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TESTIMONY.

For Plaintiff.

NOTICE AND GROUNDS OF APPEAL.

Filed June 9, 1927.

New Jersey Supreme Court

HARRY J. TEETS, *Plaintiff-Appellant,* *vs.* PERCY E. HAHN, *Defendant-Respondent.*	*On Appeal from the Plainfield District Court.* *Notice of Appeal from the Supreme Court and Grounds of Appeal.*

To Mr. William K. Flanagan, Kinney Building, Newark, New Jersey, attorney of respondent.

TAKE NOTICE, that the appellant, Harry J. Teets, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the judgment entered in this cause on the following ground:

That the Supreme Court erroneously affirmed a judgment of the District Court of the City of Plainfield directed to be entered for six cents as the damages of the plaintiff.

E. A. MERRILL,
Attorney of Appellant.

STATE OF DEMAND.

Filed February 7, 1927.

IN THE DISTRICT COURT OF THE CITY OF PLAINFIELD.

HARRY J. TEETS, *Plaintiff,*

vs.

PERCY E. HAHN, *Defendant.*

Action at Law.

State of Demand.

The plaintiff, Harry J. Teets, residing at #31 Grove street, in the Township of Cranford, County of Union and State of New Jersey, says that: ,

1. This plaintiff is the father of Mary J. Teets, an infant about the age of nineteen years; said infant resides with this plaintiff and as her father he is entitled to the services and earnings of said infant, Mary J. Teets, until she arrives at the age of twenty-one years.

2. On November 24, 1926, plaintiff was the owner of a Cleveland Six open touring car.

3. On November 24, 1926, Mary J. Teets, the infant daughter of this plaintiff, was driving and operating said car and proceeding in a westerly direction on the right-hand side of East First avenue, in the Borough of Roselle.

4. On said 24th day of November, 1926, said defendant was the owner of a certain automobile truck or delivery wagon and was operating same through his agent and servant, and said truck

was proceeding in an easterly direction on and along East First avenue, in the Borough of Roselle. While operating said automobile truck or delivery wagon it was the duty of said defendant, by his agent or servant, to operate same with reasonable and proper care and caution and in such manner as to avoid running into and injuring persons driving vehicles along said highway without negligence on their part.

5. Defendant, by his agent or servant, disregarding his duty as aforesaid, did on November 24, 1926, so carelessly and negligently run and operate said automobile truck or delivery wagon along said highway and on the wrong side of the road that as a direct and proximate cause of said carelessness and negligence said automobile truck or delivery wagon was with great force and violence driven against the automobile of this plaintiff, then and there operated by his infant daughter, Mary J. Teets.

6. As a result of the carelessness and negligence of this defendant, by his agent or servant, the automobile of this plaintiff was violently struck by said automobile truck or delivery wagon of the defendant and seriously injured and damaged, and the said Mary J. Teets was violently thrown through the right-hand door of said automobile, striking on her back and the back of her head in the highway, to her serious injury.

7. Owing to defendant's said negligence plaintiff was subjected to great loss due to the damage to his automobile and was subjected to a further loss due to the inability of his daughter, Mary J. Teets, to continue in her occupation as an employee of the Prudential Insurance Com-

pany of America, and was also put to great expense in procuring medical attendance for his said daughter.

Wherefore, by reason of the defendant's said negligence, plaintiff has sustained damages in the sum of $500.00, which he demands of said defendant.

E. A. MERRILL,
Attorney of Plaintiff.

TESTIMONY.

DISTRICT COURT OF THE CITY OF PLAINFIELD.

HARRY J. TEETS, *Plaintiff*,
vs.
PERCY E. HAHN, *Defendant*.
Action at Law.

March 25, 1927.

Before Hon. John R. Connolly, Judge, and a jury.

Appearances:

Earle A. Merrill, Esq., for the plaintiff.

William K. Flanagan, Esq., for the defendant.

(H. Richard Woebse, stenographer, sworn.)

(A jury was duly empaneled and sworn.)

Mr. Flanagan: Mr. Merrill, I would like to say before you open, if your Honor please, that for the purpose of this trial the defendant will admit liability. I say this so we can narrow the question down solely to the damages.

HARRY J. TEETS, one of the plaintiffs, called as a witness in his own behalf, being duly sworn, testifies as follows:

Direct examination by Mr. Merrill.

Q What is your occupation, Mr. Teets? A. Carpenter and builder.

Q You are one of the plaintiffs in this action? A Yes, sir.

Q Were you the owner of the car which your daughter was driving at the time of the collision? A Yes, sir.

Q What kind of a car was it? A Cleveland Six touring.

Q Of what model? A 1920.

Q Was that the year? A Yes.

Q I would like to have you think that over and make sure. A 1922.

Q And when did you buy the car? A At the same time.

Q Was it then new? A Yes, sir.

Q What did you pay for it? A $1,590.

Q Was that paid on the installment plan?

Mr. Flanagan: I object. How are we interested in that?

The Court: I sustain the objection.

Q In what condition was the car prior to the collision? A The car was in first-class condition. It needed new paint; it looked rough. Outside of that it was in first-class running condition.

Q Has the car been repaired since the accident? A It has not.

Q What is its present condition? A It isn't worth anything.

Q What damage was done to the car by the collision? A The left-hand side of the car was smashed in near the cowl, which includes the front axle, which was bent; the left side and the steering shaft was bent, and the gears were bent; the steering post, where the wheel is fast to, and the radiator was burst loose by the impact pulling it around.

Mr. Flanagan: I ask that the latter be stricken out as a conclusion of the witness.

The Court: All right. Strike it out.

Q What expenditures have you made, if any, since the collision with reference to the car? A I haven't made any on the car.

Q Where is the car now? A Down at the Roslyn Garage at Roselle.

Q Did you pay for having it hauled in? A Yes.

Q How much did you pay? A Five dollars.

Q What was the car worth before the collision?

Mr. Flanagan: Objected to, because this man has not been qualified to testify to any such question. That is expert testimony.

(Argument.)

The Court: I cannot allow the question.

Q You used this car in connection with your work? A Yes, sir.

Q Had you had any trouble with it? A No, sir.

Q It did your work all right? A Yes, sir.

Q Have you replaced the car? A No, sir.

Q Why not?

Mr. Flanagan: I object to that as immaterial, his motive for not replacing the car.

The Court: I don't see the materiality of that question.

Q Did you make any repairs on the car?

Mr. Flanagan: He said "No."

Harry J. Teets, direct.

Q Was that because of your belief that the car is worthless?

Mr. Flanagan: I object to that as immaterial.

By the Court.

Q Has the car been repaired?

Mr. Flanagan: No. He said "No" a long while ago.

The Court: Then the measure of damages will be the difference in the value of the car before and after; that is all.

By Mr. Merrill.

Q Did you have any photographs taken of the car? A Yes, sir.

Q I ask you if these photographs (handing photographs to witness) show the car in the condition it was immediately after collision? A They do.

Q At the time that these photographs were taken had anything been done in the way of repairing the car or changing its condition? A Not one thing.

Q The photographs were taken under your instruction? A Yes.

By the Court.

Q Did you take these photographs? A No, sir.

Q Where was the car when the photographs were taken? A Right where it is, the Roslyn Garage.

Q Where is that? A Roselle.

Harry J. Teets, cross.

Q A short distance from where the accident happened? A Pulled right across the road.

Q When were these photographs taken with reference to the day the accident occurred? A I think it was around a couple of months after.

By Mr. Merrill.

Q In the meantime nothing had been done to the car? A Nothing. We had it just pulled across the road right where this occurred.

Q I show you another photograph and ask you who took that photograph? A My son took that photograph the next day, on a Sunday.

Q That is the next day after the collision? A Yes.

Q Is that a correct representation of the condition of the car? A It is exactly.

Mr. Merrill: I will ask the witness to bring in the cowl.

By Mr. Merrill.

Q Where did this cowl come from? A Off of my car.

Q Is it in the same condition now that it was right after the accident? A Exactly.

Q This part of the cowl (indicating) was on what side of the car? A The left-hand side.

Q How is this bend, if you know, in relation to the bent frame you testified to? A On the same line.

Q Was that bend there before the accident? A No, sir.

Cross examination by Mr. Flanagan.

Q Mr. Teets, I understood you to say that this was a 1920, and then you changed your mind

and said it was a 1922 car. A It was a 1922 car.

Q You also said that the cost price of that to you was $1,590? A Yes, sir.

Q Do you know what the $1,590 included? A It included the cost of the car.

Q Did you understand the price of the car was $1,095, the list price? A I didn't because this was paid on the installment plan.

Q So that the $1,590 included the finance charges? A Exactly.

Q Do you know how much the finance charges were? A I can't recall that now.

Q Were they $500? $485? A No, I don't think so. I can't recall it.

Q You recall that you had to take out insurance for the finance company? A Yes.

Q And this charge of $1,590 included the insurance, too? A It included everything, I understand.

Q Is it your recollection that all those charges, finance charges and otherwise, amounted to about $495? A They must have.

GEORGE MALLORY, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Merrill.

Q You are the proprietor of the Roslyn Garage? A Yes, sir.

Q You towed this car in after the collision? A Yes, sir.

Q Have you had occasion to make prices on second-hand cars?

Mr. Flanagan: I object to that.

The Court: I sustain the objection.

Q Are you familiar with the prices of second-hand cars? A Yes, sir.

Q How long have you been in the garage business? A For myself since last June.

Q Before that. A I worked in garages and sold cars and things, but never was in for myself.

Q For how long have you been familiar with garage work? A For the last four or five years.

Q You have examined this particular car? A I have.

Q What is its worth as it stands? A Nothing, only for junk.

Q Mr. Teets testified that he paid you five dollars for towing the car in, is that correct? A Yes, sir.

Q I show you here a small photograph and will ask you if that shows the condition of the car, so far as the picture goes, as it was after the collision? A Yes, sir.

Q And the same with that photograph (indicating)? A Yes.

Q And the same with that photograph (indicating)? A Yes.

Q Those are fair representations of the car and its condition? A They are.

Mr. Merrill: I offer these photographs in evidence. Do you want to look at them, Mr. Flanagan?

Mr. Flanagan: I object to them because they are not properly proved. However, to save time, I will let them go in.

(Photographs referred to were received in evidence and marked "Plaintiff's Exhibit 1" and "Plaintiff's Exhibit 2.")

Mr. Merrill: The plaintiff rests.

Mr. Flanagan: The defendant rests.

MOTION FOR DIRECTED VERDICT.

Mr. Flanagan: I ask that the Court direct the jury that there is no evidence upon which to find any judgment for damages in favor of the plaintiff for the automobile.

The Court: That is, with respect to the automobile?

Mr. Flanagan: Yes, your Honor.

The Court: The jury can find damages of six cents, that is all. There is no proof of damages.

Mr. Flanagan: Yes.

The Court: I will direct the jury to find damage to the automobile in the amount of six cents.

Mr. Merrill: I object. As I understand the motion, it is that there is no evidence from which the jury may come to a conclusion with respect to damages to the automobile.

In the first place, there is the testimony of Mr. Teets that the front axle was bent, that the steering gear was bent and that the cowl was damaged. Now, the difficulty of estimating damage does not affect the right to have the damages estimated. You have the price of the car originally, you have the age of the car and you have two photographs showing the present condition of the car.

I submit that when you have the make, style, age and price of the car, when you have the parts that were damaged, and its condition you have a sufficient basis for a jury to make an esti

mate as to what the damages may be reasonably said to be.

The Court: With all that, the Court will still stand to its position, and grant Mr. Flanagan's motion.

The rule in a case of this kind is that there must be evidence as to the reasonable value of the car before and after the accident.

Mr. Merrill: Exception.

(Argument.)

The Court: On the motion for a direction, I feel that I should direct. As to that, the case was concluded.

The Court charged the jury as follows:

JUDGE'S CHARGE.

HARRY J. TEETS,
Plaintiff,
vs.
PERCY E. HAHN,
Defendant.

CONNOLLY, *J.*

Gentlemen of the Jury: This is a case entirely within your province. There is no law to be charged to you. It is a fact case, and has been confined by counsel to the question of damages only. The defendant has admitted liability.

The infant plaintiff, Miss Teets, is entitled to such amount of money as you figure will reasonably compensate her for the pain and suffering

occasioned by the injuries which you may find from the evidence she sustained in this automobile accident.

The father, Harry J. Teets, is entitled to such amount as you may find from the evidence will compensate him for the loss of wages, if any, occasioned by the injuries to his infant daughter, as well as to the reasonable expenses for medical services and attentions to cure her from those injuries.

With respect to the other item of damage, to the automobile owned by the plaintiff, Harry J. Teets, for want of evidence of damage to the automobile, as to the amount thereof, according to the rules of law, the Court directs you to find damages to the plaintiff, Harry J. Teets, for the damage to his automobile in the sum of six cents.

It is entirely within the province of the jury to fix the damages, except insofar as the Court has directed you with respect to the damage to the automobile.

There are two cases submitted to you. The first case is that of the infant plaintiff, Miss Teets. Fix her damages separately and bring in a verdict for her according to your finding as to the amount of damages to which she is entitled.

As to the father, Harry J. Teets, you find separately as to his damages. His damages will be six cents for the damage to his automobile, as the Court has directed you, and the loss of wages of his infant daughter, Mary Teets, if any, and for the medical services which he supplied to cure her of her injuries.

So there will be two separate verdicts to be brought in in the two separate cases.

TRANSCRIPT OF CLERK'S DOCKET.

IN THE DISTRICT COURT OF THE CITY OF PLAINFIELD.

STATE OF NEW JERSEY, COUNTY OF UNION. } *ss.*

HARRY J. TEETS, *Plaintiff,*
vs.
PERCY E. HAHN, *Defendant.*

In an Action at Law.

Demand, $500.00.

Att'y of Pl'tff, E. A. Merrill.
Att'y of Def't, William K. Flanagan.

A summons was issued in the above-stated cause February 7th, A. D. 1927, returnable February 16th, A. D. 1927, at ten o'clock A. M., and was returned by the Sergeant-at-Arms as follows:

I served the within summons on the within-named defendant, Percy E. Hahn, this 8th day of February, A. D. 1927, by reading the same to him and leaving him a true copy thereof.

GEORGE YORK,
Sergeant-at-Arms.

State of demand filed February 7th, 1927 A. D.
Counter-claim filed by the defendant March 24th, 1927.

Case tried with case of Mary J. Teets, an infant, by her next friend, Harry J. Teets.

Demand for jury filed *December* 7th, 1927.

Court set Friday, March 25th, 1927, at 10:00 o'clock in the forenoon, as the time and date for trial of the above cause.

Venire issued March 19th, 1927, and placed in the hands of George York, Sergeant-at-Arms. Venire returned March 25th, 1927.

Both parties appeared for trial represented by counsel.

H. Richard Woebse sworn as stenographer.

The following jurors were called and sworn: (1) Alfred E. Willard, (2) William Fox, (3) Marcus Hoyt, (4) Thomas Moore, (5) Thomas K. Higgins, (6) Thomas Hughes, (7) Michael Devine, (8) Charles A. Case, (9) Oscar M. Dunham, (10) William Morgan, (11) Christian Gloeckler, (12) Charles Barry.

Both counsel made opening to the jury.

The following witnesses were called and sworn for the plaintiff: Rowland P. Blythe, Mary Teets, Harry J. Teets, George Mallory, Edwin Bennett, Charles M. Seamans.

Exhibits offered for plaintiff: Exhibit P. 1, Photo; Exhibit P. 2, Photo.

Counsel for plaintiff rested case.

Defendant rested.

Counsel summed up.

Court charged jury, George York, Sergeant-at-Arms sworn to attend jury, jury retired at 12:20 o'clock P. M., returned at 12:45 o'clock P. M. Roll call all jurors answered call. Alfred E. Willard, answered as foreman, verdict in favor of the plaintiff in the sum of one hundred twenty-five 06/100 dollars.

Jury dismissed with thanks of the Court.

Jury rendered verdict of judgment in favor of said plaintiff and against said defendant in the sum of one hundred and twenty-five dollars and six cents, $125.06.

Trial of the above case held March 25th, 1927.

Judgment entered March 25th, 1927.

OPINION OF SUPREME COURT.

Per Curiam. Plaintiff's daughter was injured while driving plaintiff's motor car, by collision with a truck of the defendant. The suit was for loss of services of the daughter (an infant) expenses of her treatment and cure, and damages to the motor car. For this last item the jury awarded six cents under direction of the Court; and this is the sole point raised on this appeal.

We consider that the trial judge ruled correctly, and for the reason that the proof of damages failed on a fundamental point. It appeared that the motor car after the accident was a worthless heap of junk, not susceptible of repair. Hence the measure of damages was the fair value of that car before the collision. There was no evidence from which the jury could legally assess that value. The evidence the plaintiff indicated that the car was a 1922 model, costing when new $1,590 on the installment plan, or about $1,100 cash. It was approximately five years old when destroyed; was in first-class condition though it looked rough and needed painting. This was all the testimony on value; it was competent, but only partial. Plaintiff's counsel very properly tried to show by the testimony of the plaintiff himself, and that of a garage keeper what the

value was before the collision. The questions were excluded, neither witness appearing to be qualified to give an opinion on value, and it is not claimed that this exclusion is erroneous. Some photographs of the wrecked car were introduced, but they did not help matters.

The argument seems to be, and necessarily must be, that given a car five years old in good order but needing paint and costing when new $1,100 cash, the jury are entitled to guess at its fair value (for it is no more than a guess) and award a verdict against the defendant for any sum they see fit, between the limits of zero and $1,100 dollars. To this we cannot give our assent. Undeniably, the price when new, and age, and conditions are elements to consider in fixing value, but they are not enough in themselves. Our leading cases go no farther than to say that they are elements for consideration. Luce *v.* Jones, 39 N. J. L.

See State *v.* Duelks, 97 *Id.* 43, 47; Lebkeucker *v.* Penna. R. R., *Id.*, 116.

In Luce *v.* Jones, *supra*, at p. 709, the Court said: "a sale (when new) was evidence of the market value of the thing when new, and the value of such goods, when worn, can scarcely be ascertained except by reference to the former price and the *extent of depreciation.*"

The proof failed, therefore, at the critical point, viz, the fair value of the car when wrecked; and in that event a direction of a nominal verdict was proper.

The judgment will be affirmed.

NOTICE OF ARGUMENT.

Filed July 18, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRY J. TEETS, *Plaintiff-Appellant,* *vs.* PERCY E. HAHN, *Defendant-Respondent.*	*On Appeal.* *Notice of Argument.*

TAKE NOTICE of the argument of the issue joined in this cause before the Court of Errors and Appeals to be held at the State House in the City of Trenton, New Jersey, on the third Tuesday of October, 1927, at eleven o'clock in the forenoon, or as soon thereafter as counsel may be heard.

E. A. MERRILL,
Attorney of Plaintiff-Appellant.

Westfield, New Jersey, July 7th, 1927.

To WILLIAM K. FLANAGAN, Kinney Building, Newark, New Jersey, Atty. of Defendant-Respondent.

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

New Jersey Court of Errors and Appeals

HARRY J. TEETS, *Plaintiff-Appellant,* *vs.* PERCY E. HAHN, *Defendant-Respondent.*	*Action at Law.* *On Appeal.*

BRIEF FOR THE DEFENDANT-RESPONDENT.

Statement of Case.

This is an appeal by the plaintiff from the judgment of the Supreme Court affirming the judgment of the Plainfield District Court in an action in tort brought to recover damages for injuries to the plaintiff's minor daughter and consequential damages arising therefrom to himself, and also for damages to plaintiff's automobile, all arising out of a collision between said automobile and defendant's car. The cases were tried with a jury. The defendant admitted liability for the collision, leaving the only issues to be tried the amount of damages. Neither party complains of the judgment in favor of the daughter. This appeal is taken by the father from the judgment in his favor, and the sole error of which he complains relates to that portion of the trial judge's charge wherein he instructed the jury to assess the damages to the plaintiff on account of the injury to his automobile at the sum of six cents.

Our argument will consist of two points: first, that the question sought to be raised by the plaintiff is not properly before this Court for

the reason that he failed to take a proper exception to the part of the trial judge's charge of which he now complains; and second, that the portion of the charge complained of was correct, for the reason that there was, as stated in the charge, a want of evidence of damage to the automobile as to the amount thereof according to the rules of law. It is obvious that if our first point is well founded, it will be unnecessary for this Court to consider the second; and we, of course, argue the second point only if and in the event that this Court should decide against us on the first point.

ARGUMENT.

POINT I.

The appeal is not properly before this Court.

The rule is well settled that, on appeals from a judgment resting on the verdict of a jury, the appellate court will not consider alleged error in the trial judge's charge unless a proper exception thereto appears in the record. *Corbo* v. *East Orange, etc., Co.,* 86 N. J. L. 563.

It has been held that on a rule to show cause a verdict may be set aside for an error in the charge which has not been called to the attention of the trial judge by an exception, although this power is exercised cautiously by the appellate court and only in an unusual case. *Henny* v. *Public Service Ry. Co.,* 2 N. J. Misc. Rep. 396; *Wolek* v. *Public Service Ry. Co.,* 2 N. J. Misc. Rep. 431; *Shotwell* v. *Public Service Gas Co.,* 2 N. J. Misc. Rep. 435; *Clark* v. *Public Service R. R. Co.,* 83 N. J. L. 319; *Otis Elevator Co.* v. *Headley,* 81 N. J. L. 173; *Butler* v. *Hoboken, &c.,*

Co., 73 N. J. L. 45; *Hatfield* v. *Central R. R. Co.,* 33 N. J. L. 251.

It has also been held, following the rule laid down in *Pannonia B. & L. Assn.* v. *West Side Trust Co.,* 93 N. J. L. 377, that on appeal from the district court in cases tried by a judge without a jury exceptions are not necessary. *Lambert* v. *Cahill,* 2 N. J. Misc. Rep. 825.

The two classes of cases just referred to, however, are only exceptions to the general rule which do not apply to the present case, which, as has been seen, is an appeal from a judgment founded on the verdict of a jury; and the rule that exceptions are necessary applies in all its vigor to the present case.

The record in this case shows the following situation:

Both parties having rested, the defendant's attorney asked "that the Court direct the jury that there is no evidence upon which to find any judgment for damages in favor of the plaintiff for the the automobile" (Case, p. 12, ll. 10 to 14); to this the Court replied that "the jury can find damages of six cents, that is all. There is no proof of damages. I will direct the jury to find damages to the automobile in the amount of six cents" (p. 12, ll. 18 to 22). Whereupon attorney for the plaintiff said "I object" (p. 12, l. 23) and then proceeded to argue the question with the Court.

The Court's reply was that it would "still stand to its position, and grant Mr. Flanagan's (defendant's attorney's) motion. The rule in a case of this kind is that there must be evidence as to the reasonable value of the car before and after the accident" (p. 13, ll. 6 to 12). "Mr.

Merrill (plaintiff's attorney): Exception" (p. 13, l. 13). Then followed further argument. "The Court: On the motion for a direction, I feel that I should direct. As to that, the case was concluded" (p. 13, ll. 15 to 17).

Thereupon the respective attorneys summed up and the Court then delivered its charge. In the course of this charge the jury were instructed to find six cents damages only on account of the injury to the plaintiff's automobile (p. 14, ll. 14 to 20, and ll. 31 to 34).

No exception appears in the record to this charge, or to any part thereof.

In this situation, we submit, the rule to which we have adverted applies. No proper exception was taken by the plaintiff to the portion or portions of the charge of which he now complains.

It is true that, as has been hereinabove stated, the plaintiff's attorney used the words "I object" (p. 12, l. 23) and "Exception" (p. 13, l. 13); but neither of these applies to the charge as delivered. They are merely part of a colloquy between the Court and both attorneys on the subject of the proposed rule of law to be embodied in the charge to be made by the Court. Neither related to any judicial action. No judicial act was taken until the charge was actually delivered, and we submit it is an exception to judicial action actually taken that is required in order to bring the matter properly before the appellate court. Up to the time of the actual delivery of the charge, the trial court might reconsider the question, and might still have decided to charge otherwise than as indicated in its colloquy with counsel. Until that time, nothing had been done to lay the basis for a proper exception, because no judicial action had been taken, and, as no exception was

noted after the delivery of the charge, to any part thereof, there is no exception before this Court to the judicial action embodied in the charge of the trial court, and the appeal should be dismissed for this reason.

POINT II.

The Court's charge was correct.

The general rule on the subject of injury to personal property is laid down in Corpus Juris as follows:

> "As a general rule market value rather than actual or intrinsic value governs in cases where the value of personal property is involved, and it is usually considered that actual or intrinsic value can be shown only where the property has no market value. Where, however, the property in controversy has no market value, other evidence must necessarily be resorted to to prove its value, and it has been considered that where goods are kept for use and not for sale, their actual value may be shown without first showing that they have no market value."
> 22 C. J. 182.

Of course it is unnecessary for us to argue so well known a fact as the proposition that used automobiles have a market value.

Continuing, we may quote the following further passages from the same authority:

> "While the price which the owner of personalty paid for it does not, by itself, furnish a satisfactory test of value, it is a circumstance to be weighed in connection with other evidence, provided the time of the purchase is sufficiently near to the time at which the value is relevant; and it has even been said that the price paid for property is entitled to great weight in determining its value, although not conclusive evidence thereof. The

question of the admission of such evidence is to be determined by considerations involving the exercise of a sound discretion, under all the circumstances, and the evidence is more readily received when other evidence of value is apparently unavailable."

22C. J. 184.

"Where the issue of value of personal property is involved in an action, it is usually with respect to the value at some particular time, and hence evidence of value is relevant only when directed to value at the time in question, or at a time so near thereto that it may reasonably be expected to throw some light on the value at such time. *It follows that evidence of value a considerable time before or after the time in question is incompetent, in the absence of further evidence showing either that the value remained the same, or the comparative values on the two occasions.* On the other hand, it has been held that evidence of value at a time several months from the time in controversy is receivable without evidence that the condition of property remained the same during the intervening period, where there is no suggestion by the adverse party of any change."

22 C. J. 190.

(Italics ours.)

We may note, in connection with the passage last quoted, that the limit of time is set at several months, whereas in the present case, it was some five years.

"The cost of personal property may be proved as an element of its value; but only if accompanied by evidence of other circumstances."

Sedgwick on Damages, Sec. 1296.

In the present case the accident occurred in November, 1926. The testimony on the subject of damages, all of which was given by the plaintiff himself, was that the automobile was a 1922

model (p. 9, l. 39, to p. 10, l. 5); that the cost price was $1,590, which, however, included the finance charges, the amount of which latter the plaintiff could not recall, although in answer to a question on cross examination whether they amounted to about $495.00, he answered "they must have" (p. 10, l. 6 to 27); that at the time of the collision the car was in good running order but looked "rough" because it needed paint (p. 6, ll. 24 to 28); and it was testified by the plaintiff's witness Mallory, that after the collision the car was worth nothing except for junk (p. 11, ll. 15 to 18).

The foregoing was the sole testimony as to the value of the car before and after the collision. The striking feature of it is that the nearest time to the time in question as to which there is any estimate of value is some five years prior thereto. Of testimony as to the value of the car at the time of the collision there is none whatever.

Our Courts have, on many occasions, laid down the rule that testimony as to the price paid for personal property is admissible, but have, in such cases, carefully limited the weight of such testimony as being only one element to be considered by the jury in arriving at its actual value at the time of its injury or destruction.

Thus, in *Luse* v. *Jones,* 39 N. J. L. 707, one of the earliest cases on the subject, this Court said:

"The first exception insisted upon is, that the plaintiff was allowed to prove the cost of a bedstead, as tending to show its value. This cost was the price at which a regular dealer in such articles had sold it when new, in the ordinary course of trade. A sale so made was evidence of the market value of the thing when new, and the value of such goods when worn can scarcely be ascertained, ex-

cept by reference to the former price and the extent of depreciation. Of course, the cost alone would not be a just criterion of the present value, but it would constitute one element in such a criterion, and the attention of the jury in this case was clearly directed to the importance which it deserved to have."

In *Goodman* v. *Lehigh Valley R. R. Co.*, 82 N. J. L. 450, 456, this Court said:

"The evidence as to cost of the farm buildings was clearly admissible on the question of damages. Of course, the cost was not the measure of damages, but such cost is a fact to be considered in ascertaining the fair value of the buildings at the time of the fire and from that the depreciation in value of the farm by reason of the fire."

In *Lebkuecher* v. *Pennsylvania R. R. Co.*, 97 N. J. L. 112, 116, the Supreme Court said:

"While the measure of damages was not the original cost, but the market value of the lost articles, yet original cost is an element to be considered with others in ascertaining the market value at the time of loss."

In *Dantes* v. *McGann*, 98 N. J. L. 55, it was held that it was not error to permit the plaintiff to testify as to the price he had paid for household furniture, which had been destroyed in the defendant's warehouse, the purchases having been made at various times, the earliest of which was some fourteen months prior to the destruction of the goods, on the ground that "while the price paid for property does not, by itself, establish the value thereof, yet it is an element to be taken into consideration by the jury in determining the value."

A case very much in point is *Ward* v. *Huff*, 94 N. J. L. 81. In that case the Supreme Court, in making absolute a rule to show cause obtained by

the defendant in an action in trover for the value of an automobile truck, said as follows:

"*Nor was there any substantial proof as to the value of the car at the time of the conversion.* The only testimony on this subject for the plaintiff was that of one Herring, who had not seen the car for at least a year prior to the trial; and opposed to that was the testimony of witnesses who examined the car and fixed its value at $300. The charge of the court was sufficiently specific upon this point, but the jury evidently ignored it and found a verdict for $2,600, which apparently was based upon Herring's valuation, plus interest and plaintiff's claim of loss of earnings, which he fixed at $1,000."

(Italics ours.)

That the reception of evidence as to the original cost of an article is in the nature of an exception to the rule that the measure of damages is the difference between the value immediately before and immediately after the injury further appears from several other cases. In *Hintz* v. *Roberts*, 98 N. J. L. 768, 770, the Supreme Court laid down the general rule as follows:

"In an action for injury to an automobile (or other personal property) the general rule is that the measure of damages, where no circumstances of aggravation are shown, is the amount which will compensate for all the detriment naturally and proximately caused. This detriment, in the absence of total destruction of the automobile, is the difference in value of the automobile immediately before and immediately after the injury."

And in *Farnsworth* v. *Miller*, 60 Atl. 1100, affirmed on the opinion below, 74 N. J. L. 599, the Supreme Court, reversing the trial court for its refusal to permit the defendant in an action in trover to ask the man who had sold the property

in question (second-hand store shelving and counters *in situ*) to the plaintiff shortly before the alleged conversion what the selling price was, said:

> "While the market price of personal property at the time of the conversion fixes the amount of damages, yet it is proper to prove, on the question of the market value, an actual bona fide sale of the property, fairly conducted, and not forced, whether at auction or private sale, if the sale be shown to have been made, when the property was in a similar condition to that in which it was in at the time of the alleged conversion. Such evidence is held to be some evidence of value, and such as a jury may consider."

Appellant, at pages 4 to 7 of his brief, seeks to invoke in his favor the rule that "when the evidence, or legitimate inferences of fact from the evidence, will support any verdict for the plaintiff, a motion for a directed verdict against the plaintiff must be denied." This is as true as it is trite; but it is quite beside the mark so far as the present case is concerned—so much so, that this part of appellant's argument seems frivolous. Obviously, the rule cited deals with the question of *liability,* not with the question of *damages;* and the issue of liability did not exist in the present case, liability being expressly admitted by the defendant below. Every one of the cases cited by the appellant on this rule—*Barry* v. *Borden, &c. Co.,* 100 N. J. L. 106; *Hunke* v. *Hunke,* 5 N. J. Adv. Rep. 791; *Dickinson* v. *Erie R. R. Co.,* 85 N. J. L. 586; *Uvalde, &c. Co.* v. *Central, &c. Co.,* 84 N. J. L. 297; *Weston, &c. Co.* v. *Benecke,* 82 N. J. L. 445, and *Riebenack* v. *Rubens,* 3 N. J. Adv. Rep. 1592—deals solely with the question of liability, and not at all with that of damages, as, indeed, the alleged excerpt quoted by appellant at page 21 of his brief expressly states. It seems too obvious to mention that no amount of testimony in a plaintiff's favor on the question of liability (except in certain classes of cases, such, for instance, as libel *per se,* within none of which the present case falls) will entitle him to more than six cents damages; he must still prove his damages, by testimony which will afford a proper basis for the finding of damages by a jury.

We may add, in passing, that we have looked in vain, in the opinion in *Riebenack* v. *Rubens, supra,* for the language purporting to be quoted therefrom at page 21 of appellant's brief; apparently it is taken from the syllabus.

Appellant attempts, at pages 5 to 7 of his brief, to bring himself within the well-known "household goods" exception to the general "market value" rule. Apparently, he wants this Court to hold that a used automobile, of a specified make, model and year of manufacture, with ascertainable elements as to extent and conditions of use, and extent and particulars of deterioration or wear, "has no market value." This is asking the Court to plead ignorance of what every man on the street knows. Testimony as to the market value of such a car is not only possible, but abundant and easy to produce. There is no difficulty in properly proving such value.

Thus, in the recent case of *Bianchi* v. *Ricker,* 3 N. J. Misc. Rep. 829, the Supreme Court affirmed a judgment of $500 for the plaintiff, and, answering the defendant's contention that there was no competent proof as to the reasonable value of the plaintiff's car before and after the accident, said:

> "A witness for the plaintiff, who was an auto salesman, appraised the car at $850

> the day before the accident, and he, together with the president of his concern, examined the car shortly after the accident, and offered the plaintiff $200 for it. This testimony presented a reasonable basis for a conclusion."

In the very case now at bar, the plaintiff plainly indicated that he himself understood this to be the proper method of proof by asking these very questions of a witness, one Mallory (p. 10, l. 39, to p. 11, l. 8). The witness, however, proved not to be qualified on the subject, and his testimony was therefore excluded. Plaintiff, instead of then calling a properly qualified witness to testify to these values, made no attempt to do so, and chose to close his case without having produced such testimony. It seems too obvious to justify argument that he could have produced it without any particular difficulty.

Appellant's statement, at page 5 of his brief, that "the so-called 'market value' of second-hand, or used, automobiles is not a market value, but is an *insurable* value having no relation whatsoever to actual value" has "no relation whatsosoever to actual" facts. What he seems to have in mind are the familiar Automobile Insurance Tables, prepared by an association of automobile insurers, fixing, solely by the make, model and year of cars, the amount of insurance which these companies are willing to place on them. But, obviously, this has little if anything to do with market value, in the sense in which that term is used in the reported cases. Market value, in these cases, as in all other cases, means nothing more nor less than the price that could be obtained by a willing seller from a willing buyer; and, as we have said, there is no practical difficulty whatever in proving such value properly.

Appellant quotes no authority for his allegation, at page 5 of his brief, that "every car must be tested individually by what it is worth to the owner." We think that comment as to the soundness of such a proposition as a rule governing damages in actions at law would be superfluous.

We may remark, in passing, that appellant's statements, on page 4 of his brief, that "a depreciation of $725 was admitted," and on page 5 that "the damages (were) limited to $375," are wholly unsupported by the testimony.

The cases cited by appellant, with excerpts from the testimony therein, at pages 8 to 17 of his brief, do not help him. In the very testimony which he quotes from the first of these cases, *Goodman* v. *Lehigh Valley R. R. Co.*, 82 N. J. L. 450, already referred to by us hereinbefore, there was sufficient evidence as to the value of a number of the chattels in question at the very time of their destruction to afford a basis for "a substantial verdict." Thus:

> "Q What were they worth, the two? A Twenty-five dollars." (P. 8 of brief.)
>
> "Q What was it worth at the time of the fire? A Fifty dollars." (P. 8 of brief.)

But this was the merest fraction of the testimony on the subject. Thus, there was testimony as to the value, *at the time of the loss,* of certain hay (Case, p. 31, l. 9, to p. 32, l. 7); certain manure (p. 78, l. 29, to p. 79, l. 7); clover (p. 79, l. 27, to p. 81, l. 35), and a great variety of other property (p. 82, l. 35, to p. 92, l. 13; p. 102, l. 1, to p. 110, l. 38; p. 133, l. 22, to p. 151, l. 2; p. 236, l. 1, to p. 306, l. 3; p. 314, l. 36 to p. 321, l. 30), to say nothing of the buildings (p. 199, l. 25, to p. 223, l. 19; p. 454, l. 38, to p. 463, l. 24). In fact, without undertaking to analyze the very voluminous testimony in the case, we think it safe to

say that there was testimony of value *at the time of the fire* as to every item making up the total loss.

But, further, the record in that case is full of testimony, neither objected to nor made the subject of a request to charge, stating the value of property at various times before the fire by which it was destroyed or damaged, which would have formed a proper basis for a verdict far in excess of that rendered; and to argue, as appellant does, at page 8 of his brief, that "objections would have been made to the testimony * * * had such testimony been objectionable, or insufficient to carry the case to the jury," seems unsubstantial. If counsel do not object or request charges, there is nothing for the Court to pass upon.

And, yet again, as has already been seen in our quotation from the opinion in this case hereinabove, the Court expressly limited the effect of evidence as to cost to "a fact to be considered in ascertaining the fair value * * * at the time of the fire. * * * Of course, the cost was not the measure of damages."

The next case cited and quoted from by appellant, at pages 9 and 10 of his brief, *Dantes* v. *McGann,* 98 N. J. L. 55, also adverted to by us hereinabove, concerns household furniture and personal clothing, and is thus wholly inapplicable to the present case.

And in this case, too, the Court warningly pointed out that "the price paid for property does not, by itself, establish the value thereof (but) * * * is an element to be taken into consideration by the jury in determining the value."

So too the next case, *Lebkuecher* v. *Pennsylvania R. R. Co.,* 97 N. J. L. 112, affirmed 98 N. J. L. 271, also already considered by us, cited and quoted from at page 11 of appellant's brief, concerned personal clothing, and is hence without application to the present case. But, further, we wish to call attention to the fact that appellant's statement that "the following excerpts are fair examples" of the testimony is absolutely misleading. As to many of the chattels in question, there was expert testimony as to the value at the time of loss; for instance, a lace scarf, valued at $40 (Case, p. 20, l. 18, to p. 23, l. 6)—a beaded bag, valued at $40 (p. 24, l. 30, to p. 26, l. 30)—a string of beads, valued at $50 to $60 (p. 26, l. 40, to p. 28, l. 5)—a comb valued between $30 and $40 (p. 28, l. 6, to p. 29, l. 6)—a silver hair brush, valued at $15 (p. 29, l. 38, to p. 30, l. 20)—and many others. In fact, it is not going too far to say that there was such testimony as to practically all the articles of considerable value, forming the great bulk of the amount of loss claimed.

And in that case, too, as we have seen, the Court again pointed out that original cost is merely "an element to be considered with others in ascertaining the market value at the time of the loss."

Farnsworth v. *Miller,* 60 Atl. 1100, affirmed 74 N. J. L. 599, also already examined by us, from the opinion in which appellant quotes at pages 11 and 12 of his brief, also concerned store fixtures (shelving), making that case obviously not in point here. Further, we may point out that appellant does not even claim that the owner and tenant did not testify as to the value of these chattels, at the time of their destruction; and, indeed, the very extract of the opinion quoted by

appellant, in speaking of the landlord's "estimate of value" clearly demonstrates that there was such testimony—as, of course, the opinion in that case shows.

Again, we refer to the extract from the opinion in this case already quoted by us, to the effect that evidence of the price paid at a sale is merely an element to consider in ascertaining the market value.

Sultan v. *London Assurance Corp.*, 4 N. J. Misc. Rep. 947, cited and quoted from at pages 12 to 14 of appellant's brief, was not an appeal, but a rule to show cause. In the first place, it would be without application to the present case, as here too the chattels concerned were store fixtures. But, next, even here the values at the time of the loss were satisfactorily proved by any standard; thus, in the very testimony quoted by appellant (at page 12 of his brief):

> "Q You have fixed that value at three thousand dollars? A Yes, sir.
>
> Q Did you know the value of fixtures such as they were *at the time of the fire* in 1922? A I would like to ask whether you mean sale price—was the store to be demolished and the stuff taken out and sold over again or what it would be worth standing in the store?
>
> Q Standing in the store, *the cash market value?* A I figured around twenty-five hundred dollars." (Italics ours.)

But, finally and worst of all, appellant, seemingly not content with arguing, on the present appeal, from a case on rule to show cause concerned with the preponderance of testimony, appears deliberately to misstate what the opinion in that case holds. The Court did *not* sustain the verdict as to preponderance of the evidence as to "the value of the insured property and the

extent of its damage by fire" on the ground that there was "some evidence" of value; this ground concerned only the Court's decision on the second point argued, to wit, that the trial court had "*erred in admitting evidence* concerning the price that the few goods which remained after the fire * * * brought at a public sale." The Court did not mention this ground at all in considering the question of the weight of the evidence as to value, which was the third point argued. After what we have just said, it would seem hardly necessary to add that appellant's language that "preponderance is a relative term, and there may be a preponderance of evidence even if the testimony be meagre" has no basis in anything that appears in the Court's opinion; apparently this is exclusively the creature of his own imagination.

But we feel that we should not close our consideration of the case just referred to without quoting the very pertinent words of the Court, at page 948 of its opinion, relating to proof of value:

> "*As a general rule, the proper method of proving the value of chattels is to show what they will bring as between a willing seller and a willing buyer; and, if they have no market value, then to prove what they are worth by the opinion of experts.*" (Italics ours.)

Appellant, at page 14 of his brief, quotes from the opinion in *Babes* v. *Schaub*, 5 N. J. Misc. Rep. 371; but the opinion in that case does not set forth in full the testimony as to the value of the car; and the actual testimony in the case, though referred to by the Court as "meagre and unsatisfactory" was much fuller than that in the present case. And even in so much of the testimony as appears in the opinion in that case,

there is a most essential and vital factor which does not appear in the present case, to wit, the distance for which the car had been run.

Further, this was not an appeal, but a rule to show cause as to excessiveness of verdict.

In *Savarese* v. *Hartford &c., Co.,* 99 N. J. L. 435, cited and quoted from at pages 14 to 16 of appellant's brief, the opinion, it is true, refers to only very meagre testimony as to value at the time of the loss; but the state of case does show testimony supporting the verdict, and appellant's statement that the only testimony as to value was that quoted by him in his brief is not in accord with the facts. Not only does it appear that, at the very time of the theft, the car was insured by a reputable insurance company for $700 (Case, p. 54, l. 23 and Exhibit P. 1, p. 62), certainly evidence that would support a verdict for at least that amount, but it was apparently agreed by counsel that that amount was the value of the car at the time of its loss.

> "The Court: As I understand it, there is no dispute that $700 was the sound value of the car" (Case, p. 18, l. 38).
>
> (No comment by counsel.)

In this state of affairs, it would seem idle to contend that the verdict of $700 actually rendered was not supported by testimony of the value of the car at the time of its loss.

Weston v. *Benecke,* 82 N. J. L. 445, quoted from at page 16 of appellant's brief, has already been considered hereinabove; as we there said, it does not relate to the question of damages at all, and its injection here by the appellant is simply misleading.

The last case, *Precipio* v. *Insurance Co. of Pennsylvania,* 5 N. J. Adv. Rep. 1065, is also

wide of the mark. It relates to personal clothing. Further, the language quoted therefrom by appellant is merely a repetition in other words of the doctrine of Sedgwick on Damages, Sec. 1296, and the line of cases beginning with *Luse* v. *Jones,* 39 N. J. L. 707, to which we have adverted hereinabove.

Appellant's Point II, beginning at page 17 of his brief, may be briefly disposed of. It is no more than a restatement of his misapplication, already considered, to the question of damages, of the familiar rule that the plaintiff is entitled to go to the jury on the question of liability if there is any evidence in his favor. And, of course, the vice of permitting a jury to bring in a verdict for purely speculative damages would not be cured by fixing $375, or some other lesser amount, instead of $500 as an upper limit, nor by the fact that the Court would have power to set the verdict aside; this is too obvious to merit argument.

Just why appellant quotes, at page 19 of his brief, *Hirsch* v. *Malone,* 99 N. J. L. 473, we are at a loss to conjecture, for it is an authority against him. The language that "the defendant was entitled to some verdict, * * * nominal if there was no * * * testimony (as to amount of damages)" precisely fits the situation in the case at bar.

It need only be added that appellant's attempt, at page 21, to apply the language of *Sultan* v. *London Assurance Corp.,* 4 N. J. Misc. Rep. 947, that "manifestly, chattels injured or partially destroyed by fire can have no market value," etc., to the present case argues a failure on his part to understand the facts in that case. In the case at bar, it was admitted that the chattel

had *no* value after the collision. The proof of value *before* destruction, which is the question at issue in the present case, was, as we have already shown, ample in the Sultan case.

Appellant's claim as to the five dollars spent for towing, at page 23 of his brief, comes too late in this Court, having been raised neither in the trial court nor in the Supreme Court. But, in any event, the point would not have been available. This evidence would have been pertinent only if the damages were to be measured by the cost of repairs; it being conceded that the car was worthless, and beyond repair, and that the measure of damages was the difference between zero and the value just before the collision, this item could not be considered.

To sum up briefly:

As we have already pointed out, of all the cases on which appellant relies, there are only two which, like the present case, deal with an automobile—*Babes* v. *Schaub,* 5 N. J. Misc. Rep. 371, and *Savarese* v. *Hartford &c. Co.,* 99 N. J. L. 435. We believe that we have distinguished both these cases from the case at bar; and, in addition, *Babes* v. *Schaub,* being a Supreme Court case, must, so far as it is inconsistent with the present case, be held to be overruled thereby. But, be that as it may, we wish to add very frankly that if either of these cases can be interpreted as countenancing the doctrine contended for by the appellant in this case, then, we submit with all due deference, that that case was wrongly decided, and should now be overruled. If such a rule were to be adhered to, it would unquestionably produce untold mischief and confusion in the future in cases of this nature, the number of which is, as is well known, constantly increasing.

It would mean cutting loose entirely from the solid and well established foundations on which damages to personal property have heretofore been based; it would permit juries to indulge in the wildest speculation, untrammeled by any bounds founded upon logic; more, it would render the task of a court called upon to decide whether the verdict of such a jury can be supported by the evidence an impossible one. To take the present case as an example, what would there be to prevent a jury, on the record, from finding a verdict for any sum whatever up to $1,590.00? True, the plaintiff says the car was in good running order; but anyone who has ever had anything to do with automobiles knows that this may mean anything or nothing. The car might have been run less than 1,000 miles, over paved city streets, without an accident or required repair of any kind, and be practically in the same condition as a new car; on the other hand, it might have been run over 100,000 miles, over the roughest roads, through and over all kinds of obstacles, and, like the Deacon's One Hoss Shay, be on the very point of dropping to pieces. The body might be in perfect condition, with all the upholstery, etc., like new; or it might be in rags and tatters. Nobody knows; the record is silent.

Obviously the plaintiff, by bringing his action in a court in which he could not recover more than a total of $500 for the value of the car and his consequential damages from the injury to his daughter combined, has shown very pointedly that he does not consider the car worth very much; but aside from this question of jurisdiction, what possible limits would there be? If the jury were to bring in a verdict for $1,589.00, how could the Court, on a rule to show cause, say that the damages were excessive? On the other

hand, if it brought in a verdict for $1.00, how could the Court say that it was inadequate? So far as the record goes, either sum might be justified, and, of course, any intermediate sum also.

We submit that the present case is one of that familiar type where a party has failed to submit easily obtainable proof which would afford a safe basis for the verdict of a jury, and asks the Court to remedy his own omission or neglect by permitting the jury to engage in mere speculation. It may be that there are, or will sometime be, species of property as to which competent testimony as to the value is, or will be, impossible to obtain, or so difficult to obtain that, to some extent, there must be speculation at the risk of otherwise denying justice altogether; and the instance of future profits will readily come to mind in this connection as an example where considerable speculation must be indulged in. But that is not this case; and even where future profits are concerned, the Courts have uniformly required sufficiently full proof as to past profits and the conditions surrounding them to afford at least some reasonable basis or starting point for the estimates to be made. Here we are concerned with used automobiles, of a specified make, model and age, with ascertainable conditions as to extent and conditions of use, and extent and particulars of deterioration or wear; and testimony as to values is not only possible, but abundant and easy to produce. If such testimony is to be dispensed with, and juries permitted to speculate on no more secure a basis than that afforded by the record in this case, damages in such cases will be so wildly speculative as to make a future profits case by comparison a sum in simple addition. Such a situation should not be tolerated if it is avoidable; and we submit that it is not only avoidable but totally unnecessary.

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

WILLIAM K. FLANAGAN,
Attorney for and of Counsel
with Defendant-Respondent.

October Term, 1927.

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

New Jersey Court of Errors and Appeals

HARRY J. TEETS,
Plaintiff-Appellant,

vs.

PERCY E. HAHN,
Defendant-Respondent.

Action at Law.

On Appeal.

BRIEF FOR THE PLAINTIFF-APPELLANT.

Statement.

This appeal brings up from the Supreme Court a verdict of the Plainfield District Court for nominal damages of six cents for the destruction of plaintiff's automobile, directed by the trial judge over the objection of the plaintiff-appellant that the ascertainment of the damages was for the jury.

The action of the trial judge is unique in that it is directly contrary to the uniform and consistent practice of trial courts, many of whose decisions have been appealed to and affirmed by this court.

Heretofore the rule has been that the quantum of damages was a jury question if there was any evidence from which any part of the damages was ascertainable.

The rule applied by the trial judge, and apparently approved by the Supreme Court, seems to be that where an *automobile* has been damaged there is no jury question unless the testimony is evidential as to *all* the damages; in other words that the only measure of damages applicable is the difference in value before and after the accident, and if the testimony fails to estab-

lish *all* the damages no part of the damages may be recovered.

Admitting the correctness of the rule as to the measure of *all* the damages the plaintiff-appellant insists that a plaintiff is not barred from recovering *any* compensation merely because he fails, or is unable, to prove *all* his damages, but he may, nevertheless, recover compensation to the extent that the testimony will support a verdict in his favor, although less than *all* his damages.

On November 24, 1926, the respondent's automobile truck collided with the automobile of the appellant. The appellant's car was then being operated by appellant's minor daughter, and both daughter and car were injured.

Appellant brought his action for damages to the car, for the loss of his daughter's wages, and for the amount expended for medical services.

At the trial the respondent admitted liability and the proof was limited to the single issue of the amount of appellant's damages (Case, p. 5, l. 28).

The daughter also sued, by her father as next friend, and by stipulation of counsel both suits were tried at the same time, and before the same jury, but separate verdicts were rendered thereon.

At the close of the appellant's case, counsel for respondent moved for a directed verdict of six cents as and for the damages to the automobile, on the ground that there was no proof of the quantum of the damages (Case, p. 12, l. 11).

Counsel for appellant objected to such directed verdict upon the ground that the damages was substantial, and not nominal or inconsequential, and that there being evidence from which the jury could estimate the appellant's damages, in whole or in part, the Court could not make such determination for the jury (Case, p. 12, l. 24).

Nevertheless, the motion was granted and the jury was directed to find in the sum of six cents as and for the damages to appellant's automobile, and a separate finding as to appellant's further damages (Case, p. 14, l. 31).

The jury assessed the appellant's further damages at $125, and added to that amount the sum of six cents in accordance with the direction of the Court, and returned a verdict of $125.06 (Case, p. 17, l. 4).

The plaintiff appealed to the Supreme Court from the direction of the trial judge that the jury find for the plaintiff in the nominal sum of six cents as and for the damages to the automobile. The appeal was not directed to the inadequacy of the damages, but to the action of the trial judge in taking the issue out of the hands of the jury and himself assessing the damages and directing a verdict.

The Supreme Court affirmed the judgment on the ground that "the proof failed at the critical point, viz: the fair value of the car when wrecked and in that event a direction of a nominal verdict was proper" (Case, p. 18, l. 32).

This appeal alleges error in law in the affirmation by the Supreme Court of the directed verdict in the District Court.

POINT I.

When the evidence, or legitimate inferences of fact from the evidence, will support ANY verdict for the plaintiff a motion for a directed verdict against the plaintiff must be denied.

The rule set forth in the above caption has been many times reiterated in this court. *Barry* v. *Borden Farm Products Co.*, 100 N. J. L. 106; *Hunke* v. *Hunke*, 137 Atl. 419 (not officially reported).

The uncontradicted testimony was that the car cost, new, about $1,100 (Case, p. 10, l. 10), that it was in first-class running condition (Case, p. 6, l. 27), that there had been no trouble with it (Case, p. 7, l. 28), and that it was doing the work of the plaintiff (Case, p. 7, l. 29), who was a carpenter and builder. A depreciation of $725 was admitted. The car was worthless after the collision (Case, p. 6, l. 32; p. 11, l. 17).

Given those elements of value must it be said, as a matter of law, that a jury is unable to find, with sufficient accuracy for the purposes of justice to the defendant, what would be a fair compensation for the plaintiff's loss, or, at least, for some part thereof?

The situation was not one requiring the application of the "best evidence" rule, and the exclusion of the testimony offered. There was evidence offered and admitted which was material, relevant and competent. Testimony as to the cost of the car and its condition just prior to the collision was "some evidence" of value; plaintiff's own limitation of his loss was "some evidence" of the extent of the depreciation. This evidence had "weight," and the weight of testimony "should always be submitted to a jury

for their consideration and determination." *Dickinson* v. *Erie R. R.*, 85 N. J. L. 586.

Liability being admitted, substantial damages being proved, and the quantum of the damages being limited to $375, must it be said, as a matter of law, that a jury can find neither all nor any part of the damages without the aid of further testimony, and notwithstanding "a verdict against the weight of evidence is sufficiently controlled by the subsequent power of the court over its own verdicts"? *Uvalde Pav. Co.* v. *Central Stock Yards Co.*, 84 N. J. L. 297.

The precedents are uniformly to the contrary.

An automobile of a popular make and type, like a wagon, sleigh, or similar vehicle, falls into the general category of household goods kept by the owner for use and not for sale, and such goods have no market value by which the actual value of a particular article may be measured. The so-called "market value" of second-hand, or used, automobiles is not a market value, but is an *insurable* value having no relation whatsoever to actual value, and is the same value whether the car is in good or bad condition. As to "actual" value, and that is the measure of "compensatory" value, every car must be tested individually by what it is worth to the owner. That there is the widest variation in the actual values of used automobiles of a given make and type, depending upon their condition, is well recognized and is evident in the various quotations found in the advertisements of such cars for sale.

> "When the property in controversy has no market value other evidence must necessarily be resorted to, to prove its value, and it has been considered that where goods are

kept for use and not for sale, their actual value may be shown without first showing that they have no market value." 22 *C. J.* 182, Sec. 134.

"The value of second-hand property is established in the same way as that of other property without market value; and accordingly evidence of its cost, its market price when new, and its usefulness and present condition, is admissible." 22 *C. J.* 183, Sec. 135.

"The first question is: What is the rule by which damages for the conversion of household goods and furniture, kept for use and not for sale, should be measured? The trial court, in effect, instructed the jury that household goods and effects, owned and kept for personal use, did not have a market value by which the actual damage to the owner, sustained by reason of their conversion, could be measured; and that the measure of damage in case of the conversion of such household goods was the value to the owner, based on his actual money loss, taking into consideration all the circumstances and conditions. The appellants claim that the giving of this instruction was error, and that the correct rule of damages is what the articles would bring if sold to a second-hand dealer when there is a market for second-hand goods. The great weight of authority, and as we think the better reason, supports the rule embodied in the instruction to the jury given by the trial court." (Citing cases.) *Kimball* v. *Betts,* 169 Pac. 849 (Wash.).

In *Barker* v. *Lewis Storage & Transfer Co.,* 78 Conn. 198; 61 Atl. 363, which was an action against a bailee for goods stored and lost, "the defendant claimed that the measure of the plaintiff's recovery for these articles was their fair market value at the time and place of conversion,

with lawful interest since that date." But the appellate court held that the trial court

> "was correct in refusing to instruct the jury as requested." * * * "A cardinal rule is that a person injured shall receive fair compensation for his loss or injury, and no more. Commonly in cases of conversion the loss is the value of the property. Commonly the value of the property, as representing the owner's loss, is its market value, if it have one, since thereby is indicated the cost of replacing. Hence the subordinate rule of general application appealed to by the defendant. But the principal rule, which seeks to give fair compensation for the loss, is the paramount one; and ordinarily, when the subordinate one fails to accomplish the desired result, it yields to an exception or modification. It is now generally recognized that wearing apparel in use, and household goods and effects owned and kept for personal use, are articles which cannot in any fair sense be said to be marketable and have market value, or at least a market value which is fairly indicative of their real value to their owner, and of his loss by being deprived of them. So it has been frequently, and we think correctly, held that the amount of his recovery in the event of conversion ought not to be restricted to the price which could be realized by a sale in the market, but he should be allowed to recover the value to him based on his actual money loss, all the circumstances and conditions considered, resulting from his being deprived of the property; not including, however, any sentimental or fanciful value he may for any reason place upon it."

Looking, now, to the New Jersey cases, it will be found that where there has been a total loss of personal property this court has uniformly upheld the finding of the jury as to the damages upon even less testimony than was given in the instant case.

The case of *Goodman* v. *L. V. R. R.*, 82 N. J. L. 450, was tried three times, and objections certainly would have been made to the testimony relating to the value of the chattels destroyed had such testimony been objectionable, or insufficient to carry the case to the jury. The following excerpts are from the testimony of James Goodman, the owner, and of his son Edward, relating to the values of vehicles. No other witness testified on this subject.

Q Did you have any bob-sleds?
A Yes, sir.
Q How many?
A Two pair.
Q How long had you had them?
A About six years. One pair I only had three years and the other pair had six years.
Q In what condition were they?
A They were in good repair, sir.
Q What were they worth, the two?
A Twenty-five dollars.

* * * * * *

Q Did you have a two-seated carriage?
A Yes, sir.
Q How long had you had that?
A I had that six years.
Q You know what you paid for it?
A What I paid for it?
Q Yes.
A I paid one hundred and ten dollars for it.
Q You have got it on this statement that it is ten years old. What was it worth at the time of the fire?
A Fifty dollars.

* * * * * *

Q Did you have any sleighs?
A Yes, sir.
Q What kind?
A One Portland cutter.
Q Do you know what it cost?
A Yes, sir.
Q How much?
A It cost $75.

Q How old was it?
A It was bought the winter before the fire, in January.
Q Did you have any business sleigh?
A Yes, sir.
Q How much did that cost?
A Andrew Reilly made that sleigh for us, and we paid him $25 for it.
Q How long before the fire?
A That was about three years.

* * * * * *

Q Did you have any farm machinery?
A Yes, sir.
Q What did you have?
A We had a binder, that is a reaper and binder combined.
Q What make?
A Adams, Platt & Co.
Q How long had you had it?
A I think in the neighborhood of six years.
Q Do you know what it cost?
A Yes, sir.
Q How much?
A $140.00
Q What was its condition at the time of the fire?
A Practically as good as new.

As the jury brought in a substantial verdict which was affirmed in this court it would seem that the propriety of leaving it to the jury to decide whether the testimony was or was not sufficient to support a verdict was beyond criticism.

In *Dantes* v. *McGann*, 98 N. J. L. 55, it was held that,

> "While the price paid for the property does not, by itself, establish the value thereof, yet it is an element to be taken into consideration by the jury in determining value."

The issue was the damages of the plaintiff for personal property injured while in storage.

The only testimony relative to the value of the furniture prior to the storage was given by the plaintiff owner, and was as follows:

Q How long had you had these household goods in your house before they were shipped?

A Well, a little over a year, about thirteen or fourteen months prior to the shipment, about fourteen months.

Q Will you list as far as you can the goods you had in that shipment?

A Can I list them?

Q Yes.

A Yes; certainly I can list them.

Q What were they?

A (Witness gives list of articles.)

Q You listed the articles you shipped, Mr. Dantes. Now, tell us approximately when these articles were purchased and how much you paid for them?

A Well, the household furniture cost me about $1,250.

Q At the time of shipment in what condition was the household furniture?

A In first-class condition; there wasn't a scratch on it.

The only other witness as to the condition of the furniture prior to storage was the wife of the plaintiff:

Q What was the condition of this furniture at the time it was packed?

A It was in perfect condition.

As to the value of the furniture after it was damaged, one Louis G. Rabbino, a furniture buyer, testified:

Q Describe the condition in which you found the furniture?

A Well, I found them all rat-eaten, big holes, pieces bitten out, moths, and it looked to me as if there was some kind of fluid or something spilled over it.

Q What would you value that furniture at at the time you saw it?

A About $50.

In *Lebkeucher* v. *P. R. R. Co.*, 97 N. J. L. 112; affirmed on opinion below, 98 N. J. L. 271; it was held that

> "While the measure of damages was not the original cost but the market value of the lost articles, yet original cost is an element to be considered with others in ascertaining the market value at the time of loss. We think the testimony admissible upon the authority of *Luse* v. *Jones*, 39 N. J. L. 707."

The only testimony in support of the verdict was that of the owner, and the following excerpts are fair examples:

Q The black silk petticoat; when did you acquire it?

A About the same time; in September.

Q What did you pay for that?

A I paid $7 I think, or $9.

Q Now when did you purchase the black taffeta and cloth gown?

A I purchased that in September.

Q What was the price of that?

A $50.

Q What did you pay for the black embroidered serge gown?

A $40.

Q What was the condition of these various gowns on the 31st of January of this year?

A Perfectly good.

In *Farnsworth* v. *Miller*, 60 Atl. 1100; affirmed on opinion below, 74 N. J. L. 599, the value of certain shelving was in issue and the only testimony was that of the owner of the store where the shelving was installed and the tenant. The Court remarked that

> "While the price which the plaintiffs paid him (Sondheim, the tenant who installed the shelving), was not controlling on the question of the value of the property in this suit, it was nevertheless evidence which the

jury had a right to take into consideration in fixing the value, and especially in passing upon the weight to be given to the testimony of Goldman (the landlord) in his estimate of value."

Sultan v. *London Assurance Corporation,* 135 Atl. 58 (not officially reported), was an action by an insured against some ten insurance companies for a total fire loss aggregating about $20,000. The insured conducted a 5 and 10 and 25 cent store. As to the loss resulting from the destruction of store fixtures, the plaintiff owner testified as follows:

Q How about the fixtures?
A I considered my fixtures of the value of three thousand dollars.
Q Will you describe what fixtures you had besides the counters and shelves you have already told us about?
A Counters and shelves and show cases, cash register and fixtures for the windows.
Q Was the cash register in the store when you opened it?
A Yes, sir.
Q Describe the cash register?
A A National cash register.
Q Can you give us the type?
A Well, the ordinary—like brass, or whatever it is, painted.
Q Do you know how old it was?
A No.
Q Was it in good working order?
A Yes, sir.
Q Did you have glass show cases?
A Yes, one glass show case where I kept my jewelry line.
Q And the counters and shelves?
A Yes, sir.
Q What else did you have in the way of fixtures?
A Fixtures for the windows; that is about all.

Q You have fixed that value at three thousand dollars?
A Yes, sir.

The above testimony was supported by the following testimony given by Charles C. Hildinger, the president of a theatrical company and the lessor of the building:

Q You sublet the premises to a man named Levinson?
A Yes, sir.
Q Do you recall the fixtures, the character of the fixtures in the place at that time?
A Yes, sir.
Q Will you describe them?
A (General description.)
Q Did you know the value of fixtures, such as they were at the time of the fire in 1922?
A I would like to ask whether you mean sale price—was the store to be demolished and the stuff taken out and sold over again or what it would be worth standing in the store?
Q Standing in the store, the cash market value?
A I figured around twenty-five hundred dollars.

Upon cross examination Mr. Hildinger was asked to itemize the values of the fixtures, and the following testimony is fairly representative:

Q What else was there in the store?
A Four electric fans; they were ceiling fans, with blades on.
Q What would they cost new?
A The cost of them I imagine at the time was about seventy-five dollars apiece.
Q How old were they?
A I do not know.
Q How much do they depreciate in a year?
A Ten per cent.

On appeal the defendant urged "that the plaintiff failed to sustain by a preponderance of

the evidence the value of the insured property and the extent of its damage by fire." But "preponderance" is a relative, and not an absolute term, and there may be a preponderance of evidence even if the testimony be meagre, as it undeniably was in this case. There being "some evidence" of value the Court, upon appeal, affirmed the judgment, saying that an "examination of the testimony sent up with the rule leads us to the contrary conclusion," notwithstanding defendant's contention.

A recent case following the rules laid down in the above citations, is *Babes* v. *Schaub,* 136 Atl. 520 (not officially reported), where the court said:

> "The testimony with reference to the damage to the car was that it was wrecked. One door was smashed up. Five glasses were broken. The frame work on the roof was splintered. The roof cover was torn off. The chassis frame was bent. The fenders were bent. The body pillars were splintered. The car was not repaired. No estimate of the cost of repairs was given. The car cost originally $1,610. It was a 1924 model. It had been run about 1,000 miles when the accident occurred. There was no testimony as to the value of the car before or after the accident. While we think the testimony meagre and unsatisfactory, yet, we cannot say that it was insufficient to support a verdict of $500."

In *Savarese* v. *Hartford Fire Ins. Co.,* 99 N. J. L. 435-438, the testimony was even more meagre. In that case plaintiff sued for the value of a stolen car, and the only testimony as to value was the following testimony of the plaintiff owner:

> Q When was this; how long before you bought it?

> A I bought in the first of November, 1919.
> Q When did you lose it?
> A I lose it on the 15th of December, 1921.
> Q How much did you pay for that car?
> A $750.
> Q Did you have any repairs made on this car?
> A Yes, sir.
> Q How much?
> A Repair cost me pretty near four hundred dollars. When I bought I put four new shoes on and repair the machine and everything else.
> Q What was the condition of the car?
> A The tire was no good. I got four new tire and I fixed the motor. It cost me nearly $450 more.
> Q What did you have done to this car?
> A I buy four new tires and fix the motor; I overhaul the motor; I have to overhaul the motor and four new tires; it cost me pretty near $400 altogether.

The car, a seven-passenger Buick of 1917 or 1918 model, was bought, second-hand, two years before the theft, and the repairs were made a week after the purchase. About six months before the theft the car had been insured for $700. Not a word of testimony as to the condition or value of the car at the time of the theft, but the jury was left to arrive at its own conclusion as to the probable depreciation during the two-year interval between purchase and theft.

The defendant contended in the trial court that no jury question was presented because "there is no evidence in the case of the value of the automobile at the time of the theft." The objection was overruled and became one of the grounds of appeal.

Upon appeal this court affirmed a verdict for the plaintiff and remarked that

> "This contention (that there was no evidence of the value of the automobile at the time of the theft) lacks support from the testimony in the cause. There was proof that the plaintiff paid $750 for the car and subsequently expended about $400 more on the car for repairs and tires. The cost of the car, furnishings and repair are elements of value to be considered by the jury. (Citing cases.)
>
> "On the question of the value of the car and the amount that the plaintiff was entitled to recover, if the jury found for the plaintiff, the Court instructed the jury as follows: 'Now, the fact that the car was purchased for $750, if that was the sum paid for it, does not fix the value of the car. You are to say from the evidence you have heard what the car's value was; what the car was worth at the time it was stolen, you may take those matters in consideration in determining the value of the car; but the plaintiff is only entitled to recover, if he recovers at all, the value of the car at the time it was stolen.'
>
> "This was an accurate statement of the law as declared by this court."

The cases cited, and they might be indefinitely multiplied, cover quite a variety of kinds of chattels. The universal rule seems to be that where there is *any* evidence of value such evidence must be weighed by the jury, and

> "where the evidence, and the inferences arising therefrom, will support a verdict for the plaintiff, a motion for a non-suit must be denied." *Weston Co.* v. *Benecke,* 82 N. J. L. 445. The same rule controls a motion for a directed verdict.

"Proof of the cost of articles is an element of proof of their value at another time" (*Precipio*

v. *Ins. Co.,* V Adv. Rep. 1069. Not officially reported), and where the condition of the article "at another time" is also put in evidence the case is for the jury.

Recalling, again, that the defendant admitted his negligence, that the testimony as to the make, type, cost, and good condition of plaintiff's car was uncontradicted, and that a depreciation of sixty-five per centum was admitted, it clearly appears that a much stronger case was made out for the consideration of a jury than in any of the examples cited above. On the defendant's admission of liability, and on the evidence of the total loss of a car in good condition and doing his work, the plaintiff was entitled to compensation and should have had the judgment of the jury as to what was fair and reasonable. The defendant, certainly, had no ground for urging the trial judge to show him a leniency as undeserved as it was unprecedented.

POINT II.

A plaintiff is not confined to the recovery of ALL his damages or NONE, but may recover a PART of his damages.

The Supreme Court seem to have rested their opinion upon the theory that, as "the measure of damages was the fair value of that car before the collision" (Case, p. 17, l. 28), and as "there was no evidence from which the jury could legally assess *that* value" (italics mine) (Case, p. 17, l. 29), a directed verdict was proper.

The same thought apparently underlies the further statement in the opinion that

> "the argument seems to be, and necessarily must be, that given a car five years old in good order but needing paint, and costing

> when new $1,100 cash, the jury are entitled to guess at its fair value (for it is no more than a guess) and award a verdict against the defendant for any sum they see fit, between the limits of zero and eleven hundred dollars'' (Case, p. 18, l. 10).

These assertions involve a *non sequitur,* for such is not this case.

The jury could not "award a verdict against the defendant for any sum they saw fit, between the limits of zero and eleven hundred dollars," for the sufficient reason that the recovery was limited, by the plaintiff himself, to $375, and because *it was for the jury under instructions from the Court, and not for the Court to the exclusion of the jury,* to determine what verdict, less than the full fair value of the car, the evidence would support, if the evidence was held, as a matter of law, to be insufficient to support a verdict for the *full* fair value of the car.

Furthermore, in any action for unliquidated damages the verdict of the jury cannot be characterized, *in advance,* as a "guess." The characterization of the mental process through which the jury must necessarily go in arriving at a verdict as guessing, estimating, determining, or finding, is of no significance whatever except, perhaps, as an indication of one's mental attitude toward the jury. It is only with the *result* of that mental process that the Court is concerned. If that result cannot be supported upon any legal ground, if it is purely a random judgment, it will be set aside or modified. But if the verdict, whatever it is, cannot be said, as a matter of law, to be unsupported by the evidence it must stand. It was for the Court to await the verdict and then, if necessary, pass upon it; it was error for the Court to assume that the

verdict *must* be wrong, notwithstanding it *might* be right, and on that assumption to take the case from the jury.

As to the objection that, upon the evidence, any jury verdict would be "no more than a guess" the case of *Hirsch* v. *Malone,* 99 N. J. L. 473, appears apt and controlling.

> There one of the grounds of appeal was that "the Court erred in allowing the jury to consider the subject of a verdict against the plaintiff (on defendant's counter-claim) on account of damage to goods shipped to them and not sold, because there was no testimony of the amount of damage and in the absence of such evidence a verdict would be speculative."

But this court held that

> "there was evidence from which it could be found that the goods were damaged and therefore defendant was entitled to some verdict, substantial if there was evidence as to amount of damages and nominal if there was no such testimony,"

and affirmed a verdict for the defendant, on its counter-claim.

In the instant case the testimony was ample, and uncontradicted, that plaintiff's damages were substantial.

Everything urged under Point I upon the right of the plaintiff to go to the jury generally is equally applicable upon the contention that, in any event, there was raised a jury question.

Were the rule here contended for by the defendant to be generally applied there could be no recovery in most of the cases of total loss of goods, kept for use and not for sale, arising in insurance, bailment, and conversion cases, and

the cases cited under Point I, and numerous others, were all wrongly decided.

Where an article is of a kind in general use, and kept for use and not for sale, whether it be an automobile of a well-known and popular make, a carriage, a bicycle, a dining room table, or wearing apparel, it has universally been recognized that there is, and of necessity must be, a certain range in the estimation of values within which it must be conclusively presumed it is within the intelligence of the jury to find the damages with sufficient accuracy for the purposes of justice without calling upon experts for aid. Otherwise the jury must abdicate its proper functions and become a mere registering, or averaging, device controlled by the expert.

Where the issue is as to a part of the damages only, and the value of the article after the damage is done is fixed at zero, and no repairs are made, testimony as to the actual value of some certain part of the damages is useful only for the purpose of establishing a basis for a verdict for a *particular amount.* Such testimony however, is not *necessary,* and, in many cases, would be impossible to obtain.

Having the make, type, age, and first cost, of plaintiff's car, having its condition before the collision and its admitted depreciation at that time, and its value after the collision having been established, the jury had all the information necessary for a jury determination of *some* of the damages, and for a determination of *some* of the compensation in excess of six cents to which the plaintiff was fairly and reasonably entitled. Beginning with zero value it was the exclusive province of the jury to estimate the damages up to the point at which the trial judge

could say that, as a matter of law, a verdict would be unsupported by the evidence. Within that range there need be no expert testimony and the opinion of the jury was controlling.

If the testimony, although admissible and competent on the issue of *some* value (*Dantes* v. *McGann,* 98 N. J. L. 55), was insufficient to support a verdict for the *full* value of the car, the question whether the car did, or did not have a market value *prior* to the collision becomes irrelevant and immaterial. There no longer being any controversy over market value, and no repairs having been made, there is no issue calling for expert testimony as to value. The comment of the Court in *Sultan* v. *London Assurance Corp., supra,* that "manifestly, chattels injured or partially destroyed by fire can have no market value, and it would seem equally true that their value cannot be the subject of expert opinion" is equally pertinent here.

But that situation does not put the plaintiff out of court. The defendant has admitted liability, the damages is substantial, and one end of the scale of values has been fixed, for *after* the collision the value of the car was zero.

> "Where there are *any* facts in a case sustaining, if believed, plaintiff's *right of action,* a question for the jury is presented, and a direction of verdict for the defendant would be error." (Italics mine.) *Riebenack* v. *Rubens,* 130 A. 542 (not officially reported).

In this situation the meritorious question for the jury, under proper instructions from the Court, was this:

What amount, in excess of six cents, but not exceeding $375, is a fair compensation to the plaintiff for *so much of* his loss as may be found by the jury on the basis of the testimony before

them. That was the meritorious issue in the cases cited under Point I and such seems to be the universal rule. In fact no case to the contrary has been found.

It is for the jury to estimate such damages, the verdict being controlled, but not settled, by the Court. If the plaintiff failed to produce sufficient evidence to support a verdict for his entire loss that was his fault, as well as his misfortune, and he could not complain at the smallness of the verdict if not induced by mistake, passion, prejudice, or partiality. On the other hand, the protection of the defendant does not lie in taking the case from the jury as to any part of the damages, but in an instruction to the jury as to their limitations in estimating the damages, and in the power of the Court to set aside the verdict if, as a matter of law, it is unsupported by the evidence. The Court has no right to assume in advance that the verdict will be, or must be, such only that it would be compelled "in the exercise of a sound legal discretion to set aside the verdict."

Thus far the case has been treated as one involving only the damages to the automobile itself. But the plaintiff was entitled to compensation for *all* the damages naturally and proximately resulting from defendant's negligence. The collision was upon a highway and the car so far wrecked that it had to be hauled away. The charge for this service was one naturally and proximately incident to defendant's negligence, and the plaintiff was entitled to reimbursement for such reasonable expenditure as he made for that purpose.

The plaintiff testified that he paid five dollars to have his car hauled to the Roslyn garage (Case, p. 7, l. 12). This charge was confirmed by the testimony of Mallory, the garage proprietor (Case, p. 11, l. 18). The trial judge wholly ignored this testimony, but plaintiff contends that the charge for the service rendered was not, as a matter of law, unreasonable, and if not unreasonable in law it was for the jury.

The action of the trial judge in taking the case from the jury generally was error.

The action of the trial judge in taking the case from the jury as to any part of the damages of the plaintiff was error.

The judgment of the Supreme Court and the verdict of the District Court should be set aside, and a *venire de novo* awarded as to plaintiff's damages arising from the destruction of his automobile.

Respectfully submitted,

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with Plaintiff-Appellant.

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