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New Jersey Court of Errors and Appeals

GABRIELE GIORDANO, *Plaintiff-Appellant,* vs. ASBURY PARK & OCEAN GROVE BANK, Body Corporate, *Defendant-Respondent.*	*Appeal from the Supreme Court.* *Sat Below: Parker, Minturn and Black, J. J.*

Statement of Case

BRIEFS FOR THE APPELLANT

Plaintiff sued for damages for an alleged conspiracy, also for slander, also for loss of credit standing because of the acts of defendant.

The cause being at issue and regularly on the Circuit list for trial and plaintiff with daily assiduity attended Court waiting the call for it; but a sudden illness, on October 31, 1924, prevented plaintiff to attend Court (see affidavit annexed on page v.,) and failed to appear when the cause was called; and defendant asked and obtained a nonsuit.

The Circuit Judge later, on Nov. 20, 1924, allowed a Rule to Show Cause why the judgment should not be opened; but on Dec. 1st heard same, and on April 11th, 1925, dismissed it without stating on which ground it was dismissed (see it on page ii.)

On May 20, 1925, plaintiff applied to Supreme Court Part III for a similar Rule, according to Rule 103, and it was granted (see opinion filed on page 10), but on October 8, 1925, the Court heard same and dismissed it; and plaintiff construed such a ruling as a result in a miscarriage of Justice, and requested the Rule of Dismissal filed on record, which was filed thereof on December 7, 1925 (see it on page vi), and same for reasons obvious, appear granted on ground as vague, general and indefinite, and failed to state succinctly upon which ground the Rule to Show Cause is defective, volition by the Supreme Court's Rule 43 and 107a.

"A Common Law," default is opened up directly in two ways:

(1) by following Statute, and (2) by appealing to the inherent power of the Court; indirectly in two ways: (1) by appeal if allowed by Statute, and (2) in equity; see Encyc. Pl. & Pr. 56; also 59 Miss 167.

Motion can be more or less full in giving reasons.

Affidavit must cover the ground.

(La Salle University's Law Course, Lecture 50.)

"By Statute," default is opened up directly in two ways:

(1) Application for a Rule to Show Cause why the judgment should not be opened.

Affidavit annexed to the petition must state the ground.

(2) And by appeal provided for; lawful reasons stating ground.

Plaintiff respectfully contends, therefore, that the Rule of Dismissal should be reversed "as lacking due merits;" and the Rule to Show Cause, which was legally and meritoriously prosecuted, according to Statute should be made absolute which reinstates the cause for trial.

Respectfully,

GABRIELE GIORDANO,
Pro Se.

New Jersey Supreme Court
Monmouth County

GABRIELE GIORDANO, *Plaintiff,* vs. ASBURY PARK & OCEAN GROVE BANK, Body Corporate, *Defendant.*	*On Rule to Show Cause. Order.*

A rule to show cause having been entered in this cause on the twentieth day of November, 1924, and this cause having been argued by the plaintiff pro se and James D. Carton, of Durand, Ivins and Carton, of Counsel for the Defendant, and the Court having considered the same and finding no cause for making the rule absolute;

IT IS THEREUPON, on this 11th day of April, 1925, on motion of James D. Carton, of Durand, Ivins and Carton, ORDERED that the rule to show cause be and the same is hereby dismissed with costs, and that

the judgment in said cause be and the same is hereby confirmed.

FRANK B. JESS,
Judge.

Rule entered April 15, 1925,
on motion of
Durand, Ivins & Carton,
Attorney for Defendant.

A true copy.
EDWARD J. KELLEHER,
Clerk.

New Jersey Supreme Court

ASBURY PARK AND OCEAN GROVE BANK, Body Corporate of New Jersey, *Defendant,* ADS. GABRIELE GIORDANO, *Plaintiff.*	*Action at Law. On Postea.*

It is ordered that judgment of non-suit be and hereby is entered in favor of defendant and against the plaintiff.

Entered April 15, 1925, on motion of Durand, Ivins & Carton, Attorneys.
Costs $47.00.
A true copy.
EDWARD J. KELLEHER,
Clerk.

New Jersey State Library

New Jersey Supreme Court

GABRIELE GIORDANO, *Plaintiff.* vs. ASBURY PARK & OCEAN GROVE BANK, Body Corporate of New Jersey, *Defendant.*	*Action at Law. On Judgment for Non-Suit by Default. Rule to Show Cause.*

This matter being opened to the Court by Gabriele Giordano, plaintiff pro se, upon an application for a "Rule to Show Cause" why the above entitled action should not be opened, and sufficient reasons appearing;

Upon reading and considering the affidavits and certificate of Gabriele Giordano, plaintiff in the above mentioned cause, filed this day with the Court;

It is, on this 20th day of May, Nineteen Hundred and Twenty-Five, ORDERED that the Asbury Park and Ocean Grove Bank, through its Attorneys, do show cause before this Court holden at the State House in Trenton, on the next October term, why the judgment for non-suit by default, entered in the above entitled action, in the Circuit Court of Monmouth County, at Freehold, on the 31st day of October, last 1924, should not be opened, and the same be reinstated for trial.

And it is further ORDERED that a copy of this order and of the affidavits and certificate upon which same is granted be served on the Attorneys of Defendant, with leave to take deposition and against the rule.

On motion of Plaintiff, Gabriele Giardano.

Rule entered June 12th, 1925.

Supreme Court of New Jersey
Clerk's Office, Trenton

Jan. 26, 1926.

Mr. Gabriele Giordano, Esq.,
Kinmonth Bldg.,
Asbury Park, N. J.

Dear Sir: I find, after looking at the record of this case, that on May 20, 1925, an opinion was filed allowing the Rule to Show Cause mentioned in the enclosed letter. When an opinion is filed allowing such a Rule, the Rule does not have to be signed by the Court, as the opinion is our authority for entering the Rule.

Yours truly,
EDWARD J. KELLEHER,

v.

New Jersey Supreme Court
Monmouth County

GABRIELE GIORDANO, *Plaintiff.* vs. ASBURY PARK & OCEAN GROVE BANK, Body Corporate of New Jersey, *Defendant,*	*Affidavit Annexed to Rule to Show Cause.*

Gabriele Giordano, of full age, being duly sworn, according to law, deposes and says, that since the beginning of this October term he has been at Freehold into Court, witnessed by its Clerks, including Mr. Thompson, (Court Clerk) and non excluding Mr. Carton, Attorney for the Defendant, with whom deponent having had previous days conversed, in waiting the call of the above case for trial.

Deponent stated, that on the 31st day of October last, deponent had a sudden attack of inflammation of the tonsils, from which he shows to be suffering yet, and, therefore, was unable to attend Court; deponent was much surprised when he learned that on same day, October 31st last, the above case was called to trial and Mr. Carton, Attorney for the defendants, made a "motion" to the Court for a "nonsuit" and it was granted.

(Signed) GABRIELE GIORDANO.

Sworn and subscribed to before me this 14th day of November, A. D. 1924.

(Signed) THEO. B. BREWER,
Notary Public of New Jersey.

Reginald S. Bennett, M. D.
516 Asbury Avenue
Asbury Park, N. J.
November 18th, 1924.

To Whom It May Concern:

This is to certify that:

Gabriele Giordano consulted me professionally the latter part of the past September for tonsilitis. His throat is in such a condition that it causes him frequent periods of indisposition. He was advised by me to consult a throat specialist.

New Jersey Supreme Court

GABRIELE GIORDANO, *Plaintiff,* vs. ASBURY PARK AND OCEAN BANK, Body Corporate, *Defendant.*	*On Rule to Show Cause Why Judgment Should Not Be Opened. Order Discharging Rule.*

This cause being at issue and regularly on the Circuit Court list for trial and the plaintiff having failed to appear when the case was called and the defendant having asked and obtained a judgment of non-suit, and the plaintiff having taken a rule to show cause why the judgment should not be opened and the plaintiff allowed to present his case, returnable before this Court at the October term, 1925, and said rule coming on regularly to be heard on October 8, 1925, and Gabriele Giordano, Prosecutor, appearing for said rule, and Durant, Ivins & Carton in opposition thereto, and it appearing that the said Gabriele Giordano has failed to prosecute said rule or to take any steps to perfect said rule, and this Court having considered the matter;

IT IS, on this 5th day of December, 1925, ORDERED that the said rule be and the same hereby is discharged with costs.

Let this rule be entered.

C. W. PARKER, J. S. C.,
For the Court.

Rule entered December 7, 1925, on motion of Durand, Ivins & Carton, Attorneys for Defendant.

A true copy.

EDWARD J. KELLEHER,
Clerk.

New Jersey Supreme Court

GABRIELE GIORDANO,
Plaintiff,
vs.
ASBURY PARK & OCEAN GROVE BANK, Body Corporate,
Defendant.

Action at Law.
Pro. Rule to Show Cause.

WHAT AMOUNT TO SPECIAL DAMAGES.

Briefs, Statement of Facts

On motion to open judgment for nonsuit by default, plaintiff sued for damages for an alleged conspiracy, also for slander, also for loss of credit standing because of the acts of defendant. (Memo. by the Court, filed May 20, 1925. See p. 10.)

1. A conspiracy was planned to defraud a plaintiff as indorser. (See first count of plaintiff's complaint, annexed. P. 5, line 12.)

It should be consulted later on if the note was the real object upon which plaintiff would be defrauded, or whether the direct object was a plaintiff's real property; compelling to sell it; and as a result of the above mentioned conspiracy, plaintiff sustained considerable damages.

But in order to obtain compensation for any item of damage he must submit competent proof and evidence to the court and jury that he has sustained that damage, which meant pecuniary losses arose, pursued and resulted, as a legal consequence, previously intended by defendant, from his malicious words.

If the words are not on their face defamatory an allegation of facts showing them to be so. (Clark on pleading.)

Unless a question of fair comment or conditional privilege is raised, the plaintiff need not prove malice, all he needs to prove is the publication of the defamation, (see construction of the words used, second count of the complaint) as it is usually stated, the law implies the malice from the publication. Malice is usually a question for the jury. (Clark on Tort.)

The words spoken may not have been "actionable per se" but required proof of special damages to constitute a slander. (Clark on Torts.)

WHAT AMOUNT TO SPECIAL DAMAGES.

Special damages are those who are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions. (Blacks' Law Dictionary.)

WHAT AMOUNT TO SPECIAL DAMAGES.

STATEMENT OF FACTS.

In 1904, plaintiff became a resident of Asbury Park with a few dollars; in 1906 became a depositor into the defendant's business; in 1907, with a few hundred dollars bought real property; in 1909, obtained title to it, and thereafter with the credit-protection of defendant improved, remodeled and built upon it, enjoying in the meantime the esteem and reputation as a good and honest citizen, and so far as concerned in paying his bills promptly, his prestige grew rapidly; it gave vamp to new enterprise, and the community predicted he would succeed.

In 1922, he was in a state of prosperity, and same property which originally was bought for few hundred dollars was worth at that time $25,000 or $30,000, partly encumbered for $2,850 first mortgage; at the same time had also a retail business insured for $3,000 with assets of $2,700 and liabilities of about $300; no other liabilities could be ascertained, and the note mentioned in this case of action, upon which he was a mere indorser, and other was a real debtor (maker).

In 1922, with the death of president of defendant, a former clerk-boy of 1906 succeed to be president-dictator of defendant; and then this cause of action arose with the absence of the proper motive to support a conditional privilege, but in order to assail the character of plaintiff, with his public slanderous statement: "The bank is ready to sell you out, Giordano," then debarred by its credit, debarred by its references; followed a sequel of over 20 District Court judgments against him, for bills not promptly

WHAT AMOUNT TO SPECIAL DAMAGES.

paid; followed acts of bankruptcy in levying his personal property, and posting it at a public sale; then his retail business was overthrown; followed, on July 23, 1923, a Kingsland foreclosure proceedings against his real property, for interest not paid when due, and saved in time by friends from Sheriff's sale; followed the defendant's institution a civil action, on June 30, 1925, maliciously and without probable cause, being for the same note, and being a plaintiff a mere indorser on the original note, and for it having had his personal property seized, and having allowed the maker, real debtor, to go free (see complaint); then on July 10, 1925, followed the Walling foreclosure proceedings, apparently for same cause, while the city tax collector sold his property for $775 for taxes in arrears and assessments; and then again with the aid of friends was saved, but the mortgages against his property were increased for over $8,000; his public credit ruined; his name badly beaten; his health impaired.

And the defense is estopped to deny it.

"An imputation of insolvency is not defamatory generally, since it does not bring one into hatred, contempt or ridicule, because one may lose his money by misfortune; but if it is made with reference to one who is engaged in trade or business, it is defamatory and actionable per se because a business man must have credit to succeed in his calling." (Clark on Torts.)

The plaintiff respectfully contends therefore that the words spoken should be sustained "actionable per see" and with "proof of special damages."

Respectfully submitted,

GABRIELE GIORDANO.

Dated Nov. 12th, 1925.

New Jersey Supreme Court
Monmouth County

GABRIELE GIORDANO, *Plaintiff,* vs. ASBURY PARK & OCEAN GROVE BANK, Body Corporate of New Jersey, *Defendant.*	*Action at Law. In Torts.*

Plaintiff, Gabriele Giordano, residing at Asbury Park, New Jersey, says:

FIRST COUNT.

1. That on May 23, 1921, plaintiff sold to Nicola Oquilino of Asbury Park, N. J., an electric shoe machine, with finishing and stitching attachment therewith, in good order, for the sum of Three Hundred Fifty Dollars ($350.00), and said Aquilino gave a promissory note in payment thereof, payable monthly at the Asbury Park and Ocean Grove Bank, which note the said plaintiff indorsed and discounted.

2. Thereafter Aquilino used the said machine, from May, 1921, to September, 1922, and by his neglect in meantime broke the stitching clutch in said machine, other parts lost, and paid no attention to the note, which, after the same had been renewed several times without any payment, was protested in June, 1922.

3. At the end of August, 1922, plaintiff conferred with Irving Newman, Asst. Cashier of the defendant, and later with its President, where it was decided and AGREED to instruct its attorneys to start suit proceedings, obtain judgment, and force payment against the maker of said note.

4. On September 6, 1922, defendant in the District Court of the First Judicial District of Monmouth County recovered a judgment on the aforesaid note for Three Hundred Fifty-six Dollars and Five Cents ($356.05) against plaintiff as endorser and Aquilino as maker.

5. At the end of November, 1922, an execution was issued against Aquilino, but, by countermand of the defendant's attorney and president, the Constable returned the execution unsatisfied.

COMPLAINT.

6. Another execution was issued against plaintiff, escorted by a following explicit and peremptory order:

7. That "the matter has been arranged between Aquilino's attorney and the defendant's attorneys." Aquilino was to pay in full adjustment $200.00, with understanding that plaintiff was requested to pay the balance in $202.68, then withdraw Aquilino's claim; and, in refusal to assent to it, then the attorney and president of the defendant instructed the Constable to make a levy upon plaintiff's estate, and sell him out for full amount of $402.68.

8. Such order meaning a conspiracy was planned for the purpose to defraud a plaintiff as endorser, the plaintiff thereby turned it down.

SECOND COUNT.

9. Plaintiff said that two days after the day aforesaid, on December 2, 1922, the president of the defendant furthermore, bitterly excited, appeared in public bank where plaintiff was called, and, in presence of several persons, his declaration directed against plaintiff was of nature "slanderous actionable per se" that "the bank is ready to sell you out, Giordano."

10. Plaintiff avers, that the aforesaid words were false and malicious, and were used in defamatory sense, to wit: meaning thereby that plaintiff attempted to extract from Aquilino over $400.00, the maker of said note, which note was obtained through an unfair transaction for an old machinery's negotiating it, through the bank, but the bank has decided to sell him out as endorser, if it still persisted in refusing the attorney's decision: $200.00 in settlement thereof.

11. Plaintiff avers that by reason of the speaking of such remarks, in presence of several persons, among whom were acquaintances of said plaintiff, and being so suspected to be a worthless person, and to cause him to be an object of scorn among his

COMPLAINT.

fellow-citizens, said plaintiff has been greatly injured in his good name and credit, and brought plaintiff into public disgrace with many in his community seeing his business slowly sinking.

12. Plaintiff claims that for such action suffered for three months a nervous breakdown, with the loss of his constitutional right of life.

THIRD COUNT.

13. Plaintiff says, that on the day aforesaid that the president of the defendant spoke of a threatening statement in public direction of plaintiff: that "the bank is ready to sell you out, Giordano," and, since then, plaintiff lost his credit with defendant, which credit helped plaintiff to build up a successful position, under the late president of the defendant, in the last 16 years, then in view of such proceeding, it was a necessity, from which there was no escape for plaintiff, demanding an extension of a few days for payment thereof.

14. And, on December 15, 1922, defendant through its attorneys and president assigned said judgment to plaintiff for true amount of Four Hundred Two Dollars and Sixty-eight Cents ($402.68), which plaintiff said meaning, paid as endorser, and forced by defendant to do so.

15. Plaintiff maintains, that at that time the defendant recovered judgment against maker and endorser of said note, the maker was in position of $1,000.00 in personal estate, then in meantime the plaintiff as endorser was forced to pay the defendant, the maker sold out his estate (April 10, 1923) before plaintiff could obtain judgment against it (May 17, 1923) plaintiff disclosed that he has been defrauded.

And, therefore, prays and demands as damages:

For First Count ..... $ 5,000.00
For Second Count $10,000.00
For Third Count ..... $ 5,000.00
And interest therefrom.

Plaintiff,
GABRIELE GIORDANO.

Filed July 10, 1924

New Jersey Supreme Court
Monmouth County

GABRIELE GIORDANO, *Plaintiff,* vs. ASBURY PARK & OCEAN GROVE BANK, Body Corporate of New Jersey, *Defendant.*	*Action at Law.* *Answer.*

The defendant, a body corporate of the State of New Jersey, answering the plaintiff's complaint, says that:

1. It denies the truth of the matters contained in the plaintiff's complaint.

FIRST DEFENSE TO FIRST COUNT:

Defendant says that the first count of plaintiffs complaint does not set forth or disclose any cause of action.

FIRST DEFENSE TO SECOND COUNT:

Defendant says that the second count of plaintiff's complaint does not set forth or disclose any cause of action.

SECOND DEFENSE TO SECOND COUNT:

Defendant says that the statements alleged to have been made by its officers or agents were justified and privileged, if spoken.

THIRD DEFENSE TO SECOND COUNT.

Defendant says that the words alleged to have been spoken, if spoken by president of said bank, were not spoken in connection with his trade or business; that they did not impute want of integrity or honesty of the plaintiff, and are not slanderous in any respect, and were not said in defamatory sense.

FOURTH DEFENSE TO SECOND COUNT:

The allegations of the second count of plaintiff's complaint do not allege special damages, and do not allege words from which malice might be imputed, or from which any defamatory sense could be imputed.

FIFTH DEFENSE TO SECOND COUNT:

The plaintiff does not allege that the president of the bank was directed or authorized to speak the alleged words, set forth in the complaint.

ANSWER.

FIRST DEFENSE TO THIRD COUNT:

Defendant says that the third count of plaintiff's complaint does not set forth or disclose any cause of action.

The allegations of first count, second and third counts, singly or taken together, do not set forth any cause of action, any facts or statements from which any inference of conspiracy, libel or fraud can be taken.

Defendant reserved the right before the trial, or at the trial of said cause, for leave to strike out the plaintiff's complaint as being improper and setting forth no cause of action.

(Signed) DURAND, IVINS AND CARTON,
Attorneys for Defendant.

Filed July 26, 1924.

New Jersey Supreme Court
Monmouth County

GABRIELE GIORDANO, *Plaintiff,* vs. ASBURY PARK & OCEAN GROVE BANK, Body Corporate, *Defendant.*	*Action at Law. Reply. Motion to Strike Out the Answer as Disclosing No Ground of Defense.*

Plaintiff moved to strike out the defendant's answer filed in this cause, as admitting the facts alleged, and disclosing no ground of defense.

1. Defendant on "Second Defense to Second Count" arises, claiming:

"Defendant says that the statements alleged to have been made by its officers or agents were justified and privileged if spoken" (alluding on judgment-execution, obtained by defendant against plaintiff as indorser.)

Plaintiff in return: "Distinction between maker and indorser."

REPLY.

2. The maker is primarily or unconditionally liable. The indorser's liability is only conditional one, to pay if the maker did not.

3. The indorser would not be liable merely by reason of non-payment of the debt, for that was not his contract. It must be shown that the debt is not collectible. If the principal (maker) is able and solvent to pay the debt, the contract of the guarantor, or indorser, is not broken, and hence he would not be liable (W. U. Moore on Negotiable Instruments and Simonton on Guaranty and Suretyship.)

4. "In an action of slander a justification or discharge must be specially pleaded" (Andrew Stephens Pleading, p. 236.)

5. It is sometimes necessary for the public welfare that an individual's reputation be damaged without liability. Privilege is therefore a kind of justification. But this is the extent of the privilege; for it a party or his agent will pass beyond the prescribed limits to asperse and villify another by words or written, he is without protection and, as in other cases, must abide the consequences of his misconduct.

In the following cases the privilege is absolute, that is, the parties are protected even though they act from an improper motive, and have no belief in the truth of the statements they make:

(A) The Chief Executive of the United States, and of each State, and members of the Federal and State Legislatures, while acting in their official capacities.

(B) Judges, juries, parties, counsels and witnesses as to relevant statements in the course of judicial proceedings.

(C) Reports of naval and military officers in the course of their official duty.

(G. L. Clark on Torts)

Plaintiff therefore prays alternative relief, with special damages, and the Court may determine at the trial in submitting the facts to the jury for recovery.

GABRIELE GIORDANO,
Plaintiff.

(Filed August 8th, 1924)

New Jersey Supreme Court

GABRIELE GIORDANO, *Plaintiff,* vs. ASBURY PARK & OCEAN GROVE BANK, body corporate, *Defendant.*	*On Motion to Open Judgment of Default. Nonsuit by*

Plaintiff sued for damages for an alleged conspiracy, also for slander, also for loss of credit standing because of the acts of defendant.

The cause being at issue and regularly on the Circuit list for trial, plaintiff failed to appear when the case was called, and defendant asked and obtained a nonsuit.

The Circuit Court Judge later allowed a rule to show cause why the judgment should not be opened and plaintiff allowed to present his case, and made the rule returnable before himself at the Court House in Freehold, heard the same, and ordered the rule discharged.

Plaintiff now applies to this court for a similar rule.

This being a Supreme Court issue, a Circuit Court Judge is without jurisdiction to hear and determine such a rule, and his action in discharging it was therefore nugatory.

The matter has never been lawfully heard.

Plaintiff may take a rule to show cause returnable before this court at the next October term, with leave to both parties to take depositions for and against the rule.

Filed May 20, 1925.

EDWARD J. KELLEHER,
Clerk.

Rule to Show Cause filed June 11th, 1925. Affidavit in support averring sickness.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

GABRIELE GIORDANO, Plaintiff-appellant, vs. - ASBURY PARK AND OCEAN GROVE BANK, Body Corporate, Defendant-appellee,	ON APPEAL FROM JUDGMENT OF THE SUPREME COURT

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BRIEF OF DEFENDANT-APPELLEE.

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This is an appeal from a judgment of the Supreme Court dated December 5, 1925, and entered December 7, 1925, discharging the rule to show cause granted the plaintiff-appellant on June 12, 1925. This rule was directed to the defendant to show cause why the judgment of non-suit, by default, entered in the above action in the Circuit Court of the County of Monmouth on October 23, 1924, should not be opened.

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STATEMENT OF FACTS.

The plaintiff in the court below (the plaintiff-appellant here), brought suit against the defendant, Asbury Park and Ocean Grove Bank, Body Corporate of New Jersey, for alleged slander by reason of certain statements alleged to have been made by the President of the defendant, Asbury Park and Ocean Grove Bank. The cause being at issue and on the list for trial in the Monmouth Circuit, was reached

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on October 31, 1924, and, although the plaintiff had been in Court every day for sereval days prior to the 31st day of October, 1924, when the cause was called for trial on that day the plaintiff failed to appear and counsel for the defendant, Asbury Park and Ocean Grove Bank, moved for and was granted a judgment of non-suit by the trial court. The plaintiff below applied to the Supreme Court for a rule to show cause why this judgment of non-suit should not be opened and he be permitted to present his case. This rule to show cause was allowed on June 12, 1925, and came on to be heard in the October Term, 1925, of the Supreme Court.

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The plaintiff below, the prosecutor of the rule to show cause, failed to take any testimony or to take any other steps to perfect said rule or to substantiate his reasons for the opening of the judgment of non-suit entered by the trial Court. The rule to show cause came on for hearing on October 8, 1925, before Part III, of the Supreme Court, and the rule was discharged because of the failure of Giordano, the prosecutor, to prosecute said rule or to take any steps to perfect it. The Supreme Court was unable to consider the matter because it had no testimony or other proofs before it for consideration and, for that reason, the rule was discharged.

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ARGUMENT.

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The plaintiff-appellant, now appeals to this Honorable Court for a reversal of the judgment of the Supreme Court alleging that the Supreme Court erred in discharging his rule to show cause.

The application for a rule to show cause is always addressed to the discretionary powers of the Court, and when a rule to show cause is granted by the Court and then discharged for any reason whatsoever, the order discharging the rule cannot be the subject of appeal.

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In the case of Clark v. Swersky, 3 Misc. R., at page 433, the Supreme Court held that:

> "There can be no appeal from the order discharging the rule to show cause."

Assuming, however, that the order of the Supreme Court discharging the rule to show cause might be the subject of an appeal to this Honorable Court, then we submit that the judgment of the Supreme Court should not be reversed because an appellate court will not reverse a judgment upon points not taken or matters not raised in the Court in which the judgment was rendered. There being no evidence or proofs before the Supreme Court upon which that Court could consider the rule to show cause upon its merits, the Supreme Court had no alternative but to discharge the rule. The law seems to be well settled that a Court of review will not reverse a judgment upon points not taken or matters not raised in the Court below.

In the case of Trent Tile Co. v The Fort Dearborne National Bank, 54 N. J. L., page 579, this Court said:

> "The rule is well settled that, in an appellate court, the party shall not be heard upon a point not taken or a matter not raised and considered in the Court below."

In the case of Montclair v. Amend, 76 N. J. L., page 625, the Court said:

> "A Court of review will not reverse a judgment upon points not taken or matters not raised in the Court in which it was rendered."

In the Isaac v Ellis, 94 N. J. L., page 249, this Court said:

"A Court of review will not consider reasons for the direction of a verdict which were not presented to the trial Court as grounds for such direction."

For the foregoing reasons, the defendant-appellee respectfully submits that the judgment of the Supreme Court discharging the rule to show cause should be affirmed.

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DURAND, IVINS & CARTON,

Attorneys for Defendant-Appellee.

JAMES D. CARTON,

of Counsel.

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