INDEX

Clerk's Certificate.

CERTIFICATE.

FIRST DISTRICT COURT.
CITY OF NEWARK.

LINDEMAN-CHEVROLET, INC., a corporation, *Plaintiff*, *vs.* RELIABLE WOODWORKING CO., a corporation, *Defendant*.	*On Contract.* *Certificate.*

I, Charles R. Baldwin, Clerk of the First District Court of Newark, do hereby certify that annexed hereto is a true copy of the docket entries in the above-stated cause; also a true copy of the state of demand.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Court, this twenty-fifth day of August, Nineteen Hundred and Twenty-five.

CHARLES R. BALDWIN,
Clerk.

TRANSCRIPT OF CLERK'S DOCKET.

92629

FIRST DISTRICT COURT,
NEWARK, N. J.

LINDEMAN-CHEVROLET, INC., a corporation,
Plaintiff,
and
RELIABLE WOODWORKING CO., a corporation,
Defendant.

On Contract.

Execution
Statement.

PLAINTIFF'S COSTS.

Summons (Feb. 25)	2.10
Mileage	.08
Listing fee	.50
Witness fee	
Atty's fee	25.00
	$28.68

William Greenfield, pl'ts atty.
Rel. Woodw. Co., 27 Badger ave.
Bornstein, 33 Ridgewood ave.

A summons in the above-stated cause was issued on the twenty-fifth day of February, 1925, returnable on the sixth day of March, 1925, wherein the plaintiff demands of the defendant the sum of Five Hundred Dollars.

The plaintiff filed its state of demand Feb. 25, 1925.

The summons was served and returned as follows:

I served the within summons Feb. 28, 1925, on Morris Bornstein, he being the Treas. of said Reliable Woodworking Co., by reading to him and giving him a copy thereof.

THEO. J. CONLISS,
Constable.

Jacob Bornstein could not be found.

1925.

Mar. 5. Specifications of Defenses filed.
" 6. The cause was adjourned to March 13.
" 12. Order for Interrogatories filed, $1.00.
" 19. The plaintiff and the defendant appearing, the cause was tried and determined at this time.
" 19. Mr. Lindeman, Irving Curran, Robert Harris and Isadore Leveen sworn for the plaintiff.
" 19. Defendant, Henry Warner, Samuel Becker, Mary Phinnock and Sidney Grossman sworn.
" 19. The evidence being closed, the Court reserved decision.
" 26. Amended State of Demand filed.
" 29. Court rendered decision this day. Judgment in favor of the plaintiff, and against the defendant, Reliable Woodworking Company, in the sum of Five hundred Dollars and —— cents damages with costs; whereupon judgment is hereby entered in favor of the plaintiff and against

		the defendant, Reliable Woodworking Co., in the sum of Five Hundred Dollars ($500) and —— cents damages with costs.
Apr.	14.	Rule for plaintiff to show cause Apr. 9, $1.00.
"	14.	Rule adjourned to April 14, when it was reserved.
"	20.	Rule dismissed, $1.00.
May	11.	Notice of Appeal and Appeal Bond filed, $1.00.
"	11.	Order filed that date of Judgment be considered as of April 23, $1.00.
"	14.	Order filed extending time in which to prepare case, $1.00.
June	18.	Order filed extending time in which to settle case to June 16, $1.30.

Summons.

SUMMONS.

First District Court Summons.

ESSEX COUNTY, *ss.*
The State of New Jersey.
To any Constable in said County or to the Sergeant-at-Arms of the First District Court.

Summon Reliable Woodworking Co., a corporation, and Jacob Bornstein to appear before the First District Court of the City of Newark, to be held in the City Hall, Broad street (ground floor), in the said city, on the sixth day of March, 1925, at ten o'clock in the forenoon, to answer unto Lindeman-Chevrolet, Inc., a corporation, in an action upon contract to the damage of the plaintiff Five Hundred Dollars. Hereof fail not.

WITNESS, CECIL H. MACMAHON, Esq., Judge of said Court at Newark, aforesaid, the Twenty-fifth day of February, in the year One Thousand Nine Hundred and Twenty-five.

Clerk.

Summons.

FIRST DISTRICT COURT
OF NEWARK, N. J.

Endorsed:

Summons on Contract.

LINDEMAN-CHEVROLET, INC., a corporation,
Plaintiff,

vs.

RELIABLE WOODWORKING CO., a corporation, *et al.*,
Defendants.

Demand	$264.50
Summons	2.50
Mileage	.08
Listing fee	1.50
Attorney fee	13.22

Returnable March 6, 1925.

WILLIAM GREENFIELD,
130 Market street, Newark, N. J.,
Attorney for Plaintiff.

Summons and State of Demand.

To the Defendant:

TAKE NOTICE, that the plaintiff demand that the defendant shall file written specification of defenses intended to be made in said action on or before the time specified for appearance in the process issued in said cause.

WILLIAM GREENFIELD,
Plaintiff's Attorney.

State of Demand.

STATE OF DEMAND.

Filed February 25, 1925.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

LINDEMAN-CHEVROLET, INC., a corporation, *Plaintiff,* *vs.* RELIABLE WOODWORKING CO., a corporation, and JACOB BORNSTEIN, *Defendants.*	*On Contract.* *State of Demand.*

The defendants are summoned to answer unto the plaintiff herein in an action upon contract and thereupon the said plaintiff by William Greenfield, its attorney, complains:

1. That on or about the 9th day of January, 1925, the said plaintiff loaned to the said defendants one Chevrolet roadster, to be used by the said Jacob Bornstein, for and in behalf of the said Reliable Woodworking Co., and that the said Jacob Bornstein did then and there, for and in behalf of the said Reliable Woodworking Co., promise and agree to return the said Chevrolet roadster in as good a condition as he had received it from the said plaintiff.

2. That the said defendant, Jacob Bornstein, did then and there use the said automobile, in behalf of the said Reliable Woodworking Co., in a reckless, careless and negligent manner, and did not return the said automobile in as good a

State of Demand.

condition as he, the said Jacob Bornstein, had received it from the said plaintiff, but the said automobile was returned by the said Jacob Bornstein and Reliable Woodworking Co. in a damaged and broken condition, and that thereby the said plaintiff was obliged to and did expend the sum of $264.50 in the repair of the said automobile loaned to the said defendants on the 9th of January, 1925.

3. Wherefore, the said defendant, Reliable Woodworking Co., or in the alternative, the said Jacob Bornstein, became and is liable for the breaking and damaging of the said plaintiff's automobile in the sum of $264.50.

Wherefore, judgment will be claimed by the said plaintiff against the said defendant, the Reliable Woodworking Co., or in the alternative, against the defendant, Jacob Bornstein, or against both defendants, for the sum of Two Hundred Sixty-four Dollars and Fifty Cents ($264.50) besides interest and costs of suit to be taxed.

WILLIAM GREENFIELD,
Attorney for Plaintiff.

AMENDED STATE OF DEMAND.

Filed March 26, 1925.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

LINDEMAN-CHEVROLET, INC., *Plaintiff,* *vs.* RELIABLE WOODWORKING CO., a corporation, and JACOB BORNSTEIN, *Defendants.*	*On Contract.* *Amended State of Demand.*

The defendants were summoned to answer unto the plaintiff herein in an action upon contract and thereupon the said plaintiff by William Greenfield, the attorney, complains:

1. That on or about the 9th day of January, 1925, the said plaintiff loaned to the said defendants one Chevrolet roadster, to be used by the said Jacob Bornstein, for and in behalf of the said Reliable Woodworking Company, and that the said Jacob Bornstein, did then and there, for and in behalf of the said Reliable Woodworking Co., promise and agree to return the said Chevrolet roadster in as good a condition as he had received it from the said plaintiff.

2. That the said defendant, Jacob Bornstein, did then and there use the said automobile, in behalf of the said Reliable Woodworking Co., in a reckless, careless and negligent manner, and did not return the said automobile in as good a condition as he, the said Jacob Bornstein, had

received it from the said plaintiff, but the said automobile was returned by the said Jacob Bornstein and Reliable Woodworking Co. in a damaged and broken condition, and that thereby the said plaintiff was obliged to and did expend large sums of money in the repair of the said automobile loaned to the said defendants on the 9th day of January, 1925.

3. And the plaintiff further avers, that by reason of the damages and injuries done to the plaintiff's automobile the said automobile became greatly depreciated in value and became a total loss to the said plaintiff, and by reason thereof the said plaintiff says that it has sustained damages in the sum of $500.00.

Wherefore, judgment will be claimed by the said plaintiff against the said defendant, the Reliable Woodworking Co., or in the alternative against the defendant, Jacob Bornstein, or against both defendants, for the sum of $500.00 and costs of suit to be taxed.

WILLIAM GREENFIELD,
Attorney for Plaintiff.

Decision.

DECISION.

Filed March 29, 1925.

"Lindeman-Chevrolet, Inc., *vs.* Reliable Woodworking Co.

The plaintiff has established to my satisfaction that the sedan loaned to the defendant, Reliable Woodworking Co., was in good condition when taken by the defendant, and that it was in bad condition when returned by defendant. The explanation offered by the defendant that any damage was incurred by reason of a collision which occurred at Cherry and Canal streets is not at all convincing. On the contrary, this theory is greatly weakened by the testimony, which would indicate that the car was damaged very seriously on the day it was delivered by the plaintiff to the defendant. After such delivery, the difference in the value of the car after the accident and before is $500.00."

Judgment for the plaintiff, $500.00.

NOTICE OF APPEAL.

Filed May 11, 1925.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

LINDEMAN-CHEVROLET, INC., a corporation, *Plaintiff*, *vs.* RELIABLE WOODWORKING CO., a corporation, and JACOB BORNSTEIN, *Defendants.*	*On Contract.* *Notice of Appeal.*

To William Greenfield, Esq., attorney for Lindeman-Chevrolet, Inc., a corporation:

SIR:

TAKE NOTICE that the defendant, Reliable Woodworking Co., hereby appeals to the New Jersey Supreme Court from the judgment of the First District Court of the City of Newark, New Jersey, rendered in the above-stated action on the 26th day of March, 1925.

LEE HORLAND,
Attorney for Defendant.

Order Extending Time.

ORDER.

Filed May 14, 1925.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

LINDEMAN-CHEVROLET, INC., *Plaintiff,* *vs.* RELIABLE WOODWORKING CO., a corporation, and JACOB BORNSTEIN, *Defendants.*	*On Contract.* *Order.*

It appearing to the satisfaction of this Court that the parties to the above-entitled suit have been unable to agree upon and settle the state of the case and the said parties having applied to me to settle the same, it is hereby ORDERED that the time for settling the case is extended to June 16, 1925.

CECIL H. MACMAHON,
Judge.

STATE OF THE CASE ON APPEAL.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

LINDEMAN-CHEVROLET, INC., *Plaintiff,* *vs.* RELIABLE WOODWORKING CO., a corporation, and JACOB BORNSTEIN, *Defendants.*	*On Contract.* *State of the Case on Appeal.*

This case was tried before me without a jury. The parties being unable to agree on a state of the case, have requested me, Cecil H. MacMahon, Judge of the said First District Court, to prepare such state of the case on appeal. I find the facts to be as follows:

Plaintiff loaned Reliable Woodworking Company a Chevrolet sedan, which was taken from the plaintiff's place of business by Jacob Bornstein, an officer of the Reliable Woodwork Company. The sedan was in good condition when taken possession of by the defendants. When the sedan was returned by the defendants to the plaintiff it was in very bad condition . The testimony offered by the defendant to explain the bad condition was not convincing. On the contrary, I find the fact to be that the car was damaged very seriously while on the original trip from plaintiff's place of business to the defendant's place of business in charge of Jacob Bornstein.

At the trial, the plaintiff offered to prove that the repairs to the car would cost $264.50. This was objected to by the defendants on the ground that the true measure of damage was the difference in the value of the car before the accident and after the accident. This objection was sustained and the plaintiff given leave to amend its complaint, claiming damages for the difference before and after the accident.

The plaintiff then put in expert testimony that the value of the sedan when delivered by the plaintiff to the defendants was $900.00 and that its value when returned by the defendants to the plaintiff was $325.00.

Judgment was rendered for the plaintiff for $500.00.

All of which is respectfully submitted this 9th day of June, 1925.

CECIL H. MacMAHON,
Judge.

SPECIFICATIONS OF ERROR.

NEW JERSEY SUPREME COURT.

LINDEMAN-CHEVROLET, INC., *Plaintiff-Appellee,* *vs.* RELIABLE WOODWORKING CO., a corporation, *Defendant-Appellant.*	*On Contract.* *On Appeal from District Court.* *Specifications of Error.*

The following are the specifications of the determination of the First District Court of Newark, with which the appellant is dissatisfied in point of law:

1. The Court erred in rendering judgment for $500 in favor of the plaintiff and against the defendants because the state of demand of the plaintiff claimed damages in only the sum of $264.50 besides costs.

2. The Court erred in rendering judgment for $500 in favor of the plaintiff and against the defendant because the same was in excess of the amount claimed or demanded by the plaintiff, and no order was ever made or allowed permitting the plaintiff to file an amended demand claiming any sum in excess of the amount set forth in the original state of demand, to wit, $264.50 besides costs.

LEE HORLAND,
Attorney of Defendant.

OPINION OF SUPREME COURT.

Filed January 21, 1926.

NEW JERSEY SUPREME COURT.

No. 446, October Term, 1925.

Lindeman-Chevrolet, Inc., a corporation,
Plaintiff-Appellee,

vs.

Reliable Woodworking Co., a corporation,
Defendant-Appellant.

Submitted October 16, 1925; decided January , 1926.

Defendant's appeal from District Court.

Before Justices Parker, Minturn and Black.

For the Plaintiff-Appellee, William Greenfield.

For the Defendant-Appellant, Milton M. Unger.

Per Curiam. The only error alleged in this case is the action of the Trial Court in allowing an amendment to the state of demand, the result of which amendment was to support a judgment for $500 instead of a judgment for $264.50. The plaintiffs loaned an automobile to the defendant, and while in its custody, it was badly damaged. The liability of the defendant for this damage was not disputed. The automobile was returned to the plaintiff and put in order at a cost of $264.50, and the plaintiff sued defendant to recover that amount. The summons in the action laid the damages at $500, but in the original

state of demand it was averred that by reason of the injury "the plaintiff was obliged to and did expend the sum of $264.50 in the repair of the said automobile loaned," etc. Judgment was claimed in $264.50 besides interest and costs. At the trial, the plaintiff undertook to prove the cost of repairs as was alleged in the state of demand but, according to the certificate of the Trial Judge, "This was objected to by the defendants on the ground that the true measure of the damage was the difference in the value of the car before the accident and after the accident. This objection was sustained and the plaintiff given leave to amend its complaint, claiming damages for the difference before and after the accident." The amendment was apparently not put in writing at the time of the trial, but the trial proceeded without it, as often happens in such cases, and without objection so far as appears. Plaintiff went on to prove its damages on the basis urged by the defendant, and the testimony on this point showed that, whereas the automobile before the accident had a value of $900, its value after the accident was only $325, a difference of $575. The Court then reserved decision and a few days later before the decision was given an amended demand was filed claiming "that by reason of the damage to the automobile, the same became greatly depreciated in value and a total loss, and by reason thereof, plaintiff says that it has sustained damage in the sum of $500." Several days after this, the Court awarded a judgment for $500, and it is now claimed, as already stated, that the Court erred in permitting the amendment to be made.

There is nothing before us to show that any objection was made to the amendment, and it is reasonably evident that an amendment of this kind was contemplated. It is also a fair deduction from the language of the certified state of the case that the trial proceeded as though the amendment had been made, and that the evidence with regard to difference in value was admitted without any objection or suggestion to the Court that the damage found could not exceed that claimed in the original state of demand. In other words, the plaintiff was obliged to shift its ground by the defendant's original objection, and we fail to see how, after the ground was shifted because the defendant insisted upon it, defendant can now claim that although a different rule was applied at its own instance, the amount to be recovered is to be restricted by the damages first claimed, based on the theory of the cost of repairs. In this aspect, the case is very similar to Oxford Foundry & Machine Co. *v.* George A. Meyers & Co., 3d Misc. 1212, 130 Atl. 884. In that case the plaintiff undertook to prove damages based upon the market price of certain sash weights; defendant objected and insisted that the true measure of the damages was the difference between cost of production and the agreed contract price. The Court acceded to this view and permitted evidence to be submitted on that basis, and on rule to show cause it was alleged that the Court adopted an erroneous rule for the measure of damages. But this Court held that the defendant was not entitled to allege error in an action of the Trial Court that was taken at its own suggestion and instance. This is substantially the situation in the present case. The appellant,

having forced the plaintiff below to abandon the measure of damages suggested in its original state of demand and to prove a case based on a measure of damages suggested by the defendant, cannot now complain because the damages proved turn out to have been more than those which would have been proved if the original measure of damages had been adhered to.

The judgment will be affirmed.

Notice of Appeal.

NOTICE OF APPEAL.

Filed February 18, 1926.

NEW JERSEY SUPREME COURT.

LINDEMAN-CHEVROLET, INC., a corporation, *Plaintiff-Appellee,* *vs.* RELIABLE WOODWORKING CO., a corporation, *Defendant-Appellant.*	*On Contract.* *On Appeal from First District Court of Newark.* *Notice of Appeal.*

To William Greenfield, Esq., Attorney of Plaintiff-appellee,

SIR:

PLEASE TAKE NOTICE, that the defendant, Reliable Woodworking Company, hereby appeals from the whole of the judgment in the above cause to the New Jersey Court of Errors and Appeals.

Yours respectfully,

MILTON M. UNGER,
Attorney for Defendant-Appellant.

Service acknowledged February 16, 1926.

GROUNDS OF APPEAL

Filed February 23, 1926.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LINDEMAN-CHEVROLET, INC., a corporation, *Plaintiff-Appellee,* *vs.* RELIABLE WOODWORKING CO., a corporation, *Defendant-Appellant.*	*On Appeal from New Jersey Supreme Court.* *Grounds of Appeal.*

Reliable Woodworking Company, the defendant-appellant, as and for the grounds of its appeal from the judgment rendered against it in the above cause, hereby specifies and assigns the following:

1. The Court erred in rendering judgment for $500 in favor of the plaintiff and against the defendant because the state of demand of the plaintiff claimed damages in only the sum of $264.50 besides costs.

2. The Court erred in rendering judgment for $500 in favor of the plaintiff and against the defendant because the same was in excess of the amount claimed or demanded by the plaintiff, and no order was ever made or allowed permitting the plaintiff to file an amended demand claiming any sum in excess of the amount set forth in the original state of demand, to wit, $264.50, besides costs.

Grounds of Appeal.

3. The Supreme Court erred in affirming the judgment of the First District Court of the City of Newark, New Jersey.

MILTON M. UNGER,
Attorney of Defendant-Appellant.

Service acknowledged February 16, 1926.

New Jersey Court of Errors and Appeals

LINDEMAN-CHEVROLET, INC., a corporation, *Plaintiff-Appellee,* *vs.* RELIABLE WOODWORKING CO., a corporation, *Defendant-Appellant.*	*On Appeal from Supreme Court.*

BRIEF FOR DEFENDANT-APPELLANT.

This is the appeal of the Reliable Woodworking Company from a judgment of the Supreme Court affirming a judgment of five hundred dollars entered against it in favor of the plaintiff in the First District Court of Newark on March 29, 1925.

Facts.

On February 25, 1925, the plaintiff filed its demand on contract in the District Court, alleging that the defendant borrowed of the plaintiff a Chevrolet roadster and agreed to return it in as good condition as received; that it did not do so, but returned it in a damaged and broken condition, making it necessary for the plaintiff to spend $264.50 for repairs. Judgment was claimed for $264.50 besides interest.

The transcript of the clerk's docket shows that the case was tried on March 19th, 1925, and the evidence being closed, the Court reserved the case for decision. Up to this time no further pleadings had been filed, and it appears from the transcript that on March 26th, 1925, six

days after the trial, an amended state of demand was filed. This pleading increases the damages to $500.00, and it is clear that it was filed after the evidence was closed after the Court reserved the case for decision and after the case, so far as the actual trial was concerned, was over.

The Court thereafter proceeded to enter judgment on March 29th, 1925, for $500.00. The defendant was never served with a copy of the amended state of demand and had no knowledge or notice of such amendment until judgment for the larger amount had been entered.

POINT 1.

The Court erred in rendering judgment for $500.00 in favor of the plaintiff, because the state of demand claimed damages in only the sum of $264.50 and could not be amended after trial without a rehearing.

When the case was tried and the evidence closed on March 19th, 1925, there was in existence but one pleading upon which the claim of the plaintiff was founded and that was its state of demand in which it claimed damages for $264.50, and the defendant had a right to assume that judgment could not be given by the Court for any sum greater than the amount claimed in the state of demand.

Assuming that the Court had a right to amend the demand, this could not be done a week after the trial and after the evidence was closed and be binding upon the defendant to the extent of obligating him to pay the increased damages called for by the amended state of demand.

In *Excelsior Electric Company* v. *Sweet,* 59 N. J. L. 441, it was held that in a declaration for

unliquidated damages, where the only indication of the amount claimed is in the *ad damnum* clause, the amount there claimed should not be increased, after verdict, for the plaintiff, without sending the cause back for a new trial.

This principle was repeated in *Martinez* v. *Runkle,* 57 N. J. L. 111; in *Partridge* v. *Woodland Steamboat Company,* 66 N. J. L. 294; in *Murphy* v. *North Jersey State Railway Company,* 71 N. J. L. 5, and in *Merklinger* v. *Lambert,* 76 N. J. L. 814.

In *Drake* v. *Mowder,* 89 N. J. L. 306, it appeared that the plaintiff sued the defendant in the District Court for $331.08 and caused judgment to be entered for $415.54. Upon the return day, the defendant failed to appear and the Court ordered the state of demand amended and gave judgment for the increased amount.

The Court of Errors and Appeals said that this was erroneous. Mr. Justice Minturn, speaking for the Court, said, on page 307:

> "While we do not deny the court's power in matters of form to order an amendment, we conceive it to be manifest that a change in the *quantum* of the claim by which the defendant, without his presence, knowledge or consent is subjected to a judgment for an amount in excess of that stated in the process and pleadings, is not such an informality which the statute concerning amendments contemplates, but rather savors of the substance and gravamen of the complaint. *Non constat* that the defendant, in view of the information conveyed to him by the process, and for reasons satisfactory to himself, may have concluded to allow judgment to go against him for the claim, viewing it not as an incorrect demand, and, therefore, intentionally absented himself from the court.

> If, however, the legal *status* which he is thus permitted to assume, be subject without his knowledge or consent to be changed to his detriment, a situation is presented which admits of an enforced liability upon an absent defendant, the extent of which can only be determined by the limitation of court's jurisdiction. Excelsior Electric Company *v.* Sweet, 59 N. J. L. 441, 444. The cases of Cortelyou *v.* Cortelyou, 2 N. J. L. 318, and Excelsior Electric Company *v.* Sweet, *supra,* are sufficiently critical of such procedure as to warrant their citation as authorities adverse to it."

If, under the authority of that case, the Court could not, *at trial,* in the absence of the defendant, order the state of demand to be amended by increasing the damages to conform to the proof, then, *a fortiori,* the Court could not, *after trial,* permit the state of demand to be amended by increasing the damages without the presence, knowledge or consent of the defendant, and this is what exactly happened in the case at bar.

In 31 Cyc. 387, it is said:

> "The rule is well settled that mere leave to amend does not, of itself, operate as an amendment or raise any presumption that an amendment was made. The reason for this is obvious. A party may have leave to amend and yet not choose to avail himself of it. He is in nowise obliged to exercise the privilege given and make the amendment. * * * In some jurisdictions if the amendment is of a substantial character an actual amendment is always held necessary, and the fact that the case is tried on the theory that the amendment was made, or that the nature of the proposed amendment and leave to make it appears from the record, does not obviate the necessity for making the amendment and authorize a reviewing court to consider it as having been made."

While it is at the same place pointed out that in a large number of states a rule opposed to this last is followed, it is submitted that proper practice requires that amendments should be presently made, especially of the very gist of the action, the amount of damages claimed, and a loose, uncertain and confusing practice should not have the stamp of judicial approval. To uphold the procedure in the case under review would set a precedent for a very loose practice in a matter resting within discretion, which on the contrary should be attended with certainty and precision, since the opportunity for misunderstanding, mistake, and even abuse, of the grant of leave, are considerable from the necessarily unfixed nature of the ruling of the Court, if the amendment is not presently made or an adjournment granted for the purpose of filing an amended pleading and affording an opportunity to answer, before anything further is done in the cause.

In *Pooler* v. *Southwick,* 126 Ill. App. 264, it appeared that on a demurrer to a plea the defendant, during the argument, obtained leave to amend the plea. The record kept by the clerk of the court recites that the defendant did amend his plea.

The Court, on page 265, said:

> "It is not the office of a clerk of a court to recite in his record that a party has amended a pleading, nor to preserve in his record the language of such amendment. This recital by the clerk was unauthorized, and the record is not affected or enlarged thereby, but remains the same as if this improper recital had not been made. The plea, itself, as set out in the record, was not amended, and the clerk certifies that this is a complete transcript of the record, includ-

> ing the pleadings. Therefore, according to the record before us, the plea was not in fact amended. *An order granting leave to amend a plea does not of itself constitute an amendment, and the amendment does not take effect till the pleading is actually amended.*" (Italics our own.)

This, it is submitted, is a correct statement of the effect of a grant of leave to amend. To give it any other force is to remove from the trial of causes at law the cardinal doctrine that notice and an opportunity to be heard are essential to the rendition of a valid judgment; for if a party may obtain leave to amend and proceed without amending and after the trial of the cause, decision being reserved, file an amended state of demand upon which judgment is rendered and of which the other party has no notice until *after* the rendition of judgment, it is not perceived how such other party has had any notice of the terms of the amendment, or even of the amendment itself, or in what it consists, or any opportunity to object to it, as to form or substance, or to answer it by amending his own pleadings or filing new ones.

So, also, in *Ogden* v. *Town of Lake View,* 13 N. E. 159, 121 Ill. 422, the Supreme Court of Illinois said:

> "The granting of such leave" [to amend a petition to include a city ordinance] "certainly had no other effect than to confer on appellee the power to make such amendment. After obtaining such leave, the appellee was not at all bound to make the amendment, and until it was made the petition remained just as it was before the application was made, and so it remained until the suing out of the writ of error. To permit the amendment to be made afterwards was simply to permit the making of a

> new record. This, of course, cannot be permitted."

And in *Wisconsin, etc., Ry. Co.* v. *Wieczorek,* 38 N. E. 678, 151 Ill. 579, the Court said:

> "On motion made by the defendant for non-suit, leave was asked by plaintiff to amend his declaration. The motion was overruled and the leave granted. The proposed amendment was not in fact made, and the declaration is presented upon this record without amendment, and in all respects as it was when the motion for non-suit was entered. * * * while the appellate court saw fit to treat the leave given as amounting, in effect, to an amendment actually made, we do not feel at liberty to so regard it * * * until the amendment was in fact made, the declaration, in all respects, remained the same as though no leave to amend it had been given."

The fact that a written amended state of demand was filed in this case six days after trial clearly shows that the pleading was not automatically amended by the leave of the Court to amend, and that such was not the supposition of either the Court or counsel. If that was so, why file any further pleading to effect the amendment?

To this amended pleading, filed after the trial of the case, the defendant was deprived of his right to answer, for the case had already been tried. On this situation, the following, from 21 R. C. L., page 588, is pertinent:

> "The right of the defendant to answer an amended pleading is one of which he cannot be deprived, even after entry of a default against him on the original pleading, for where a plaintiff amends in matter of substance, he, in effect, opens the default on the original pleading."

The amended state of demand was filed on March 26th, 1925, and judgment was entered on March 29th, 1925. No notice or opportunity for a re-hearing was given. The original state of demand was not amended at or after trial. An entirely *new* state of demand was made the basis of the plaintiff's claim, and this, after all the testimony was heard and the trial closed. In such a case the defendant has a right to have an opportunity to answer or be heard or to waive such rights. It must follow, then, that the plaintiff is precluded from recovering, though not from proving, a greater sum than that alleged in the state of demand on which the case was actually tried.

In *Weber* v. *Morris & Essex R. R. Company,* 35 L. 409 (Sup. Ct. Van Syckel, *J.*), the Court said on page 414:

> "The law implies all the damages which naturally flow from a tortious act, and they may be recovered without being specifically stated in pleading, *but the plaintiff cannot recover in excess of the sum he claims.*" (Italics our own.)

Any judgment entered on this state of demand above $264.00 is bad for the reason that the demand does not conform to defendant's objection and for the reason that it was not amended in contemplation of law, and all proceedings taken thereon on the basis of an *ad damnum* allegation of $500.00 were in contravention of the legal rights of the defendant.

POINT 2.

The Court erred in rendering judgment in favor of the plaintiff, because the state of demand claimed damages in only the sum of $264.50; and an amendment of such state of demand by the plaintiff after the close of the active part of the trial and after all evidence was before the Court was prejudicial to the defendant and error.

It is submitted that the Supreme Court erred in affirming the judgment of the lower court. In the decision of that court the following statement is found:

> "The liability of the defendant for this damage was not disputed."

The Court evidently predicated its further discussion and conclusions upon this apparent admitted liability. It is submitted that this conclusion influenced the Court to affirm a judgment which was in excess of and added a pecuniary liability to that claimed in the original demand. Liability, if any existed for the amount claimed in the pleadings.

Plaintiff was suing for moneys expended upon repairs of the damages to the car.

On page 11 of the case, the Supreme Court says that,

> "After such delivery, the difference in the value of the car after the accident and before is $500."

The trial of the case was based on the pleadings in issue and the plaintiff's pleading was his demand, which was for the sum of $264.50. It is admitted that defendant's attorney objected to the plaintiff's theory of damages and submitted a new theory, but the conduct of the parties was on the basis of the pleadings on file and no one

could look for a judgment greater than the amount asked in the state of demand.

In *Jordan* v. *Reed,* 77 N. J. L. at page 592, Mr. Justice Green said that it would not be consistent with justice to amend a declaration so as to make it conform to the proofs. In the case at bar there was an amendment of the state of demand, so that the amount claimed conformed to the amount proved. It is submitted that under the authority of the above case, this was error.

In *Kent* v. *Phoenix Art Metal Company,* 69 N. J. L. 532, the Court said that where the issue as made upon the pleading and bill of particulars has been fully tried and correctly settled, no amendment having been applied for in the Court below, the Court of Review will not permit the plaintiff-in-error to amend the bill of particulars in order to bring about a reversal of the judgment and a new trial upon a different issue. By the same process of reasoning we contend that where the issue as made upon the original state of demand was tried by the Court and the evidence closed, no amendment could be applied for thereafter in order to permit the plaintiff to enlarge his damages.

POINT 3.

The Supreme Court erred in affirming judgment for $500.00.

The Appellate Court is not being asked to review a finding of fact.

It is contended that the Court erred in permitting an amendment of the state of demand so as to permit a judgment for larger damages. The defendant was never served with a copy of the amended state of demand and had no notice of

such amendment until a judgment for the larger amount had been rendered.

It may be said that the conduct of the trial was such as to give due notice to the defendant of such larger damages. The state of demand could only support a judgment for the sum of $264.50. The defendant must be presumed to have regulated his conduct and evidence accordingly. By permitting the plaintiff to file an amended state of demand after the evidence was closed, defendant was taken by surprise, prejudiced thereby and deprived of his legal rights.

In *Excelsior Electric Co.* v. *Sweet, supra,* Mr. Justice Dixon, speaking for the Court of Errors and Appeals, said, on page 444:

> "If a declaration should allege a cause of action on proof of which a larger sum must be due than is stated in the *ad damnum* clause, then that clause might be deemed formal, and, after verdict, might be amended to conform with the real claim set forth in the pleadings. But where, as in this case, the declaration is for unliquidated damages and contains no indication of the extent of the plaintiff's claim outside of the *ad damnum* clause, we must presume that the defendant regulated his conduct at the trial with reference to a claim for the damages there stated, and might have modified his course of defense had a claim for a larger sum been in controversy. As was said by Lord Kenyon, in Tomlinson *v.* Blacksmith, 7 T. R. 133:
>
> > "It would be going too far to make the amendment required without sending a cause to a new trial, as the defendant might have gone to trial relying that no more than (the stated) damages could be recovered against him."

See, also, *Corning* v. *Corning,* 6 N. Y. 97.

In its opinion, the Supreme Court says that there is nothing before the Supreme Court to show that there was any objection made to the amendment and it is reasonably evident that an amendment of this kind was contemplated.

The amendment which was asked for at the trial was for leave to "amend its complaint, claiming damages for the difference before and after the accident." No amendment was applied for and no leave was given to increase the damages to $500.00.

The Supreme Court, in its opinion, did not make any mention of this fact, and even though it must be conceded that the trial proceeded as though an amendment had been made, and that the evidence with regard to a difference in value was admitted without any objection to the Court, we contend that this was entirely consistent with the fact that the damages could not, even under the change in the theory or measure of damages, be more than as laid in the original state of demand.

The case of *Oxford Foundry Machine Co.* v. *George A. Meyers,* 3 Miscellaneous 1212, does not dispose of the present case, because there was no suggestion of any kind that the damages proved at the trial were greater than those claimed in the complaint, and that is the difference between that case and the case at bar.

While it is true that the Supreme Court said that in the present case the appellant forced the plaintiff below to abandon the measure of damages suggested in the original state of demand and to prove a case based on a new measure of damages, it does not follow that because the damages then proved turned out to be more than those that would have been proved under the

original measure of damages, that the excess can be allowed. The state of demand on which the trial was conducted did not support the excess.

The judgment of the Supreme Court should be reversed.

Respectfully submitted,

MILTON M. UNGER,
Attorney and Counsel for Defendant-Appellant.

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New Jersey Court of Errors and Appeals

LINDEMAN-CHEVROLET, INC., *Plaintiff-Appellee,* *vs.* RELIABLE WOODWORKING CO., a corporation, *Defendant-Appellant.*	*On Contract.* *Appeal from the New Jersey Supreme Court.*

BRIEF OF WILLIAM GREENFIELD,
Attorney for Plaintiff-Appellee.

Statement of Facts.

This is an appeal from the Supreme Court affirming the judgment recovered in the First District Court of Newark, by the plaintiff-appellee against the defendant-appellant. See Opinion of the Supreme Court, page 17 of the Printed State of the Case.

The plaintiff, who is in the automobile business, having a salesroom and representative for the Chevrolet Auto Company, did on the ninth day of January, 1925, at the request of the representative of the defendant company, loaned to it one Chevrolet Roadster to be used by the defendant company and to be returned to the plaintiff in as good a condition as it was at the time the plaintiff company loaned the automobile to the defendant. The defendant's representative called for the automobile, used same for about four or five weeks. The defendant company returned the automobile to the plaintiff in a very much damaged condition, requiring expenditures of $264.50 by the plaintiff company.

Suit was instituted originally to recover for that particular bill. At the trial of the cause, plaintiff offered evidence to prove the moneys expended for the repair of the automobile dam-

aged by the defendant company. Defendant's counsel objected to the evidence assigning his reason that the true measure of damage was the difference in the value of the car before the accident and after the accident. The objection was sustained and the plaintiff given leave to amend its complaint, claiming damages for the difference in value before and after the accident. See State of the Case prepared by Hon. Cecil H. MacMahon, page 15, Folio 10, of the Printed State of the Case. The Court granted leave to amend the State of Demand in accordance with the evidence and in accordance with the objection and contention of the defendant's counsel. No claim or plea of surprise. No application to adjourn the cause by reason of the amendment. Counsel proceeded to try the case until its determination, in accordance with the terms of the court. The Amended State of Demand was filed March 26, 1925, although it was sometime after the trial was had. See Amended State of Demand, pages 9 and 10, of the Printed State of the Case. Memorandum Decision was filed March 29, 1925. See page 11 of the Printed State of the Case. Hence the Appeal.

POINT I.

The Reasons for Reversal assigned by Counsel for the defendant are two-fold, namely:

> First: "The Court erred in rendering judgment for $500 in favor of the plaintiff and against the defendants because the State of Demand of the plaintiff claimed damages in only the sum of $264.50 besides costs."

Counsel for the plaintiff-appellee cannot conceive on what theory the appellant at this time can claim that the Court erred in rendering judgment for $500 for the plaintiff, where he,

in the first instance, objected to the testimony offered to prove actual costs of repair, and insisted that plaintiff-appellee prove the depreciation of the automobile. His objection was sustained. That his speculation proved rather disappointing to him, is no reason for a reversal of the judgment. It is a well-established principle of law in this State that counsel cannot speculate on objection, particularly, where his objection is sustained and has proven disastrous to him. That the Court has a right to amend States of Demand goes beyond saying. It is well established that the Court of Errors and Appeals when necessary to do justice to the litigants may amend pleadings after it is appealed.

Counsel for plaintiff-appellee desires to call the Court's attention to the case of

American Life Insurance Co. v. *Day,* 39 New Jersey Law, page 89, at page 91, by the Chancellor:

> "The 138th Section of the practice act, is of a highly remedial character, and should be so construed as, in its own language, 'to prevent the failure of justice by reason of mistakes and objections of form.' The power of amendment thereby conferred, extends to this court, and in cases where no injury has been done to the party complaining, by or through error of mere form, it is incumbent on this court, in the interest of justice, to exercise the power."

Now assuming for the sake of the argument that a new trial is granted an amendment would certainly be allowed and what would be the result? It is respectfully submitted the same, namely, judgment for $500 the difference in value of the car before and after the accident.

Ruckman v. *Bergholz,* 37 New Jersey Law, page 437, at page 439.

The Learned Chancellor says:

> "The rule governing the allowance of interest on a running account or a claim for unliquidated damages, has no application to this case. There is no error in this direction of the judge. The judge very properly refused to charge that the plaintiff was not entitled to recover under the common counts. If the plaintiff failed to prove the contract alleged in the special count, but instead of it *proved a different one, variant as to the amount of compensation or the extent of the service to be rendered, he might have recovered under the common counts, or, if necessary,* an amendment might have been allowed, at the trial, or, failing that, *this court would have made it,* if the ends of justice required."

It is therefore respectfully submitted that there was no error on the part of the Court to allow the amendment, as it is well established in the District Court Act, wherein it specifically provides, Section 161, page 141, Richard B. Eckman Edition, 1921:

> "In order to prevent the failure of justice by reason of mistakes and objections of form, it shall be lawful for any District Court or the Circuit Court, on an appeal taken thereto, at all times, to amend all defects and errors in any suit or proceedings, whether there is anything in writing to amend by or not, and whether the defects or error be that of the party applying to amend by or not, and all such amendments may be made with or without costs, and upon such terms as to the court may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made."

See *Bocchino* v. *Cook,* 67 N. J. L., page 467.

Benoliel v. *Homac,* 87 N. J. L., page 375.

"Under this section, the District Court has power to permit the *plaintiff to amend the record during the trial,* and after a motion to non-suit, by striking out the name of the plaintiff, whenever it occurs in the process and pleadings, and inserting the name of another person as plaintiff, or adding a party as plaintiff."

See *Ten Eyck* v. *Delaware & Raritan Canal Co.,* 19 N. J. L., page 5.

"Amendments are entirely in the sound discretion of the court, and will be allowed whenever the advancement of justice requires it, under the particular circumstances of each case."

See opinion of the Supreme Court, page 17 of the Printed State of the Case.

Therefore it was in the discretion of the Court below to allow this amendment, although the amended State of Demand was filed after the trial but such amendment having been made during the course of trial. Nevertheless, it was filed by order of the Court, with knowledge on the part of the defendant, as certified to by Judge MacMahon, page 15 of the Printed State of the Case.

It is therefore respectfully submitted that the First Reason assigned by the defendant is frivolous and sham. It is respectfully submitted that judgment should be affirmed with costs.

POINT II.

The Second Reason assigned by the defendant is as follows:

"The Court erred in rendering judgment for $500 in favor of the plaintiff and against the defendant because the same was in excess of the amount claimed or demanded by

> the plaintiff, and no order was ever made or allowed permitting the plaintiff to file an amended demand claiming any sum in excess of the amount set forth in the original State of Demand, to wit: $264.50 besides costs."

Counsel for the plaintiff desires to call the Court's attention to page 15 of the Printed State of the Case, wherein the Learned Court sets forth that the defendant objected to the evidence; that the amendment was ordered in open court and that the trial proceeded in accordance with the amendment. No request for a continuance, no plea of surprise. No question raised as to a plea of surprise or continuance requested or that the same was refused by the Trial Court. The State of the Case as certified to by the Court should be accepted as the true facts that took place at the time of the trial.

It is a well-established principle of law, that the Court will not award a venire *de novo* where it is manifest that it will not benefit the applicant. In the case at bar, assuming that a venire *de novo* would be granted, it is respectfully submitted that it should not, as the defendant-appellant is not entitled to a new trial, and what benefit can the defendant-appellant derive therefrom? The result will be a venire *de novo* under the amended State of Demand and can there be any doubt of the same result? See *Van Dyke* v. *Admrs. of C. Van Dyke,* 17 N. J. L., page 478. It is therefore respectfully submitted under the authorities herein cited, that the defendant has no reason or ground, either in the proofs, pleadings or Counsel's Brief, for a new trial to be granted in this case. It was a pure, simple question of fact to be determined by the court

below and such determination of facts is not reviewable by the Appeal Court.

Charles McLaughlin v. *Josephine Beck,* New Jersey Supreme Court, 71 N. J. L., page 380.

Lapat v. *Erie Railroad Co.*, 71 N. J. L., page 377.

Doolittle v. *Willet,* Court of Errors and Appeals, 57 N. J. L., page 398.

Opinion by Van Syckel, J.

"This case was tried in court below without a jury, and judgment was rendered in favor of Willet. This court will not review the finding of facts; if there is any view of the evidence which will sustain such finding, the judgment will not be reversed."

Powell v. *Mayo and others,* 26 N. J. Equity, page 120, affirmed in 27 N. J. Equity, page 440.

It is respectfully submitted that if the Court would not have granted the plaintiff the right to amend its State of Demand and proceeded with the trial of the case, without such amendment, the result would have been a non-suit. Hence a venire *de novo*. Nothing gained by the defendant, except time and delay. The Learned Court below rightfully exercised its judicial discretion by allowing the amendment. The plaintiff, with its counsel and witnesses were there, as well as the defendant, with its counsel and witnesses. The case was tried on its merits. No plea of surprise. No application to postpone. Hence, counsel for the defendant came there prepared and we must assume that he was, because no request to adjourn the case was made to meet the alleged new issue and the issue was met. The witnesses were examined and cross examined. There were no objections or claim made to the amendment, and if counsel was gravely disap-

pointed in his unexpected result, surely, it is no reason or cause to complain at this time.

It is respectfully submitted under the authorities herein cited, facts proven and determined before this Court, judgment should be affirmed with costs.

WM. GREENFIELD,
Attorney for and of Counsel with
Plaintiff-Appellee.