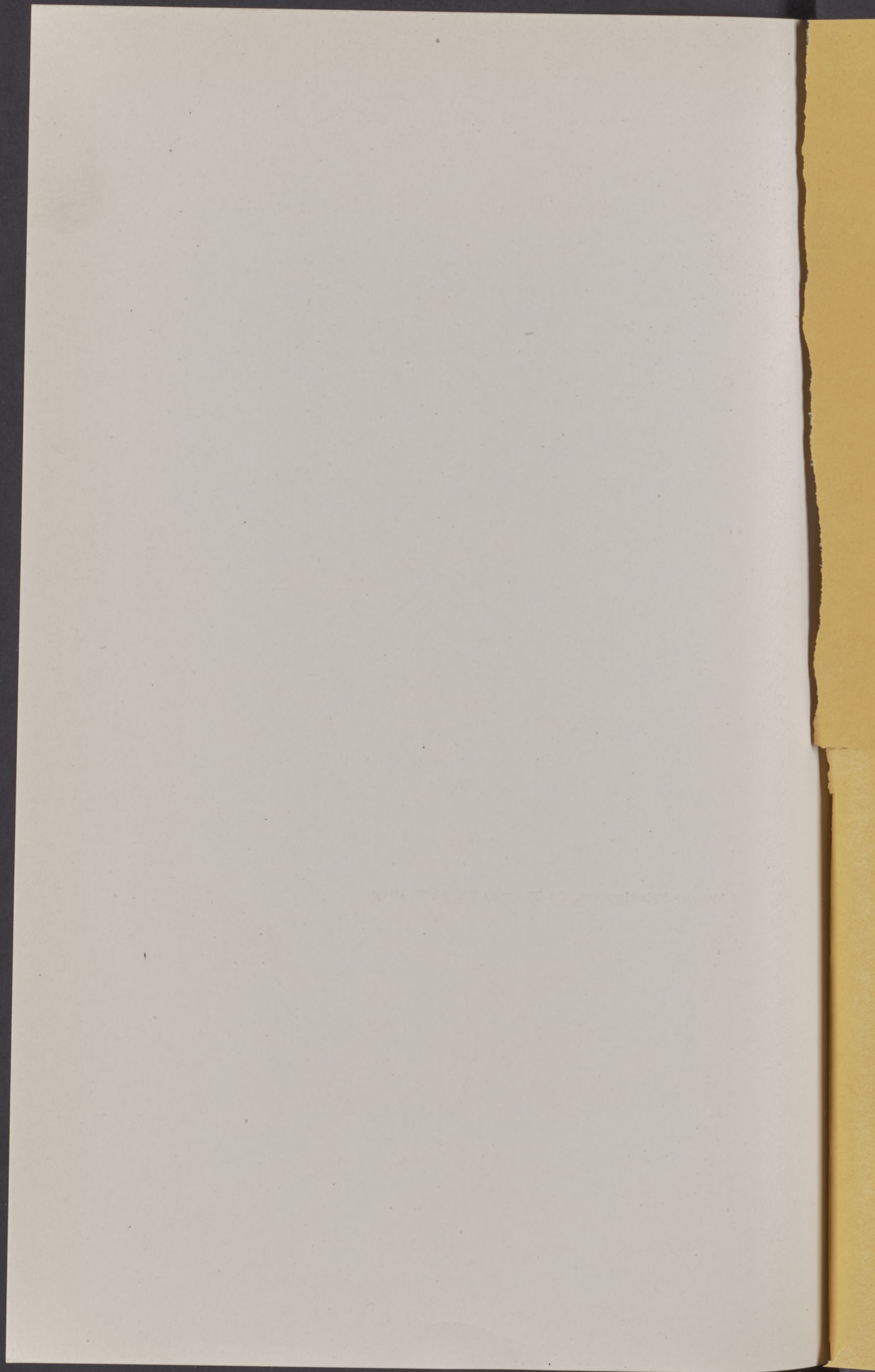
Third.—The three Grasers were incompetent witnesses and that their testimony could *not be used to convict the defendant*, and it should therefore not have been permitted to go to the jury.

Fourth.—The testimony being incompetent and illegal, it having been material to sustain the State's case, a conviction predicated upon this testimony must be set aside.

Respectfully submitted,

ROBERT CAREY,
Attorney for Plaintiff-in-Error.

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