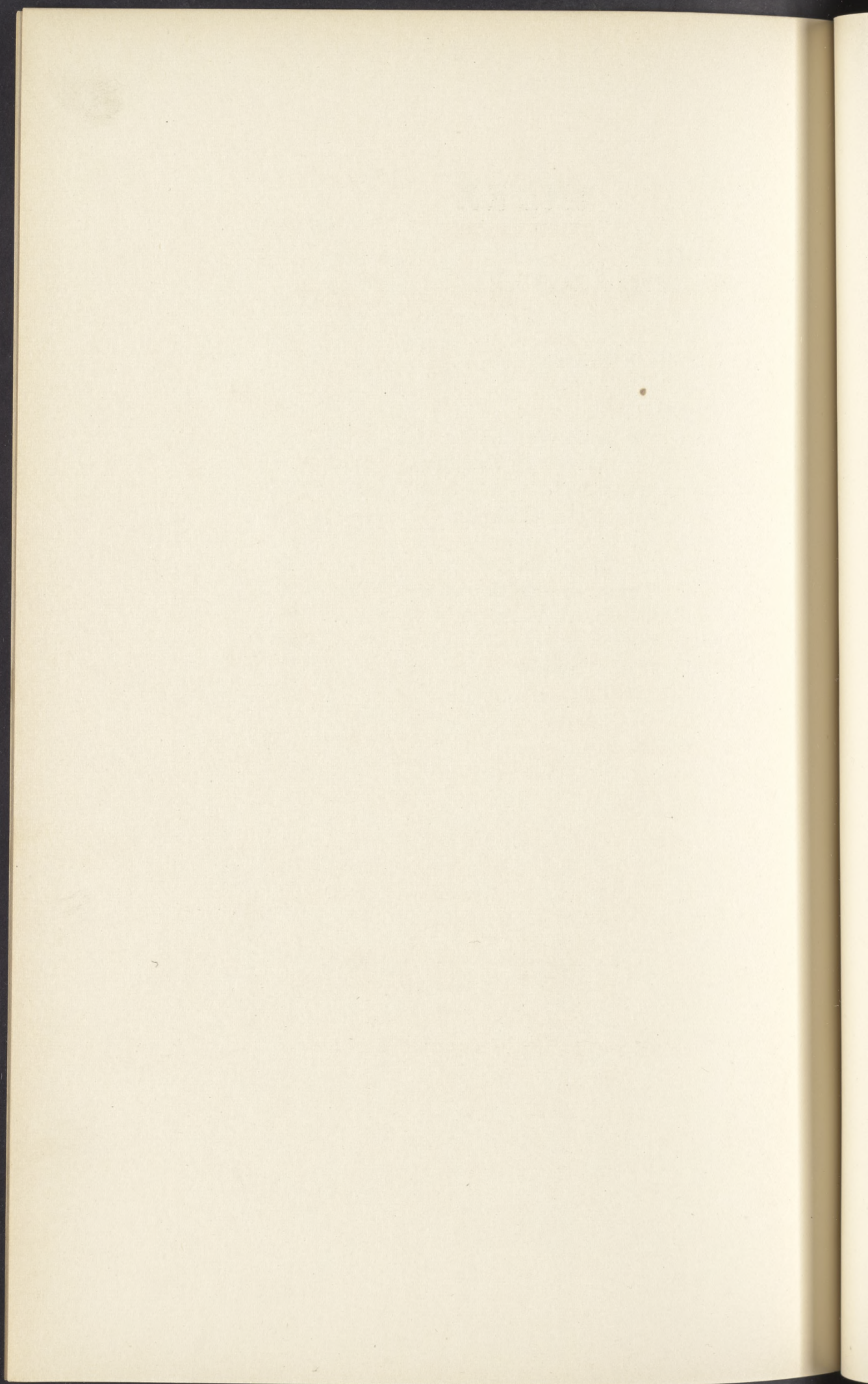


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Stipulation.

STIPULATION.

New Jersey Supreme Court

JOSEPH J. CORN, <i>Plaintiff-Appellant,</i>	}	<i>On Appeal.</i>	10
HARRY KAPLAN and OCEAN GARAGE, INC., <i>Defendants-Appellees.</i>			
<i>vs.</i>		<i>Stipulation.</i>	

It is hereby stipulated that the statement of the case on appeal of the above cause from the Essex County Circuit Court to the New Jersey Supreme Court shall consist of: 20

1. This stipulation.
2. Notice of appeal.
3. Complaint.
4. Answer.
5. Reply.
6. Judgment.
7. Transcript of stenographer's notes on return of rule to set aside judgment, including findings and decision of the Court. 30

CORN & SILVERMAN,
Attorneys for Plaintiff-Appellant.

MILTON M. UNGER,
Attorney for Defendants-Appellees.

*Notice and Grounds of Appeal.***NOTICE AND GROUNDS OF APPEAL.**

Filed July 2, 1924.

ESSEX COUNTY CIRCUIT COURT.

10 JOSEPH J. CORN,

*Plaintiff,**vs.*IKE LUSTBADER, HARRY MARGO-
LIES, HARRY KAPLAN and
OCEAN GARAGE, INC., a New
Jersey corporation,*Defendants.**Action at
Law.**Notice of
Appeal.*20 To Milton M. Unger, Esq., Attorney for Defend-
ants, Harry Kaplan and Ocean Garage, Inc.:

TAKE NOTICE, that the plaintiff appeals from the whole of the judgment entered in this cause against the plaintiff and in favor of defendants, Harry Kaplan and Ocean Garage, Inc., on the following grounds:

1. The Court, having directed the clerk to receive the verdict of the jury, the said clerk
30 (without plaintiff's consent) refused to receive the verdict first brought in by the jury.

2. After the jury had retired to deliberate and before it had rendered its final verdict, the clerk of the Court (without plaintiff's consent) did talk to the jury and give them instructions harmful to the plaintiff.

3. After the jury had retired to deliberate and before it had rendered its final verdict, the
40 clerk of the Court (without the direction of the

Notice and Grounds of Appeal.

Court and without plaintiff's consent) did give to the jury the pleadings in said cause.

4. The Court refused to set aside the verdict on the foregoing grounds.

CORN & SILVERMAN,
Attorneys of Plaintiff-Appellant. 10

Service of the within notice is hereby acknowledged this 2nd day of July, 1924.

MILTON M. UNGER,
Attorneys for Defendants,
Harry Kaplan and Ocean Garage, Inc.

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30

40

Complaint.

COMPLAINT.

Filed.

ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH J. CORN, <div style="text-align: right;"><i>Plaintiff,</i></div>	} <i>Action at Law. Complaint.</i>
	<div style="text-align: center;"><i>vs.</i></div>	
	IKE LUSTBADER, HARRY MARGO- LIS, HARRY KAPLAN and OCEAN GARAGE, INC., a New Jersey corporation, <div style="text-align: right;"><i>Defendants.</i></div>	

20 Plaintiff, residing in the City of Newark,
 County of Essex and State of New Jersey, says
 that:

1. Defendant, Ocean Garage, Inc., is a cor-
 poration created and existing under and by vir-
 tue of the laws of the State of New Jersey, and
 was incorporated on the 18th day of March,
 1920, under and pursuant to the terms and pro-
 visions of an act of the Legislature of the State
 of New Jersey, entitled, "An Act Concerning
 30 Corporations" (Revision of 1896), approved
 April 21, 1896, and the several acts amendatory
 thereof and supplemental thereto.

2. The authorized capital stock of said cor-
 poration is \$33,000.00, divided into 330 shares
 of a par value of \$100.00 each, all of which is
 common stock. The certificate of incorporation
 of said defendant corporation provided that the
 amount of capital stock with which it shall com-
 mence business was 330 shares, the total amount
 40 authorized.

Complaint.

3. Before the dates hereinafter mentioned said defendant corporation issued 330 shares of its capital stock and received in return cash or its equivalent to the amount of \$33,000.00.

4. Said defendant corporation has at no time decreased the amount of its capital stock nor the par value of its shares, in accordance with law and the act under which it was incorporated. 10

5. On December 16, 1920, one Bernard Schweitzer was the owner of part and in control of the remainder of the 330 shares of the capital stock authorized and issued by defendant corporation.

6. On that day said Bernard Schweitzer sold, assigned, transferred and set over one-half of said 330 shares (to wit, 165 shares) to defendants, Ike Lustbader, Harry Margolis and Harry Kaplan and plaintiff: said 165 shares to be divided in four equal parts amongst them. 20

7. Plaintiff thereby became the owner of and entitled to $41\frac{1}{4}$ shares of the capital stock of defendant corporation, and became entitled to have said $41\frac{1}{4}$ shares transferred on the books of said corporation in his name and a certificate for the said $41\frac{1}{4}$ shares issued by said corporation in his name. 30

8. On October 13, 1921, said Bernard Schweitzer and one Regina Blake were the owners of the remainder of 165 shares of the capital stock of defendant corporation.

9. On that day said Bernard Schweitzer and Regina Blake sold, assigned, transferred and set over said 165 shares to defendants, Ike Lustbader, Harry Margolis and Harry Kaplan and plaintiff. 40

Complaint.

10 10. Plaintiff thereby became the owner and entitled to an additional $41\frac{1}{4}$ shares of the capital stock of defendant corporation and became entitled to have said additional $41\frac{1}{4}$ shares transferred on the books of said corporation in his name and a certificate for said additional $41\frac{1}{4}$ shares issued by said corporation in his name.

11. Defendants, Ike Lustbader, Harry Margolis and Harry Kaplan, are stockholders, officers and directors of defendant corporation.

12. On September 13, 1922, defendants took and converted to their own use the said $82\frac{1}{2}$ shares of capital stock of defendant corporation belonging to plaintiff.

20 13. Since that date defendants have refused to transfer plaintiff's said stock on the books of defendant corporation and to issue to plaintiff a certificate for said stock, though frequently requested by plaintiff so to do.

30 14. On March 26, 1923, at Newark, New Jersey, plaintiff demanded in writing from defendants possession of his said stock and the transfer thereof on the books of defendant corporation.

15. Defendants did then and there refuse and still refuse so to do.

Plaintiff demands \$8,250.00 for the value of said stock and \$2,000.00 damages for its unlawful conversion.

CORN & SILVERMAN,
Attorneys for Plaintiff.

Complaint.

Due and legal service of within summons and complaint is hereby acknowledged this 28th day of March, 1923:

MILTON M. UNGER,
Atty. Def'ts, Ike Lustbader, Harry
Margolis, Harry Kaplan and Ocean
Garage, Inc.

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Answer of Defendants.

ANSWER OF DEFENDANTS.

Filed February 18, 1923.

ESSEX COUNTY CIRCUIT COURT.

10	JOSEPH J. CORN, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> IKE LUSTBADER, <i>et als.,</i> <div style="text-align: right; padding-right: 20px;"><i>Defendants.</i></div>	}	<i>Action at Law.</i> <i>Answer of Defendants.</i>
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20 The defendants, Ike Lustbader, Harry Margolis and Harry Kaplan, residing in the City of Newark, New Jersey, and Ocean Garage, Inc., a corporation of the State of New Jersey, having its principal office in the City of Newark, answering the complaint, say that:

1. They admit paragraph 1 of the complaint.
2. They admit paragraph 2 of the complaint.
3. They admit paragraph 3 of the complaint.
4. They admit paragraph 4 of the complaint.
5. They admit paragraph 5 of the complaint.
- 30 6. They deny paragraphs 6, 7, 8, 9 and 10 of the complaint.
7. They admit paragraph 11 of the complaint.
8. They deny paragraphs 12, 13, 14 and 15 of the complaint.

FIRST DEFENSE TO THE COMPLAINT.

- 40 1. On March 20, 1920, said Ocean Garage issued to Bernard Schwitzer certificate No. 1 for 110 shares of stock of said company.

Answer of Defendants.

On March 20, 1920, it issued to Henry Gallin certificate No. 2 for 110 shares of stock of said company. Said certificate was surrendered and cancelled on September 9, 1920.

On March 20, 1920, it issued to Morris Fisher certificate No. 3 for 110 shares of said company. Said certificate was surrendered and cancelled on September 9, 1920. 10

On September 9, 1920, it issued certificate No. 4 for 54 shares to Bernard Schwitzer. Said certificate was later surrendered and cancelled.

On September 9, 1920, it issued certificate No. 5 for one share to Joseph Schwitzer, which said certificate was later cancelled and surrendered.

On September 9, 1920, it issued certificate No. 6 for 165 shares to Abraham Gottfried, which said certificate was later, on September 9, 1920, surrendered and cancelled. 20

On September 6, 1920, it issued to Esther Gottfried certificate No. 7 for one share.

On September 9, 1920, it issued to Abraham Gottfried certificate No. 8 for 164 shares of stock.

On September 6, 1920, it issued to Bernard Schwitzer certificate No. 9 for 55 shares of stock 30

On December 20, 1920, all of the uncanceled and outstanding shares of stock were owned by said Bernard Schwitzer and Regina Blake and aggregated 330 shares. On said date an arrangement was entered into whereby the plaintiff and the individual defendants in the above cause did purchase the said 330 shares of stock, having a par value of \$33,000, for the sum of \$7,000, to be paid to the said Bernard Schwitzer 40

Answer of Defendants.

and Regina Blake in installments, commencing September 20, 1920, and ending on February 14, 1922.

At the time of the acquisition of said stock it was agreed by and between the individual parties to the above suit, constituting all the officers and directors of said corporation, that the said 330 shares of stock should be surrendered to the treasury of said corporation, and that instead and in lieu thereof there should be issued to the plaintiff and to the said Ike Lustbader, Harry Margolis and Harry Kaplan the shares in the following proportions: To Harry Kaplan, 42 shares; to Ike Lustbader, 41 shares; to Harry Margolis, 41 shares; to Joseph J. Corn, 41 shares. In token and in fulfilment of said agreement, the plaintiff, who was then acting as secretary of said corporation and did actually issue certificates in conformity with said agreement, which said certificates were then and there duly signed by Bernard Schwitzer, the president of said corporation, and the certificate of the said Harry Kaplan was duly signed and attested by the said Joseph J. Corn, as secretary thereof. The remaining three certificates remained in the stock certificate book of said corporation at its place of business from and since said time, awaiting the signature of the said Joseph J. Corn, who has neglected and refused to execute the same, although often required so to do.

SECOND DEFENSE TO THE COMPLAINT.

Prior to the institution of the above suit and on or about January 10, 1923, the said Joseph J. Corn did commence a suit in the Court of

Answer of Defendants.

Chancery of New Jersey against said defendant, Ocean Garage, in which said suit he claimed to be a creditor to the extent of \$2,125, and a stockholder owning 83 shares of the common capital stock thereof.

In the prayer of said bill, the said complainant asked for, among other things, the appointment of a receiver for said corporation, and the Chancellor of the State of New Jersey, to whom the bill was presented, did make an order requiring the defendant to show cause before said Chancellor why a receiver should not be appointed. At the hearing upon the return of said order the said bill of complaint was dismissed and the appointment of a receiver denied. At the hearing upon said rule the defendant, Ocean Garage, Inc., by its solicitor, did offer to immediately surrender and deliver to the complainant the certificate of the shares of stock so as aforesaid issued, and did call upon the said Joseph J. Corn to accept the same. The said offer was refused and the delivery of said certificate declined.

Defendants plead the adjudication in said Chancery suit as a bar to the maintenance of the above suit.

MILTON M. UNGER, 30
Attorney of Defendants.

*Reply.***REPLY**

Filed April 12, 1923.

ESSEX COUNTY CIRCUIT COURT.

10

JOSEPH J. CORN,

*Plaintiff,**vs.*

IKE LUSTBADER, HARRY MARGO-
LIS, HARRY KAPLAN and
OCEAN GARAGE, INC., a New
Jersey corporation,
Defendants.

*Action at
Law.**Reply.*

20 Plaintiff joins issue with defendants on de-
fendant's answer.

REPLY TO FIRST DEFENSE.

1. Plaintiff admits that "on December 20, 1920, all of the uncanceled and outstanding shares of stock were owned by said Bernard Schweitzer and Regina Blake, and aggregated 330 shares."

30 As to the matters contained in the first de-
fense preceding this sentence, plaintiff has not
sufficient knowledge or information whereof to
form a belief.

40 Plaintiff denies the remainder of the first de-
fense, except that he admits that he "was then
acting as secretary of the said corporation and
'which' said certificates were then and there
signed by Bernard Schweitzer, the president of
the said corporation, and the certificate of the
said Harry Kaplan was signed and attested by

Reply.

the said Joseph J. Corn as secretary thereof” and except that he has not sufficient knowledge or information whereof to form a belief concerning “the remaining three certificates remained in the stock certificate book of the said corporation at its place of business from and since the said time awaiting the signature of the said Joseph J. Corn.” 10

2. Plaintiff says that the four shares of stock mentioned in the first defense were drawn in accordance with the arrangement mentioned in paragraph 6 of the complaint.

REPLY TO SECOND DEFENSE.

1. Plaintiff denies that “At the hearing upon said rule, the defendant, Ocean Garage, Inc., by its solicitor, did offer to immediately surrender and deliver to the complainant the certificate of the shares of stock so as aforesaid issued, and did call upon the said Joseph J. Corn to accept the same. The said offer was refused and the delivery of said certificate declined.” 20

2. Plaintiff says that the adjudication in said Chancery suit is not a bar to the maintenance of his above suit.

3. Plaintiff objects that the second defense discloses no defense. The adjudication in said Chancery suit is not a bar to the maintenance of this suit and that neither the parties in the matters in dispute are the same or similar in point of law and that the Court of Chancery had no jurisdiction to pass on the issue raised in this suit. 30

CORN & SILVERMAN.

40

Judgment.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

10	34039 JOSEPH J. CORN, vs. IKE LUSTBADER, HARRY MARGO- LIS, HARRY KAPLAN and OCEAN GARAGE, INC., 	Plaintiff, Defendants.	} Action at Law on Non-suit.
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Judgment entered March 5, 1924.

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COSTS.

After verdict costs.....\$59.66

Stein, Stein & Hannoeh, attorneys of defendants:

30 Judgment on non-suit by order of the Court in the above-entitled action at law was rendered on the fifth day of March, A. D. nineteen hundred and twenty-four, in favor of the said defendants, Ike Lustbader and Harry Margolis, and against the said plaintiff, Joseph J. Corn, for the sum of costs of suit.

Judgment after verdict in the above-entitled action was rendered on the fifth day of March, A. D. nineteen hundred and twenty-four, in favor of the said defendants, Harry Kaplan and Ocean Garage, Inc., for and against the said plaintiff, Joseph J. Corn, for the sum of fifty-nine dollars and sixty-six cents costs of suit.

Judgment entered and signed March 5, 1924.

40

Book 98, Circuit Court Judgments, page 510.

Motion to Set Aside Verdict.

ESSEX COUNTY CIRCUIT COURT.

Friday, March 14, 1924.

JOSEPH J. CORN,

vs.

IKE LUSTBADER, HARRY MARGO-
LIES, HARRY KAPLAN and
OCEAN GARAGE, INC., a New
Jersey corporation,

10

For the plaintiff appears Charles B. Clancey.

For the defendants appear Herbert J. Hano-
noch.

Mr. Clancey: My motion is for a new trial on
the ground that the verdict as rendered—the
first verdict—should have been received by the
Court. The clerk had no authority to give in-
structions to the jury. The only person who
can do that is the judge of the Court.

20

The Court: So you think that if a jury comes
in court and wants to render something which
is not in fact a verdict at all that the clerk ought
to take it?

Mr. Clancey: I don't think it is up to the clerk
to decide whether the verdict is a proper verdict
or not. If this were a sealed verdict the clerk
would have had to accept it. He could not have
sent the jury back with any instructions.

30

The Court: You have told what occurred, but
I do not know anything about that. I certainly
cannot grant your motion because of just what
you have said to me. There seems to have been
a proper verdict.

40

Testimony of Anthony Gmeiner.

Mr. Clancey: I would like to call the clerk.

ANTHONY G. GMEINER, sworn.

By Mr. Clancey.

Q Mr. Gmeiner, you are the clerk of this
10 Court? A Yes, sir.

Q Do you remember the case of Joseph J.
Corn vs. Lustbader and others? A I do.

Q Do you remember the jury having come
in with a verdict in that matter? A Yes, I do.

Q And who was present when the jury came
in? A There were quite a number of persons
present when the verdict came in.

Q Was the judge here? A No, sir; I was.

Q What time of the day was it? A I think
20 it was five or five minutes after five, I think.

Q Do you remember what the verdict of the
jury was? A Yes. When they returned into
court I asked the jury if they had agreed upon
a verdict, and they said, "Yes," and I said, "Mr.
Foreman, how do you find?" And they said,
"We find for the plaintiff, and we vote one-
quarter of the 330 shares of the stock, duly
signed, and assign no money damages." I then
30 said, "If you find for the plaintiff you must
give me an amount." Then there were some
questions asked, and I said, "I am not here to
give you any instructions." I said, "You will
have to retire." And then I handed the fore-
man the pleadings in the case, and then they
retired, and sometime later they returned into
court with a verdict for the defendant.

Q Did they ask for the pleadings or did you
offer them? A They didn't ask for the plead-
40 ings.

*Decision of the Court.**By Mr. Hanooh.*

Q That is exactly what my young man said. He had a memorandum of it.

Mr. Clancey: That is exactly what Mr. Silverman said. I don't think there is any dispute as to what happened. It seems to me that the clerk acted without any authority, and I don't wish to reflect in any way on the clerk. He said that he was not here to give them instructions. I maintain that he had given them instructions. 10

The Court: (After argument.) My view is that the clerk did precisely what he ought to have done. The verdict offered by the jury was not a verdict at all. He couldn't accept it. The Court could not have accepted it if the Court had been here. No instructions were given to the jury except that he could not receive that verdict and that if it be a verdict in favor of the plaintiff they must indicate the amount stated in the pleadings. The jury returned and gave a verdict which in its practical effect was precisely the verdict they had offered and which the clerk had refused to receive. 20

It is very true that the clerk has no right to give instructions, but the clerk did nothing more than, in effect, to state to the jury that their verdict was not in proper form and that he could not receive it in that form. 30

Regarding this as a motion to set aside the verdict because of irregularity, the motion will be denied, but without prejudice to raise the same point upon appeal, if it 40

Decision of the Court.

is decided to appeal upon the evidence that has been introduced, and the return of the Court can be made precisely in accordance with the testimony given by Mr. Gmeiner.

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Notice of Argument and Motion.

NOTICE OF ARGUMENT AND MOTION.

Filed December 5, 1924.

NEW JERSEY SUPREME COURT.

JOSEPH J. CORN, <i>Plaintiff-Appellant,</i> <i>vs.</i> HARRY KAPLAN and OCEAN GARAGE, INC., a New Jersey corporation, <i>Defendants-Respondents.</i>	}	<i>Action at Law.</i> <i>On Appeal from Essex Circuit Court.</i> <i>Notice of Argument and Motion.</i>	10
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To Milton M. Unger, Attorney of Defendants-Respondents. 20

SIR:

PLEASE TAKE NOTICE that on the first Tuesday of January, A. D. nineteen hundred and twenty-five, at the State House, in Trenton, at ten o'clock in the forenoon or as soon thereafter as the Court can attend to the same, we shall move the argument on the objections to the State of the Case filed by you in this cause.

And please take further notice that at the time and place aforesaid, we shall move for an order dismissing the said objections filed by you on the ground that the State of the Case served upon you and filed in this Court, is in accordance with the stipulation entered into between you and us, and filed in this Court. 30

CORN & SILVERMAN,
Attorneys of Plaintiff-Appellant.

Notice of Argument and Motion.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Service of a copy of the within notice is hereby
10 acknowledged this 4th day of December, 1924.

MILTON M. UNGER,
Attorney of Defendants-Respondents.

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30

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Order.

ORDER.

NEW JERSEY SUPREME COURT.

JOSEPH J. CORN, <i>Plaintiff-Appellant,</i> <i>vs.</i> HARRY KAPLAN and OCEAN GA- RAGE, INC., a New Jersey cor- poration, <i>Defendants-Respondents.</i>	}	<i>Action at Law.</i>	10
		<i>On Appeal from Essex Circuit Court. Order.</i>	

This matter being opened to the Court by Corn & Silverman, attorneys for plaintiff-appellant, and Milton M. Unger, attorney for defendants-respondents consenting hereto: 20

It is, on this day of January, 1925, ORDERED that the objections to the state of the case filed in this cause, be, and the same are hereby dismissed.

Justice.

I hereby consent to the entry of the foregoing order. 30

MILTON M. UNGER,
Attorney for Defendants-Respondents.

Entered January 5, 1925, on motion of Corn & Silverman.

A true copy.

EDWARD J. KELLEHER,
Clerk.

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Opinion of Supreme Court.

OPINION.

Filed November 20, 1925.

No. 22. January Term.

NEW JERSEY SUPREME COURT.

10

JOSEPH J. CORN,
Plaintiff-Appellant,

vs.

HARRY KAPLAN and OCEAN GARAGE, INC., a New Jersey corporation,
Defendants-Respondents.

20

Submitted January 16, 1925.

Decided October 15, 1925.

On Appeal from the Essex County Circuit Court.

For the plaintiff-appellant; Corn & Silverman, Esqrs.

For the defendants-respondents; Milton M. Unger, Esq.

30

Before Gummere, Chief Justice, and Justices Parker and Katzenbach.

Per Curiam:

This is an appeal from a judgment of the Essex County Circuit Court. The judgment was entered upon a verdict of a jury. The question sought to be reviewed is the action of the clerk in refusing to accept a verdict rendered by the jury which resulted in the jury retiring for further consideration of the case after receiving

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Opinion of Supreme Court.

from the clerk the pleadings in the case. The record contains a stipulation to the effect that the record to be submitted to this Court shall contain only said stipulation, notice of appeal, complaint, answer, reply, judgment and transcript of the stenographer's notes on the return of a rule to show cause allowed by the trial judge to the defendant. 10

The action was instituted by Joseph J. Corn against Ike Lustbader, Harry Margolis, Harry Kaplin and the Ocean Garage, Inc., a New Jersey corporation. The three personal defendants and the plaintiff had caused to be incorporated the Ocean Garage, Inc. Its capital stock was \$33,000 divided into 330 shares of the par value of \$100 each. 165 shares were divided equally between the three personal defendants and the plaintiff. 165 shares went to Bernard Schwetzer and Regina Blake. These shares were later transferred to the three personal defendants. The plaintiff claiming that he was entitled to $41\frac{1}{4}$ shares of the 165 shares thus divided, demanded possession of said $41\frac{1}{4}$ shares of stock. This demand was refused. The present action for money damages was then instituted. The answer denied any refusal to give to the plaintiff the shares of stock claimed by him. The Trial Judge directed the clerk to receive the verdict. The jury returned. The clerk asked them if they had agreed upon a verdict. The foreman informed him that they had. Upon being asked by the clerk how they found, the foreman replied, "We find for the plaintiff and we vote $41\frac{1}{4}$ of the 330 shares of the stock, duly assigned, and assign no money damages." The clerk then said, "If you find for the plaintiff you must give him an amount." There were 40

Opinion of Supreme Court.

some questions asked and the clerk said, "I am not here to give you any instructions. You will have to retire. He then handed the foreman the pleadings in the case. The jury retired. Later they returned and rendered a verdict in favor of the defendant.

- 10 The Court had already directed that a verdict in favor of the defendants, Lustbader and Margolis, be entered. Counsel for the plaintiff made a motion for a new trial on the ground that the first verdict rendered should have been received by the clerk. The Trial Judge permitted the clerk to be sworn. He testified as above stated. The Trial Judge then said, "Regarding this as a motion to set aside the verdict because of irregularity, the motion will be denied, but without prejudice, to raise the same point upon appeal, if it is decided to appeal upon the evidence that has been introduced, and the return of the Court can be made precisely in accordance with the testimony given by Mr. Gmeiner." Mr. Gmeiner was the clerk.
- 20

- No exception to this ruling appears in the record. If it was a motion substantially in arrest of judgment there would have to be an exception taken to the ruling of the Trial Court on the motion before this Court could consider the question. This Court cannot decide a question on appeal to which no exception to the ruling of the Court below has been taken. It would appear from the stipulation entered into that this motion was now sought to be turned into a rule to set aside the judgment so as to bring it within the case recently decided of *Folkner vs. Hopkins*, 126 Atl. Rep. 633, not yet officially reported. If the proceedings in the Circuit Court amounted to a rule to show cause why a new
- 30
- 40

Opinion of Supreme Court.

trial should not be granted, the action of the judge was equivalent to discharging the rule. From this discretionary action of the Court no appeal will lie. The case of *Folkner vs. Hopkins* was upon a rule to show cause in a case instituted in this Court. The present action, as stated, was in the Circuit Court. We cannot consider the question raised, if it be an appeal, because of the lack of an exception. From the action of the Trial Judge in discharging the rule no appeal will lie for the reason stated. This leads us to an affirmance of the judgment of the Circuit Court.

The judgment is accordingly affirmed.

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*Rule for Affirmance and Remittitur.***RULE FOR AFFIRMANCE AND
REMITTITUR.**

NEW JERSEY SUPREME COURT.

10	JOSEPH J. CORN, <i>Plaintiff-Appellant,</i> <i>vs.</i>	}	<i>Action at Law.</i>
	IKE LUSTBADER, HARRY MAR- GOLIS, HARRY KAPLAN and OCEAN GARAGE, INC., a New Jersey corporation, <i>Defendants-Respondents.</i>		<i>Rule for Affirmance and Remittitur.</i>

20 This cause having been argued before our New Jersey Supreme Court at the January Term, 1925, upon an appeal taken by the plaintiff-appellant from a judgment entered in favor of the defendant-appellees in the Essex County Circuit Court, and the Court being satisfied that the judgment was in all things proper.

30 IT IS THEREFORE, on motion of Milton M. Unger, attorney for the defendant-appellees, adjudged that the judgment entered in the Essex County Circuit Court in favor of the defendant-appellee, Harry Kaplan, and against the plaintiff-appellant, Joseph J. Corn, be and the same is hereby affirmed, with costs in this court to be taxed by the clerk; and

IT IS FURTHER ORDERED that the record in this cause be remitted to the Essex County Circuit Court for further proceedings thereon, according to law and the practice of that court.

Entered December 12, 1925.

40 On motion of Milton M. Unger,
Attorney for Defendant-Appellee.

Notice of Appeal.

A true copy.

EDWARD J. KELLEHER,
Clerk.

NOTICE OF APPEAL.

10

Filed October 14, 1926.

NEW JERSEY SUPREME COURT.

JOSEPH J. CORN,
Plaintiff-Appellant,

vs.

HARRY KAPLAN and OCEAN GARAGE, INC., a New Jersey corporation,
Defendants-Respondents.

Action at Law.

On Appeal from the Supreme Court.

20

Notice of Appeal.

To Milton M. Unger, Esquire, attorney of defendants-respondents:

TAKE NOTICE that the plaintiff-appellant appeals to the Court of Errors and Appeals of New Jersey, from the whole of the judgment entered in this cause.

30

CORN & SILVERMAN,
Attorneys of Plaintiff-Appellant.

Dated at Newark, N. J., October 11, 1926.

Notice of Appeal.

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX. } ss.

I, JEROME WEIL, being duly sworn according to law on my oath depose and say that I am a clerk in the office of Corn & Silverman, attorneys of plaintiff-appellant; that on the 13th day of
 10 October, 1926, I served a copy of the within notice on Milton M. Unger, attorney of defendants-respondents, by handing to him the same, explaining to him the contents thereof and exhibiting to him the original thereof.

JEROME WEIL.

Sworn and subscribed to before
 me this 13th day of October, 1926.

20 JACOB FOX,
 A Master in Chancery of New Jersey.

30

40

Grounds of Appeal.

GROUNDS OF APPEAL.

**COURT OF ERRORS AND APPEALS OF
THE STATE OF NEW JERSEY.**

JOSEPH J. CORN, <i>Plaintiff-Appellant,</i> <i>vs.</i> HARRY KAPLAN and OCEAN GARAGE, INC., a New Jersey corporation, <i>Defendants-Respondents.</i>	}	<i>Action at Law.</i> <i>On Appeal from New Jersey Supreme Court.</i> <i>Grounds of Appeal.</i>	10
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Plaintiff-appellant appeals from the whole of the judgment entered in this cause on the following grounds: 20

1. That the Court erred in affirming the judgment entered in the Essex County Circuit Court.

2. Defendants-respondents were estopped from objecting that no exception to the ruling of the Essex County Circuit Court appears in the record, inasmuch as they served notice in the New Jersey Supreme Court of objections to the state of the case which objections were thereafter dismissed. 30

CORN & SILVERMAN,
Attorneys of Plaintiff-Appellant.

Endorsed:

“Filed Nov. 15, 1926,

JOSEPH F. S. FITZPATRICK,

Clerk.”

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Grounds of Appeal.

Service of the within grounds of appeal is hereby acknowledged this 13th day of November, 1926.

MILTON M. UNGER,
Attorney of Defendants-Respondents.

10 A true copy.

JOSEPH F. S. FITZPATRICK,
Clerk.

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*Substitution of Attorney.***SUBSTITUTION OF ATTORNEY.**COURT OF ERRORS AND APPEALS OF
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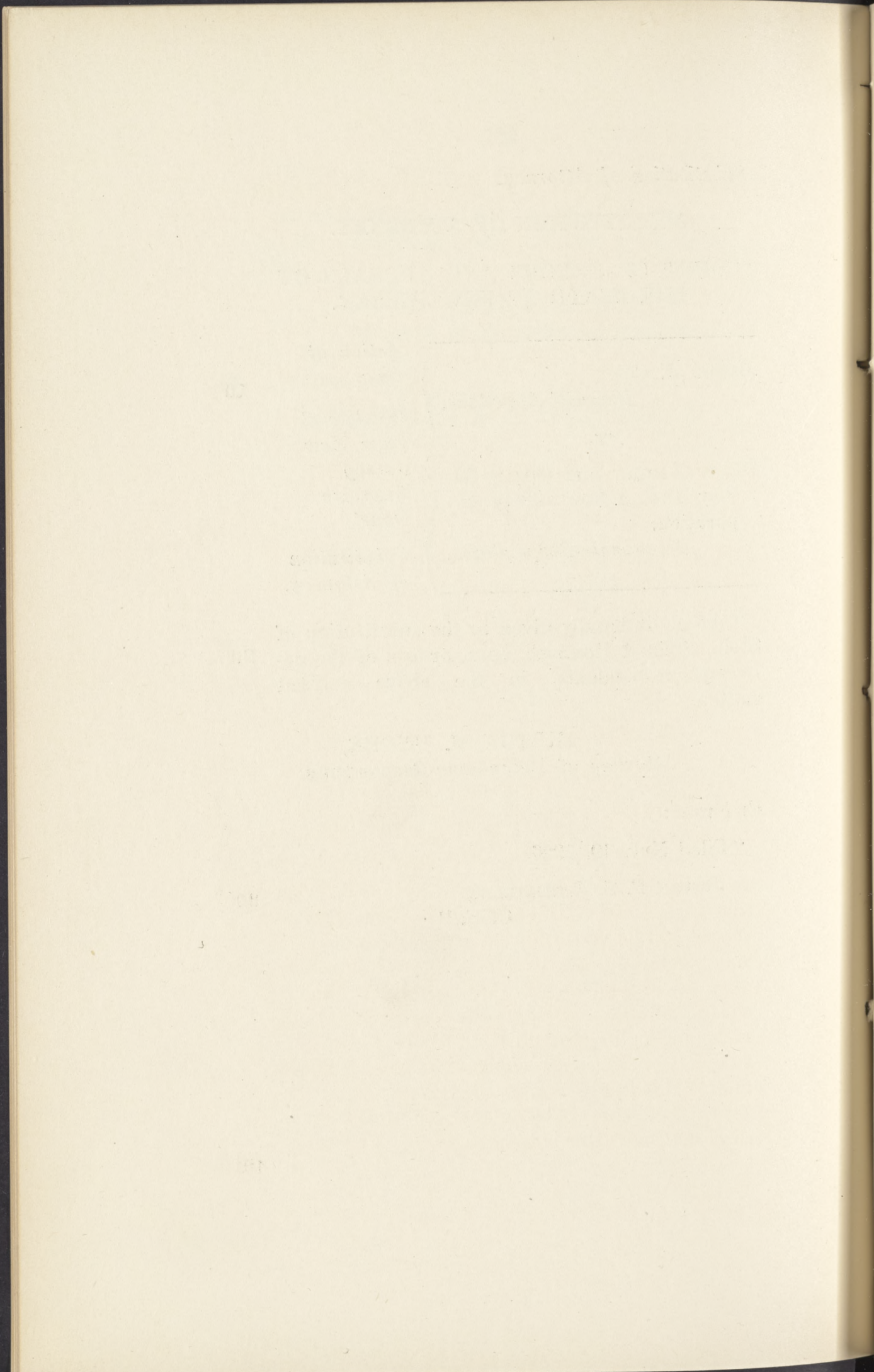
Consent is hereby given to the substitution of Stein, Stein & Hannoeh, as attorneys of the defendants-respondents, in the above entitled matter. 20

MILTON M. UNGER,
 Attorney of Defendants-Respondents.

Endorsed:

“Filed Nov. 19, 1926,

JOSEPH F. S. FITZPATRICK,
 Clerk.” 30



Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOSEPH J. CORN,
Plaintiff-Appellant,

vs.

HARRY KAPLAN and OCEAN
GARAGE, Inc.,
Defendants-Respondents.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

This action was for damages for the alleged conversion by defendants of one-fourth of 330 shares of stock claimed to be owned by plaintiff. The case was tried before the Essex Circuit Court, with a jury, on March 5, 1924. When the jury retired the Court directed the clerk to take the verdict and left the court room. The jury thereafter came in and rendered their verdict: "We find for the plaintiff, and we vote one-quarter of the 330 shares of stock, duly signed, and assign no money damages." The clerk refused to take the verdict, directed the jury again to retire and gave them the pleadings without request. Thereafter the jury brought in a verdict for defendants, which verdict the clerk accepted and on which the judgment appealed from was rendered. By stipulation, the state of the case on appeal to the Supreme Court was to consist of the complaint, answer, reply, judgment and transcript of stenographer's notes on return of rule to set aside judgment, including findings and decision of the Court. Appellees served notice of objections to the state of the case and thereafter consented to the entry of dis-

missal of objections. The Supreme Court affirmed the judgment.

ARGUMENT.

First Ground of Appeal.

The Court erred in affirming the judgment entered in the Essex Circuit Court.

The four grounds of appeal to the Supreme Court now follows as Points 1 to 4. As the Supreme Court's opinion touched only the absence of exceptions to the Trial Court's ruling, this is taken up in Point 5.

POINT I. The Court having directed the clerk to receive the verdict of the jury, the said clerk (without plaintiff's consent) refused to receive the verdict first brought in by the jury.

The reception of a verdict is a judicial act, which cannot be delegated to be exercised by an agent or deputy (Abbott on Trials, 3d edition, sec. 471).

Folkner v. Hopkins, 100 N. J. L. 189 (Sup. Ct., 1924). At common law a verdict could only be rendered in the presence of the court; that is, in the presence of the judge or judges before whom the trial was had.

Morris v. Harburger, 91 N. Y. Supp. 409 (1905). A judgment entered on a verdict received by the clerk, even under direction of the court and without objection of the parties being interposed to such reception, is void.

In this State this rule was modified by section 160 of the 1903 Practice Act:

The court may direct that the verdict be taken by the clerk in open court in the absence of the judge and may order that the court remain open for that purpose.

Powers conferred on clerks by statute are to be strictly construed and exercised in accordance with the statute conferring them (5 R. C. L. 625).

11 C. J. 890. In some jurisdictions clerks of court are, by statute or constitutional provision, vested with certain judicial or quasi judicial powers. Where this is the case the clerk's authority is strictly limited within the terms of the statute conferring it.

Moneyweight v. Friedman, 79 N. J. L. 214 (Sup. Ct. 1909). The only power to adjourn cases conferred upon the clerk is that contained in section 27 of the district court act, where, in the absence of the court, the court may exercise that power. This is an express grant of power, and therefore it must be assumed to be the legislative intent that the power thus conferred shall be confirmed to the particular contingency expressed in the act. The maxim, '*expressio unius est exclusio alterius*,' contains the doctrine of statutory construction applicable in such case.

Folkner v. Hopkins, *supra*. The power of the clerk (under sec. 160 of 1903 Practice Act) is strictly limited by the statute, and that is to take such verdict as the jury shall render, without regard to whether or not it is in accordance with the instructions delivered to that body by the court; without regard to whether or not the finding can be legally justified.

The second verdict in the instant case (on which the judgment appealed from is based) is a nullity, for the clerk should have taken the first verdict rendered by the jury, regardless of what such verdict may be.

Folkner v. Hopkins, *supra*. He cannot legally refuse to accept a verdict, but must "take" it as rendered.

Sokolowski v. Olkowski (not yet officially reported), 130 Atl. Rep. 514 (Sup. Ct. 1925) There is only one sound rule of conduct for

a clerk in a case where he is deputized to take a verdict and some complication has arisen; to receive the verdict as rendered, no matter how wrong it may appear, and let it go at that.

The clerk had no power or authority to send the jury back to find a verdict different from that first rendered, as that is the province of the court.

Davis v. Tallon (not yet officially reported, 103 Atl. Rep. 236 (E. & A. Ct. 1918)). The correction of a verdict upon which a judgment rests is the function of the trial court.

Sokolowski v. Olkowski, supra. It was the clerk's duty to take the verdict of the jury, but at common law only in the presence of the judge, or to put it in another way, in open court. One important reason for this is that if there be irregularity or inconsistency or other informity in the verdict, which is subject to correction, this may be done under the direction of the court itself as it frequently is done. If the judge was to mould the verdict, or send the jury back to correct it, he should have the jury before him in open court.

Had the clerk taken the first verdict, as he was by law bound to do, the Trial Court would have declared a mistrial.

Page 17, State of Case. By the Court: "The verdict offered by the jury was not a verdict at all. He (the clerk) couldn't accept it. The Court could not have accepted it if the Court had been here."

POINT II. After the jury had retired to deliberate and before it had rendered its final verdict, the clerk of the court (without plaintiff's consent) did talk to the jury and give them instructions harmful to the plaintiff.

After retirement, no person but the Court can lawfully speak to the jury, except for the attending officer to ask if they have agreed on a verdict and for the clerk to take the verdict.

Missiouri v. Moore, 47 Texas Civ. App. 531 (1907). After a case has been submitted to a jury, no one except the Court should give any further instructions or explanations.

In the instant case the clerk said to the jury (p. 16, State of Case), "If you find for the plaintiff you must give me an amount," and this is equivalent to giving instructions.

Hilliard on New Trials, 2nd edition, p. 255. Any decision or declaration of the court, upon the law of the case, made in the progress of the cause, and by which the jury are influenced and the counsel controlled, is considered within the scope and meaning of the term "instructions."

Sokolowski v. Olkowski, *supra*. The confusion that would result from clerks undertaking to instruct juries, and mould verdicts, need not be imagined.

Folkner v. Hopkins, *supra*. It is no concern of the clerk's, officially, whether the verdict can be upheld; or whether or not judgment can be entered upon it. If the verdict is informal in its phrasing, but is susceptible of being moulded by the court so as to conform to the issues raised by the pleadings, it is the function of the court to so deal with it.

That the words spoken by the clerk to the jury had an effect on the verdict, is apparent by comparison of the first and second verdicts brought in. If the difference between the two verdicts is

material, appellant has been harmed; if the difference is not material, the Trial Court would not have accepted the second verdict (for the first verdict would not have been accepted, as stated in above quotation from page 17 of State of Case) and no judgment would have been entered.

POINT III. After the jury had retired to deliberate and before it had rendered its final verdict, the clerk of the court (without the direction of the Court and without plaintiff's consent) did give to the jury the pleadings in said cause.

At common law the jury, on retirement, could have only writings under seal.

Wigmore on Evidence, 2nd edition, sec. 1913. It was formerly said that writings under seal, received in evidence or as part of the issue, could be taken by the jury for further perusal upon retirement into their room for deliberating upon their verdict, but that other writings could not be.

This rule has been modified in this State, by section 158 of the 1903 Practice Act:

Papers read in evidence, though not under seal, may be carried from the bar by the jury.

This, being in derogation of the common law, must be strictly construed and cannot, by implication, be extended to include pleadings among "papers read in evidence."

The practice of permitting the jury to carry the pleadings to the jury room has no legislative sanction in this State. In most jurisdictions, where the statutes do not expressly permit such practice, it is looked upon with disfavor by the courts.

Powley v. Swenson, 146 California 471;
Good v. Martin, 1 Colorado 171;
Walton v. Mays, (Idaho) 194 Pac. Rep. 354.

Bernier v. Illinois, (Illinois) 129 N. E. Rep. 747;
Mattson v. Minnesota, 98 Minnesota 296;
Blackmore v. Missouri, 162 Missouri 455;
Sweeney v. Darcy, 21 Montana 188;
Schroeder v. Lodge, 92 Nebraska 650;
Branthover v. Monarch, (North Dakota) 156 N. W. Rep. 529;
Reese v. Hershey, 163 Pennsylvania 253;
Harding v. Norwich, 10 South Dakota 64;
Nashville v. Anderson, 134 Tennessee 666;
Pulos v. Denver, 37 Utah 238.

At any rate, the jury must not have the pleadings without proper instructions from the Court as to their purpose.

Thompson on Trials, 2nd edition, sec. 2314. It is the duty of the court to determine what are the issues, and to state them to the jury and it is error to refer them to the pleadings to determine the issues, in whole or part.

Carroll v. Sweet, 57 N. Y. Super Ct. 100 (1889). For the court to submit pleadings to the jury without proper instruction is error.

In the present case the clerk gave the jury the pleadings, while the Court was absent.

Page 16, State of Case: By the Clerk: "And then I handed the foreman the pleadings in the case, and then they retired, and sometime later they returned into court with a verdict for the defendant. Q Did they ask for the pleadings or did you offer them? A They didn't ask for the pleadings."

A clerk of court is a ministerial officer (11 Cyc. 890).

Folkner v. Hopkins, supra. He is not vested by the statute with any judicial power, nor does the order of the court directing him to take the verdict attempt to confer such power upon him.

Sokolowski v. Olkowski, supra. The clerk of court is a ministerial, and not a judicial officer.

5. R. C. L. 626. The courts uniformly hold that the office of the clerk of a court of justice is ministerial, and that it includes no judicial authority except by constitutional or legislative provision.

The jury should not have had the pleadings under the circumstances in this case.

Rorer v. Rorer, 48 N. J. L. 50 (Sup. Ct. 1886). Bills of particulars, statement of claims and computations used on the trial for reference, although not received in evidence, may be taken to the jury room if so directed by the court, for such papers, like the pleadings in a cause, may be of material aid to the jury, provided, however, that the jury are told by the court and made to understand that such papers must not be regarded by them as evidence.

3 *Blackstone* 375. If the jury receive any fresh evidence in private, this will entirely vitiate the verdict.

Jessup v. Eldridge, 1 N. J. L. 401 (Sup. Ct. 1795), The judgment must be reversed, because it appears that this paper, although of little or no consequence, yet relating to the cause, was delivered to the jury after they had retired, and under a deception.

POINT IV. The Court refused to set aside the verdict on the foregoing grounds.

The judgment entered in this cause is a nullity for it is not based on any legal verdict. The first verdict was not taken by the clerk; this is the only verdict on which the judgment could have been entered, had the clerk received it. The act of the clerk in refusing to accept the first verdict created a mistrial.

The second verdict of the jury is no verdict at all. There was no Court in session to receive this verdict; whatever authority the clerk had in this case came to an end on his refusal to take the first verdict.

Aside from this consideration, a mistrial should have been declared because of the words spoken to the jury by the clerk. The only method by which this irregularity could have been cured was by proper instructions from the judge to disregard the clerk's statements. But the judge was absent.

And, thirdly, a mistrial should have been declared because the jury improperly had papers relating to the case.

POINT V. That no exception to the Trial Court's ruling appears in the record, is not a bar to this appeal.

The extent of the State of Case in this matter is set out by stipulation. It is evident much has been omitted: the evidence and exhibits at the trial, the rule to show cause. The object is fairly to present the question raised upon the appeal, as briefly as can be. In such cases it would seem that the appellees should not be permitted to take advantage of the assumption that because the record does not disclose an exception no exception was taken; but rather they should be required to bring to appellant's attention such omission, by having the failure to except noted in the record or in the stipulation, so that their adversary may have an opportunity to complete the record in that respect, if he can. If such be not the rule it is dangerous for an appellant, in any cause, to abridge the record for the judgment might be sustained on failure of the record

to show affirmatively some jurisdictional or other requirement which requirement may appear in the unabridged record.

No exception need appear in the record where (a) the error complained of is apparent on the record:

2 *Cyc.* 678. An exception to the general rule—that the appellate court will not consider objections first raised on appeal—exists in the case of errors apparent on the face of the record; these may be considered by the court though not objected to below.

Leaver v. Kilmer, (not officially reported) 59 Atl. Rep. 643 (E. & A. Ct. 1905). The alleged errors in the record are now relied on for reversal. Upon examination of the record it is clear that reversible error appears therein.

Coxe v. Field, 13 N. J. L. 215 (Sup. Ct. 1832). No notice will be taken of an alleged irregularity of the court below, unless established by the record.

Heinz v. Delaware, 90 N. J. L. 198 (E. & A. Ct. 1917). Where no points are reserved in a rule to show cause why a new trial shall not be granted, the appellant is barred from taking or prosecuting an appeal, except upon matters of law arising upon the face of the record.

Union v. Wilner, 98 N. J. L. 441 (E. & A. Ct. 1923). Where it appears from the record that the verdict and judgment are not within the issues raised by the pleadings, the judgment should be reversed even though exceptions are not shown to have been taken.

Margolies v. Goldberg, (not yet officially reported) 127 Atl. Rep. 271 (E. & A. Ct. 1925). The record includes the pleadings (declaration and plea) and judgment (postea and verdict).

(b) questions of jurisdiction; and (c) questions of public policy.

State v. Shupe, 88 N. J. L. 610 (E. & A. Ct. 1916);

McMichael v. Horay, 90 N. J. L. 142 (E. & A. Ct. 1917);

Kennedy v. Coon, 91 N. J. L. 100 (Sup. Ct. 1917);

State v. Snell, 96 N. J. L. 299 (E. & A. Ct. 1921);

Donohue v. Campbell, 98 N. J. L. 755 (E. & A. Ct. 1923);

Walter v. Keuthe, 98 N. J. L. 823 (E. & A. Ct. 1923);

Allen v. Paterson, 99 N. J. L. 489 (E. & A. Ct. 1924).

The errors complained of in this appeal fall into all three of the classes where exceptions are unnecessary. It is apparent on the record that the verdict on which the judgment in question was entered was erroneously taken and that the judgment is hence invalid. The Court had no jurisdiction to enter judgment for there was no valid verdict on which to found it. Public policy should require a judgment to be set aside which comes into being on the usurpation of judicial power and authority by a clerk.

Moneyweight v. Friedman, supra. Where a clerk of a district court, without authority, adjourned the case and a judgment was rendered on the adjourned date, the court was without jurisdiction to render the judgment.

Objections and exceptions to the Court's ruling need not be in any formal terms; it is sufficient if it appears to the Court and the successful party that the defeated party challenges the Court's ruling.

Associates v. Davison, 29 N. J. L. 415 (E. & A. Ct. 1860). Any bill to the charge of the

Court which shows on its face the precise decisions complained of, is sufficient.

Benz v. Central, 82 N. J. L. 197 (Sup. Ct. 1912). Common sense and common fairness alike require that if counsel notices a slip in judicial language or what he deems judicial error in the conduct of a trial, he should call the judge's attention to it at a time and in a manner conducive to its correction at the trial—The rule that requires that an exception be specific, and that counsel in asking for its allowance shall point out to the trial judge the error into which counsel think he has fallen, has for its prime object the correction of such error then and there.

2 R. C. L. 69. The form of an exception is immaterial, it being sufficient to show clearly that a particular ruling is excepted to.

Kargman v. Carlo, 85 N. J. L. 632 (E. & A. Ct. 1914). The rule is that no ruling relating to the reception or rejection of evidence will be reviewed, unless the record discloses that an objection to such ruling was duly made or such ruling otherwise challenged at the time of the ruling.

Appellant took exceptions to the entry of the judgment and the refusal of the Court to set aside the judgment. Of course he could not except to the verdict when entered, for no court was in session since the judge was not present (*Davis v. Delaware*, 41 N. J. L. 55). He however timely applied for a rule to set aside the judgment—the application for the rule and its argument before the trial judge in appellee's presence is the noting of an exception to the entry of the judgment. The language of the Court in rendering the decision (p. 17, State of Case)

“The motion will be denied, but without prejudice to raise the same point upon appeal, if it decided to appeal.”

amply shows that the Court's ruling was challenged then and there, and that the Court knew

appellant contemplated an appeal. It would have been a waste of time and a mockery formally to object and to pray an exception; it can hardly be required of counsel to object where to do so will be of no avail. If appellant is deemed to have excepted either to the entry of the judgment or the court's refusal to set aside, that is sufficient.

Kimble v. Kavanaugh, (not yet officially reported) 128 Atl. Rep. 259 (E. & A. Ct. 1925). An exception to some ruling of the Trial Court involving the question sought to be argued upon appeal is necessary to permit a question to be argued on appeal.

Sokolowski v. Olkowski, *supra*. That the attorneys did not object in the presence of the clerk (to his refusal to take the first verdict of the jury and to his taking of the second verdict) is of no consequence. Unless the judge was present there was no court except by statute for the taking of the verdict. Objection was made to the judge in due season. (In that case, the form of objection was an application and a motion to set aside, as in the present case.)

The taking of exception is not always essential to the prosecution of an appeal.

Renault v. N. Y. Life, (not yet officially reported) 2 N. J. Misc. Rep. 237 (Sup. Ct. 1924). When no exceptions are taken this court will not, as a usual thing, consider the propriety of the rulings. That we have the power to do so, must be conceded, under our decided cases.

McMichael v. Horay, *supra*. The true doctrine is that a Court of Appeals need not, not that it cannot, decide a question arising on a record before it, which was not raised in a court below, whether that court be an intermediate court of appeals, or a court of first instance.

Clark v. Public Service, 83 N. J. L. 319 (Sup. 1912). That no exception to the

charge was taken at the trial is no bar to the setting aside of the verdict upon a rule to show cause, if a rule of law injurious to the appellant has been erroneously charged to the jury upon an essential feature of the case.

The motion to set aside the judgment for irregularities was in effect a motion in arrest of judgment, for as hereinabove stated there was no legal verdict on which the judgment could be entered. The Court heard this motion and the testimony, without a jury. From refusal to arrest the judgment an appeal lies without taking any exceptions, by virtue of the 1916 (p. 109) amendment to section 25 of the 1912 Practice Act:

Where causes are submitted to the court to be heard without a jury, any error made by the court in giving final judgment in the cause shall be subject to change, modification or reversal without the grounds of objection having been specifically submitted to the court.

Pannonia v. West Side, 93 N. J. L. 377 (E. & A. Ct. 1919). P. L. 1916, p. 109 is constitutional, and permits a review of any errors of law residing in the findings of the trial judge, provided they shall be specified in grounds of appeal.

Smith v. Cruse, (not yet officially reported) 128 Atl. Rep. 379 (E. & A. Ct. 1925). (Construing P. L. 1916, p. 109). There is no requirement that the defeated party must have preferred a request for a finding of law or fact, or law and fact, and except to an adverse finding, in order to secure a review of the judgment; but an appeal is given to him, as a matter of right, although he did not submit the grounds of appeal to the trial judge.

When does and does not P. L. 1916, p. 109 apply? The evident intent of the act is that no

exception need be taken to rulings made by the Court while sitting without a jury, even though in the same case a jury had been previously or was thereafter drawn. There should be no different rule as to exceptions, for example on appeal from an order striking part of answer, depending on whether at the trial of the cause a jury was or was not called. And likewise on appeal from adverse ruling on motion after trial, counsel should not be required to take exception because the trial had taken place before a jury, and be relieved from taking exception if at the trial the Court sat without jury. It would seem that exceptions need now be taken only from rulings made by the Court between the impanelling and the verdict of the jury.

The rule requiring objections and exceptions as ground-work for appeal does not apply to denial of a motion addressed to the judgment (as in the instant case) or to any other decision of the Court (other than matters arising during the conduct of a trial with a jury); the argument for or against the rule apprises the Court of counsel's contentions, the filing of the appeal is the taking of the exceptions and the "grounds of appeal" specify the particular respects in which the Court's ruling is challenged. Ordinarily motions before and after (but not during) the trial are decided after argument of counsel upon notice, and the ruling is in the form of an order or rule, frequently entered some time after the ruling is made. Such rulings then become judgments, for they finally dispose of all or part of the direct or collateral issues raised by the pleadings.

No exception need be taken to the grant or refusal to grant of any motion made before or after the trial; the reported cases in this State in which

appeals were dismissed for lack of exception (except the instant case), concerned admission or rejection of evidence, the charge and requests to charge, remarks of counsel and like matters arising only during the actual trial. When such motion (not *ex parte*) is made there is an immediate objection by the opposing side to the grant and an immediate objection by the moving party to the refusal to grant; the specific objections are expressed in the argument of counsel for and against the motion and the defeated party unless he expressly consents must be said to except to the Court's ruling. If such be not the state of the law, counsel must necessarily file formal exception to every adverse ruling of the Court made before or after the trial in order to preserve appeal; appellant questions if such practice has been followed by the bar, if prior to 1916 exceptions were filed in the Supreme Court in all or most of the cases appealed from that Court to this Court, if the careful attorneys of this State have filed exceptions with the clerk of the trial court in such motions.

Pannonia v. West Side, supra. It was apparently, however, to remedy the situation created by the filing of the judge's findings in the clerk's office, whereby counsel and parties in given causes are first informed of the court's decision some time after it is made, they having had no previous opportunity to object, that the statute of 1916 (p. 109) was passed, so as to afford protection to, and an opportunity for a review of a decision by, defeated litigants. And while the successful litigant would still be informed by the opponent's attitude by the filing of objections to findings in the office of the clerk of the trial court, he is not now required to do so, and is as well informed, and in no wise harmed, by those objections being first made to appear in grounds of appeal, which have to be filed and served.

Second Ground of Appeal.

Defendants-respondents were estopped from objecting that no exception to the ruling of the Essex County Circuit Court appear in the record, inasmuch as they served notice in the New Jersey Supreme Court of objections to the State of the Case, which objections were thereafter dismissed.

The objections to the State of the Case were not filed by appellees and hence do not appear in the record. The notice of argument to dismiss the objections and the consent rule of dismissal appear on pages 19 to 21 of the State of the Case.

The State of the Case is fixed by the stipulation as to its contents; it does not show that exceptions were not taken, but is silent on that point.

Supreme Court Rule 141 provides that the State of the Case shall include the notice of appeal, the record of the case, and so much of the evidence taken and documents filed in the cause as shall be necessary to present the questions raised upon the appeal. The questions raised in this case are those four set out in the grounds of appeal. If appellees considered that a fifth question was raised, to wit, that the appeal could not be taken because no exceptions were noted at the trial, this should have been affirmatively presented by the record and the State of the Case amended accordingly if in fact no exceptions were noted on hearing of objections.

Appellees did object to the State of the Case and the objections were dismissed. The question of the absence of objections should not therefore have been raised upon this appeal. Where an ap-

peal is submitted by consent of the parties on an abridged record it should not be assumed that absence from the record of a technical phrase not going to the merits of the question is equivalent to such phrase being actually absent from the part of the record omitted.

The failure to take exceptions, in those cases where such failure may lead to dismissal of an appeal, is not a fatal defect. The Court will consider such failure only when taken advantage of by the appellee, and even then it may in its discretion reverse the judgment below without regard to such failure.

In this case dismissal of objections to the State of the Case should be resolved into a waiver by appellees of the failure to note exceptions on the record. This follows the reasoning under Supreme Court Rule 42 providing for every motion addressed to a pleading to present every cause of objection then existing, which rule is invoked to act as a waiver of every cause of objection then known or which should have been known and has not been presented by the motion.

CORN & SILVERMAN,
Attorneys for and of Counsel with
Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

JOSEPH J. CORN, <i>Plaintiff-Appellant,</i>	} <i>Action at Law.</i>
<i>vs.</i>	
HARRY KAPLAN and OCEAN GAR- AGE, INC., <i>Defendants-Respondents.</i>	} <i>On Appeal from Supreme Court.</i>

BRIEF OF RESPONDENT.

Statement of Issue.

This is an appeal from the judgment of the Supreme Court affirming the action of the Essex Circuit Court, which denied a new trial applied for by the plaintiff after a judgment had been rendered by a jury in favor of the defendant.

The complaint alleges that on December 16, 1920, and October 31, 1921, one Bernard Schweitzer and one Regina Blake, assigned their stock in the Ocean Garage, Inc., amounting to 330 shares in all, to the individual defendants and the plaintiff to be divided in equal parts amongst them and charges that the defendants converted the 82 $\frac{1}{4}$ shares of stock which were the plaintiff's share to their own use and refused to issue same to plaintiff.

The answer sets up that the above Bernard Schweitzer and Regina Blake owned all of the outstanding stock of the Ocean Garage, Inc., and that the three individual defendants and plaintiff agreed to purchase all the stock from them; that the four purchasers then agreed to surrender all the stock and to issue new stock in lieu thereof in the following proportions; to

Harry Kaplan, 42 shares; to Ike Lustbader, 41 shares; to Harry Margolis, 41 shares and to Joseph J. Corn, 41 shares.

The answer further states that Joseph J. Corn was the secretary of the corporation as thus reorganized and that he issued certificates in accordance with the agreement; that the president, Bernard Schweitzer, then signed all the certificates and that Joseph J. Corn, as secretary, signed and attested the certificate of Harry Kaplan, but that he neglected and refused to sign the remaining certificates which remained in the stock certificate book of the corporation at its place of business, awaiting the secretary's signature.

The answer further discloses that on January 10, 1923, the plaintiff instituted proceedings in the Court of Chancery against the Ocean Garage, Inc., seeking an adjudication of insolvency and the appointment of a receiver; that *in his bill the plaintiff alleged he was a stockholder of the company*; that the application was contested and, after hearing, the bill was dismissed; and that at this hearing *the defendant, Ocean Garage, Inc., by its solicitor, offered to deliver to this plaintiff his certificate of stock already issued and awaiting only his signature as secretary, but the plaintiff refused to accept it.*

Plaintiff's reply admits that he "was then acting as secretary," states that he has no knowledge as to the disposition of the stock certificates in the stock certificate book and denies that at the hearing the stock had been offered to him and refused by him.

Defendant's position, thus disclosed in the pleadings, is that the plaintiff's certificate of stock remained in the stock certificate book

awaiting only the plaintiff's signature as secretary, and that they had offered plaintiff his stock and plaintiff refused to take it.

At the trial the plaintiff was non-suited as to the defendants, Lustbader and Margolis (State of the Case, p. 14, l. 24).

The case was submitted to the jury and the jury returned with a verdict in the following words (p. 16, l. 26):

“We find for the plaintiff and we vote one-fourth of the 330 shares of stock duly signed, and assign no money damages.”

What transpired upon the receipt of this verdict appears in the testimony taken before the Court upon the return of a rule why a new trial should not be granted. It is as follows:

The Clerk of the Court was called to the stand and was asked (p. 16, l. 21):

“Do you remember what the verdict of the jury was? A Yes. When they returned into court I asked the jury if they had agreed upon a verdict, and they said, ‘Yes,’ and I said, ‘Mr. Foreman, how do you find?’ And they said, ‘We find for the plaintiff, and we vote one-quarter of the 330 shares of the stock, duly assigned, and assign no money damages.’ I then said, ‘If you find for the plaintiff you must give me an amount.’ Then there were some questions asked, and I said, ‘I am not here to give you any instructions.’ I said, ‘You will have to retire.’ And then I handed the foreman the pleadings in the case, and then they retired, and sometime later they returned into court with a verdict for the defendant.”

Thereupon an application was made for a new trial alleging that this conduct of the clerk was error.

Argument was thereupon heard, and the Court dismissed the application, concluding that the first and second verdicts were identical verdicts, and denying the application for the new trial. From this action an appeal was taken to the Supreme Court, which affirmed the judgment.

POINT I.

The error, if any, is not ground for reversal.

A. An Application for a new trial is directed to the discretion of the trial court and is not appealable.

The Supreme Court said (p. 24) if the proceedings in the Circuit Court amounted to a rule to show cause why a new trial should not be taken, the action of the Court was equivalent to discharging the rule. Upon this discretionary action of the Court, no appeal will lie.

It is well settled that the granting or refusing of a new trial rests entirely in the discretion of the trial court and is not appealable.

Jaffney v. Illingsworth, 90 N. J. L. 49 (Appeals 1917);

Blum v. Parsons Mfg. Co., 95 N. J. L. 471 (Appeals 1921);

Hickman v. Powell, 99 N. J. L. 274 (Appeals 1924);

Pariser v. Pasteelnick, 112 Atl. 187.

In the *Pariser* case above cited, the Court also pointed out that an appeal would not lie from a refusal of the *Circuit* Court to grant a new trial, because the power of the *Circuit* Court to finally determine whether or not a new trial should be granted, is one of its Constitutional prerogatives not to be interfered with, even

by a legislative enactment. The Court (at p. 188), quoting from the *Central Railroad v. Tunison*, 55 N. J. L. 561, said:

“The Circuit Courts are constitutional courts. These courts have always exercised as an important branch of their jurisdiction, the right to decide *finally*, and *without review*, whether a new trial shall be granted, and that right cannot be taken from them without substantially and materially impairing their powers. Its right to dispose finally of a rule to show cause why a new trial should not be granted, has always existed and been recognized since its formation and is beyond reach of hostile legislation.”

For this reason the order is not appealable. *All questions reserved have been argued, and hence can not be the subject matter of an appeal.*

“No appeal can be taken from a final judgment after the granting of a rule to show cause, unless exceptions are reserved in the rule.”

Hickman v. Powell (supra).

Furthermore even if the exceptions are reserved, they must be regarded as having been abandoned as reasons for appeal, if argued in the application for the new trial.

The Court, in *Goekel v. Erie Railroad, supra*, states the rule to be (p. 281) as follows:

“The Supreme Court in its *per curiam* opinion properly held that the reserved exceptions were all covered in the reasons filed for a new trial under the rule to show cause, and that that was dispositive of the case on appeal, under *Farragasso v. Introcasso*, 98 N. J. L. 583, which holds that the Supreme Court cannot hear and determine the validity of exceptions reserved, if they have been considered and determined by the trial court on a rule to show cause why a verdict should

not be set aside and the judgment was therefor affirmed.”

At p. 287, in the opinion of the above case, the Court adds:

“The broad principle is, that whatever question—whether one residing in the strict record or in reserved exceptions taken on the trial—which is made a reason for setting aside the verdict, becomes definitely settled by the decision on the rule in the trial court, and cannot afterwards be made the subject of review on appeal.”

But it is argued by the appellant that the trial court in denying the application, stated (p. 17):

“* * * the motion will be denied but without prejudice, to raise the same point upon appeal if it be decided to appeal on the evidence that has been introduced.* * *”

We respectfully submit that this reservation is of no effect and cannot vary the rule above laid down.

A somewhat similar situation arose in the case of *Hemmindinger v. McGann Co.*, 98 N. J. L. 265 (Appeals 1922). In that case, a rule to show cause why a verdict should not be set aside was granted without reservations of exceptions, and was then argued. After argument, the Court discharged the rule and then, by its order, undertook to “grant and restore to the defendant the right to review by proper appeal.”

This Court held that the trial court was without power to restore the right of appeal. This Court stated:

“We think that no power exists in the court, when a party having the option of accepting a rule to show cause without reservation, or of abandoning his application for the rule, and relying upon his exceptions sees fit to take the rule, and thereby waive his right to appeal, the trial court cannot,

whether of its own volition, or on the application of the parties, inject into the rule after argument thereon, a reservation of exceptions which the party himself has deliberately waived. To do so, is, in legal effect, to attempt to over-ride the standing rule of the Court, and this, of course, the Court below cannot do."

Accordingly, we respectfully submit that this appeal should be dismissed because, first, the denial of the motion to set aside the verdict and grant a new trial is discretionary and not appealable; second, that there is no right of appeal from the denial by the Circuit Court of an application for a new trial, and third, appellant has elected to argue in the application for the new trial the points reserved, and having so elected, cannot again present the same grounds as grounds of appeal.

POINT II.

There was no reversible error in the conduct of the clerk.

Section 27 of the Practice Act, reads as follows:

"No judgment shall be reserved, or new trial granted on the ground of misdirection, or improper admission or exclusion of evidence, *or for error as to matters of pleading or procedure*, unless, after examination of the whole case, it shall appear that the error injuriously affected the rights of a party."

It is submitted that this plaintiff has had a fair trial on the merits of the case. It is attempted to upset the verdict upon what must be considered as a technicality. There is no question as to what the jury meant. It is uncontroversial that the verdicts rendered are identical, in substance and effect. The first verdict was

that the plaintiff had suffered no money damage, but that the defendant should deliver him his stock. This was exactly the defendant's position throughout the trial. The defendant had always contended that the stock had not been converted, and that the plaintiff had not been damaged.

The second verdict, being a general verdict for the defendant, also meant that the plaintiff had not suffered any damage, and that the defendant had not converted his stock and naturally, if the defendant had not converted his stock, the plaintiff was still the owner thereof.

The Court said, after hearing the clerk's testimony as to what transpired:

"The jury returned and gave a verdict which in its broad effect was precisely the verdict they had offered and which the clerk refused to receive."

The verdict for the defendant as entered must be regarded as a verdict moulded by the Court.

In the recent case of *Folkner v. Hopkins*, 100 N. J. L. 189, Chief Justice Gummere stated that if the verdict rendered by the jury is informal in its phrasing, but is susceptible of being moulded by the Court so as to conform to the issues raised by the pleadings, it is the function of the Court to so deal with it.

The Court has indicated, and it is clear, that the two verdicts which were brought in are exactly the same in effect. Herein lies the distinction between the present case and the two cases, somewhat similar, relied upon by appellant as the basis for reversal.

In *Folkner v. Hopkins, supra*, the verdict, as a result of the clerk's conduct and instructions, was increased from \$1,000.00 to \$2,500.00. This

prejudicial change is directly attributable to the clerk, and therefore a reversal was proper.

Similarly in *Sockowlowski v. Olkowski*, 130 Atl. 514, the verdict was increased from \$213.00 to \$426.00, also as the result of the clerk's instructions.

In the instant case, however, the jury did not render two conflicting verdicts, but two consistent verdicts.

Furthermore, they are capable of being moulded to suit the facts, and the Court has so moulded them.

Appellant was, therefore, in no way prejudiced or harmed by the change in the form of a verdict.

We, therefore, respectfully submit that the appeal should be dismissed and the judgment affirmed.

STEIN, McGLYNN & HANNOCH,
Attorneys for Respondent.

HERBERT J. HANNOCH,
Of Counsel.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOSEPH J. CORN,
Plaintiff-Appellant,

vs.

HARRY KAPLAN AND OCEAN GAR-
AGE, INC.,
Defendants-Respondents.

*Action at
Law.*

*On Appeal
from Su-
preme Court.*

BRIEF OF RESPONDENT.

Statement of Issue.

This is an appeal from the judgment of the Supreme Court affirming the action of the Essex Circuit Court, which denied a new trial applied for by the plaintiff after a judgment had been rendered by a jury in favor of the defendant.

Facts.

The plaintiff and defendant, Kaplan, are members of the bar, practicing at Newark, New Jersey. At one time, they were partners, occupying offices at 116 Market street, in that city. On March 18, 1920, Corn, Kaplan and the remaining defendants incorporated the Ocean Garage, Inc., its object being to conduct a garage at Bradley Beach, New Jersey. The issuance of 165 shares of stock was authorized as follows:

Corn	41 shares
Kaplan	42 "
Margolis	41 "
Lustbader	41 "

Corn was secretary of the company. Its by-laws provided that the shares of stock must be

signed by him and the president. It appears that his certificate of stock was signed by the president but not by him and he allowed them to remain with the books and other records of the Company in the law firm's office. *The certificate was not endorsed by the plaintiff.*

On October 3, 1922, the plaintiff and defendant suddenly dissolved their co-partnership, and the plaintiff was ejected from the offices which he had occupied with the defendant, and with the remaining defendants who operated a loan office therein. The books of the garage company remained in the old offices, and included among them, were the plaintiff's certificate of stock. These books were not discovered by the defendants until sometime after the plaintiff had vacated the office, and then they were found in the back of one of the desks.

A short time after the severance of the partnership relationship, plaintiff had a conference with some of the defendants relating to his ownership in the stock in the garage and stated that he desired some protection as to his holdings, so that the remaining defendants would not deprive him of voice in the management of the business. A suggestion was made that a voting trust be created and Milton M. Unger, Esquire, a member of the Bar, was selected by all of the parties to prepare an agreement and designate himself as the voting trustee. *At the time Mr. Unger was requested to prepare the agreement, all of the books of the corporation, including the certificates, of stock of the stockholders were delivered to him.*

While this agreement was in the course of preparation, the plaintiff decided not to enter into the same.

On January 10, 1923, the plaintiff instituted proceedings in Chancery of New Jersey seeking an adjudication of insolvency and the appointment of a statutory receiver. *In the bill, plaintiff alleged he was a stockholder of the Company.* The application was contested, and after hearing and argument, the bill was dismissed. At the time of the argument, plaintiff's certificate of stock, still unsigned by him as secretary and still unendorsed by him, was in the possession of Mr. Unger, who was present at the hearing. At the conclusion of the hearing, Mr. Unger offered the certificate of stock to the plaintiff's solicitor in the Chancery suit in the presence of the plaintiff, but it was refused. A short time later, Mr. Unger again offered the plaintiff his certificate, but it was refused.

Thereafter, the plaintiff brought the within action, seeking to recover damages for conversion of stock.

Defendants contended throughout the trial, that they had always offered to deliver the stock to the plaintiff and were still ready to deliver it to him, and argued from the evidence, that no conversion had taken place, but that if any conversion had taken place, it was a conversion simply of the actual *paper certificate* entitling the plaintiff at the most to nominal damages, because the certificate, not being either properly executed, nor endorsed, was of no value to anyone.

A non-suit was granted as to the defendants, Lustbader and Margolis.

The case was submitted to the jury, and the jury returned bringing in a verdict in the following words (S., p. 14):

“We find for the plaintiff and we vote one-fourth of the 330 shares of stock duly signed, and assign no money damages.”

What transpired upon the receipt of this verdict appears in the testimony taken before the Court upon the return of a rule why a new trial should not be granted. It is as follows:

The Clerk of the Court was called to the stand and was asked (p. 16, l. 21):

“Do you remember what the verdict of the jury was? A Yes. When they returned into court I asked the jury if they had agreed upon a verdict, and they said, ‘Yes,’ and I said, ‘Mr. Foreman, how do you find?’ And they said, ‘We find for the plaintiff, and we vote one-quarter of the 330 shares of the stock, duly assigned, and assign no money damages.’ I then said, ‘If you find for the plaintiff you must give me an amount.’ Then there were some questions asked, and I said, ‘I am not here to give you any instructions.’ I said ‘You will have to retire.’ And then I handed the foreman the pleadings in the case, and then they retired, and sometime later they returned into court with a verdict for the defendant.”

Thereupon an application was made for a new trial alleging that this claim of the clerk was error.

Argument was thereupon heard, and the Court dismissed the application, concluding that the first and second verdicts were identical verdicts, and denying the application for the new trial. From this action an appeal was taken to the Supreme Court, which affirmed the judgment.

POINT I.

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In the Pariser case above cited, the Court also pointed out that an appeal would not lie from a refusal of the Circuit Court to grant a new trial, because the power of the Circuit Court to finally determine whether or not a new trial should be granted, is one of its Constitutional prerogatives not to be interfered with, even by a legislative enactment. The Court (at p. 188), quoting from the *Central Railroad v. Tunison*, 55 N. J. L. 561, said:

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