

NEW JERSEY  
Court of Errors and Appeals.

MARCH TERM, 1878.

AUGUSTUS FISHER }  
ads. } *On Writ of Error and Bill of*  
THE STATE. } *Exceptions.*

*Points for Plaintiff in Error.*

The indictment is for breaking and entering, and charges that Augustus Fisher broke and entered the store house of "The Oxford Iron Company."

The Oxford Iron Company is a corporation. Act of incorporation is to be found in Laws of 1859, page 377.

The act of incorporation is a *private act*.

The error assigned is—That it does not appear by the indictment that the Oxford Iron Company is a corporation. That from the manner of pleading, the Oxford Iron Company might be only a private firm, having no corporate existence.

In *criminal* pleading it should be stated in the indictment that the Oxford Iron Company was a corporation.

*State vs. Mead, 27 Vermont 722; 28 Vermont 583.*

It is admitted that such is not the rule in this State as to pleading in *civil* cases.

*Bennington Iron Co. vs. Rutherford, 3 Harr. 158.*

It is however insisted, that whatever the rule as to pleading may be, it is necessary (where the property alleged to be broken and entered is charged to be in a corporation, and the act creating such corporation is a *private act*), that a copy of the laws containing such private act should be produced on the trial. A private act must be proved either in this way, or else by an exemplified copy.

*1 Greenleaf on Evidence, section 480, page 639.*

*1 Saunders on Pleading and Evidence, page 53.*

In this case the act of incorporation was *not* produced on the trial.

There was no proof offered or given on the trial, to show that there had been any *acceptance* of the charter, or that there had been any *organization under it*.

While in this state the rule in civil suits is that when any plea to the merits has been pleaded, a corporation being plaintiff, need not prove its corporate existence,—attention is called to the reason given for such rule—that a plea to the merits, admits the corporate existence of the plaintiff, and that if it is desired to deny such corporate existence the proper way to do so is by plea of *nul tiel* corporation. Then it is admitted that such corporation would have to prove both its charter, (if a private act) and also an organization under such charter.

*The Star Brick Company vs. Ridsdale, et al., 7 Vroom, 229.*

In criminal law the plea of *not guilty* being the *only* plea by which to defend under an indictment, every charge contained in the indictment is denied, and all is put in issue, that in a civil suit would be raised by the plea of *nul tiel* corporation.

Taking then, all the testimony in the case as to the *ownership*, and *character of ownership*, of the property alleged to be broken and entered, or as to the *legal existence* or *legal character* of such alleged owner, and it does not appear that there is or was any such corporation in existence as The Oxford Iron Company.

It is submitted that the plaintiff in error is entitled to have a new trial ordered.

MERCER BEASLEY, JR.,  
Counsel for Plaintiff in Error.

*As to <sup>leaf</sup> testimony in his own behalf - see 5<sup>th</sup> & 6<sup>th</sup> Requests to charge (Book page 8 lines 19-30-)  
Ruloff vs. The People 215 New York Court of Appeals - 213.*

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# Court of Errors and Appeals.

AUGUSTUS FISHER

ads.

THE STATE.

} *On Writ of Error to Warren  
County Oyer and Terminer.*

HENRY S. HARRIS, for Defendant in Error.

MERCER BEASLEY, JR., for Plaintiff in Error.

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[Filed July 9, 1877.]

New Jersey, ss.—The State of New Jersey, to Mercer Beasley, Esquire, Chief Justice of the State of  
[L. s] New Jersey, and to the Judges of the Court of Common Pleas of the county of Warren, constituting the Court of Oyer and Terminer, holden at Belvidere, in and for the county of Warren, of the term of September, in the year of our Lord one thousand eight hundred and seventy-six.

Because in the record and process, and also in giving of 10 judgment upon a certain indictment against Augustus Fisher, late of the county of Warren, "The store house of the Oxford Iron Company therein situate by night, wilfully and maliciously did break and enter with intent the goods and chattels of the said the Oxford Iron Company in the said store house then and there being found and then and there

unlawfully to steal, take and carry away to the evil example of all others in like cases offending, 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." *Pro ut* the said indictment and the several counts therein, whereof, before you he hath been indicted, and is thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said Augustus Fisher, as it is said, manifest error hath intervened to the great damage  
10 of the said Augustus Fisher, as from his complaint we have received information, we being willing in this behalf, to correct the error in due manner, if any there shall be, and that speedy justice be done to him the said Augustus Fisher, command you that if judgment be thereon given, then that you distinctly and openly send, under you seal, the record and proceedings aforesaid with all things touching the same to our Court of Appeals in the last resort in all causes of law, to be held at Trenton on the twenty-first day of November next, and this writ, that the record and proceedings  
20 aforesaid being inspected we may further cause to be done thereupon, for correcting that error, what of right and according to the laws and customs of New Jersey, ought to be done.

Witness Theodore Runyon, our Chancellor, at Trenton, this twenty-eighth day of October, in the year of our Lord eighteen hundred and seventy-six.

HENRY C. KELSEY,  
*Clerk.*

30 W. M. MACKEY,  
*Attorney.*

Presented to me this 28th of October, 1876.

M. BEASLEY,  
*Chief Justice.*

State of New Jersey, Warren County, to wit.—Be it remembered that a Court of Oyer and Terminer and General Jail Delivery held at Belvidere, in and for the county of Warren, on the the first Tuesday of January, in the term December in the year of our Lord one thousand eight hun-

dred and seventy-five, before the Hon. Mercer Beasley, Chief Justice of the Supreme Court of Judicature of the State of New Jersey, and Samuel Sherrerd, Jesse Stewart, Jr., and Robert Rusling, Esquires, Judges of the Court of Common Pleas of the said county of Warren, assigned to take cognizance of all crimes and offences whatsoever which by law are of an indictable or presentable nature and which have been committed, done or attempted within the said county of Warren, according to the form of the statute in such case made and provided, and on the oath of George 10  
 H. Beatty, J. H. Graff, Jacob Young, John Tinsman, James Ayres, William Fritts, Peter Cramer, Charles Leidy, Theodore Tinsman, John A. Jones, John W. Dean, Jesse F. Carhart, Smith Hazzard, Samuel Fitts, John N. Linnaberry, Jehiel T. Kern, Wilson Hunt, John Painter, Joseph Durling, Henry W. Johnson, David Shields and Hiram D. White, good and lawful men of the said county of Warren duly summoned and there sworn and charged to inquire in behalf of the State of New Jersey, and for the body of the county of Warren. It is presented in manner and form 20  
 following, to wit :

The Grand Inquest for the State of New Jersey and for the body of the county of Warren, upon their oath, present : That John Grier, James Grier, and Augustus Fisher, late of the township of Oxford, in the said county of Warren, on the twenty-second day of October, in the year of our Lord one thousand eight hundred and seventy-five, at the township of Oxford aforesaid, in the said county of Warren and within the jurisdiction of this court, the store house of the Oxford Iron Company there situate, by night, wilfully 30  
 and maliciously did break and enter with intent the goods and chattels of the said the Oxford Iron Company in the said store house then and there being found and then and there unlawfully to steal, take and carry away to the evil example of all others in the like case offending, 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.

JOSEPH VLIET,

*Prosecutor.* 40

(Endorsed) A true bill.

GEORGE H. BEATTY,

*Foreman.*

Which said indictment is afterwards, to wit, on the fourth day of January, in the year of our Lord one thousand eight hundred and seventy-six, at the Court of Oyer and Terminer and General Jail Delivery, holden at Belvidere aforesaid, in the county of Warren aforesaid, before the Hon. Mercer Beasley, Chief Justice of the Supreme Court of Judicature of the State of New Jersey, and Samuel Sherrerd, Jesse Stewart, Jr., and Robert Rusling, Esquires, Judges of the Court of Common Pleas of the said county of Warren, duly delivered here in court by the grand jury aforesaid in form of law to be determined, whereupon the sheriff of the county of Warren is commanded to take the said John Greer, James Greer and Augustus Fisher if they may be found in his county, and them safely keep to answer to the felony whereof they stand indicted. And afterwards to wit, at the term of Oyer and Terminer and General Jail Delivery, holden at Belvidere in the county of Warren, on the twenty-fifth day of September, in the year of our Lord one thousand eight hundred and seventy-six, before the said Honorable Mercer Beasley, Chief Justice of the State of New Jersey, and Samuel Sherrerd, Jesse Stewart, Jr., and Robert Rusling, Esquires, Judges of the Court of Common Pleas in and for the county of Warren here cometh Augustus Fisher under the custody of John Gardner, sheriff of the said county of Warren, in whose custody he had been before committed, being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed, and forthwith being demanded of and concerning the premises in the said indictment above specified upon him how he will acquit himself thereof. Wherefore let a jury thereupon here come before the said Court of Oyer and Terminer and General Jail Delivery last above mentioned, at Belvidere in the county of Warren aforesaid, to wit, at the hour of eleven o'clock in the forenoon on Monday, the twenty-fifth day of September, in the term of September, in the year of our Lord one thousand eight hundred and

seventy-six, of good and lawful men of the county aforesaid, by whom the truth of the matter may be better known, and who are not of kin to the said Augustus Fisher, to recognize upon their oaths whether the said Augustus Fisher be guilty of the felony in the indictment aforesaid above specified or not guilty, because as well Joseph Vliet, Esquire, who prosecutes for the State of New Jersey in this behalf. as the said Augustus Fisher have put themselves upon the said jury, &c.

At which day, to wit: on Monday, the twenty-fifth day 10 of September, of the term of September, in the year of our Lord one thousand eight hundred and seventy-six, at the hour of eleven o'clock in the forenoon, before the said Court of Oyer and Terminer and General Jail Delivery, at Belvidere, aforesaid, in the county of Warren aforesaid, here cometh, as well, the said Joseph Vliet, Esquire, who prosecutes for the State of New Jersey in this behalf, as the said Augustus Fisher, under the custody of John Gardner, Esquire, Sheriff as aforesaid, and the jurors of the said jury, by the Sheriff of the said county, for this purpose 20 empaneled and returned, agreeably to the statute in such case made and provided, to wit:

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|-----------------------|-------------------------|
| 1 William C. Shannon, | 7 Wm. C. Smith,         |
| 2 Nelson Van Camp,    | 8 Isaac Dill,           |
| 3 Roderick Vanatta,   | 9 George Lantz,         |
| 4 Samuel Mawder,      | 10 Samuel J. Creveling, |
| 5 Wm. C. Howell,      | 11 Jacob Wyckoff,       |
| 6 Geo. F. Reeder,     | 12 John L. Cline,       |

being called, came, who being chosen, tried and sworn to speak the truth, of and concerning the premises in the in-30 dictment aforesaid, above specified, upon their oath say, that the said Augustus Fisher is guilty of the felony, on him above charged, in the form aforesaid, which verdict was *of the jury duly, was duly* rendered and taken in the said Court, on the twenty-eighth day of September, of the term of September, in the year of our Lord one thousand eight hundred and seventy-six.

And afterwards, to wit: on the twenty-ninth day of September, of the said term of September, in the year of our Lord one thousand eight hundred and seventy-six, at Bel-40

videre, in the county of Warren, the prisoner, Augustus Fisher, being placed again at the bar, it is considered and adjudged by the said Court of Oyer and Terminer, that the said Augustus Fisher be imprisoned in the State Prison of New Jersey, at hard labor, for the term of ten years in solitary confinement at hard labor, that he pay the costs of prosecution, and that he be further *imp.* from and after the expiration of the said term of ten years, until the costs of this prosecution are paid.

10 State of New Jersey, Warren county, *ss.*

I, James E. Moon, Clerk of the Court of Oyer and Terminer and General Jail Delivery, in and for the said county of Warren, do hereby certify that the above and foregoing is a true, full and correct copy of the record in the case of the State *vs.* Augustus Fisher, so full and entire as the same remains among the records of said Court.

Witness my hand and seal of said Court, at Belvidere, this 2d day of June, A. D. 1877.

JAMES E. MOON,  
*Clerk.*

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WARREN COURT OF OYER AND TERMINER, AND GENERAL  
JAIL DELIVERY. DECEMBER TERM, A. D. 1876.

AUGUSTUS FISHER }  
*ads.* } *On Indictment.*  
THE STATE.

*Bill of Exceptions.*

Which said issue in manner aforesaid joined between the State of New Jersey and the said Augustus Fisher, at the Court of Oyer and Terminer and General Jail Delivery, 30 holden at Belvidere, in the county of Warren, came on to be tried.

And thereupon to maintain the issue above joined, as to

the ownership and character of ownership of the property alleged in the said indictment to be broken and entered, or with regard to the legal existence, or legal character, of such alleged owner, there was given in evidence by the State of New Jersey the testimony of one William H. Searing, who said: "On the night of the twenty-second and morning of the twenty-third day of October, eighteen hundred and seventy-five, I was watchman at the Oxford Iron Company's office." (That being the time of the alleged breaking and entering.)

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And on the same subject there was offered, on the part of the said State, a lawful and proper copy of the laws of the State of New Jersey for the year eighteen hundred and sixty-five, at page 401, and also a like copy of the laws of the said State for the year eighteen hundred and ~~seventy-~~ *1866* ~~six~~, at page 295.

And the above evidence so offered and given in evidence by the said State of New Jersey, was the only evidence offered or given upon the trial of the above issue as to the ownership, or character of ownership, of the property alleged in the said indictment to have been broken and entered, or with regard to the legal existence, or legal character, of such alleged owner.

And the said defendant, Augustus Fisher, was not offered as a witness in his own behalf on the trial of the said indictment.

Whereupon the counsel of the said Augustus Fisher, conceiving that, by the law of the land, the said issue as to the ownership and character of ownership of the property alleged in the said indictment to be broken and entered should have been in favor of the said Augustus Fisher and against the said State of New Jersey, requested and asked that the said Court of Oyer and Terminer and General Jail Delivery would charge and direct the jury impanelled to try the said issue, severally as follows, to wit:

*First.* That the indictment was materially defective, inasmuch as it does not describe the Oxford Iron Company therein mentioned as a person in law, artificial or otherwise, having the right or power under the laws of the State

of New Jersey to hold, possess or own property of any kind therein.

*Second.* If the Oxford Iron Company is a corporation created by or under the laws of the State of New Jersey, or a foreign corporation, recognized thereby, and legally doing business and entitled to hold property therein; that fact should be specially pleaded in the indictment. Its corporate existence cannot be presumed. And therefore in view of such material defect, the jury must acquit the defendant; 10 inasmuch as no judgment of the court could follow any verdict thereon rendered.

*Third.* The "breaking and entering of a store house" by night, with intent to commit a felony, is not within the purview of the statute upon which the indictment is based. And the jury must therefore render a verdict of acquittal.

*Fourth.* There is no proof of the ownership of the property alleged to have been broken and entered upon by the defendant, as the property of the Oxford Iron Company.

*Fifth.* The fact of a defendant not availing himself of the 20 privilege of taking the witness stand in his own behalf, is not a circumstance that the jury can take into consideration upon the question of the defendant's guilt or innocence, of the offence of which he stands charged.

*Sixth.* A defendant may for reasons entirely independent and apart from the charge contained in the indictment, refrain from availing himself of his privilege of testifying in his own behalf; and the jury have no right to assume anything against such defendant (from the fact of his so refraining from testifying) upon the question of his guilt or inno- 30 cence of the crime of which he is indicted.

All of which said requests and each and every one of which said requests to charge were severally refused to be charged by the said court, and not then and there charged to the said jury impanelled as aforesaid, to try the said issue; and inasmuch as the matters aforesaid, do not appear by the record of the verdict aforesaid, the counsel on behalf of the said Augustus Fisher, prayed that the said court would set its hand and seal to this bill of exceptions contain the several matters so proved and given in evidence as 40 aforesaid, according to the force and effect of the statute in

such case made and provided; and thereupon the said Mercer Beasley, Chief Justice, hath set his hand and seal thereto, according to the form of the statute in such case made and provided, at Belvidere aforesaid, the eighteen hundred add seventy-six.

M. BEASLEY,  
*Chief Justice.*

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*Assignment of Errors.*

Afterwards, to wit: on the twenty-first day of November, eighteen hundred and seventy-six, before the said Court of Errors and Appeals in the last resort in all causes, at Trenton, comes the said Augustus Fisher, by Mercer Beasley, Jr., his attorney and says:

That in the record of the proceedings aforesaid, and also in the giving the judgment aforesaid, there is manifest error in this, to wit:

*First.* Because the said Court of Oyer and Terminer decided that the indictment upon which the above judgment was rendered was sufficient and proper in law.

*Second.* Because the said court decided that the description in the said indictment as to the ownership of the property, alleged to be broken and entered, was sufficient in law.

*Third.* Because the said court decided that the character in which the said property in the said indictment charged to be broken and entered was held, was sufficiently set forth in the said indictment.

*Fourth.* Because the said court decided that it was not necessary to allege in the said indictment, that the said Oxford Iron Company was a corporation created by, and existing under and by virtue of the laws of the State of New Jersey.

*Fifth.* Because the said court decided that breaking and entering "a store house" as described in the said indictment was sufficient in law to constitute the crime, con-

templated by the statute of New Jersey, which creates and describes the crime breaking and entering by night, and under which statute the said indictment is drawn.

*Sixth.* Because the said court decided that in all respects the said indictment was good and sufficient in law.

*Seventh.* Because the said judgment as it appears is imperfect, and of no force, effect, nor avail in law.

Joinder in error in usual form.