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NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRIET NELL and JOHN J. NELL, Plaintiffs-Appellants, v. WILLIAM C. GODSTREY, Defendant-Respondent.	Action at Law on Appeal.

Brief for Plaintiffs-Appellants in Resistance to Motion to Dismiss Appeal.

FACTS.

The motion papers do not disclose, but we concede—as will appear from the record and proceedings automatically removed to this Court by the appeal under Section 26 of the Practice Act of 1912—that the cause was an action at law for negligence, brought in the Circuit Court of the County of Bergen; that Hon. William M. Seufert, Judge of the Common Pleas of that county, held the Circuit Court at the April Term, 1916, tried the action with a jury, and directed a verdict in favor of the defendant, upon which the judgment duly entered is now before this court by the plaintiffs' appeal.

The verdict was rendered June 5, 1916. On June 10, 1916, counsel for the plaintiff (a New

York lawyer) presented to the trial judge at his summer home in the State of New York a draft of a rule to show cause why a new trial should not be granted, reserving exceptions, which draft had been prepared by the attorney of record. The trial judge erased the reservation, signed the rule and handed it back to the counsel, who took it away with him. There was some discussion about the New Jersey practice with regard to the reservation of exceptions, the judge saying to the counsel that it was not his custom to reserve them; but the counsel did not fully apprehend the matter and said so to the judge, and it is entirely plain that he thought the judge had signed the rule as drawn. There was no light in the room, except from an open fire, and the counsel did not know that anything had been erased from the draft (Case, p. 16). Counsel sent the rule to the attorney of record, and on learning from him on the Monday or Tuesday following that the reservation had been struck out, went to the judge with the attorney of record to discuss the matter further. The judge said that he would not reserve exceptions, but informed counsel that if they did not want to take a general rule they might refrain from entering it, and at the end of ten days it would "automatically fall" (Case, p. 17). Judge Seufert does not remember saying this, but it is very plain that he did give this information, which, as we shall argue, was entirely correct. The rule was not entered, and appeal was taken. Counsel for defendant in some way learned of the signing of the rule; hence the present motion to dismiss, based upon rule 129 of the Supreme Court providing that the granting of a rule to show cause shall be a bar against an appeal except on points expressly reserved.

ARGUMENT.

I.

THE RULE TO SHOW CAUSE NEVER BECAME EFFECTIVE.

The rules of the Supreme Court are under rule 219 applicable to the practice of the several Circuit Courts.

Rule 214 reads as follows so far as appropriate:

> "Every rule taken in open court or allowed by a justice shall be entered in the minutes of the court, and shall take effect only from the time of such entry, and the true date of such entry shall be stated at the foot of such rule; provided, however, that the justice allowing such rule may nevertheless order in the said rule that the same shall take effect forthwith, in which case such rule shall take effect from the time of signing the same; and all rules, whether granted by the court or a justice, shall be entered in the minutes within ten days from the granting of the same, and in default thereof shall be of no effect."

This leaves it absolutely at the option of the party taking a rule whether or not he shall avail himself of it. There is no option to the other side, as in the case of failure to file postea within the time limited to compel an entry of the rule. It may happen that there is serious question in the mind of counsel whether to take a case up by rule or on appeal, and for precaution's sake the rule will be taken within the six days, but not entered, in order to have further time for reflection and consultation; and if later

it should be decided that appeal would be wiser, the rule will be allowed to lapse. I submit in passing that this Court has no competent evidence that any rule to show cause was ever granted. Such evidence can only be afforded by the minutes. If the defendant had any right in the premises, it was to move before the Supreme Court to compel the entry of the rule.

Counsel for defendant lays stress on the language of the rule on which he relies, which reads as follows:

> "129. Granting to a party a rule to show cause why a new trial shall not be granted shall be a bar against him to taking or prosecuting an appeal, except on points expressly reserved in said rule."

Counsel argues that the rule is granted as soon as it is signed by the judge, but the grant is manifestly subject to the condition of entry under rule 214. If the rule is not entered within the ten days, then it has not been granted. There must be mutuality. If the rule to show cause is void as against the party taking it in favor of the other party, it must also be void in favor of the party taking it against the other party.

The rules of court being compiled from formulations running over many years, naturally are not uniform in expression. For example, in rule 125 the phrase used is "*obtaining* such rule." In that expression, as in the expression "granting" in rule 129 there is included the necessary implication of entry in the minutes. Rule 129 is borrowed from a statute (Comp. Stat. 4119, sec. 214), repealed by the Practice Act of 1912, and undoubtedly the word "granting" used in that section and in the rule substituted therefor contemplates an entry of record effectuating the grant.

Rule 123 provides that a rule to show cause when granted "shall be forthwith entered by the clerk of this Court * * *"; but this is merely an injunction on the clerk and must be read in connection with rule 214. Furthermore, the only penalty for non-compliance with rule 123 is that the Supreme Court will not entertain an application for a rule to show cause.

II.

THE ALLEGED RULE TO SHOW CAUSE IS NOT WITHIN THE PURVIEW OF RULE 129.

Both Judge Seufert and plaintiffs' counsel were under the impression that a rule to show cause in a case in the Circuit Court must be applied for within six days. This was an error. Rules 122 and 123 only apply to Supreme Court cases. In a Circuit Court case rule 124 relative to trials at bar is the one that is applicable and motion for a new trial can be made at any time within the term at which the trial is had. Indeed, a rule to show cause is not necessary at all in a Circuit Court action. There may be a direct motion for a new trial, and that is the better practice, for the rule providing that the granting of a rule to show cause shall be a waiver of exceptions not reserved has no *raison d'etre* in a Circuit Court action. The reason for the rule is that the party will get a review by three judges of the highest court of the State, and he ought to be satisfied with that even on questions of law, if he is not content to have a review only on such questions. To put him to the dangerous hazard of having the same judge who tried the case review his own alleged errors, or else to be debarred from attacking a verdict as against the weight of the evidence, or the charge of the court,

or as excessive in amount, is unreasonable in the extreme. Of course, if he takes a rule to show cause, then he waives his exceptions; but careful practitioners will not do this. My present point is that the rule Judge Seufert granted was not one of the character that is contemplated by rules 122, 123, 125 and 126 *et seq.* Those rules require the filing of "reasons" and service thereof with the state of the case within thirty days after the entry of the rule, and the argument to be brought on at the next term of the court. Judge Seufert's rule was made returnable in ten days after its date and at the same term of the court at which the trial was had. It really amounted to nothing more than the fixing of a day for the hearing of a motion for a new trial.

III.

THE RULE TO SHOW CAUSE WAS *CORAM NON JUDICE.*

It was signed in the State of New York, where the judge had no jurisdiction.

It is a well settled rule that a Judge has no authority to do any official act required of him by the laws in his State beyond its jurisdiction. His official act derives all its force and authority from the constitution and the laws of the State wherein he is justice. A justice outside of his own State cannot be said to be acting as if *there* in obedience to the mandates of his State. See *Buchanan* vs. *Jones,* 12 Ga. 612; also *Dunn* vs. *Travis,* 45 Kansas 541; 26 Pac. 247, where an order by a Judge of one of the Judicial Districts of the State of Kansas, extending the time within which a case for the Supreme Court could be served, settled and signed, the Judge being in the State of Illinois at the time the order was

made and signed, was held to be an absolute nullity and the case not having been served and settled within the time prescribed in the original order, the petition was dismissed.

Also see *Price* vs. *Baylis,* 131 Ind., 437; 431 N. E., 88, where a temporary injunction or restraining order was signed by a Judge of the Wells Circuit Court of Indiana while in the State of Michigan, the Court held that such an order was void and said:

> "This action was unquestionably erroneous. His authority as a judge was conferred alone by the Constitution and laws of this State. Our laws have no extra territorial operation. When the Judge passed the boundary of the State, the power to exercise judicial functions did not follow him. He could not as a Judge sit in Chambers in the State of Michigan and issue a valid restraining order."

IV.

IN THE EXERCISE OF SOUND DISCRETION, DEFENDANT'S MOTION SHOULD BE DENIED.

I have above stated the reasons why the granting of a rule to show cause was made conditional on a waiver of exceptions unless expressly reserved. They apply just as well to the bar against an appeal prescribed by rule 129. Undoubtedly the reason for changing from statute to rule was to give the Court some liberty of discretion. Originally the matter was governed by rule and was of course under control of the Court; then it was changed to statute, and the Court lost its control. An interesting history of the subject will be found in the case of *Finley*

v. *Handley,* 50 N. J. L., 503. In the new Practice Act, the Legislature wisely restored the subject to the domain of Court rules.

It will be a great hardship to the present plaintiffs to be debarred from the right of reviewing a judgment based on a direction of verdict in favor of defendant, merely because their counsel took a rule to show cause, which he promptly abandoned when he learned what would be its effect. The case was not one for a rule to show cause, as there would be nothing inherent in a directed verdict that would be appropriate for review on a rule to show cause. The Court will not permit such an injustice if it has the power to prevent it. It undoubtedly has such power, the matter not being statutory, but under a rule that can be relaxed in the exercise of sound discretion.

It is expressly provided by rule 218 as follows:

> "These rules shall be considered as general rules for the government of the Court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the Court in any case where it shall be manifest to the Court that a strict adherence to them will work surprise or injustice."

Defendant's motion should be denied with costs.

GILBERT COLLINS,
Of counsel with Plaintiffs-Appellants.

New Jersey Court of Errors and Appeals.

HARRIET NELL and JOHN NELL,
Plaintiffs-Appellants,

against

WILLIAM C. GODSTREY,
Defendant-Respondent.

ON MOTION TO DISMISS APPEAL. MEMORANDUM OF RESPONDENT.

Statement.

This is a motion to dismiss an appeal taken by the appellant from a judgment entered upon a verdict directed by Jude Seufert holding the Bergen County Circuit Court.

The action was brought in the Bergen County Circuit Court and came on for trial in June, 1916, resulting in a direction of a verdict for the defendant on the 5th day of June, 1916. On the 10th day of June, the defendant made personal application to Judge Seufert for a rule to show cause why a new trial should not be granted and submitted to the Judge a proposed rule containing a reservation of the plaintiff's exceptions (Case, page 8).

The application was made in person by the attorney who had conducted the trial of the action (page 8). Judge Seufert refused to grant the rule as submitted containing a reservation of the exceptions, but offered to sign the rule with such res-

ervations stricken out (page 8). He explained to the plaintiff's attorney the difference between the two forms of rule and suggested to him that he consider the application for the rule as having been made and take time to determine whether or not he would accept the rule which the Judge would grant (page 11), or would proceed with an appeal. Plaintiff, however, elected to take the rule with the reservation of restrictions stricken out. The Judge thereupon signed it after striking out the reservation of restrictions and delivered to the plaintiff's attorney who took it away with him. The rule was not filed or entered, neither was it vacated.

The rule to show cause, as printed in case, does not show the portion struck out by Judge Seufert. A correct copy is printed on the last page hereof.

Grounds of Motion.

The ground of this motion to dismiss the appeal is that the plaintiff waived his right of appeal by taking the rule to show cause.

Points.

Section 25 of the revised practice act of 1912 provides:

> "Bills of exceptions and writs of error in civil cases are abolished. In lieu of a writ of error, an appeal may be taken in any case in which the appellant would, heretofore, have been entitled to that writ. Subject to rules, such appeal shall be in the nature of a rehearing upon any question of law involved in any ruling, order, or judgment below."

Section 32 of the same Act gives to the Supreme Court the power to prescribe rules for that court and for the circuit courts and provides that such

rules shall supersede statutory and common law regulations theretofore existing.

Rule 129 is as follows:

> "Granting to a party a rule to show cause why a new trial shall not be granted shall be a bar against him to taking or prosecuting an appeal, except on points expressly reserved in said rule."

Rule 122 is as follows:

> "Where either of the parties to a trial at the circuit shall desire a rule to show cause why a new trial shall not be granted, he shall apply to the judge before whom the trial took place for such rule. The judge to whom such application is made shall exercise the same discretion in granting such rule as is now exercised by the court, and shall prescribe the terms. * * *"

Rule 123 provides:

> "Such application shall be made *ex parte*, and within six days after the verdict or finding. The rule when granted shall forthwith be entered by the clerk of this court and proceeded in and brought to hearing in the same manner as heretofore. In default of compliance with the foregoing requirement, no application for a rule to show cause by the party so failing shall be heard by the court, except upon matters which were not known to the party before the expiration of six days after trial. * * *"

Rule 214 relates to the following:

> "Every rule taken in open court or allowed by a justice shall be entered in the minutes of the court, and shall take effect only from the time of such entry, and the true date of such entry shall be stated at the foot of such rule; * * * and all rules, whether granted by the court or a justice, shall be entered in the min-

> utes within ten days from the granting of the same, and in default thereof shall be of no effect."

Rule 219 makes the foregoing rules so far as appropriate applicable to the practice of the circuit court.

The foregoing rules are substantially the same as the statute and rules which existed prior to the amendment of 1912, the only difference, if it is one, is that Section 214 of the practice act of 1903 provided that the granting of a rule was a waiver of all bills of exceptions, whereas rule 129 above quoted provides that the "granting to a party of a rule shall be a bar against his taking or prosecuting an appeal." As to whether or not this difference of phraseology would preclude a party taking an appeal from an error on the record as distinguished from an error assigned on a bill of exceptions under the old practice it is not necessary to discuss for the reason that all the grounds of this appeal relate to matters which would under the old practice have been raised on a bill of exceptions.

In the case of *Finley* v. *Handley*, 50 Law, page 503, the Supreme Court reviewed the history of the provision incorporated in the Practice Act providing that the granting of a rule should be a waiver of all bills of exception, and held that it was the intention that in every case the granting of a rule should be a waiver of all bills of exceptions, and said:

> "Whether therefore the rule to show cause is general or special, the mere granting of it, on the application of a party who holds bills of exceptions, operates as a waiver of all exceptions save those which are expressly reserved in the rule to show cause. The statute

applies as well to circuit as to the Supreme Court."

Applying this statement of the Supreme Court to rule 129 which provides: "Granting to a party a rule to show cause * * * shall be a bar against him taking or prosecuting an appeal. * * *" It would appear that the respondent's motion should prevail, and that the appeal herein should be dismissed.

It will be argued, however, that the rule which was granted by Judge Seufert was of no effect because of the failure of the party who obtained it, entering it within ten days in the minutes.

An examination of the history of Rule 129 clearly shows that it was the intention of the court and also of the legislature that the mere granting on the application of a party of a rule was a bar against such party taking or prosecuting an appeal. The reason for this is apparent. The party has six days in which to determine whether to apply for a rule or to take an appeal, and having elected to accept a rule without reservation of exceptions, he should not be permitted thereafter to change his mind.

It is true that the rules provide that every rule granted shall be entered in the minutes of the court and shall take effect only from the time of entry, and that unless entered within ten days shall be of no effect. This rule, however, imposes a duty upon the person obtaining the rule to show cause and is in no way inconsistent with the contention of the respondent herein. If it had been intended by the court when formulating the rules, that the failure of a party to enter a rule would relieve him from the election he had made when he obtained it, they certainly would not have used the phraseology which appears in rule 129.

The old practice Act merely provided that the granting of the rule should be a waiver of bills of exceptions whereas the new rule as it now exists provides that the mere granting of a rule shall be a bar against an appeal.

Rule 123 shows that the court clearly had in mind in formulating the rules the distinction between the granting of a rule and the subsequent effect thereof.

The respondent's motion should prevail and the appeal herein should be dismissed.

Respectfully submitted,

WENDELL J. WRIGHT,

Attorney and of Counsel with Respondent.

BERGEN COUNTY CIRCUIT COURT.

HARRIET NELL and JOHN J. NELL, Plaintiffs, *v.* WILLIAM C. GODSTREY, Defendant.	Action at Law. Rule.

Application for a Rule to show cause having been made within the time limited by law, it is on this 10th day of June, 1916, ordered, that the defendant show cause before this Court, at the County Court House, at Hackensack, in the County of Bergen, on the 20th day of June, 1916, why a new trial should not be granted; and it is further ordered ~~that all exceptions taken in the course of the trial be reserved to the plaintiffs.~~

Let this rule be entered on the minutes.

WM. SEUFERT.

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New Jersey Court of Errors and Appeals.

HARRIET NELL and JOHN J. NELL, Plaintiffs-Appellant, *versus* WILLIAM C. GODSTREY, Defendant-Respondent.	On Appeal. Motion to Dismiss.

Sir:

Please take notice that I shall make a motion before the Court of Errors and Appeals of the State of New Jersey at the State House in the City of Trenton on Tuesday, November 21, 1916, at the hour of eleven o'clock in the forenoon or as soon thereafter as counsel can be heard to dismiss the appeal taken in the above entitled cause upon the ground that the plaintiffs-appellant have no right to the appeal and are barred therefrom by reason of having within four days after the entry of the verdict herein applied for and having been granted a rule to show cause why a new trial should not be granted without reservation of points.

Dated October 11, 1916.

Respectfully,
WENDELL J. WRIGHT,
Attorney for and of Counsel
with Defendant-Respondent.

To

Nathaniel Kent, Esq.,
Attorney for Plaintiffs-Appellant.

Notice and Grounds of Appeal.

BERGEN COUNTY CIRCUIT COURT.

HARRIET NELL and JOHN J. NELL,
Plaintiffs-Appellants,

against

WILLIAM C. GODSTREY,
Defendant-Respondent.

To Wendell J. Wright, Esq., Attorney of Defendant:

Take notice, that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this case, upon the following grounds:

1. The Trial Court directed a verdict against the plaintiffs and in favor of the defendant when thereunto moved by counsel for the defendant, whereas said Court should have denied said motion, and should have submitted to the jury for decision the questions involved in the issues.

2. Receipted bills showing money paid by the Borough of Edgewater to the Undercliff Taxi Co., referred to in the testimony of the witness Gantert, were excluded from evidence.

3. The affidavit sworn to by Patrick Dowdell, Plaintiffs' Exhibit 19 for identification, was excluded from evidence.

4. The contract between the Undercliff Taxi Co., and the Public Service Corporation, Exhibit D1 was admitted into evidence.

5. The book referred to as the "ledger at the beginning of the Undercliff Taxi Company's business," Exhibit D2, was admitted into evidence.

6. Exhibit D3 was admitted into evidence.

7. The billheads, Defendant's Exhibit 4, were admitted into evidence.

8. The memoranda from the Standard Oil Co., Defendant's Exhibits 5, 6, 7, 8 and 9, were admitted into evidence.

The following questions were overruled;

To the witness Harriet Nell:

9. Q. Have you suffered from melancholy at all?

10. Q. Did you have any trouble in carrying on a conversation before the accident?

11. Q. Have you shown any trouble in carrying on a conversation since?

12. Q. Can you recall—is there anything else that you recall?

To the witness William C. Godstrey:

13. Q. You have been subpœnaed here to produce the books of that corporation, and I ask you to show me the certificate of stock issued to you in that corporation?

14. Q. Was there any reason in the world why that bank account—why the corporation could not have given you, as manager of that company, authority to sign checks?

15. Q. Do you mean to say that when Dowdell took the car out that night that it was with the idea of depriving you out of the money he earned?

To the witness Henry Wissel:

16. Q. Have for how long?

To the witness Joseph Rosenstangle:

17. Q. Just tell us what he said about his relations with Dowdell?

18. Q. Did you have any talk with Mr. Godstrey when he came to the Station House?

19. Q. Questions to the witness Gantert as to his possession as a freeholder.

The following questions were admitted:
To the Witness Benjamine Campbell:

20. Q. The taxi business was under the name of Undercliff?

21. Q. Allowing the witness Campbell to testify who the officers of the Undercliff Taxi Co., were. Such evidence following the question and answer reading as follows:

22. Q. Do you know who the officers of the corporation were? A. Yes, sir.

23. Q. That Company operated with taxi cabs, did it not?

24. Q. As manager of the Taxi Company?

25. Q. When was that?

To the Witness William C. Godstrey:

26. Q. I show you a paper, what is that paper that I show you?

27. Q. And this spring you said—did you make any statements over to the people interested?

28. Q. Did you ever give him any instructions to drive cars?

29. Q. Did you know this taxi cab in which Mrs. Nell was riding on the night of January 15th or 16th?

30. Q. Did you personally own and operate any

taxi cabs in the Borough of Edgewater at any time from September, 1913, down to the present time?

31. Q. Did you personally have any interest in the result of the accident?

To the Witness Henry Wissel:

32. Q. At that time, what was the condition of the company?

To the Witness Joseph Gantert:

33. Q. In January, or at the time of the accident, who was operating the taxi cab?

To the Witness Robert W. White:

34. Q. Who do you work for?

To the Witness Orlando H. Spear:

35. Q. What was that?

36. Q. When?

37. Q. What did he say to him about that?

NATHANIEL KENT,
Attorney of Appellant.

Notice of Taking Deposition.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRIET NELL and JOHN J. NELL,
Plaintiffs-Appellant,
versus
WILLIAM C. GODSTREY,
Defendant-Respondent.
} On Appeal.

Sir:

Please take notice that I shall take the deposition of Honorable William M. Seufert before Milton Demarest, Esq., a Supreme Court Commis-

sioner of the State of New Jersey, at the Court House, Hackensack, Bergen County, New Jersey, on Wednesday the 18th day of October instant, at the hour of ten o'clock in the forenoon, for the purpose of using such deposition upon the argument of the motion to dismiss the appeal taken in the above entitled action.

Dated October 11, 1916.

Respectfully,
WENDELL J. WRIGHT,
Attorney for Defendant-Respondent.

To
Nathaniel Kent, Esq.,
Attorney for Plaintiffs-Appellant.

Stipulation.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRIET NELL *et al.*,
Plaintiff-Appellant,

against

WILLIAM C. GODSTREY,
Defendant-Respondent.

It is hereby stipulated and agreed between the parties hereto that the deposition of William M. Seufert, notice of taking of which was heretofore. given for the 18th of October at ten o'clock in the morning, be taken with the same force and effect on Thursday, October 19, 1916, at the same hour and place.

Dated October 13, 1916.

NATHANIEL KENT,
Attorney for Plaintiff-Appellant
WENDELL J. WRIGHT,
Attorney for Defendant-Respondent.

Deposition.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRIET NELL and JOHN J. NELL,
Plaintiffs-Appellants,

vs.

WILLIAM C. GODSTREY,
Defendant-Respondent.

Hackensack, N. J., October 19, 1916.

Examination of witness taken pursuant to notice, in the presence of the subscriber and Honorable Milton Demarest, a Supreme Court Commissioner of the State of New Jersey, and in presence of Honorable Wendell J. Wright, attorney for Defendant-Respondent and Tobias A. Keppler, attorney for the Plaintiffs-Appellant.

Mr. Keppler: May it be understood on the records, Mr. Wright, that although I think we will be satisfied with the Judge's commission, in case it is necessary to take my commission and Mr. Kent's commission, we reserve that right, and it may be taken at your office in New York before a special Master in your office.

HON. WILLIAM M. SEUFERT, being duly sworn, testifies as follows:

Direct examination by Mr. Wright:

Q. You are the County Judge of Bergen County? A. I am.

Q. And were in the month of June, 1916? A. Yes.

Q. And on the 1st, 2nd and 5th days of June,

did you hold the Circuit Court of Bergen County and try a case entitled—

Mr. Keppler: We will admit that.

Q. —"Harriet Nell and John J. Nell against William C. Godstrey?" A. I did.

Mr. Wright: And it is admitted that a verdict was rendered on the 5th day of June. I looked it up this morning; that is the fact.

Mr. Keppler: We concede that Judge Seufert tried the case and that he had jurisdiction of the case and that he directed a verdict on or about the 5th day of June.

Mr. Wright: It was the 5th. I looked it up this morning.

Mr. Keppler: Well, on or about.

Q. Subsequent to the entry of the verdict in that cause, did the attorney for the plaintiffs make an application to you for a rule to show cause? A. Mr. Keppler appeared before me with an aplication for a rule to show cause.

Q. Did you grant a rule to show cause? A. I granted a rule to show cause, yes, why a new trial should not be granted.

Q. Did that rule contain any reservation of exceptions? A. It did not.

Q. Did it, as submitted to you originally, contain a reservation of exceptions? A. As I remember it did, and it was crossed out by me before the rule was signed.

Q. Was there a discussion between you and Mr. Keppler before the rule was signed with respect to the reservation of exceptions? A. Yes, there was.

Q. After that discussion you signed the rule without the reservation and delivered it to Mr. Keppler? A. I did.

Cross examination by Mr. Keppler:

Q. Judge, where was this rule signed? A. It was signed at my cottage on Greenwood Lake.

Q. Do you recall the date it was signed? A. I do not remember the exact date—except this statement, that it was made by you, Mr. Keppler, that it was the last day on which it could be signed.

Mr. Wright: It was the Saturday after the verdict was rendered, wasn't it, Mr. Keppler? You told me that you were going up there then.

Mr. Keppler: It was a Saturday; I don't recall what date it was.

The Witness: I don't remember that, except the statement that it was the last day on which the rule could be signed.

Q. Do you recall what time it was signed, Judge? A. Late in the evening.

Q. About what time? A. I think it was around 9 o'clock.

Q. You had just moved up to Greenwood Lake that day, hadn't you? A. I am not certain about that.

Q. Do you recall telling me that you had just taken your family up? A. I might have. I think it was the time when we had spent a week-end at Greenwood Lake, probably either Friday or Saturday, that same Saturday that we went up there; I think possibly it was the same day, because it was a stormy day, and there was one time we went up in a storm. I remember particularly this being a very stormy night, because I was exceedingly surprised that anybody ventured out there at that time.

Q. Your home in Greenwood Lake was located in New York State? A. In New York State, yes.

Q. Do you recall that you had no electric light or gas light connected up at that time? A. Yes; we had none.

Q. What was the artificial light at that time? A. It must have been oil lamps.

Q. Wasn't it candles? A. I don't remember that; it might have been at that. I remember that the meter had not been put in at the house at that time.

Q. Do you recall whether or not you had a fire burning? A. Yes, we did have a grate fire burning.

Q. Do you recall, in signing this rule to show cause, you did it at the light that reflected from the fire grate? A. It must have been from some light, because I signed it in light enough to sign.

Q. Do you recall, Judge, my telling you that I did not understand the meaning of the words "reserving exceptions" and that I brought you the rule as it had been drawn up by the attorney that represented me in New Jersey? A. That is right.

Q. And that you endeavored to explain to me the difference between the two, and that I confessed to you that it wasn't clear to me? A. I endeavored to explain the difference between the procedure on a rule to show cause and an appeal to either the Supreme Court or the Court of Errors.

Q. And do you recall that I said to you that I confessed that I did not understand it, that it was not clear to me? A. Yes, yes, that is true.

Q. And do you recall that after you signed the rule, that I took it from you and put it in my pocket without reading it? A. Well, I would not say as to that. I know the rule was discussed and I think it was read by me in detail, and when I came to that part "reserved exceptions" I stated

that it was not my practice, in granting rules to show cause, to reserve exceptions.

Q. And do you recall, when you signed it, you were sitting on a chair and that you had your legs crossed and you were reading it by the light of the fire? A. I don't remember the exact details. All that I remember is that I crossed out that part of the rule which reserved the exceptions and then signed it. Just the manner in which it was done, I don't remember. I know that I did not intend to sign a rule with the exceptions reserved, and so explained; and the rule would only have been signed in any event, without the exceptions being reserved in it.

Q. But you don't remember, Judge, whether I did or did not read the rule that you gave me? A. I don't. All I remember is that I explained in detail that I would refuse to sign any rule with the exceptions reserved. Now, I do remember this, that in making the explanation I said that if you don't want to take the rule in that condition, if you are not satisfied to take the rule without the exceptions reserved in it, that you could find from your attorney what the legal situation was, and that I would consider the application as having been made, and that you subsequently wanted to take the rule without the exceptions in it, I would sign it as of its date that you made the application, if you wanted to leave without the rule being signed at that time. But you did not seem to care to do that, but took the rule with the exceptions reserved stricken out, and signed.

Q. And do you recall telling me that if I was not satisfied with the rule, after talking it over with the attorney of record in New Jersey, that I could come back to you with him at a later date, and if I did not like it, I could consider it a nul-

lity and withdraw it? A. No; I don't remember that. In fact, my memory is to the contrary, as I have just stated previous to this, that if you did not want to take the rule then, signed without the reservation as to exceptions in it, that I would consider the application as having been made as of that date, and if you did not take the rule with you then, signed in the manner that I would sign it, but subsequently wanted the rule in that shape, why I would consider the application as having been made at that date, and sign it without the reservations in it. But instead of accepting that suggestion, why, the rule was taken as signed.

Q. Do you recall, Judge, suggesting to me that I come before you again with Mr. Kent after he had taken the matter up? A. That was before I signed the rule.

Q. And do you also recall my saying in answer to your explanation that I could not get an intelligent grasp of the difference between signing with exceptions and without the exceptions? A. Yes; no question about that. But I remember your making the statement that you would take the rule with you anyway, as signed.

Q. And while you was signing it, Judge, you held it to yourself so that I could not see what you were doing with it? A. I told you what I was doing with it. I told you I was going to strike out this reservation, and did actually strike that out, because I made it obsolutely plain that I would not sign a rule to show cause for a new trial with the exceptions reserved; at least, I tried to make it plain.

Q. Do you recall telling me, Judge, that if that rule was not filed within ten days, it fell and would be regarded as a nullity? A. No, I don't remember that.

Q. Do you remember when Mr. Kent and I appeared before you a few days after you signed the rule and we requested you to put in the exceptions as I originallly presented it to you that we asked you if that wasn't done whether we ought to enter an order withdrawing the rule or what we should do, and do you recall telling both of us at that time that if it wasn't filed, it would fall and would be regarded as if it had never been signed? A. I don't remember that, Mr. Keppler.

Q. Do you recall what the conversation was at that time? A. No, I don't remember particularly what the proposition, except that there was a general discussion in connection with the rule. I don't remember making any statement that would indicate that the rule could be withdrawn or let fall.

Q. Then you don't recall at all the conversation that we had, Mr. Kent, you and I? A. Except this: I think I made a suggestion that in order to have it fall or be regarded as a nullity, you had better get the consent of the attorney for the defendant.

Q. Isn't it possible that you are in error about that, Judge. A. Not that I remember, because I do not see how I could have made any other statement.

Q. Then you base your answer on that, as to your memory of that matter, on the fact that it seemed to you that that is the most logical way that the thing could have occurred? A. No, I base it upon my memory in connection with the conversation between you and Mr. Kent, that I suggested the way out of it if you wanted to abandon the rule, and that was to do it by consent.

Q. Well, was there any further discussion? A. There might have been a lot of talk about abandon-

ing it and leaving it drop, as far as you and Mr. Kent were concerned, but I don't remember making any statement that would lead you to conclude that I was coinciding in it.

WM. M. SEUFERT.

Subscribed and sworn to before me this 19th day of October, 1916.

Milton Demarest,
Sup. Ct. Com.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRIET NELL and JOHN J. NELL,
Plaintiffs-Appellants,

v.

WILLIAM C. GODSTREY,
Defendant-Respondent.

Deposition of Tobias A. Keppler, taken by consent before Leroy Vander Burgh, Master in Chancery, New Jersey, at 50 Church Street, New York City.

Present—WENDELL J. WRIGHT, Attorney for Defendant-Respondent.

By Mr. Vander Burgh:

Q. Mr. Keppler, raise your right hand, do you solemnly swear that the testimony you give in this matter of Nell v. Godstrey will be the truth, the whole truth, so help you God? A. I do.

By Mr. Keppler:

I am one of the attorneys representing the plaintiffs in this action. I am admitted in New York, but not in New Jersey. My associates and the at-

torney of record on this appeal are Nathaniel Kent and Judge Gilbert Collins.

Mr. Kent gave me a rule to show cause which according to promise made to the respondent, I now produce. (Rule marked in evidence Exhibit A.) When I received that rule to show cause, it was in the same condition it is in now, except that the name of Judge Seufert and the ink erasures were not thereupon and in that condition, I took it to Judge Seufert. I found that he had left his home in Bergen County and had gone to his summer home at Greenwood Lake, New York. I thereupon went up to his home and reached there at about 9 o'clock at night. After getting into his home, I found that no lights were lit except as near as I can remember, a candle or small lamp, but it was so dark that I could hardly recognize the persons in the room. I told Judge Seufert that I wanted to have him sign the rule to show cause. As there was not sufficient light in the room, he bent the paper down near the fire grate that was burning and read it by that light After reading it, he stated that it was not his practice to sign a rule reserving exceptions and endeavored to explain to me the difference between the two.

I told him that I was a New York attorney, unfamiliar with the practice and despite his explanation, I confessed that I did not understand it, as the practice was new to me and different than the New York practice, but that I was instructed to get the rule signed as submitted. After explaining the matter to me in detail, he told me that I could consider the application made as of that date, and I could come to him at a later date after talking it over with Mr. Kent. I told him that I feared that that would enable the other side to claim that the rule was not signed in time because my understanding was that it had to be signed within a cer-

tain number of days and that was the last day. He thereupon suddenly turned around and said, "Well, then I will sign the rule" and bent over the fire and signed it.

It only took him, it seemed to me, about the length of time it would take a man to sign his name and he handed me back the paper and unless I would have bent over the first grate, I could not see what had been written upon it by him. I did not bend over the fire grate but put it in my pocket. The impression that I got was that he had signed the rule in the form that I had submitted to him and I thanked him for what I considered his generousness to me in departing from his usual practice of not reserving exceptions and signing it in the form that I had given it to him. I simply mean that that was the impression that I got from what the Judge had said and the sudden manner in which he said "I will sign the rule."

I am positive that at that exact time, when he signed the rule, no words were spoken about striking out the exceptions and I went away content that he had signed the rule in the original form. Before I went away, the Judge said to me that if after talking the matter over with Mr. Kent, I wanted to take it up further with him, I could come to Hackensack with Mr. Kent to see him if I would make an appointment.

I sent the rule to Mr. Kent's office and on Monday or Tuesday following the signing of the rule, one of my clerks called to my attention the fact that he had learned that the reservations of exceptions had been stricken out. As I felt that this was the result of a mistake or a misunderstanding between Judge Seufert and myself, Mr. Kent and I went over to Judge Seufert and asked him to rectify it but he stated that it was not his practice to sign rules to show cause reserving exceptions and thus

giving two chances to appeal. Mr. Kent then asked him what was to be done with the matter and he repeated what he had told me the first time I called on him when he signed the rule, viz.: that if it was not entered within a limited time, as near as I could remember, about ten days, that it automatically fell. I believe he also did say that perhaps the other side would stipulate but I stated that as we did not intend to do anything further with the matter, and did not intend to notify the other side, and they would probably never even know about the matter, and it would not be entered that it would not be necessary, as the rule would become a nullity, and as near as I can remember, Judge Seufert concurred in that view.

So far as I can recall there was no light in the room where the rule was signed except the light that came from the fire grate. There was light in the adjoining room through which I entered.

Cross examination by Mr. Wright:

Q. You are the real attorney for the plaintiffs are you not? By that I mean, that the suit instituted by Mr. Kent, at your request. A. Well, I can answer that best by saying that my clients live in Bogota, N. J., and consulted me about this matter. I told them that I could not handle the case myself and I would have to refer it to a Jersey attorney, and Mr. Kent came into the case through me.

Q. You personally tried the case in the Bergen Circuit by consent and courtesy of the Court? A. I did.

Q. Mr. Kent was not present at the trial was he? A. I think he was present for a short time on one day.

Q. But you conducted the entire case? A. I did, because Mr. Kent told me that the trial of a

negligence action in New York and New Jersey were identical.

Q. On the Saturday after the verdict, the evening on which you went to see Judge Seufert with the rule as you above testified, did you remember calling me on the 'phone with regard to being the last day to get a rule and whether I would grant an extension or not? A. I do.

Q. And you remember that I told you that all it would be necessary would be to make the application; that you could get the rule signed afterwards at your convenience? A. I recall a conversation but I can't specifically recall that.

Q. Don't you recall that I told you that if you got a hold of Judge Seufert by the telephone and made the application in that manner, that it would be all that was necessary, to protect your rights? A. I do remember that you suggested something about getting the Judge on the telephone but I don't recall particularly that statement.

Q. How long were you at the Judge's house at Greenwood Lake before the rule was signed? A. Five or ten minutes.

Q. You say the Judge explained to you the difference between a rule that contained reservations of exceptions and a rule without such reservations? A. The Judge made certain explanations to me but I told him that I could not for the life of me grasp the distinction from the statements he made.

Q. Is it not a fact that the Judge told you that you could consider that you made the application and that later on when you could talk to Mr. Kent, get the rule actually signed? A. I believe he did, but I was afraid even if the Judge took that view of it, that you would find some legal flaw in that and my understanding when I was sent out there,

was that the getting of a rule to show cause was a necessary prerequisite to the right to take an appeal, and if the rule was not signed, the right to appeal was absolutely lost. I considered it very arbitrary and unreasonable but that was the impression that I had gotten from what my managing clerk had reported to me of his conversation with Mr. Kent.

Q. Had I not informed you over the 'phone that same day, that an application was all that you need make and that you could get your rule signed later? A. I don't recall that.

Q. Do you recall what you called me up for on that day? A. I asked you to consent to an extension of my time to appeal because I regarded the rule to show cause as notice of appeal and you refused to do so.

Q. Didn't I state to you that I was doubtful as to whether or not it was in my power to waive that provision of the Statute? A. I don't recall that. I do recall that you refused to do that.

Q. And don't you recall that I told you that all you had to do was to make your formal application and that you could get the rule signed later? A. I don't recall that. I don't imagine that it was that way because I would not have, on a very stormy day, have gone all the way to Greenwood Lake, N. J., if I could have avoided it.

Q. Don't you recall that I told you at that time that on least one occasion, that I had protected my rights by applying to the Judge over the telephone for a rule the same as I sugested to you that day? A. I don't recall that.

Q. And will you say that I did not say it? A. I won't swear that you didn't. I don't recall it

and I have a fairly good memory, and I would recall it, if you had said it.

TOBIAS A. KEPPLER.

Sworn to before me this 27th day of October, 1916.

LeRoy Vander Burgh,
Master in Chancery,
of New Jersey.

BERGEN COUNTY CIRCUIT COURT.

HARRIET NELL and JOHN J. NELL, Plaintiffs, *v.* WILLIAM C. GODSTREY, Defendant.	Action at Law. Rule.

Application for a rule to show cause having been made within the time limited by law, it is on this 10th day of June, 1916, ordered, that the defendant show cause before this Court, at the County Court House, at Hackensack, in the County of Bergen, on the 20th day of June, 1916, why a new trial should not be granted; and it is further ordered.

Let this rule be entered on the minutes.

WM. M. SEUFERT.