"The brief of defendant was prepared and filed by New York counsel, under a statement of counsel that the authorities are clear to the effect that a corporation is entitled to a lien on stock of stockholders who embezzled money of the corporation, excerpts from the opinions of the courts in the two last cited cases are quoted. There is omitted any reference to the fact that both of these cases were decided upon statutes. A cursory examination of the cases would have indicated that they cannot be considered in anywise as authority for the proposition advanced by counsel. The courts in this jurisdiction are not accustomed to having cases cited to them in a misleading manner. The courtesy usually extended to counsel from New York to appear in cases in this Court will not be extended by me to counsel engaged in this case until his conduct shall have been, if it can be satisfactorily explained."

Lask vs. Bedell, 91 N. J. Eq. 341, 345, (affirmed Court of Errors and Appeals).

"It seems almost unnecessary to say that when counsel reproduce extracts from decisions in their briefs, they should state them with meticulous accuracy, without paraphrase or omission. Any other course is a waste of time on the part of counsel, an attempted imposition on the court and a needless drain on judicial time and temper."

Lask vs. Bedell, 91 N. J. Eq. 341, (at page 345).

Harld Holding Co. vs. Laird, 101 N. J. Eq. 94, 98, (affirmed on opinion below by

Court of Errors and Appeals, 6 N. J. Adv. Rep. 1016).

Certain misstatements and misrepresentation in defendants' brief, particularly as to new matter not reasonably to be anticipated when writing our original brief, make it necessary for us to reply to them. Rule 32 of the rules of this Court provides that the order of argument shall be: first, counsel to open for appellant; second, counsel for opposite party to answer; third, counsel for opening party to reply. We assume that the spirit of this rule embraces written argument as well as oral. The result from this construction is the fullest possible enlightenment of the Court.

Defendants argue in their brief that plaintiffs urged the reserved exceptions presented on this appeal, in arguing the rule to show cause before the Supreme Court. We reply, that ***we did not argue the errors presented on this appeal or any of the reasons herein assigned upon the rule to show causes*** and that the rule and causes cited by my adversary have no pertinency.

There were seven reasons assigned for reversal on the rule to show cause all of which were considered by the Supreme Court and will be found in the opinion, Matisovsky vs. Companies, 7 N. J. Misc. 907, to wit: 1 & 2 are that the verdict is contrary to the weight of the evidence; 3, that the verdict of the jury was contrary to the court's charge; 4, that the defendants failed to establish any of the defenses interposed, by evidence, and, 5-6-7, that the verdict was the result of bias and prejudice of the jury etc.

On a rule to show cause the Supreme Court can only consider the reasons written down for a

new trial which must be assigned with such particularity as is now required in stating grounds of appeal.

Rule 125, Supreme Court Rules, 1926.

Napper vs. West Jersey & Seashore R. R. Co., 6 N. J. Mis. 1035, (Supreme Court, 1928).

Benson vs. Brady, 5 N. J. Mis. 13, 14, (Sup. Ct. 1926).

In arguing the reasons assigned on the rule to show cause I referred generally to the admission of evidence of the indictment of the assureds and of the bankruptcy of assureds upon the theory that the admission of such evidence resulted in the bias and prejudice of the jury and caused the return of the verdict. The Supreme Court having decided the question of bias and the reasons assigned against us we must accept their decision as final.

In an endeavor to show that the Supreme Court passed on the questions now presented by the reserved exceptions as to illegal evidence, defendants quote, at page 4 of their brief:

> "The cross-examination of the assignee, Joseph J. Brumberg, as to his acquaintance with the suspicious circumstances before he took his assignment seems pertinent and not prejudicial. The examination was not to prove the fact but to prove the assignees state of mind at the time he advanced money for the assignment."
>
> Matisovsky vs. Fidelity Phoenix F. Ins. Co., Supra.

But if defendants' counsel had quoted this particular portion of the Supreme Court's opinion, where the paragraph starts, without attempting

to excerpt an isolated passage, which divorced from the context results in false inference, it would read as follows:

> ***"The last three reasons challenge the verdict because it is the result of feeling, bias or prejudice.*** The cross-examination of the assignee, Joseph J. Brumberg, as to his acquaintance with the suspicious circumstances before he took his assignment, seems pertinent and not prejudicial. The examination was not to prove, the fact but to prove assignee's state of mind at the time he advanced money for the assignment."

Thus it will be seen that ***none of the errors presented on this appeal were the subject of reasons written down on the rule to show cause*** and could not have been argued and disposed of on the rule to show cause. Justice Trenchard, speaking for this court in Caterall vs. Otis Elevator Co., 103 N. J. L., 381 at page 382, says:

> "Now, the general rule is well settled that where a rule to show cause why a verdict should not be set aside is allowed, with exceptions reserved and the party obtaining the rule specifies as his reasons for asking that the rule be made absolute, the matters upon which the reserved exceptions are based, and upon the return of the rule argues those matters, and the court afterwards considers and determines them, the exceptions are to be considered as abandoned with the approval of the court, and the right to have them reviewed by an appellate tribunal is lost. Margolies vs. Goldberg, 101 N. J. 75, Goekel vs. Erie

R. R. Co. 100 Id. 279; Faragasso vs. Introcaso, 98 Id. 583, Gregutis vs. Steinberg, 97 Id. 1, El Mora Realty Co. vs. Griffin, 2 N. J. Mis. Rep. 1187."

All the cases cited in the above case are to the same effect, i.e., that ***the reserved exceptions must have been made one of the reasons for a new trial before it will be considered abandoned*** for the purpose of appeal. And the reason is plain, if the reasons do not embrace the reserved exceptions, the Supreme Court cannot approve any argument on the reserved exceptions and cannot pass on them.

Defendants refer at page 20 of their brief to the fact that we cite Robertson vs. Burstein, 104 N. J. L., 218, for the proposition that an assignee may bring an action even though he pays no consideration for his assignment. They do not deny this principle of law therein cited but state that Robertson vs. Burstein was reversed in 7 N. J. Adv. Rep. 836, and note this, Your Honors, while defendants were eager to call to your attention the fact of the reversal, they studiously avoided informing you that this Court reversed the Supreme Court in that case ***on the ground that the assignments were admitted in evidence, without their authenticity having been proven*** and the proposition of an assignee's ability to maintain the action though he pays no consideration was not even considered or discussed. Therefore the Supreme Court's opinion on that point is still good law.

In 1855, the then existing Practice Act provided, Act March 17, 1855, (Nix. Dig. p. 737, pl. 142) that "the assignee ***for a valuable consideration*** of any chose in action heretofore or here-

after assigned, if the assignor be dead, may sue for and recover the same in his own name." Under this act it was held that the assignee of a chose in action cannot maintain an action thereon if there is no evidence that the assignment was for a valuable consideration.

Andrews vs. Rue, 34 N. J. L., 402.

Since then the act has been amended, Practice Act of 1903, Comp. Stat. 4056, Section 19, to read:

> "—an all choses in action arising in contract shall be assignable at law and the assignee may sue thereon in his own name."

thus leaving out entirely any requite of ***"valuable consideration."*** Can there be any doubt then, that our learned Chief Justice's pronouncement was legally correct when he declared in Robertson vs. Burstein, Supra:

> "Assuming that no consideration was paid them by the plaintiff that fact did not invalidate the assignments. Since the enactment of Section 19 of the Practice Act of 1903, (Complied Statute, p. 4056), which vests in the assignees of a chose in action the unrestricted right of suing upon it in his own name, the assignee is entitled to maintain the action without regard to whether or not the assignor received consideration therefore, the defendant in the action being entitled to set up any defense which he might have if the suit had been brought against him by the assignor."

Defendants say at page 7 of their brief that grounds of appeal, 1 to 7, should be dismissed for the reason that they do not set forth the answers

to the questions objected to nor that the questions were admitted above objection. They cite:

Benson vs. Brady, 5 N. J. Misc. 3.

Bowen vs. State Highway Commission, 5 N. J. Misc. 10, 11.

Bowen vs. State Highway Commission, supra, the ground of appeal the Supreme Court was passing upon merely alleged.

> "2—The Court permitted evidence to be introduced showing the selling price at different times of property located at or near the corner of Communipaw Avenue and Mallory Avenue, which property is not substantially similar to the property under condemnation."

This the Court held to be invalid and of course, no one can quarrel with that conclusion ***since the ground of appeal did not set forth the questions*** objected to. The Court did say at page 11, that the grounds did not say the questions were admitted over objection, but a reading of the whole opinion shows that this was not the ground for the decision.

Benson vs. Brady, supra, ***arose upon a rule to show cause*** and not upon appeal. There the reason for a new trial simply alleged.

> "2—The trial court admitted alleged illegal evidence."

The Supreme Court held this to be insufficient, obviously correctly, for here again the illegal question is not set forth and the reason is therefore too general. Defendants isolated the following passage from the opinion in which the words "the answer" obviously are dicta:

"The alleged illegal testimony question and answer should be embodied in the reason. This is the settled legal rule relative to the stating of a ground of appeal.

Benson vs. Brady, 5 N. J. Misc. 13, 14.

Now, without attempting to divorce isolated excerpts of opinion from the facts of the case in which the opinions were rendered ***what is the rule as to stating grounds of appeal on questions of evidence?*** The rule is that the illegal question to be stated and that the court permitted it. It is not necessary to state that the question was permitted over objection ***nor is it necessary to state the answer to the question.***

Consider the form prescribed by the Practice Act of 1912, 2 Cum. Supp. to Comp. Stas., pages 2831 and 2832, Section 163, 345; Notice of Appeal, No. 37, Appeal (Pr. Act Sec. 26, Rules 72, 74) as rearranged by promulgation of the court, June Term 1913, (in force September 1st, 1913).

Following is an exact copy of the form as it appears in the supplement to the Complied Statutes, so far as it relates to errors of evidence.

The following questions were overruled:

"4. To the witness B. C. (*copy the question)*

5. To the witness C. D. *(copy the question)"*

The following questions were admitted:

"6. To the witness G. H. *(copy the question)"*

Said the Supreme Court in Kotwica vs. Daneski, 1 N. J. Mis. 140 at page 141:

"The form in Pamph. L. 1912, p. 415, 416, No. 37, Supreme Court Rules of 1919,

page 79, indicates the correct manner of assigning error in rulings on evidence in the ordinary courts of Common Law."

If the intention were to have the answer as well as question copied, the form would naturally have read like this:

"(Copy question ***and answers).***"

As it is, we have followed the prescribed form to the letter. We have stated the illegal question, that the Court permitted it and what is more, we have cited the page and lines where the question appears in the record. The Court and opposing counsel can readily find them. Take for example the first ground of appeal:

"The Court erred in permitting the following questions to the witness Brumberg:

And you have either had your client, the assured, execute them (non-waiver agreements) or you have executed them for and on behalf of the assured on many occasions, have you not?"

(State of Case, p. 72, line 20 to bottom and page 73, lines 1-2.)

Furthermore, to state the record from question to answer, would have unduly prolonged the grounds of appeal. For instance, in ground of appeal No. 1, the question starts, Case, page 93, line 22 and the answer to it after argument of counsel on the legality of the question occurs; Case, page 95, line 5.

Defendants state at page 18 of their brief that no exception was taken by plaintiffs to the following question:

"Do you know Mr. Brumberg, from the accounts of the fire which you read in the

> newspapers, or from what you saw in the premises that there were quantities of gasoline around in cans and in automobile tire coverings, papers and the like?" (S. C., p. 99, l. 24-32.)

To this plaintiffs objected to, objection was overruled and the witness answered.

> "Only what I read in the papers?" (S. C., page 100, lines 8, 9.) Defendants then reincorporated the whole question in the following one. 'What did you read in the papers about that?' (S. C., p. 100, 11, 12.) Plaintiffs objected on the ground that it was hearsay, not the best evidence, irrelevant and immaterial to the issue, and on the objections being overruled, took exception. (S. C., p. 100, line 19.) It was to show to what the exception really went that the question on page 99, lines 25-32 was made a ground of appeal, along with the question on page 100, lines 11-12."

Defendants' in their brief attempt to forestall the consideration by this Court of the error complained of by which the trial Court admitted in evidence Ex. D-4, ***the copy of the order appointing the trustee in bankruptcy for the assureds;*** by asserting at page 24 of their brief that this was argued on the rule to show cause. ***We have already shown that this was not so*** and challenge them to point that the admission of this order in evidence was made a reason for a new trial, thus it could not and was not considered on the rule to show cause. What we did do on the rule to show cause was to argue generally the reasons assigned

without referring to this order or any specific question or error of the trial judge and that the effect of the testimony, "That a bankruptcy petition was filed," resulted in bias or prejudice on the part of the jury, and they having refused to set aside the verdict we are bound by the Supreme Court's decision on this proposition and cannot argue the weight of the evidence in this court.

At page 25 of their brief, defendants endeavor to show that the admission of the order appointing the trustee was harmless, because of previous cross-examination by them of the witness Brumberg that he ***knew*** that the assureds went into bankruptcy. But admittedly they introduced this ***not to show the fact of bankruptcy, but to show the witness' knowledge*** of the bankruptcy under their alleged theory of impeaching his credibility.

Thus they state at page 17 of their brief:

> "The cross-examination of Brumberg inquired as to Brumberg's knowledge, and at page 12 of their brief, they quote the Supreme Court's opinion thus: 'The examination was not to prove the fact but to prove the assignee's state of mind at the time he advanced money for the assignment.' Matisovsky vs. Fidelity Phoenix Fire Insurance Company, Supra."

Furthermore ***the Court admitted this cross-examination for the*** sole and limited ***purpose of affecting the credibility*** of the witness, Brumberg:

> "Q. Did you know they went into bankruptcy? A. I did.
>
> Q. When did they go into bankruptcy?

Mr. Lieblich—I object. The best proof would be the record.

The Court—No, that is going to this mans credit." (S. C., p. 79, ll. 9-15.)

Thus it will be seen that the only substantive proof of the fact of bankruptcy in this case was the admission in evidence of this order, Ex. D-4.

Defendants at page 26 of their brief say:

> "The only objection made to its admission was that the order did not prove the adjudication o bankruptcy, but proved the appointment of a trustee." (S. C., page 116, ll. 22-26.)

Your Honors, ***this is a mis-statement.*** On page 113 of the printed case, lines 24-27, you will note that I objected to the admission of Ex. D-4 for Id. "on the ground of surprise, and as not within the issue as framed in this case" and that the argument thereon continued to page 116 where the Court admitted the paper and then I noted my exception. Counsel for the defendants knew this when they wrote their brief, and no good excuse can be offered for this misstatement of the record.

One page 27 of their brief defendants state:

> "Defendants by their pleadings had raised the contention that the cause of action, if any, was vested in the Trustee in Bankruptcy, and not in the plaintiffs. On that issue the order was of the utmost importance."

Here again is a misstatement—I pointed out on page 20 of our original brief Eilen and Schleider were dropped as parties to the record on motion

of defendant's attorney. (S. C., page 45, lines 30-34, and page 46, lines 1-10.) Defendants had at the opening of the trial moved to amend the answer to set up title to the cause of action sued on, in the Trustee in Bankruptcy of the assureds. (S. C., page 29, lines 32 to bottom, and page 30, lines 1-5, and argument thereon pages 30-36.) ***And if successful were prepared to prove same by Ex. D-4, for which it may have been evidential.***

It appearing that Eilen and Schleider had no interest in the suit, they having assigned all of their claim to Frank J. Matisovsky, Trustee, and Joseph J. Brumberg, the matter was solved by dropping their names from the record as parties, and the Court denying the motion to amend the pleadings. (S. C., page 46, lines 1-8.)

So that in asserting that the pleadings raised the issue, that ***title to the cause of action vested in the Trustee in Bankruptcy,*** and that for this purpose the order was admissible, the defendant's counsel misstated the fact. He knew the fact to be otherwise.

And here is a point from which there is no turning. How could the order appointing a trustee in bankruptcy for Eilen and Schleider, on file in the United States District Court at Trenton, impeach Brumberg's testimony, how could he have notice of it, and how did it relate to him, or anything he testified to? Upon what theory was Ex. D-4 evidential?

The prejudicial result of admitting this order, was to bring before the jury the fact of the assureds having gone bankrupt four or five months after the fire, and this was used to convince them

"It was a set fire" (S. C., 196) ***"who set this fire?"*** (S. C., 197), for the purpose of avoiding bankruptcy.

In discussing the court's refusal to grant plaintiff's motion to strike out the matters contained in defendant's first separate defense, ***defendants again indulge in excerpting isolated passages,*** and in making half statements, plaintiff's motion carefully separated the various items contained in the first separate defense, in defendant's answer so as to make each item the subject of separate consideration:

> "Mr. Lieblich—I wish to make a motion. I first move to strike out each and every part of the first separate defense interposed by the defendants upon the ground that there is no proof adduced with respect to first, ***that the assured knowling and wilfully, falsely and fraudulently misrepresented in writing*** (1) the amount and value of the property; (2) the cost of said property; (3) the amount of damage caused by said fire; (4) the origin and cause of said fire. (S. C., 189, lines 12-25.)
>
> The cases are clear that, in order to established such a defense, the burden is upon them to establish that by proof, ***and I suppose it can be admitted to all intents and purposes for this argument, that there is no proof of the other items, with the exception of the interjection of the firemen as to the cause and origin of the fire; so I think that I will confine myself to that particular point,*** if that would meet with your

Honor's approval. (S. C., page 189, lines 26 to bottom.) and at page 192:

Mr. Lieblich—I make my motion, and your Honor can rule accordingly on it.

The Court—*I will rule. Have you got any more motions.*

Mr. Lieblich—*That is the motion to strike out the defense.*

The Court—Motion denied.

Mr. Lieblich—I make a motion. Your honor will permit me an exception?

The Court—What is that?

Mr. Lieblich—I say your honor will permit me an exception." (S. C., page 192, lines 15-28.)

So that it will be seen that the motion was carefully separated, both when made and when argued as to the various items, and in denying it as to the items pointed out in our original brief Point 6, page 24, the Court below erred and is an entirely different situation as disclosed by Bashaw vs. Eichenberger which my adversary cites upon the theory that my motion was too broad.

Defendants assert, page 30, of their brief, that the following remarks were made by them in open Court:

> "and our first defense here is that there is fraud and misrepresentation on the part of the assured as to values." (S. C., page 33, lines 30-34.)

were withdrawn by them in the very next breath, on the next page of the transcript of the printed case, by the following excerpted statement:

"The question of values is now out of the case." (S. C., page 34, lines 14-16.)

But here is what actually took place as disclosed by the record. Counsel for defendants was at that time arguing his theory that the non-waiver agreement merely fixes the amount of recovery, leaving the question of liability of defendants on the policies unaffected and still to be determined.

In arguing this he said:

"Mr. Vanderbilt—Well, as I understand it, the parties have agreed that if there is to be any recovery at all, that recovery will be in the amount of $9,000, but the express terms of the non-waiver agreement, and the conditions of the policies are still preserved.

The Court—In other words that is part of the adjustment agreement?

Mr. Vanderbilt—Yes, so incorporated in it, in so many words; so, the question of values is now out of the case." (S. C., page 34, lines 5-18.)

So that it will plainly be seen that the statement referred to merely was to the effect that the non-waiver agreement made it unnecessary to determine values in the event a recovery was had, the amount of recovery being fixed by agreement, at $9,000. ***But it was far from being a withdrawal of the defense as to fraud and misrepresentation on the part of the assured as to the values,*** particularly in view of the Courts charge (S. C., page 193, lines 19-26, and S. C., page 195, lines 5-15).

At page 32 of their brief, ***defendants again attempted to forestall the consideration of the legal error,*** this time in the charge of the Court, by stating it was argued and disposed of before the Supreme Court on the Rule to Show Cause. We have shown before that this was not so. The portions of the charge assigned for error on this appeal, were not made reasons for a new trial, and therefore, could not have been argued, and thus disposed of on the rule to show cause. Caterwall vs. Otis Elevator Co., Supra.

Our sixth reason on the rule to show cause was that ***the verdict was the result of bias etc.,*** on the part of the jury, and pages 12 and 13 of our brief submitted in the Supreme Court we refer to portions of the charge as substantiating this. But nowhere did we argue the legal errors arising in the charge, ***nor could we, not having made any portion*** of the charge on which exception was prayed, ***a reason for a new trial*** on the rule to show cause. Caterwall vs. Otis Elevator, Supra.

Apparently counsel for defendants thought he was arguing a rule to show cause and not an appeal, when he drew his brief. His statement of facts, pages 1-3 of his brief, can be accounted for in no other way. Indeed it is the statement of facts which he presented on the rule to show cause to the Supreme Court. See pages 1-3 of his brief in the Supreme Court. On page 34 of his present brief, he quotes from the Supreme Court's opinion, on the weight of the evidence, to wit:

> "There was ample proof to justify the verdict of the jury."

What effect this sort of argument was intended to have on this Court, we do not know. ***It was***

manifestly improper. This court has frequently admonished counsel against arguing the weight of evidence on appeal, in civil cases.

Said this Court in Osborn vs. DeYoung, 99 N. J. Law 204, at page 204.

> "There can be no good excuse offered why an elementary legal rule be so often disregarded by counsel in arguing on the weight of the evidence in a civil case at law on appeal, before this Court, which is only concerned with correcting errors in law, with the credibility of witnesses, or the weight of the evidence we have no concern."

My adversary in his oral argument stated:

> "That Eilen and Schleider attempted to bribe the chief to quash the criminal proceedings."

May I ask the Court to read the testimony in connection therewith (S. C., 166-170) and the Chief's answer:

> "Q. So, all that he wanted was a retraction of certain newspaper articles? (referring to Schleider) A. That is right, yes, sir." (S. C., 170, line 5.)

so that my adversary should have differentiated between his conclusions and the actual facts as adduced for Your Honors are not ***"sitting as jurors, some of you for the first time"*** and have no concern with ***"there seems to be ample proof that this fire was of incendiary origin"*** or ***"it was a set fire"*** or with ***"who set this fire"*** but are concerned solely with the inquiry was there legal error committed in the trial of this cause? and if so, was it harmful error?

I respectfully submit that by reason of the manifest harm to plaintiffs resulting from legal error the judgment be reversed and a new trial granted.

Respectfully submitted,
JOSEPH T. LIEBLICH,
Of counsel with plaintiffs-Appellants.

New Jersey Court of Errors and Appeals

FRANK J. MATISOVSKY, JOSEPH J. BRUMBERG and MAX J. SCHLEIDER and NATHAN EILEN, trading as ART FURNITURE COMPANY,
Plaintiffs-Appellants,

vs.

FIDELITY PHENIX FIRE INSURANCE CO., AUTOMOBILE INSURANCE CO., SPRINGFIELD FIRE & MARINE INSURANCE CO., NORTH BRITISH & MERCANTILE INSURANCE COMPANY, THE STATE ASSURANCE COMPANY, THE COMMONWEALTH INSURANCE COMPANY, THE BALTIMORE AMERICAN INSURANCE COMPANY, NATIONAL LIBERTY INSURANCE COMPANY and AETNA INSURANCE COMPANY,
Defendants-Appellees.

Action at Law.
ON APPEAL FROM THE SUPREME COURT.

REJOINDER BRIEF FOR DEFENDANTS-APPELLEES.

This cause was argued on February 10, 1930, at which time leave was granted to appellants to file a reply brief and to appellees to file a rejoinder brief.

Appellants' reply brief opens with the assertion that the alleged errors presented on this appeal were not the subject of reasons assigned on the rule to show cause. In our brief we never stated that the alleged errors were the subject of reasons assigned but did state that the alleged

errors were argued before that Court and were expressly overruled. Need we do more than quote from pages 12 and 13 of the brief submitted by appellants to the Supreme Court to prove that their assertion that they "did not argue the errors presented on this appeal" is not true?

> "Thus under the pretext of testing the veracity of the witness, Brumberg, as to the consideration for this assignment, my learned adversary brought before the jury:
>
> 1. That Mr. Brumberg read in the newspapers about the suspicious fire (pp. 99-106).
>
> 2. That Eilen and Schleider were indicted (pp. 106-107).
>
> 3. That a bankruptcy petition was filed, etc. (pp. 79-221-23).
>
> I regret the fact that my study of the law and my knowledge is circumscribed by my inability to grasp or ascertain the legal theory upon which Mr. Brumberg was examined and this evidence admitted.
>
> (a) In view of the issue raised by the pleadings.
>
> (b) The failure to establish or identify the particular newspaper referred to.
>
> (c) That it is hearsay evidence.
>
> (d) That it was prejudicial to the interest of plaintiff Judge Matisovsky.
>
> (e) That the Court in his charge passed *sub silento* over the prejudicial effect of this testimony on the plaintiff Judge Matisovsky.

And I am frank to admit that after a very exhaustive search of the leading works on evidence, I am unable to find authority to sustain the action of the learned Trial Judge but I trust that my learned adversary may be able to enlighten the Court on the point herein raised in his answering brief, or in the ab-

> sence thereof, this Court will grant the plaintiffs a trial *de novo.*"

That the Court considered the alleged errors and expressly overruled appellants' contentions is evident from the portion of its opinion referred to in our original brief. Since appellants argued the alleged errors now urged and the Supreme Court expressly overruled appellants' contentions, they should not be considered here.

In *Faragasso* v. *Introcaso,* 98 N. J. L. 538, 121 Atl. 773 (Sup. Ct. 1923), and *El Mora Realty Co.* v. *Griffin,* 2 N. J. Misc. 1187, 126 Atl. 639 (Sup. Ct. 1924), quoted from at length in our original brief, the Courts stated that where matters are argued and considered on a rule to show cause the same matters will not be considered on appeal. And the very reason given for the rule negatives any requirement that the matter must be set forth in the reasons submitted to the Supreme Court on the rule to show cause.

> "When a party argues under a rule the questions reserved in the rule, his action is a waiver of the reservations made in the rule. His action will be deemed an abandonment of the exceptions reserved." *El Mora Realty Co.* v. *Griffin,* 2 N. J. Misc. 1187, 126 Atl. 639 (Sup. Ct. 1924).

When appellants argued the alleged errors now urged and those matters received the consideration of the Supreme Court appellants waived their right to again urge them on appeal.

Appellants on page 1 of their reply brief infer that our quotations from the *El Mora* and *Faragasso* cases were misleading. We quoted from those cases to show that they held that where the alleged error was argued and considered by the Court below on a rule to show cause it would not be again considered on appeal and if appellants

will but read those cases they will find that they are accurately cited.

Appellants state that "if the reasons do not embrace the reserved exceptions the Supreme Court cannot approve any argument on the reserved exceptions and cannot pass on them". That is not the law. Supreme Court Rule 125 is relied upon by appellants. That rule does not prevent the Supreme Court from considering matters not embodied in the reasons submitted. It merely affords the Court the privilege of not considering those matters although it may disregard that privilege. It saw fit to do so in our case.

In the case cited below, and in numerous other instances, our Supreme Court has seen fit to consider alleged errors not embodied in the reasons in the manner required by Rule 125:

> "It will be observed that these reasons are general and are lacking in that particularity referred to by this rule. We feel that for this reason they should not be considered. We have, however, examined with care the points made by the defendant, and feel that no harm was done to the defendant in the rulings which the trial court made, and which are considered under these titles as points 14 and 15 of the defendant's brief." *Carero* v. *Breslin,* 3 N. J. Misc. 507, 512, 128 Atl. 883, 886 (1925).

At page 5 of appellants' reply brief they refer to the fact that we commented on *Robertson* v. *Burstein,* 104 N. J. L. 218 (Sup. Ct. 1928), reversed in 7 N. J. A. R. 836, 146 Atl. 355 (E. & A. 1929). That case was cited in appellants' brief for the proposition that an assignee may sue though he paid no consideration. We neither affirmed nor denied the validity of that proposition, for it had no bearing on our case as we displayed in our original brief. Appellants omitted to give

the citation of the case on appeal and we accordingly supplied the omission. An intelligent reading of our statements on page 20 cannot help but show to appellants that we did not deny that the Supreme Court stated that an assignee may sue without having paid for his assignment. We found it unnecessary to consider the validity of that proposition.

Appellants next refer to our remark that the answer to the question objected to should be embodied in the petition of appeal. They do not deny that *Benson* v. *Brady,* 5 N. J. Misc. 13, 135 Atl. 343 (Sup. Ct. 1926) so states. The reason for this requirement is obvious. Where there is no answer or where the answer nullifies any possible objection to the question, there is no ground of appeal and this Court should be so advised in the petition of appeal. Indeed, in our case one of the allegedly objectionable questions set forth in the petition of appeal was not answered (S. C., p. 99, ll. 25-36), and to another the answer was "I don't remember" (S. C., p. 100, ll. 10-21).

At page 10 of appellants' reply brief we are challenged to prove that the admission of the copy of the order appointing the trustee was a reason submitted to the Supreme Court. A re-reading of our original brief will disclose to appellants that we never stated that it was one of the reasons assigned. We stated that it was argued and considered there. Our earlier quotation from their brief submitted to the Supreme Court shows that it was argued and the opinion of the Supreme Court shows that it was expressly considered.

In our original brief we pointed out that the admission of the order appointing the trustee in bankruptcy could not have prejudiced appellants. In appellants' reply brief it is stated that the only substantive proof of bankruptcy was the

order appointing the trustee. That order was not admitted for substantive purpose, but only on the question of credibility. Furthermore, even if it had been admitted for substantive purposes, it could not have been prejudicial for plaintiff Brumberg had earlier testified without objection that assureds went into bankruptcy (S. C., p. 79, l. 9 to p. 80, l. 2).

At page 12 appellants charge us with misstatements. Those charges are unfounded. While it is true that the first objections made by appellants to the admission of the order appointing the trustee were "surprise" and "not within the issues" the State of Case discloses that those objections were, in effect, abandoned (S. C., p. 113, l. 20 to p. 116, l. 32). The objections as to "surprise" and "not within the issues" were obviously made upon the assumption that the order was offered for substantive purposes. The Court then considered its admission on the question of credibility. After lengthy discussion between Court and counsel, the following was said:

> "The Court: Therefore, in view of the fact that the plaintiff Brumberg has testified that when he made these payments he knew of the existence of the bankruptcy, this may be admitted on the basis, although it is collateral, to affect the credit.
>
> Mr. Lieblich: But, sir, it is not a certified copy of an exemplified copy of the appointment of the trustee; it is a certified copy of some other proceeding in that matter. Now, how will that prove when the adjudication took place?
>
> The Court: The witness said he knew that the adjudication had taken place.
>
> Mr. Lieblich: That is quite true, sir; but this paper is not proof of an adjudication. It is proof of some collateral matter in the adjudication. How is it evidential in this case?

> The Court: That is all that this is admitted for, for a collateral purpose.
>
> Mr. Lieblich: True, sir; but I make my objection, and I will ask an exception."

Can there be any doubt that we were accurate in our statement that the only objection made "was that the order did not prove the adjudication of bankruptcy, but proved the appointment of a trustee". Our understanding that the objections as to "surprise" and "not within the issues" were abandoned is supported by the fact that they were also abandoned by appellants' briefs.

The next charge in appellants' brief is that our assertion that the pleadings raised the contention that the cause of action was not vested in plaintiffs, but was vested in the trustees, is not true. Here again the charge is utterly unfounded. Defendants in their answer, in effect, denied the alleged assignments to plaintiffs Brumberg and Matisovsky (S. C., p. 254, ll. 20-28). If defendants could show that the trustee in bankruptcy and not plaintiffs had title to the alleged cause of action, then plaintiffs would not be entitled to recover. And if it could be shown that the trustee in bankruptcy had title to part of the cause of action, as to that part, the alleged assignees were not entitled to recover.

Appellants next raise the objection that Brumberg had no notice of the order appointing the trustee. That objection is without merit and was not made below, and, as shown in our original brief, the admission of the order was entirely proper. At page 13, appellants state that the admission of the order appointing the trustee was prejudicial since it was used to bring before the jury the fact that assureds went bankrupt. That is not so. As we have already stated, Brumberg

had earlier testified without objection that assureds went into bankruptcy (S. C., p. 79, l. 9 to p. 80, l. 2).

At pages 14 and 15, appellants state that their motion to strike defendants' separate defense was separated as to values and origin. After long argument as to alleged insufficiency of the evidence as to the origin of the fire, counsel for appellants said:

> "That is the motion to strike out that defense" (S. C., p. 192, ll. 19-20).

Can it possibly be urged that when counsel for appellants said, after argument as to origin of the fire, that he moved to strike out *that defense* he referred to the portion of defendants' first separate defense relating to values?

Appellants conclude their reply brief with the astounding comment that we argued the weight of evidence in our brief. In appellants' brief they stated that the Court erred when it expressed its opinion that the fire was set by someone. We answered that statement by the remarks that under the law the Court had a right to express its opinion, and under the facts its expression of opinion was entirely justified. The mere statement of the facts suffices. Appellants conclude their reply brief with another reference to something not in the State of Case.

It is respectfully submitted that the judgment rendered upon the verdict of the jury should be affirmed.

Respectfully submitted,

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Of Counsel with Defendants-Appellees.