

New Jersey Court of Errors and Appeals

OCTOBER TERM, 1930.

<p style="text-align: center;">STEPHEN JONES, Plaintiff-Appellee,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">U-DRIVE-IT COMPANY, a corpora- tion, and WILLIAM C. OAKLEY, Defendants-Appellants.</p>	}	<p>On Appeal from Supreme Court.</p>
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BRIEF FOR DEFENDANTS-APPELLANTS.

This suit was brought in the Hudson County Circuit Court to recover damages for alleged malicious prosecution.

The defendant corporation is in the business of renting automobiles. The defendant Oakley is its manager. On November 6, 1926, plaintiff rented an automobile to be driven by himself. He promised in writing to return the car at 10:00 P. M. of the day he hired it. Upon the basis of the proposed use of the car which he thus represented to the defendant company and its manager, he paid the calculated rental of \$15.00 in advance.

The car was not returned that night. Nor did the defendants know the whereabouts of the plaintiff or their car until a day or two later when a telegram was received from the police of a remote part of New York State, where the plaintiff and the car had been taken into custody on suspicion. The further facts are stated in the narrative contained in this brief.

There was a general verdict of \$2500 against the defendants.

A rule to show cause was dismissed; and on reserved exceptions an appeal was taken to the Supreme Court. The Supreme Court did not consider the questions raised by the grounds of appeal, but disposed of the case on the authority of *Catterall v. Otis Elevator Co.*, 103 N. J. L. 381.

POINT I.

The Trial Judge erred in submitting the case to the jury because there was no evidence of malicious prosecution.

The best argument under this point is, of course, a consideration of the facts.

The facts, with little exception, are not in dispute. The disputed facts will be taken up later in this brief.

The undisputed evidence is, the plaintiff Jones, who was an expert automobile mechanic, rented a Chrysler coach from the U-Drive-It Company at 2:00 o'clock on Saturday afternoon, November 6th, 1926. The value of the car was \$1900.00. When Jones rented the car, he signed a written agreement in which, after giving his home address at 153 Pavonia Avenue, he stated he would return at about 10:00 P. M.

Thereupon Jones deposited \$15.00 against the rent of the car and left the garage of the defendants, 77 Sip Avenue, Jersey City, and proceeded into the unknown. From 2:00 o'clock *Saturday*, when he signed the agreement to return and made the \$15.00 deposit, *until the following Tuesday morning*, neither the U-Drive-It Company nor Oakley, nor any other person connected with them, had any knowledge or information of any kind as to what had become of Jones and their Chrysler coach.

Jones agreed to return the car to its owner at 10:00 o'clock *Saturday evening*. *He did not return Saturday night, nor Monday, nor Monday night*. At 10:00 o'clock, when under the terms he was to return the car to its owner, he was speeding northwesterly on a journey which he says took him to Erie, Pa., 505 miles away, just across the border from a foreign country.

He says he arrived in Erie about noon on Sunday. If this be true, instead of returning the car to its owner, in accordance with his written agreement, at 10:00 o'clock on Saturday night he spent all of Saturday night and half of Sunday motor-ing away from the jurisdiction of the courts of New Jersey.

The first information with reference to the departure of Jones and the missing Chrysler coach was received by the U-Drive-It Company from the police authorities in the form of information that Jones had been arrested at Friendship, New York.

The defendant company which, in good faith, permitted Jones to take their motor car worth \$1,900.00 on the agreement that it would be returned at 10:00 o'clock on Saturday, three days later learned of his arrest by the police of New York State; *and had every right to believe that Jones absconded with the car*. The U-Drive-It Company itself did nothing about the matter. But Oakley, the other defendant, upon receiving word from the police authorities of the arrest of Jones, filed a complaint, which is in evidence, and which is the basis of this suit.

We maintain that nothing can be clearer than that the filing of the complaint against Jones was not actuated by malice. Not only was there no malice on the part of the defendants, but, to a reasonable being, there is a good deal of ground for suspecting that Jones had some ulterior motive in his mind in taking this car away.

Let Jones tell the story of what happened after he rented the property of the defendant at 2:00 o'clock on Saturday.

At the very opening of his testimony, he says: "I was in the automobile game."

He had been living at the address given in the contract, 153 Pavonia Avenue. But on the very day he took the car, *he gave up his residence there.*

Thirty minutes before he hired the car, he evidently had prepared to leave 153 Pavonia Avenue.

When he took the automobile from the garage of the defendant, he did not have with him either bag or baggage, nor tools. That is, he came empty-handed, like the ordinary person renting a motor car. But he immediately went to the place where he had lived at 153 Pavonia Avenue, and put his baggage in the car. In addition to this, he put his kit of tools in and then remained about somewhere in Jersey City, *although paying per hour for the car, until after dark.* And at 6:00 o'clock on Saturday evening, within four hours of the time he agreed to return the car, he, with his restaurant acquaintance, Gorski, started on a long journey to the frontier, *agreed between counsel to be 505 miles.*

When he left 153 Pavonia Avenue, he left it for good. He never returned to that place again to live.

The excuse he gave at the trial for renting the motor car to go this long journey of 505 miles and return (altogether over 1,000 miles), which would cost over \$200.00, was to deliver a radio to his sister. And what reason had he to take the tools with him is described by himself: "There were big wrenches and hammers, small wrenches and chisels, and pliers; different kinds of pliers, cutting pliers, diagonals, and all kinds; small

hand wrenches and big hand wrenches." Over 50 pieces of tools.

Is it any wonder that this man, with a New Jersey license on his car, nearly 500 miles from New Jersey, with such an equipment, was apprehended by the police?

The plaintiff, according to his own story, rode away from Jersey City all of Saturday night, through the early hours of Sunday morning and until noon on Sunday. He says he motored around Erie on Sunday, and that some time during that day 'phoned back to the U-Drive-It Company that he was on his way back. At the trial, he testified that he told Oakley he was going to Erie. But in the letter written by him from the jail, he said, "Would you please forgive this time. I know I was wrong that I did not notify you that I was going to Erie". Then he states that in writing the letter *he was trying to deceive Oakley.*

If he would deceive Oakley in a letter, if he had deceived him in failing to return at 10:00 o'clock as agreed in writing, what reasonable person would believe, even if he did telephone that he was coming back, that he actually was coming back?

Jones says that after riding around through Erie during Sunday, he started Sunday night on his way northeasterly. He says back toward New York, but it could just as well be toward Buffalo, New York. Up to the point of his first contact with the police at Westfield, N. Y., he might just as well have been headed for the Canadian border as back to the jurisdiction of New Jersey. And nobody in the world except Jones knew where he was going, nor why, but it cannot be denied that he had grossly deceived the defendants when he took the car from their possession.

After leaving Westfield, and after having been interviewed by the New York police authorities, it

may be that Jones had a change of heart or mind, but whether he did or not, he was in possession of the property of the defendant company nearly three days over the time contracted for, and at a place 400 miles from where he agreed he would re-deliver the car.

Jones' manner of travel is indicated by his testimony when he describes his running out of gas at 2.30 in the morning at Westfield; that he traveled by night and by day; that he hired the car at 2:00 o'clock on Saturday afternoon, and did not start until after dark; that he traveled all night and until noon Sunday; that he lay over at Erie the balance of Sunday and went out of Erie at night, running out of gas at 2:30 in Westfield when the police interfered.

This plaintiff, who, contrary to his written contract, had detained this rented car for more than two days beyond the hour when he had agreed to redeliver it, traveled by night, being interviewed by police, finally meeting with two State troopers at Cuba, New York. After they looked the situation over, this man, with a New Jersey license on his car, with no apparent right to possession at the time and place, with a kit of automobile tools in the car, is taken into custody on suspicion, and is finally transferred to the jail at Friendship, N. Y.

There must have been something suspicious in the very appearance of the situation, for Jones said, "They stopped us to see if there were any stolen cars on the road". Apparently the New York police know the route by which stolen cars reach Canada.

Jones said the police stated, "We will hold them".

In Friendship, the police sent telegrams to Jersey City. Oakley was informed of the arrest of Jones under these circumstances; the car was

nearly three days overdue; it was 400 miles from the jurisdiction of our courts; Jones had left \$15.00 deposit against its rent; he was in custody of the police authorities of New York; and Oakley did the only thing that a good citizen would do under the circumstances; he signed a complaint alleging that this Chrysler coach worth \$1,900 had been stolen from his employer, and that he suspected Jones of stealing it.

In this there was no malice, no evil thought, no improper motive, and nothing that would justify a court or a jury assessing damages against the defendants based on the complaint.

Of course, Jones came back to Jersey City in the custody of Detective O'Neill of Jersey City, but of his own volition. This apparently seemed to have some weight with the jury. But he was subject to extradition. And the only thing for him to do under the circumstances was to offer to return.

Whether he stole the car or not, he certainly had given himself every aspect of a thief. Arrested by the police 400 miles from our jurisdiction, he was found in possession of a car, the ownership of and right of possession to which at that time was in the defendant company. We insist that Jones had absolutely no right to the possession of this car after 10:00 o'clock on Saturday night; and his being found with it three days later, 400 miles away, was ample justification for the complaint by Oakley.

The contract that he signed when he deposited the \$15.00 against rent—which, by the way, would carry him only about 75 miles, and if he were going 75 miles, he could well get back at 10:00 o'clock Saturday night—bound him to return 10:00 o'clock Saturday night, and after that hour expired, he was in wrongful possession of the car (Contract, p. 114).

At the middle of page 59 the Court pursued a very interesting line of inquiry, showing that Erie is 505 miles away, as agreed by counsel; and that to take a radio to Erie and return the car to New Jersey would have cost the plaintiff over \$200.00.

When Oakley received word from the police authorities that Jones was in the custody of the New York police more than twenty-four hours by road from the time and place where he agreed to deliver the car, and in possession of an auto worth \$1,900, we say any fair mind would come to the same conclusion as expressed in his affidavit of complaint: "that he has just cause to suspect and does suspect that the same was stolen by Stephen Jones".

This complaint, it must be remembered, was made November 9th, the third day after the car had totally disappeared from New Jersey and all trace of it lost to the owners. Oakley did just exactly what every other sensible man would have done under the same circumstances: he went to the police court and made a complaint. The only thing for Oakley to have done was to appeal to the courts; *and if this verdict is permitted to stand, it will be unsafe for any man to attempt to recover his property or to assist the State in bringing wrongdoers to justice.*

Jones was lodged in the Jersey City jail on the 10th of November; on the 12th he was bailed; but later surrendered by his bail. He was indicted and tried in Special Sessions; and, fortunately for him, it was Christmas time. He was acquitted by the Court of having stolen the car. Whether or not he had actually stolen it, he had certainly surrounded himself with all the evidence which would cause a just and prudent man to believe that he had done so.

If a responsible citizen, conducting a lawful business, can be subjected to the treatment that

these defendants were subjected to at the hands of Jones, and then be mulcted in damages to the extent of \$2,500, we say there is absolutely no protection in the law for any citizen either in attempting to protect himself in his property rights or to assist the State in the enforcement of its criminal laws.

So far as the defendant company is concerned, it did absolutely nothing and had no knowledge of the matter. Oakley, who in his affidavit says that he is the manager, was worried about the car that had been gone for three days and was fully convinced that it had been stolen. There is nothing surprising about the stealing of a motor car. Thousands are stolen from this section every month, and a large part of them find their way to the Canadian border.

Here is a case where a concern doing a perfectly legitimate business of renting cars, hires a car out to a man who brings no bag or baggage with him, brings no tools, gets into the car, leaves \$15.00 for deposit, and signs that he will return at 10:00 o'clock, and does not turn up in three days, in fact, never turned up, but was in the hands of the police. Not one word had the U-Drive-It Company heard except the alleged telephone conversation by Jones concerning their \$1,900 motor car, from the time it was rented *until the time they received word from the police of Friendship, N. Y., that the man who rented it was arrested and in their custody.* What does the law require of a man who has been thus deprived of his property? Must he sit down and permit his property to be asported and take no action?

Suppose a broker's clerk or a bank clerk borrowed \$1,900 worth of bonds with a promise to return them at 10:00 o'clock at night, and the banker or broker heard nothing, directly or in-

directly, from the clerk (except a telephone message), for more than 24 hours after the bonds were borrowed; that the possessor of the bonds was then in Erie, 500 miles away, and said he was going to come back with them. *Would not the banker or broker be justified in having a warrant issued?* This is assuming that Oakley and the U-Drive-It Company had actually received the telephone message—a question which we will deal with a little later.

If under the present circumstances the citizen wronged is not justified in appealing to the law for protection, to recover his property and to punish the offender, the entire criminal law breaks down. Nothing can be a greater encouragement to attempts at car-stealing than verdicts of \$2,500 in cases like the present case.

As we have stated, evidence of malice is missing. They attempt to show it by testimony from the mouth of the man who wants this \$2,500 verdict sustained, and from his mouth alone. It is of two types: First, the statement that when Mr. Oakley first saw Jones at the police station at Friendship, he said he would ride him into jail. The second piece of evidence that might be construed as tending to prove malice is the statement made by Jones that on Sunday he telephoned from Erie, Pa., to Oakley at Jersey City, and said he was on his way back, leaving the inference that the arrest was unjustifiable.

In view of the conduct of Jones in this particular transaction, we very strongly urge that anyone knowing the facts as related by Jones himself—that he came to the U-Drive-It Company's place and hired a car at 2:00 o'clock on Saturday; that he went to his former boarding house and took away his clothes and baggage, including 100 pounds of tools; that he was in the "automobile game"; that when he departed Jer-

sey City, there was absolutely nothing here to bring him back; that he represented that he would return at 10:00 o'clock that night; that he did not leave Jersey City until 6:00 o'clock that night, when he started on an all-night journey, traveling between 6:00 o'clock Saturday night and 12:00 o'clock on Sunday, 505 miles to Erie, Pa., and just across the Lake from the great market for stolen American motor cars. Suppose he did telephone from Erie, Pa., and say he was on his way home. Were the defendants required to believe him, *when they had already been deceived as to his intentions?* His statement on the telephone could not be stronger than his written promise to return the car at 10:00 o'clock, which he violated. If the telephone message was received, Oakley knew that Jones was then, contrary to his agreement, 500 miles away and beyond his reach. Why was Jones entitled to be believed on the telephone when he already had deceived? No man in his senses would have believed he was on his way back. Not a man having any experience in the affairs of life could be expected to believe Jones when he said he was in Erie, Pa., and would start back, when Jones had already lied in writing with reference to his return at 10:00 o'clock. The telephone message would be treated as just another lie.

Furthermore, in this case there is ample evidence that Jones is a liar. He first said that he told Oakley that he was going to Erie, which was absurd, of course, as shown by the Court's examination of Jones, which brought out that the trip to Erie would cost \$202.00, while the U-Drive-It Company got only \$15.00 deposit. He then stated that he telephoned Oakley that he was going to return; but forgot that he had written a letter from the jail in which he stated that he did not tell Oakley that he was coming back, and when

confronted with that letter, he was compelled to say that he had written it to *deceive Oakley to save himself from prosecution*. Plaintiff says he wrote the letter because he wanted to get out of jail.

Jones admits that the last night he slept at 153 Pavonia Avenue in Jersey City was the night before he hired the car; that he had his baggage ready to make his departure as soon as he arrived with the car. How could the jury, with these facts before them out of the mouth of Jones, find that his arrest grew out of malice? Would Oakley have rented the car if he had known when Jones signed to be back at 10:00 o'clock, that he had no intention of doing it; that before the car would ever return to the garage he would take a trip of 30 hours toward the Canadian border?

Plaintiff got possession of the car in the first instance by criminal false pretense.

What does Jones mean when he says in his letter, "I would like to ask you to please give me another chance. As you know, I did not have any intention of stealing your car. Where I was wrong is I was too dumb to tell you I was going so far." That letter gives the direct lie to the only possible basis that Jones could have for suit; namely, that when he hired the car, he informed Oakley he was going to Erie.

His letter pleads for "another chance". There is not a word in the letter which attempts to justify his taking the car. Not a word in the letter indicating an unkind and unfriendly attitude on the part of the man who is now held by the jury to have been actuated by malice. Though Jones testified he had always lived in Jersey City, in his letter he says: "Mr. Oakley, you are from the South, and so am I, from Dania, Florida." Just another misrepresentation.

POINT II.

The fact that plaintiff was acquitted of the charge for which he was brought to trial should not avail where the uncontradicted proof in the subsequent action for malicious prosecution is that he was, nevertheless, guilty of a criminal offense in the transaction that led to the making of complaint against him.

Defendants contend under this head that the proof uncontradicted in this case—indeed, resting on the plaintiff's own story—is that regardless of the result of the criminal prosecution against the plaintiff he was, nevertheless, guilty of a criminal offense in his conduct with the defendants' property.

For one thing, he got possession of the automobile in the first instance by means of false representations. For example he gave as his residence an address in Jersey City. This residence he had just then previously abandoned and was without a residence in this city. Another thing, he represented that his proposed use of the car was such as to enable him to return it at ten o'clock the same evening. On the contrary, the plaintiff himself admits it was then his intention to use the car on a journey that would be a matter of days at least. Furthermore, it was on the basis of this latter representation that the deposit of \$15.00 for rent was calculated.

All of this we say was in clear violation of Section 186 of our Crimes Act (Vol. II, Comp. Stat. 1800).

One of the provisions of this Statute is that the property be obtained "with intent to cheat or defraud". The plaintiff's wrongful use of the car, his depriving the defendants of the proper rental

money for such use, all constitute a cheat. And since the defendants were thus cheated by the plaintiff, the latter must have *intended* the necessary consequences of his conduct.

Facts in the present case, also without controversion, show that the plaintiff obtained the defendants' automobile upon a contract of bailment under circumstances that violated another Section of our Crimes Act, viz. Section 184 (Vol. II Comp. Stat. 1799). The language of the Section is:

“Any * * * bailee entrusted with the care * * * of any personal property, who shall fraudulently take or convert the same * * * to his own use * * * shall be guilty of a misdemeanor.”

Under the criminal law *conversion* of property to one's own use is the wrongful assumption of dominion over such property inconsistent with the rights of the lawful owner. Clearly the plaintiff was guilty of that. But the statute requires also that the conversion be done “fraudulently”. As to this, the same argument must be made concerning the consequences of plaintiff's acts and his necessarily presumed intention with relation to them as is made above concerning the plaintiff's false pretenses.

So, it is established, that here we have a suit for malicious prosecution where it is shown without controversy, and in the plaintiff's own case, that in the transaction from which the criminal prosecution of the plaintiff resulted, *he was in fact guilty of one or more criminal offenses*. We have a case where proof of that guilt is inherent in the very evidence by which the plaintiff seeks to establish his claim for damages. In this the present case is unique. It is altogether unlike the ordinary line of cases for malicious prosecution where the question of plaintiff's guilt has been

finally determined by the conclusion of a criminal prosecution favorable to him.

Termination of the criminal case favorable to the suitor for damages is a prerequisite to the cause of action for malicious prosecution. Now, in view of such a requirement, we respectfully contend that there is neither sense nor justice in submitting to a jury plaintiff's claim for damages in a case where *there is no dispute that in the transaction that resulted in the criminal prosecution he was, as a matter of fact, guilty of one or more criminal offenses in addition to that for which he was indicted.*

In this case the philosophy of the law requiring that the question of plaintiff's guilt be first set at rest by an outcome favorable to him of the prosecution claimed to have been malicious, has not been satisfied.

POINT III.

The case of *Catterall vs. Otis Elevator Company* does not apply.

The Supreme Court decided this case under the authority of *Catterall vs. Otis Elevator Company*, 103 N. J. Law 381. The holding of that case does not dispose of the question here. The rule laid down in the *Catterall* case is pronounced as a "general" rule. The situation under Point II above relative to the plaintiff's showing of guilt by his own proofs is in no sense a matter of mere weight of evidence. It may well be that the theory of no evidence upon which a motion for nonsuit is based is included in a decision by the trial court as to weight of evidence. And that is all that the *Catterall* case holds. *It does not set any precedent for what a trial court should do on a*

motion to non-suit and on a motion to direct a verdict, in an action for malicious prosecution, where the uncontradicted proofs in a case demonstrate that the plaintiff was guilty of criminal offenses in the transaction that resulted in the prosecution.

The precedent upon which the Supreme Court rested its decision is not at all in point.

The judgment of the Supreme Court should be reversed.

Respectfully submitted,

PERKINS & DREWEN,
Attorneys for Defendants-Appellants.

New Jersey Court of Errors and Appeals

<p style="text-align: center;">STEPHEN JONES, Plaintiff-Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">U-DRIVE-IT COMPANY, a corporation, and WILLIAM C. OAKLEY, Defendants-Appellants.</p>		<p style="text-align: center;">On Appeal from Supreme Court.</p>
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BRIEF FOR PLAINTIFF-APPELLEE.

The plaintiff instituted this action to recover damages for malicious prosecution. The defendants made a criminal complaint against the plaintiff, charging him with having stolen an automobile belonging to the defendants, which automobile had been hired by the plaintiff, two days prior to the making of the charge.

The plaintiff was indicted by the Grand Jury of Hudson County, and subsequently tried in the Hudson County Court of Special Sessions and was acquitted. Thereafter, the present suit was brought, which resulted in a verdict in favor of the plaintiff and against the defendants generally in the sum of Twenty-five Hundred (\$2500.00) Dollars.

Subsequently, the defendants obtained a rule to show cause why a new trial should not be granted on the following grounds:

1. That the verdict was contrary to the weight of the evidence.
2. That the verdict was excessive.
3. That the verdict was contrary to the charge of the Court.

All of the exceptions taken at the time of the trial were reserved by the defendants.

The rule was argued before the Trial Judge and was discharged.

Subsequently, appellants-defendants appealed to the Supreme Court on the exceptions reserved by them in the rule to show cause (State of Case, p. 3). Appellants urged in the Supreme Court that the judgment should be set aside and reversed upon the grounds, generally speaking, because the Trial Court erred in refusing to non-suit and to direct a verdict in favor of appellants.

The Supreme Court, in its opinion (State of Case, p. 5), held that the argument upon the rule to show cause that the verdict was contrary to the weight of the evidence was tantamount to an admission that there was some evidence although insufficient to support the verdict, and that such argument upon the rule to show cause precluded an appeal based upon a reservation of exceptions to refusal to non-suit or direct a verdict.

Through inadvertence of counsel, the memorandum filed by the Trial Judge discharging the rule to show cause and the order entered thereon were not included in the State of Case filed by the appellants, and is herein made part of the State of Case by a stipulation filed with the Clerk of this Court. The following are the said memorandum of the Trial Judge and the order entered thereon:

Memorandum.

HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">STEPHEN JONES, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">U-DRIVE-IT COMPANY, a corporation, and WILLIAM C. OAKLEY, Defendants.</p>	}	<p>On Rule to Show Cause.</p>
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CLEARY, J.

This is before the court on the defendant's rule to show cause why a verdict of Twenty-five Hundred (\$2,500.00) Dollars in favor of the plaintiff and against the defendants, should not be set aside and a new trial granted. The rule was argued on the grounds that the verdict is against the weight of the evidence, and it is excessive, and that it is contrary to the charge of the Court. All of the exceptions taken at the time of the trial are reserved.

The plaintiff instituted this action to recover damages for malicious prosecution. The defendants made a criminal complaint against him, charging him with having stolen an automobile belonging to the defendants, which said car had been hired by the plaintiff two days prior to the making of the charge.

The matter was made the subject of an investigation by the Grand Jury and an indictment was found. Afterwards the plaintiff herein was tried in the Court of Special Sessions before Judge O'Regan and acquitted, and thereafter the present suit was brought.

Proof was submitted that the criminal charge made by the defendants was false, and such proof justified a finding of want of probable cause and of malice. Whether or not the defendant's proof was sufficient to overcome this inference was for the jury.

After a careful reading of the testimony I can see no reason why the verdict of the jury should be set aside.

The rule to show cause will be discharged.

(Signed) FRANK L. CLEARY,
Judge.

Order Dismising Rule to Show Cause.

HUDSON COUNTY CIRCUIT COURT.

<p style="text-align: center;">STEPHEN JONES, Plaintiff,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">U-DRIVE-IT COMPANY, a corporation, and WILLIAM C. OAKLEY, Defendants.</p>	}	Action at Law.
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This matter being opened to the Court before the Honorable Frank L. Cleary, Judge of the Hudson County Circuit Court, on an application for rule to show cause why a new trial should not be granted to the defendants, U-Drive-It Company, a corporation of the State of New Jersey, and William C. Oakley, returnable on the 11th day of December, 1928, and adjourned from time to time to the 8th day of March, 1929, in the presence of

Henry Pass, attorney for the plaintiff, and Perkins and Drawen, Esqs., attorneys for the defendants; and the Court having heard and considered the arguments of counsel;

It is, on this 8th day of July, 1929, ORDERED that the rule to show cause issued herein is hereby dismissed with costs in favor of the plaintiff and against the defendants, U-Drive-It Company, a corporation of the State of New Jersey, and William C. Oakley.

FRANK L. CLEARY,
Judge.

Rule actually entered July 9th, 1929.

HENRY PASS,
Attorney for Plaintiff-Appellee.

I. FAERBER GOLDENHORN,
Of Counsel.

PERKINS & DREWEN,
Attorneys for Defendants-Appellants.

POINT I.

The Supreme Court properly decided that the argument by the appellants upon the rule to show cause, "That the verdict was against the weight of the evidence", precluded an appeal upon the reserved exceptions based upon a refusal to non-suit or direct a verdict.

The appellants, in their grounds of appeal in the Supreme Court, set forth seven specific reasons why the judgment of the Circuit Court should be reversed and a new trial granted. These were the exceptions reserved when the rule to show cause was granted, and are now urged by the appellants as grounds two, three, four, five, six, seven and eight in this Court (State of Case, p. 7). The appellants, both in this Court and in their appeal to the Supreme Court, have failed to argue the second, third and fourth grounds of appeal. That where an appellant does not argue grounds of appeal, he is deemed to waive them is too elementary to require the citation of authority. As to the remaining grounds of appeal, the appellants have apparently consolidated them and argued the same under Point I of their Brief. These grounds were those urged by them in their argument in the Supreme Court (State of Case, pp. 3, 5).

Every argument made by the appellants under this point was made practically verbatim upon the argument on the rule to show cause (State of Case, p. 124).

Any matter considered by the Court on a motion for a new trial constitutes *res adjudicata* and will not be considered again on an appeal. *Margulies v. Goldberg*, 101 N. J. L. 75; *Goekel v. Erie Railroad Co.*, 100 N. J. L. 279.

This is true even where the matters argued are expressly reserved in the rule to show cause by the appellants, since it has been repeatedly held that the argument on a rule to show cause of exceptions reserved in the rule constitutes a waiver of the exceptions. *Faragasso v. Introcaso*, 98 N. J. L. 583; *Atkins v. Wellman*, 2 N. J. Misc. 282; *Goekel v. Erie, supra*; *El Mora Realty Co. v. Griffin*, 2 N. J. Misc. 1187.

Further, each of the four grounds urged by the appellants under Point I of their brief relate to the refusal of the Trial Court to grant either a non-suit at the end of the plaintiff's case or a direction of a verdict in favor of the defendants on the whole case.

It has been frequently held in this Court, that where one of the exceptions reserved is an exception to the Court's refusal to non-suit the plaintiff or to direct a verdict, then the question of the weight of the evidence cannot be argued at the hearing of the rule, and if such question is argued upon the return of the rule, the exceptions reserved are deemed to be waived. *Catterall v. Otis Elevator Co.*, 103 N. J. L. 38; *Holler v. Ross*, 67 N. J. L. 60; *Faragasso v. Introcaso, supra*.

POINT II.

The question raised by the appellants under Point II in their brief was neither made a ground of appeal nor raised at the trial of the cause.

It is a settled rule of this Court that no contention will be considered on appeal which is not supported by a ground of appeal. *Castelbaum v. Wolfson*, 92 N. J. L. 165, at page 167, and it is a fundamental rule that only questions which have already been raised in the lower Court will be considered on appeal. The Appellate Court is concerned only with errors committed in the lower Court. No new matter which has not been taken up in the Court below may be taken advantage of on appeal. *Allen v. Patterson*, 99 N. J. L. 489; *Donaghue v. Campbell*, 98 N. J. L. 755; *Joseph M. Byrne Co. v. Snead & Co.*, 98 N. J. L. 256; *Shaw v. Bender*, 90 N. J. L. 147; *Ruggles v. Ocean Acc., etc., Corp.*, 89 N. J. L. 180.

The appellants, by their brief, are endeavoring to reargue the entire case after the same was disposed of by the decision upon their rule to show cause. Under the cases above cited, the Supreme Court properly held that they should not consider the appeal filed therein.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed with costs.

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