

# Court of Errors and Appeals.

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JOHN W. SCHANCK,  
*Plaintiff in error.*

*vs.*

WILLET GRIFFIN,  
*Defendant in error.*

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*In Error  
to Supreme Court.*

MUIRHEID & MCGEE for Plaintiff in error.  
GILBERT COLLINS for Defendant in error.

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## BRIEF OF PLAINTIFF IN ERROR.

### I.

The declaration does not disclose a cause of action.

It narrates that Schanck filed an affidavit of, and obtained a writ in attachment against, Griffin; that thereby Griffin's property was seized; that an auditor was appointed; that the auditor adjusted the claim, and reported a sum due, and that judgment was thereupon rendered for Schanck against Griffin; that, as a result, there came to the hands of the auditor money, and that the auditor paid that money to Schanck, under the attachment act; that Griffin entered no appearance, and was not within the jurisdiction of the

Court pending the suit; and that the money so received by Schanck was neither in whole nor in part due nor owing.

This declaration shows no ground on which to found an implied promise to repay the money awarded by and received under the judgment of the Court.

The judgment of a court of competent jurisdiction is conclusive between parties, as to the matters adjudicated by the suit.

*Broom's Legal Maxims*, 323.

*Roscoe's Nisi Prius Ev.*, 193.

The report of the auditor, and the judgment confirming the same, set forth in the declaration, decide, as a matter of record, that the money therein mentioned was due and owing, and the correctness of that result cannot be questioned in any collateral proceeding.

If any action will lie, it cannot be the assumpsit.

*Sergeant & Harris vs. Stryker*, 1 Har. 464.

## II.—EVIDENCE.

A. On the trial we offered to show that Cyrus Lawrence, the principal witness for defendant in error, in a replevin case, in which the ownership of the property attached in this cause was the only question at issue, had sworn that the horse was his property and not that of Griffin; and that after full and complete investigation, the court—in that cause—decided this to be untrue, and we stated to the court that our purpose was to discredit the witness.

The court ruled out the testimony as incompetent.

*Case*, p. 35 and 36.

We submit to the court that we were entitled to this evidence, and that the court erred in rejecting it.

*B.* A material question at issue in the cause being, whether Schanck bought the horse in controversy absolutely, or whether he took it only for trial, to be retained if satisfactory, and returned if not. We offered to show the custom in that community regarding the taking of horses on trial, as a preliminary to purchase. The court refused to admit it.

*Case, p. 53.*

This custom we proposed to prove as a circumstance collateral to, and confirmatory of Schanck's allegation, and contradictory to that of Griffin and Lawrence.

It was to throw upon the transaction the light of ordinary usage, and to test its probability.

We submit that we were entitled to have the benefit of it before the jury.

In both these cases the verdict of the jury was likely to be greatly influenced by the refusal of the court to admit the evidence offered, and we were prejudiced thereby.

*Ros. Nisi Prius Ev.*, 89.

*Noble vs. Kennaway, 2. Doug.*, 510.

### III.—NONSUIT.

*A.* We moved to nonsuit on the ground that the liability of Griffin to Schanck for the debt recovered in the attachment suit, and the regularity of the suit is made *res adjudicata* by the judgment, and can not be questioned in any collateral proceeding.

That while that judgment stands Griffin can not come into this court or any other and say I do not owe the money awarded, nor that the attachment would not lie.

This we submit is the law, unless there be some statute of this State changing the rule.

*Roscoe's Nisi Prius Ev.*, 83.

*Greene vs. Hearne*, 3 *T. R.*, 301.

*Stone vs. Meyers*, 9 *Minn.*, 303.

*Gaddis vs. Lord*, 10 *Iowa*, 141.

The 47th section of the attachment act, Nixon's Digest, p. 46, fails to do this. It only provides for a bond and directs what the condition of the bond shall be. It seems to imply that a remedy exists already, but it provides none. It in no sense can have the force of changing existing law. The law will not be changed by implication. A change if effected must be by express provision.

*Potter's Duar. on Stat.* 185, 193, 205.

*McCluskey vs. Cromwell*, 11 *N. Y.*, 602.

*Logan vs. The Earl of Courtonn*, 13 *Bev.*, 29.

*Fordyce vs. Bridges*, 11 *Jur.*, 157.

*Philpot vs. St. Geo. Hospital.* 3 *Jur. N. S.*, 1269.

The justice refused, on this state of facts, to grant our motion to nonsuit, and in such refusal we submit there was error.

B. We also moved to nonsuit on the ground, that even if it be held, that a judgment in rem, operates only upon the property attached, yet a judgment in attachment may become more than this and have the force of a judgment in personam, where there is an appearance, in which case it certainly concludes the parties as to the questions adjudicated.

If this be true, and it has been so held in *Miller vs. Dungan*, 7 *Vroom*, 21, we are irresistably driven one step further, namely—that where a defendant does that which is equivalent to entry of appearance, he thereby invests the judgment with personal characteristics, and deprives it of its character of a judgment in rem.

The force of the exception made, if made, in favor of judgments in rem, is upon the idea that the defendant has no notice, and ought not to be concluded without a chance to be heard.

But it in this case appears, that Griffin knew of the attachment within three weeks after it was made; that he was within a few hours ride of the court all the time it was pending; that for two years after he voluntarily took no action.

*Case*, p. 17, l. 30, 40; p. 18, 19.

We submit to the court, that in this case Griffin had notice and every chance to be heard; that the reason of the exception made in favor of judgments in rem fails; that he is in a position similar to a man who has suffered judgment to pass against him by default after service of summons; that he cannot during the whole six months that an attachment suit is pending and for two years after, with full knowledge of its pendency, sit still, and then come and ask to be paid the money he has allowed to be recovered from him; that he is estopped from so doing and that he is exactly in the same position as if he had entered appearance and then judgment passed against him.

With this fact before him the justice refused to nonsuit, and in so doing we submit he was in error.

*Le Guen vs. Gouverneur, et al*, 1 *Johns. Cas.*, 436.

## IV.

The court charged the jury that a recovery might be had, either if the attachment would not lie, or if Schanck received money not due and owing.

*Case, p. 73, l. 15-36; p. 74, l. 1-7.*

In this we submit he was in error.

If this action can stand at all, it must be by force of the 47 section of the attachment act above quoted. By that section the only provision for recovery is where the plaintiff has received money not due and owing. It matters not if the attachment was all wrong, yet, if the money was due, no recovery can be had in the counter suit. The learned justice seems to have entirely over-looked this provision. As he put it to the jury, if either case appeared to be made, a recovery was to follow, and who can say on which alternative they founded their verdict.

In this part of the charge grave error seems to us to appear.

## V.

The court charged the jury, that a payment by Griffin to the auditor of the damages obtained against Lawrence in the replevin suit, was not a voluntary payment, and does not estop Griffin from seeking to recover it by suit.

*Case, p. 77, l. 35-40; p. 78, l. 1-10.*

This we submit was error.

## VI.

The Court charged the jury that Griffin was entitled to recover, not only the sum awarded and paid to Schanck, but also the taxed cost and interest therein paid to his

attorney; that the whole was to be regarded as paid to Schanck, and recoverable by Griffin if a case was made out on the other points.

*Case, pp. 87, 88.*

In this, we submit, there is very grave error. The 36th section of the Attachment Act, Nixon's Digest, page 44, provides that the auditor shall distribute among the plaintiff and creditors, all the moneys arising from the sale, &c., *first deducting legal costs and charges.*

What can be plainer? This is a statutory proceeding. The statute which creates the action provides that of the moneys the Court and its officers shall receive one portion, the plaintiff and creditors the other. First the costs, then the creditor, shall be paid. It does not, as in other cases, award to the plaintiff his debt and costs, but awards the costs to the officers entitled, and the debt to the creditor.

The statement of the proposition seems to be enough to establish its correctness.

## VII.

The Court refused to charge, as requested, that the laches of Griffin, in not appearing to the attachment suit, after he had notice, worked an estoppel.

In this we submit there was error, for the reasons detailed under point 3, B.

## IX.

We submit that the judgment rendered, was erroneous, in being for Griffin when it should have been for Schanck, and in being for the whole amount, when, if at all, it should be only for the amount received by Schanck personally, for the reasons herein given under former points.



# New Jersey Supreme Court.

WILLET GRIFFIN,

*vs.*

JOHN W. SCHANCK.

*In Case,  
On Postea, &c.*

DIXON & COLLINS, *Attorneys.*

As yet of the Term of February, A. D. eighteen hundred and seventy-four.

(Witness) MERCER BEASLEY, *Chief Justice.*

BENJ. F. LEE, *Clerk.*

HUDSON COUNTY, *ss.:*

John W. Schanck, the defendant in this suit, was summoned to answer unto Willet Griffin, the plaintiff therein, of a plea of trespass on the case upon promises, and thereupon the said plaintiff, by Dixon & Collins, his attorneys, complains for that, whereas, heretofore, to wit, on the thirtieth day of March, A. D. eighteen hundred and seventy-one, the said defendant, at Jersey City, in said County of Hudson, made oath before a justice of the peace of said County of Hudson, that the said plaintiff was not to his knowledge or belief resident at that time in the State of New Jersey, and that the said plaintiff owed unto him the sum of three hundred and fifty-four dollars and twelve cents as nearly as he could specify; and said oath was then

and there filed in the office of the clerk of the Circuit Court of said County of Hudson, and a writ of attachment was thereupon sued out of the said court against the rights and credits, moneys and effects, goods and chattels, lands and tenements of the said plaintiff at the suit of the said defendants in an action of trespass on the case upon promises, which said writ was tested and sealed on the day and year at the place aforesaid, and was made returnable to the first day of April then next, and was directed to and delivered to the

10 sheriff of the said County of Hudson, and the sheriff of said county on the said thirtieth day of March, in the year aforesaid, at the place aforesaid, attached by virtue thereof the property of the said plaintiff; and the plaintiff avers that after the return of said writ of attachment, to wit, on the first day of April aforesaid, one John A. Blair was appointed by the said Circuit Court to audit and adjust the demands of the said John W. Schanck and such of the plaintiff's creditors as should apply to said court or auditor for that

20 purpose, and afterwards such proceedings were held before said auditor that he did audit and adjust the demands of said Schanck at the sum of four hundred and fifty-nine dollars and five cents and did so report in writing to the said Circuit Court, to wit, on the third day of October in the year aforesaid, at the place aforesaid; and thereupon, to wit, on the day and at the place last aforesaid judgment was rendered by said court upon said report in favor of said Schanck for the said sum of four hundred and forty-nine dollars and five cents; and the plaintiff further avers that afterwards, to wit, on the first day of March, A. D. eighteen hundred and

30 seventy-four, at Jersey City aforesaid, there came to the hands of the said auditor as the proceeds of the alienation of the property so as aforesaid attached, a large sum of money, to wit, the sum of five hundred dollars, afterwards, to wit, on the eleventh day of March aforesaid, at the place aforesaid, the said auditor paid to the said Schanck and the said Schanck did receive out of the said proceeds and on account of the judgment aforesaid a large sum of money, to wit, the sum of four hundred and eighty-one dollars and eighty-one cents, by virtue of an act entitled, "An Act for the relief of

40 creditors against absconding and absent debtors," approved

April 16, 1846, and the supplements thereto; and the plaintiff further avers that neither at the time of issuing said writ of attachment, nor during the pendency of said proceedings had thereon, nor at the time of the rendering of said judgment was he resident within this State or within the jurisdiction of the said Circuit Court, and that he did not appear or enter or cause to be entered any appearance, or make any defence in the said suit of the said John W. Schanck, and the said Circuit Court never obtained in the said writ any jurisdiction of the person of this plaintiff. 10

And the plaintiff further avers that neither at the time of issuing said writ of attachment, nor at any time afterwards was the said sum of four hundred and eighty-one dollars and eighty-one cents so as aforesaid received by said John W. Schanck or any part thereof due or owing from the said plaintiff to the said John W. Schanck; by means whereof the said defendant then and there became and was indebted to the said plaintiff in the said sum of four hundred and eighty-one dollars and eighty-one cents, and being so indebted he, the said defendant, afterwards, to wit, on the day 20 and year and at the place last aforesaid undertook and then and there faithfully promised to pay to said plaintiff the said sum of four hundred and eighty-one dollars and eighty-one cents on request.

And, whereas, also the said defendant on the twenty-first day of March, in the year of our Lord, one thousand eight hundred and seventy-four, at Jersey City in the County of Hudson aforesaid, was indebted to the said plaintiff in the sum of one thousand dollars for money lent by the said plaintiff to the said defendant at his request, and in the like sum of 30 money for money paid by the said plaintiff for the use of the said defendant at his request, and in the like sum of money for money received by the said defendant for the use of the said plaintiff; and in the like sum of money for interest due from the said defendant to the said plaintiff for the said plaintiff's having forborne moneys due from the said defendant to the said plaintiff at the said defendant's request, for a long time then elapsed, and in the like sum of money for money found to be due from the said defendant to the said plaintiff on an account then and there stated 40

between them ; and the said defendant afterwards, to wit, on the day and year and at the place last aforesaid, in Jersey City aforesaid, respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request, yet he, the said defendant, disregarded his said promises and has not paid any of the said moneys or any part thereof to the said plaintiff's damage of one thousand dollars, and thereupon he brings his suit, &c.

And the said defendant by Muirhead & McGee, his attorneys, comes and defends the wrong and injury, when, &c., and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c.

And the said plaintiff doth the like.

Therefore, let a jury thereupon come before the Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Jersey City in and for the County of Hudson, on the third  
 20 Tuesday of January, in the year of our Lord one thousand eight hundred and seventy-five, by whom, &c., and the same day is given to the parties aforesaid, there, &c.

And now at this day, to wit, the twenty-third day of February, A. D. eighteen hundred and seventy-five, before our said Supreme Court at Trenton comes the said plaintiff by his attorneys aforesaid, and the Justice before whom and having sent hither his record had before him in these words, to wit,

Afterwards, to wit, at a Circuit Court held on the third  
 30 Tuesday in January in the year eighteen hundred and seventy-five at Jersey City, in and for the County of Hudson, before Manning M. Knapp, Esq., one of the Justices of the Supreme Court, came as well the said plaintiff Willett Griffin as the said defendant John W. Schanck by their attorneys respectively within mentioned, and the jurors of the jury aforesaid also come, who to speak the truth of the matters and things within mentioned being duly chosen, tried and sworn upon their oath, say, that the said defendant did promise and undertake in manner and form as the said  
 40 plaintiff has within thereof alleged against him, and they

assess the damages of the said plaintiff against the said defendant by reason of the performance of the said promises and undertakings at the sum of five hundred and fourteen dollars and two cents over and above his costs by him about his suit in this behalf expended, and for those costs, six cents.

Therefore it is considered that the said plaintiff do recover against the said defendant his said damages by the jurors in form aforesaid found to five hundred and fourteen dollars and two cents, and also fifty-five dollars and twenty- 10 seven cents for his costs and charges aforesaid by the court now here adjudged to the said plaintiff, and with his assent which said damages, costs, and charges in the whole amount to five hundred and sixty-nine dollars and twenty-nine cents.

Judgment signed this twenty-third day of February, A. D. eighteen hundred and seventy-five.

M. BEASLEY, *Ch. Jus.*

I, Benj. F. Lee, Clerk of the N. J. Supreme Court, do hereby certify that the foregoing is a true copy of the judg- 20 ment in the above stated cause as the same remains of record in my office.

In testimony whereof I have hereto set my hand and the seal of said Court at Trenton this sixth day of March, A. D. eighteen hundred and seventy-five.

[L. s.]

BENJ. F. LEE, *Ck.*

## IN SUPREME COURT, N. J.,

HUDSON COUNTY CIRCUIT, JANUARY TERM, 1875.

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 WILLET GRIFFIN,

v.

JOHN W. SCHANCK.

 } *In Case.*  
 } *Bill of Exceptions.*


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HON. M. M. KNAPP, *Justice*, presiding, with a Jury.

J. DIXON, Esq., appearing for plaintiff.

FLAVEL MCGEE, Esq., appearing for defendant.

Be it remembered, That at a Supreme Court Circuit, held  
 10 at the city of Jersey City, in and for the County of Hudson  
 on the second day of February, 1875, before Honorable  
 Manning M. Knapp, one of the justices of the Supreme  
 Court, the several issues in the above stated cause, joined  
 between the said parties, according to the form of the sta-  
 tute in such case made and provided, came on to be tried  
 (*pro ut* the said issues) at which day before the said justice  
 come as well the said Willet Griffin as the said John W.  
 Schanck, by their respective attorneys, and the jurors of the  
 jury also come, who being duly sworn according to law, the  
 20 cause proceeds to be tried before the said justice and jury.

And thereupon the said plaintiff to maintain the said  
 issues on his part offers in evidence writ of attachment in  
 the suit of Schanck *vs.* Griffin ; and, also, an order for the

appointment of John A. Blair as auditor, and for the sale of perishable property, made by Justice Bedle, April 3, 1871, filed April 11; and, also, offers in evidence the auditor's report, dated October 3, 1871, for \$363.53, and the costs of the plaintiff in attachment, taxed at \$85.52, filed October 3, 1871. In Minute Book No. 10, in this court, page 494, is the rule confirming the report of the auditor and ordering judgment for the plaintiff for \$363.53, besides \$85.52 costs, October 3, 1871; and, also, the book of Judgments No. 16, page 458, the entry of the judgment in favor of the plaintiff 10 in attachment, Schanck *vs.* the defendant, Griffin, for those amounts, the judgment being a judgment in attachment entered October 3, 1871; also, offers in evidence the affidavit of Schanck upon which the attachment was issued, dated March 29, 1871.

*Defendant's Counsel.* We admit that Schanck received the amount of the judgment, with interest, less the costs, and it is also admitted that the attorney received the costs with interest; Mr. Schanck received \$381 and some cents, and the costs amounted to \$100 more and odd cents, which 20 the attorney received.

*Plaintiff's Counsel.* Our claim is that no amount was due, and that the receipt of the costs was by the plaintiff, as well as the receipt of the damages

And further to maintain the issues on his part called as a witness

*Willet Griffin*, who being sworn testifies as follows:

*Direct examination* by Mr. Dixon.

I live in Westchester County, New York; I was born there; I am fifty-eight years old; my business is going 30 west, buying cattle and horses, and stock of different kinds; I have been engaged in that business thirty years; I know Mr. Schanck; I was the defendant in those attachment proceedings; I never had dealings with Mr. Schanck but once; that was four or five years ago; it was in the streets in this

city near the ferry ; Mr. Lawrence was with me ; Mr. Lawrence married my daughter ; I had only one interview with Mr. Schanck at that time ; that was somewhere in the middle part of the day.

*Q.* State the interview in your own way, and as accurately as you can remember it.

*Defendant's Counsel.* We object to the witness giving this interview between himself and Mr. Schanck as irrelevant ; and on the further ground that he is estopped, and in this case, cannot question the regularity of the proceed-  
10 ings under attachment as it now stands. As is now stands, there appears to have been a regular attachment, and a regular judgment, paid regularly according to the forms of law ; and they have not shown that there was no appearance on the record, nor that the defendant in attachment was ignorant of the proceedings, and he is now estopped from going into that.

*The Court.* I will take the testimony, subject to ruling hereafter, and will give counsel an opportunity to have  
20 these points clearly raised.

*Q.* Tell us, in your own way, as accurately as you can, what occurred at the interview that you had with Mr. Schanck on the only occasion when you say you had any business dealings with him.

*A.* I am in the habit of bringing horses to market ; I brought in a car load of horses and stopped at Jersey City one night ; I had a very fine noble horse, a very large one, weighed 1,600 pounds, and Mr. Lawrence said he thought he knew of a man who would like to buy him, and advised  
30 me to leave him a few days there.

*Q.* I asked you to give us that interview between you and Schanck.

*A.* In the first place I left this horse with Mr. Lawrence and he let Mr. Taylor have him on trial a few days ; he tried him but he didn't buy him on the ground he was not fast as he would like for his mate. We took the horse from Taylor's stable and I started to go home with it ; we met

Mr. Schanck in the streets ; he was a stranger to me ; Mr. Lawrence knew him ; the horse was with us at the time. Mr. Lawrence asked him if he didn't want to buy a horse. He came up and looked at the horse and said he did ; he wanted a horse to put before a coal cart ; he looked at the horse ; he asked me what I asked for him ; I told him \$325, and we had quite a little talk ; I was telling him about Mr. Taylor having him and trying him ; he was a good puller and a good worker, and he said he thought that was a pretty good price, and asked me if I couldn't take any less ; 10 I told him not well ; but finally he said, I will give you \$312.50 for the horse. Well, I thought of it a few minutes ; finally I told him he might have him. Then he says "I haven't got the money to pay for it ; you will have to take my note." Says I, "You are a stranger to me." "Well," says he, "you can ask Mr. Lawrence whether my note is good." Mr. Lawrence said he thought his note was ; then I told him if he would give me a note that I could use, as I wanted to go west again in a few days, and he gave me his note payable at our bank for \$312.50 and took the horse. 20 The note was to run thirty days ; he took the horse, and I took the note and went home. That was a bank at Sing Sing ; I put the note in the bank and got the money on it, and in a day or two went west again and was gone some two or three weeks—something like that ; any how I had got back again with another drove and was home, and up came Mr. Schanck to our place one day and said that the horse I sold him was dead ; "Well," I says, "I am very sorry, but I cannot help that ;" I says, "I can't insure horses lives." Well, he says, he thought he shouldn't ought 30 to pay for him ; "Well," says I, "I thought he was your horse." Still, he wanted me to come down and see him ; I told him some day when I got through I would come down and see ; I came down and he wanted to arrange the matter. Well, I felt a little sorry for him it is true, but he wanted me to lose the whole horse ; I don't know but I would have given him a little something to make him feel a little better, but he wanted me to lose the horse, and I told him I should not do it ; that I had sold the horse in good faith and I shouldn't do it. So that is about the sum and substance of it. 40

Q. When he came up to "our place," as you call it—what place do you mean?

A. Sing Sing.

Q. When he saw you was anyone with you?

A. Yes.

Q. Who was there at the interview between you and him?

A. Mr. Lane.

Q. After that do you remember about the attachment?

10 A. Yes.

Q. How much did you finally pay on the attachment?

A. I paid into court, if my memory serves me right—

(Interrupted by defendant's counsel objecting.)

Q. To whom did you pay it?

A. To Mr. Lawrence, or your partner; I paid them \$550.

Q. You paid Mr. Lawrence \$550?

A. Yes.

Q. You paid it for the purposes of this attachment suit?

A. Yes.

20 Q. At the interview at which you sold the horse to Mr. Schanck did you make any representations to him in reference to the horse, and if so, what?

A. I told him who I bought the horse from; I told him I had seen the horse work; I told him I bought it of a man by the name of William Clark, Chautauqua Co., Jamestown; he was there in New York a spell, a week or two before that; I referred him to Mr. Taylor; says I, "Mr. Taylor has had the horse and used him, and pronounced him good, kind and sound."

30 Q. Did you tell him that Mr. Taylor had declined to buy him?

A. Yes.

Q. Did you tell him why?

A. I think I did.

Q. What did you tell him about that?

A. I think that the objection was that he wanted to match a horse and his horse was a little quicker than this horse of mine, but found no fault in his work.

Q. What Mr. Taylor did you mean?

A. David Taylor, in the soap factory.

Q. Did you make any warranty to Mr. Schanck of the horse?

A. No, sir; no word warranty used.

Q. Was there any condition about the sale?

A. No, sir; not any condition that I considered.

Q. Was anything said about it suiting him?

A. After he bought the horse—had taken the horse and put him in the stable, just as I was coming away, he says 10 to me, "Now, you're bringing in horses all the time; suppose," he says, "this horse shouldn't suit me for my business, would you let me have another horse in his room?" Says I, "Yes, I would do that, provided you return this horse to me in good condition."

Q. Had you at that time received the note?

A. Yes, and was just starting to go home; had delivered him the horse and he had put him into the stable.

Q. Where was the note drawn up and signed?

A. In his office; I can't tell the street; I was never 20 there before nor since.

Q. Had you any other interview with him in regard to the sale than this one?

A. Never seen him before.

Q. Did you hear anything from the horse from that time till he came to Sing Sing to see you?

A. Never.

Q. Did you get the note discounted before or after he came to Sing Sing?

A. I got the note discounted the next day or the day 30 after I sold the horse, because I went west, and got the note discounted to get the money.

Q. Can you fix the time of this occurrence with any accuracy?

A. It strikes me it was in March, four or five years ago.

Q. About how long before the attachment suit was commenced was it that you sold the horse?

A. In the first place, that suit in New York—

(Interrupted by defendant's counsel objecting.)

—I think that suit was on hand a year, and I think the next Spring after we brought it to a trial; then they withdrew their suit; then I think the next Spring they commenced this attachment.

*Q.* How long before the suit in New York was commenced was it that you had sold the horse?

*A.* It strikes me it was a month or two.

*Q.* How long was this horse with Mr. Taylor?

*A.* I can't tell exactly, but something like a week—may  
10 be a little short of that, some several days there any how.

*Q.* How much had you paid for this horse when you bought him of Mr. Clark?

*A.* I paid \$265 for him.

*Q.* Up in Chataqua County?

*A.* Yes.

*Q.* What sort of a horse was he?

*A.* I considered him a first-class horse; he weighed 1,600  
pounds, plump.

*Q.* Was he sound?

20 *A.* He was, so far as I could see.

*Q.* Do you know of any bad tricks that he had?

*A.* He had none that I knowed of; I had seen him work two years while Mr. Clark owned him; I seen him work a year on a sprinkling cart they had in the village; and then he was working on a farm; he was used to all kinds of work.

*Q.* Was he worth the price for which you sold him to Mr. Schanck?

*A.* I think I could have got it for him.

30 *Q.* Are you familiar with horses?

*A.* Yes.

*Q.* Are you a judge of them?

*A.* I pretend to be.

*Cross-examination by Mr. McGee:*

*Q.* Who had this horse first when you brought him to Jersey City?

*A.* I left him with Mr. Lawrence.

Q. Then who had him next?

A. I don't know; I left him with Mr. Lawrence and found him with Mr. Lawrence. I think we took him from Mr. Lawrence's stables. I had been home, and came down for him, provided he wasn't sold.

Q. Do you know whether Crocker & Smith had him a while?

A. I don't know anything about that.

Q. All you know about his being with Mr. Taylor is what you have heard? 10

A. I have heard Mr. Taylor say so; I don't know anything only what I was told.

Q. You don't know how many other people had him or tried him during that time he was in Jersey City?

A. No, sir.

Q. For what purpose did Mr. Taylor propose to use the horse?

A. He has told me that he wanted him on his trucks.

Q. And he wanted to drive him in double trucks?

A. I don't know. 20

Q. Do you know what Taylor's business is?

A. I understand he is in the soap business, connected with Colgate & Co., soap manufacturers.

Q. Do you know what kind of wagons or trucks they used for driving?

A. Large heavy trucks, double and single.

Q. You don't know whether Mr. Taylor wanted to use the horse for single or double trucks?

A. No, sir.

Q. There is a difference between horses; sometimes a 30 horse that will go good to a single truck won't go good to a double one?

A. Sometimes it is the case; a good deal depends upon the way the horse is broke; if a horse is broke single, he will go most any way.

Q. If a horse is broke to go double will he go single always?

A. There is different kinds of horses.

Q. Then some very good horses that will go double are not worth a cent single? 40

A. Horses differ ; I have seen this same horse work single and work good before I bought him ; I saw him on a plow, single, and a horse that will plow will generally do anything.

Q. The horse never had been in the city before ?

A. No, sir.

Q. Did you ever see this horse hitched single to any kind of a wagon ?

A. Yes ; I saw him hitched up out there to a wagon ; a  
10 lumber wagon ; I saw him work all kinds of ways ; I had  
knowed the horse two years before I bought him ; I knowed  
him when he was four years old, and he was six years old  
when I brought him in.

Q. Where was this place ?

A. Jamestown, Chataqua county ; I used to go there five  
or six times a year.

Q. Did you stop with this man any time ?

Q. No, I never stopped with him ; I stopped at the hotel ;  
I have been to his place a number of times ; I have been  
20 around on his farm.

Q. You never saw this horse except incidentally as you  
happened to see him when you was there ?

A. I saw him to work.

Q. You saw him hitched to a plow ?

A. Yes.

Q. And to a lumber wagon ?

A. Yes, I saw him several times on a lumber wagon.

Q. Did you ever see him hitched to a single truck or  
wagon in the city ?

30 A. No.

Q. You only saw him hitched up single to the lumber  
wagon ?

A. I seen him hitched up more, than twenty times ; I  
knowed him two years.

Q. Where had the horse come from the day you was lead-  
ing him down the street ?

A. It strikes me we took him from Mr. Taylor's.

Q. He had been in Jersey City trying to be sold ?

A. I told you so.

40 Q. And you hadn't succeeded in selling him and you  
were starting home with him ?

A. I left him in Lawrence's possession ; I didn't try to sell him ; I left him with Lawrence to sell and he let Taylor have him on trial to sell him.

Q. He tried to sell him to Dr. Varick ?

A. I guess you are mistaken.

Q. Did he try to sell him to anybody else ?

A. I don't know.

Q. What is the first thing Schanck said when he came out into the street ?

A. We met Mr. Schanck in the street ; he was a stranger 10 to me ; Mr. Lawrence knew him, and he was going along, and he said to Mr. Schanck, "Don't you want to buy a horse?" Mr. Schanck said, "I do." Then he, I think, introduced me to Mr. Schanck, and he looked at the horse and inquired the price, and I told  $3\frac{1}{4}$  ; he finally offered me  $312\frac{1}{2}$  ; I told him he might have him.

Q. Did he ask you whether the horse was sound ?

A. I forget whether there was anything said about that ; I think I referred him to Mr. Taylor—that he had been used there, and they said that he worked good. 20

Q. You don't remember whether Mr. Schanck asked you any particular questions about the different points of the horse or not ?

A. I don't know but he did ; I will state that I say, in my judgment he was a sound horse.

Q. What did you tell Mr. Schanck about it ?

A. I couldn't say ; I don't think I said he was an unsound horse.

Q. You don't remember whether Mr. Schanck asked about his being a sound and kind horse and those things ? 30

A. I think I told him I knew the horse for some time, and had seen him work all ways.

Q. Didn't you refer him to Crocker & Smith ?

A. I might ; I don't remember ; I remember Mr. Taylor.

Q. Mr. Schanck distinctly told you he wanted to buy that horse to put to a coal cart ?

A. He told me that was the business he was in.

Q. Didn't he say he would like to try a horse—he wouldn't buy a horse before knowing what he was like ?

A. No.

*Q.* Didn't you tell him you couldn't do that, that you wanted to go west and hadn't time?

*A.* No; I referred him to Mr. Taylor; he might go and ask him if he wanted to about his work.

*Q.* Didn't Mr. Schanck say he would take the horse and keep him thirty days, and if he suited then he would take him?

*A.* No.

*Q.* Didn't you tell him you wanted to go home and hadn't time, you couldn't do that?

10 *A.* No.

*Q.* Didn't he finally say he would take him and give you his note for him at thirty days, and then if he suited he would keep him, and if not he should return him and the note should be handed back, or something to that effect?

*A.* No, sir.

*Q.* Or if he didn't suit at the end of thirty days you would take the horse back and give him another horse in the place of him?

20 *A.* After he had bought the horse I started to go home, and he then says, "supposing this horse shouldn't answer my turn," says he, "you are bringing horses all the time, would you exchange with me and let me have another horse?" Says I, "certainly I would, if you return me this horse in good condition."

*Q.* How did you tell him to let you know if the horse didn't suit him?

*A.* There was nothing said about it.

*Q.* Didn't you tell him to report to Cyrus?

*A.* No, sir.

30 *Q.* Cyrus was your son-in-law, wasn't he?

*A.* Yes.

*Q.* Didn't he transact your business for you in Jersey City?

*A.* No, sir; I do my own business.

*Q.* You left the horse with Cyrus to be sold?

*A.* Yes.

*Q.* Cyrus effected this sale, didn't he?

*A.* No; I effected the sale myself.

*Q.* Didn't you say to Mr. Schanck at that time when he

asked you about taking the horse back, if the horse didn't suit, he should let Cyrus know about it?

A. No, sir; nothing said about it.

Q. How long after that was it before you heard that the horse didn't suit?

A. The first I heard about it was when Schanck came up to our place and said the horse was dead.

Q. Didn't Cyrus send you word about that?

A. No; I went West the next day or day after that, and had just come home when Schanck came up to our place; I had never seen Cyrus nor Schanck, neither one of them.

Q. Did you get any letter from Cyrus telling you the horse didn't suit?

A. No; I never heard anything about it till Schanck came up to our place and said the horse was dead.

Q. It is customary, isn't it, when men are selling horses around New York for the purchaser to take the horse and have him ten or twenty or thirty days to try him?

A. It haint with me.

20

Q. If a man buys a horse at the Bull's Head sales don't they take them home and try them?

A. Sometimes they do.

Q. Isn't that the general custom?

A. No, sir, it is not, although I have known it to be done.

Q. This attachment was begun in March, 1871; how soon after that did you know about the attachment?

A. I started to go west, and when I came back I found there was an attachment issued.

Q. You started to go west about what time?

30

A. The day before the attachment was served.

Q. You started to go west the day before the attachment was served and you came back how soon?

A. Two or three weeks.

Q. Then you knew of the attachment two or three weeks after it was issued?

A. I did, and employed counsel to put in an answer to it; and you had a judgment two years before I knowed it.

Q. You knew of the attachment about three weeks after it was issued, and that was in the Spring of 1871 wasn't it? 40

A. About that.

Q. And you knew that attachment was pending from that time on?

A. Yes, and expected to try the matter out, and never knowed any contrary till two years.

Q. Whom did you employ?

A. A man by the name of Mount, living out here somewheres.

Q. What course did the attorney pursue in that suit?

10 A. He told me, in the first place, that he would put in an answer. I see him afterwards and he told me that he had; and I thought we was to have a suit; and it went on two years before I knowed but what he had put in an answer—nearly two years anyhow.

Q. What did the attorney do?

A. Didn't do anything.

Q. Didn't he replevin the horse?

A. I didn't; Mr. Lawrence did.

Q. What did the attorney do?

20 A. He done nothing for me.

Q. What did he do?

A. I can't tell you.

Q. Didn't he begin a replevin suit?

A. You can find out by Mr. Lawrence.

Q. Don't you know he began a replevin suit?

A. There was a replevin suit.

Q. Did he replevin the horse that was attached as your property?

A. They had a suit about it.

30 Q. Don't you know that that attorney issued a writ of replevin to take that horse that was attached as your property as the property of Cyrus Lawrence?

A. I say there was a suit of that kind.

Q. Weren't you a witness in that suit?

A. Yes.

Q. Wasn't there a trial in it?

A. Yes.

Q. Didn't you get beat?

A. Mr. Lawrence did.

40 Q. How long was that trial pending?

A. I don't know. I thought I was going to have a suit all the time. I presumed I had a suit with Mr. Schanck on this attachment, and thought so for nearly two years, till finally he told me he had never put in any answer, and I had no suit

Q. Didn't you think that that suit was your suit?

A. No, sir.

Q. Who paid Mr. Mount for that work?

A. I don't know anything about it?

Q. Didn't you?

10

A. I never paid him.

Q. Haven't you paid him any bills?

A. No, sir.

Q. None at all?

A. No, sir.

Q. Has he been paid?

A. He never done nothing for me.

Q. Don't you know whether he has been paid for that suit?

A. I don't know anything about it.

20

Q. Didn't you pay the money which went to pay for that suit which you say was Lawrence's?

A. I told you no, sir; that I never paid him a cent.

Q. Didn't you pay the money to somebody for him?

A. No, sir.

Q. Didn't you pay to somebody money to carry on that suit?

A. No, sir.

Q. Didn't you give Lawrence money?

A. I gave Lawrence, I think, \$550, if my memory serves 30 me right, to pay this horse, and he and Mr. Collins settled it, I suppose.

Q. How was it you came to give money to Lawrence to pay for this horse?

A. I gave it to Mr. Collins, they were together; they went down somewhere and commenced this suit, and we had to pay the money before we could commence the suit, and I may as well say I gave it to Mr. Collins; they both were together.

Q. Didn't you give this money to Mr. Lawrence to settle 40

a judgment against him in replevin, in order that his replevin bond might not be sued ?

A. No, sir ; I gave Mr. Collins and Mr. Lawrence so much money, as I understood it, that we had to pay before we could commence this suit ; whether Mr. Lawrence took the money, or Mr. Collins, I don't remember ; it was one of them, or both of them together.

Q. Then you paid this money voluntarily ?

A. No, I was compelled to, I thought.

10 Q. The money was not made out of any property of yours on execution ?

A. As I understood it, it was judgment and costs.

*Mr. McGee to Plaintiff's Counsel.* Will you admit that there was no sale in that replevin suit, and that the money was paid by Griffen, or by some one for him ?

*Mr. Dixon.* I understand it, that under the replevin Lawrence took the property, and the issue then was whether the property was Lawrence's or Griffens, and on the trial of the replevin it was found by the jury to be Griffen's, and  
20 the Sheriff got judgment for a return, and this money went to pay the judgment for the return, and this was paid by the sheriff over to the auditor, and that money went to this defendant Schanck.

*Re-direct examination :*

Q. Did you understand from Mr. Schanck when he came up to your place, about three weeks after the sale, how long the horse had been dead ?

A. I think he said he had died the night before he came up.

30 Q. You were asked the custom in regard to horse trades taken on trial—did you ever know a horse to be taken on trial and a note given for him, and then upon his death in the hands of the purchaser, to have the note returned or canceled ?

A. No, sir ; I have let men take horses on trial.

Q. In cases where horses are taken on trial, are they paid for, either in money or note, at the time they are taken ?

A. No, sir ; not till they see whether they—that is the way I do ; I don't know any other custom ; it is the general custom if a man takes a horse on trial he don't pay for him till after he has tried and satisfied with him ; then he pays.

Q. In this case you say there was no trial by Schanck, he was to take the horse—he bought the horse ?

A. Yes ; he bought the horse, and said that he hadn't the money and asked me if I would take his note for the horse ; I told him I would and he gave it to me.

Q. Was there any arrangement that he should have him 16 on trial ?

A. No, sir ; never a word said about trial.

And further to maintain the issues on his part, plaintiff called as a witness

*Cyrus Lawrence*, who being sworn, testifies as follows :

*Direct examination* by Mr. Dixon.

I reside in Jersey City ; I am in the grocery trade on the corner of Washington and Montgomery streets ; Mr. Griffin is my father-in-law ; I know Mr. Schanck ; have known him about ten years ; he is in the retail coal business ; I remember this transaction between Mr. Griffin and Mr. Schanck ; it was about five years ago, I think, as near as I can remember.

Q. Where was it ?

A. In Hudson street, at Mr. Schanck's office, in the neighborhood of Grand street ; I think at the foot of Grand street.

Q. How came about the interview ?

A. We had this horse there—or I did—for sale, and I heard that Mr. Schanck wanted to buy a horse, and I told 30 my father-in-law ; and he was on his way home with him, and he took him there and sold him to Mr. Schanck.

Q. You say you had the horse there ; what do you mean by that ?

A. I had the horse at my stable some days in Jersey City ; my stable was in York street at that time.

Q. You heard that Mr. Schanck wanted a horse ?

A. Yes.

Q. When did you hear that?

A. Before I saw Mr. Schanck.

Q. And you told your father-in-law? What did you say about his being on the way home with the horse?

A. He came down after the horse, and we had got the horse; I think Mr. Taylor had him at that time, and he took the horse from there and was on his way home, and we went down to see Mr. Schanck, and he bought the horse  
10 of him.

Q. Had the horse then just come out of your stable or out of Mr. Taylor's.

A. From Mr. Taylor's.

Q. What transpired between Mr. Schanck and Mr. Griffin in the neighborhood of Mr. Schanck's office?

A. I met him near his office on the street, and we then went back to his office.

Q. Did anything happen before you went back to the office?

20 A. I introduced them and they commenced talking horse then—about selling the horse.

Q. Give us what they said.

A. The price, I think, he asked was \$325, and they split the \$25 and made it 312½, and Mr. Schanck gave his note for the horse; the horse was there at the time on the street; Mr. Schanck looked the horse over.

Q. Do you remember whether anything was said about his character?

30 A. He asked me if I knew he was all right, gentle, &c., I told him that he was, and that Mr. Taylor's folks had had him, and I had driven him and he was all right as far as I knew, and gentle.

Q. Did you hear anything else pass between Griffin and Schanck in reference to the character of the horse?

A. Nothing that I remember of. They then bargained for the horse.

Q. Can you tell us what was said?

40 A. Mr. Schanck, just before Mr. Griffin left to go home said, "In case this horse don't suit me"—he asked if he would change him for another; Mr. Griffin told him he

would if he returned the horse all right ; if he had anything that would suit him—he would change him—give him another horse if the horse was returned to him all right.

*Q.* Was that before or after the sale ?

*A.* That was after the sale.

*Q.* Was there any bargain up to the time of sale—up to the moment when the note passed ?

*A.* Mr. Schanck told him he was satisfied whatever I said about the horse ; he said he was satisfied with what I told him. I told him that Mr. Taylor had worked him and he 10 worked all right ; I told him I had driven him to New York and he worked all right ; Mr. Schanck said he was satisfied, and they then bargained for the horse.

*Q.* Was anything said about Mr. Schanck's taking the horse on trial ?

*A.* No, sir.

*Q.* At the time this price, \$312.50, was agreed upon, whether it was to be cash or note ?

*A.* Note.

*Q.* It was understood at the time the price was fixed it 20 was to be note ?

*A.* I think so ; Schanck told him he would give him a short note for the horse.

*Q.* Anything said about Mr. Schanck's responsibility ?

*A.* Mr. Griffin was a stranger to him, and he spoke to me about Schanck's responsibility, and I told him it was all right.

*Q.* How long had you known this horse at that time ?

*A.* I think I had him there about two weeks.

*Q.* Had you driven him during that time ?

30

*A.* Yes.

*Q.* To loads ?

*A.* Yes.

*Q.* What sort of loads ?

*A.* I used to go to New York and haul loads of groceries home ; I would probably have on thirty hundred, and sometimes more.

*Q.* Double or single ?

*A.* A heavy single wagon.

*Q.* How did he drive ?

40

- A. First rate.
- Q. About how long did Mr. Taylor have him ?
- A. Two or three days.
- Q. Do you know whether anybody else had him ?
- A. Crocker & Smith had him a little while.
- Q. Who were they ?
- A. They were coal men, at the foot of Morris Street.
- Q. Had they him before Taylor or after ?
- A. I think before Taylor.
- 10 Q. Do you recollect whether you said anything to Mr. Schanck about Crocker & Smith ?
- A. I don't remember I did.
- Q. You referred him to Mr. Taylor ?
- A. Mr. Schanck knew that they had him ; knew that Crocker & Smith had him.
- Q. How do you know he did ?
- A. Mr. Smith told me that he had mentioned it to Mr. Schanck ; that is the way I came to know that Mr. Schanck wanted a horse ; Mr. Smith told me ; he had had the horse
- 20 working on a coal cart and he said they had no use for him and that Mr. Schanck wanted to buy a horse.
- Q. Had Crocker & Smith made any objections to him ?
- A. Never, that I heard ; I saw him working with him all right.
- A. Do you know whether he was a sound horse or not ?
- A. I considered him so.
- Q. Are you anything of a judge ?
- A. I pretend to be.
- Q. Deal in horses much ?
- 30 A. Considerable, more or less.
- Q. Owned them how long ?
- A. Fifteen or seventeen years.
- Q. Brought up among them ?
- A. Yes.
- Q. You have owned them ever since you have been in business ?
- A. Yes.
- Q. Had he any bad tricks ?
- A. Never, that I saw.
- 40 Q. How large was he ?

A. Sixteen and a half to seventeen hands ; he ought to weigh over 1,600 pounds ; I think 1700 pounds, in good order.

Q. When did you next hear from the horse after that sale?

A. I heard from him along several times ; I don't remember hearing any fault found till the horse was dead.

Q. About how long after the sale was it that the horse died ?

A. I think in the neighborhood of three weeks.

Q. How did you hear of his death ?

10

A. Schanck came up and told me the horse was dead ; he said that they put him in the stable at night ; that they had been working him that day and in the night he died ; whether he had been overfed or choked to death he didn't know, but they found him dead in the morning ; he was all right the night previous ; had been worked all that day before.

Q. Do you know whether, during these two or three weeks that Schanck had him he was working him ?

A. I think he was working him, off and on, all the 20 while.

Q. Do you know whether you see him to any coal cart ?

A. Yes, I think I remember seeing him around.

*Cross-examination :*

Q. Do you remember that your father-in-law, Mr. Griffen, was sued by Schanck in this matter, in New York ?

A. Yes.

Q. Do you remember that in that case there was a commission sent to New Jersey to take testimony before Mr. Muirheid—to take your testimony and others'—before Mr. Muirheid in that case ?

80

A. I don't remember anything of that kind.

Q. Do you remember being examined before Mr. Muirheid in that case ?

A. Yes, I remember being there at his office several times.

Q. Don't you remember you were subpoenaed there, and was examined in that case ?

A. Yes, I remember being there several times on this horse business ?

The further examination of this witness is suspended for the present, to accommodate the following witness, who cannot conveniently be present to-morrow, that his testimony may be taken to-day ; and at this point, by courtesy, defendant was permitted to introduce a witness, and there-upon, to maintain the issues on his part, defendant called—

*William Muirheid*, who, being sworn, testifies as follows :  
10

*Direct examination*, by Mr. McGee :

Q. (Showing witness paper)—What is that paper ?

A. A commission that came to me from New York.

Q. In what case ?

A. In a case pending in the Supreme Court in the state of New York, between John W. Schanck and Willett Griffen—that is, the plaintiff and defendant in this suit.

Q. Do you know what transaction that case concerns ?

A. It concerns this same transaction.

20 Q. Was Cyrus Lawrence sworn on that case ?

A. Yes ; that is the last witness here.

Q. Have you his testimony there ?

A. Yes.

Q. Is that the original testimony ?

A. Yes.

Q. The original interrogatories ?

A. Yes ; and was signed with his signature at the bottom of his testimony.

Q. When was that testimony reduced to writing ?

30 A. At the time it was taken.

Q. Was it by putting the interrogatories that were there and recording the answers that were given ?

A. Yes.

Q. Did he answer as it is here written ?

A. Yes.

Q. In whose handwriting are these answers ?

A. Mine.

*Q.* In what capacity were you acting when you wrote that down ?

*A.* Special Commissioner.

*Q.* Was he sworn before it was written down ?

*A.* He was.

*Q.* Is all the testimony he gave there ?

*A.* All of it.

*Q.* I notice there are some lines erased ; when were these erasures made ?

*A.* At the time. 10

*Q.* Why ?

*A.* On account of the change in the answer.

*The Court.* Is the object of this to contradict the testimony of the witness who was on the stand last ?

*Mr. McGee.* Yes, sir.

*The Court.* I shall hardly be willing, unless counsel consents, to have the witness who is called to do that, discharged from the cause before the matter is fully made known, and before the witness is fully examined. 20

*Mr. McGee.* I am not going to offer that paper in evidence unless it becomes necessary.

*Q.* I see there is a blank page with your name written at the bottom of that ; why is your name written there ?

*A.* I don't know ; it is an exhibit, I think ; it is an exhibit which is put in under the instructions contained in the commission ; it is a copy of the note, and the commission requires that the name shall be signed on the last line of each page.

*Q.* Has there been anything at all written in that testimony since the signing by Cyrus Lawrence ? 30

*A.* There has not other than what comes after that, except that which is written further on in the paper—the testimony of the other witnesses.

*Q.* Were there any words written into that paper ahead of that signature, Cyrus Lawrence, that were not there when he signed it ?

A. Nothing.

Q. Had you at that time any interest in this case?

A. I had not.

Q. Had I?

A. Not that I am aware of.

Adjourned for the day.

WEDNESDAY MORNING, February 3, 1875.

*Cyrus Lawrence, cross-examination continued:*

10 Q. When Mr. Griffin comes to Jersey City he always stops at your house?

A. Yes.

Q. When he has horses here to sell they are generally put in your hands to sell?

A. Not at all times.

Q. It was at your suggestion that this visit to Schanck was made that morning—you went to solicit Schanck in the first place to buy the horse, you and he?

A. No.

Q. Schanck didn't come to you?

20 A. No; we met Schanck on the street.

Q. Schanck told you he didn't want the horse for a month yet?

A. I don't remember that he did?

Q. Didn't he say that he had no use for a horse for a month yet?

A. No, sir; Mr. Smith told me he wanted a horse.

Q. Don't you remember that Schanck told you he had no use for a horse for a month yet?

A. He might have done so but I don't remember it now.

30 Q. What was the first thing that was said to Griffin by Schanck about the sale of the horse?

A. I think after I introduced Griffin to Schanck he told him he had a horse that he wanted to sell and he heard that he wanted to buy.

Q. Did he tell him the horse's age?

A. I suppose he did; I don't remember.

Q. Did he tell him whether he was sound or not?

A. I think he did; yes, sir.

Q. Then the next question was the price, was it?

A. I think it was; after he had concluded to buy.

Q. They decided on the price to be \$212.50?

A. That is it, I believe.

Q. Didn't Schanck say anything about wanting to take the horse to try him before he bought him?

A. Not that I remember.

Q. You don't remember his saying anything about that? 10

A. I don't remember now; no, sir.

Q. Do you remember you told Schanck that the horse was all right, that you had worked him, and he was all right in every respect?

A. Yes.

Q. Did you say anything about the horse being green, just from the country?

A. I told him the horse was a little green; he had just came in from the country; he was rather awkward around the city; and so he was. 20

Q. Did Griffin make any guaranty to Schanck as to the soundness of the horse, and as to his being kind, gentle, and well-broken?

A. I think he guaranteed the horse sound.

Q. Did he guarantee him to be kind and well-broken?

A. I think he did guarantee him being kind and gentle.

Q. Didn't he guarantee him to be so broken as was necessary for the business that Schanck wanted to use him for?

A. He guaranteed the horse to be kind and gentle. 30

Q. Didn't Schanck say he didn't want to buy a horse till he had had an opportunity to try him?

A. I don't remember that he did.

Q. Didn't they agree before Schanck bought the horse that if, at the end of thirty days, the horse didn't prove to be satisfactory to Schanck that your father-in-law was to take him back and give him another horse in place of him; didn't your father-in-law agree to that?

A. I don't think he did.

Q. Didn't Schanck make that a condition before he took the horse or gave his note?

A. No, sir; I think not.

Q. There was nothing said about that till after the note was given?

A. Schanck merely asked that if the horse didn't suit him, if he had something else, whether he would change him or not, and Griffin told him he would if he would return this horse to him as good as it was then.

10 Q. That was after the note was given?

A. Yes.

Q. And after Schanck had bought the horse?

A. Yes.

Q. Didn't you know that Schanck didn't buy the horse, but that he took the horse upon the distinct understanding, made before he took him, that if the horse didn't suit, your father-in-law would take him back, and give him another in his place?

A. No, sir; I know that Schanck did buy the horse.

20 Q. Don't you know that the note was given upon your father-in-law saying to Schanck that he wanted to go West, and wanted to use the money, and that he should give him a note that he could use it, and in case of collateral against the horse?

A. No, sir; I remember Schanck bought the horse and gave his note for it.

Q. You have been sworn on this same matter before?

A. I believe I have.

Q. You were sworn before Mr. Muirheid?

30 A. I believe so.

Q. Upon a suit pending in New York?

A. Yes.

Q. Wherein Schanck was plaintiff and Griffin defendant?

A. I believe that was it.

*Counsel for Plaintiff.* You had better show that suit by the record.

*Defendant's Counsel.* I have the record of the testimony

here, and propose to ask the witness what he swore to there.

*Q.* In that suit did you swear that Mr. Griffin told Schanck that if the horse didn't suit him after a reasonable time and was not as he represented him he would exchange him?

*A.* I don't remember swearing anything of that kind; I think I swore that if the horse didn't suit him and Schanck would return the horse in good condition that he would exchange him if he had anything that would suit him. 10

*Q.* Didn't you at that time swear that at the interview Schanck, the plaintiff, told Griffin, the defendant, that he would take the horse on these conditions, as specified in the twelfth interrogatory, which is the one I last asked you?

*A.* I don't remember.

*Q.* Didn't you swear at that time that Schanck told Griffin that he would take the horse on those conditions, namely: that if the horse didn't suit him after a reasonable time and he was not as he represented that Griffin would exchange him? 20

*A.* I might have sworn to that.

*Q.* Isn't that a fact?

*A.* Yes, that's the fact.

*Q.* That Schanck took the horse on those conditions?

*A.* He bought the horse and if the horse wasn't as he represented him—

*Q.* The point is whether that is not the fact, that Schanck took the horse on condition that if, after reasonable time, he was not as represented and didn't suit he would exchange him? 30

*A.* If Schanck would return the horse to him in good condition, yes.

*Q.* You insist upon it that that was in it, that if Schanck would return the horse to him in good condition?

*A.* That is the way it was related to Mr. Schanck, between Schanck and Griffin.

*Q.* (*By the Court.*) That is your present recollection of the facts?

*A.* Yes; I don't think he intended to have the horse returned to him crippled, or anything of that kind. 40

*Q.* Was there at that time anything said about the horse being returned in good condition?

*A.* I don't remember anything further than you have asked.

*Q.* You don't remember anything further than I have asked?

*A.* I don't.

*Q.* Then this other condition that you spoke of about the horse being returned in good condition is one which  
10 you put in as seeming to be likely, rather than as remembering distinctly that it did take place?

*A.* I remember that it did take place; that it was said.

*Q.* Did you swear at that time in these words: "I don't remember of Schanck ever saying anything to me about the horse till he came to tell me the horse was dead. I do now remember that Schanck did tell me the horse didn't suit. As near as I can remember it was a short time before the note was due." Did you swear that below?

*A.* I think so.

20 *Q.* Did you swear below as follows: "I don't remember of Schanck's ever saying anything to me about the horse till he came and told me the horse was dead. I do now remember that Schanck did tell me the horse didn't suit. As near as I can remember this was a short time before the note was due." Did you swear that below?

*A.* I think I did; I don't remember whether that was before his death or not.

*Q.* Did you swear that way before Mr. Muirheid, or didn't you?

30 *A.* I must have done so if it is there.

*Q.* Is it a fact that Schanck did come to you before the horse was dead, and told you he didn't suit?

*A.* I don't remember his coming to me before the horse was dead.

*Q.* You have no memory upon the subject now?

*A.* I don't remember whether it was before his death or not.

*Q.* You can't say whether it was or not?

*A.* No, sir.

*Q.* Did you tell Griffen that Schanck had been to you and told you the horse didn't suit?

*A.* I don't think I did; I don't remember now; I think Griffen had gone West.

*Q.* Griffen returned before the horse died, didn't he?

*A.* I couldn't say as to that.

*Q.* The note came due before the horse died, didn't it?

*A.* I think not.

*Q.* You don't remember?

*A.* I don't think it did; the horse was dead before the 10 note came due.

*Q.* You don't remember whether you told Griffen that the horse didn't suit then or not?

*A.* I don't think I did.

*Q.* Didn't you tell Schanck, when he told you that the horse didn't suit, that if the horse didn't suit your father-in-law would make it all right when he came back from the West?

*Mr. Dixon.* I don't know that what the witness said to Schanck, after this transaction was at an end, is of any 20 relevancy—I don't see any agency.

*Q.* Didn't you, at the time Schanck told you if the horse didn't suit—didn't you tell Schanck that if the horse didn't suit Griffen would make it all right with him when he came back from the West?

*Mr. Dixon.* I don't see the relevancy of that.

*Mr. McGee.* I offer it as bearing upon the understanding of the parties present at the bargain, as to what the bargain was; as evidence of what the agreement was.

*The Court.* You may ask the question, but it cannot 30 effect this case. As any substantive agreement, its force will depend upon the connections that may be made.

*Q.* Didn't you tell Schanck at that time, when he told you the horse didn't suit him, that if the horse didn't suit

him Griffen would make it all right with him when he came back from the West ?

A. I think, as near as I can remember now, that I told Schanck he would have to arrange it with Griffen ; that is as near as I can remember ; I might have told him in other words, but I don't remember now.

Q. You don't remember saying anything like that that I have asked you ?

A. No, sir ; I think I told him he would have to arrange  
10 it with Mr. Griffen.

Q. Didn't you, before Mr. Muirheid, in the examination we have spoken of, swear as follows to the tenth interrogatory : "I think I told Schanck that if the horse didn't suit him, defendant, Griffen, would make it all right with him when he came back from the west?"

A. I might have told Schanck that.

Q. Didn't you so swear ?

A. Probably I did, if you have got it there so.

Q. Didn't you so swear ?

20 A. I can't say whether I did or not ; I might have told Schanck so ; he was bothering me a good deal about the horse ; I didn't want to be bothered with it ; it was none of my affairs ; after he bought him Schanck acted as though he bought the horse of me.

Q. Well, didn't he ?

A. No, sir ; I had nothing to do with him.

Q. Didn't Schanck, before he was willing to make the purchase, as you call it, or give his note, say to you that  
30 Griffin was a stranger to him and he didn't know anything about him, and didn't you tell him that Griffin was all right and a responsible man ?

A. I told him so, and believe him to be so.

*Mr. Dixon.* Did you understand the question ?

A. Yes ; I understood the question to be whether Griffen was all right and responsible for the horse.

Q. Didn't Griffen say to Schanck at that first interview in your presence that if the horse didn't suit he was to let you know, or words to that effect, and you would let him  
know ?

40 A. He may have said so ; I don't remember that he did.

*Q.* Do you remember that he didn't?

*A.* No, sir.

*Q.* Wasn't it understood between you three there that Schanck should communicate to you anything he had to say about the horse?

*A.* I don't think it was.

*Q.* Wasn't Griffen going away, and didn't Schanck want to know how he could communicate with him, and wasn't he answered that he should let you know?

*A.* Schanck was as near to him as I. 10

*Q.* That is no answer to my question.

*A.* It might have been so; he might have told him, and asked me about it, but I don't remember whether he did or not.

*Q.* Didn't he tell him if the horse didn't suit to tell "Cy," or Cyrus?

*A.* I don't remember that he did.

*Q.* And didn't he say that Cyrus would let him know?

*A.* He might have done so; I don't remember about that. 20

*Q.* Have you much of a memory?

*A.* It has always carried me along pretty well so far.

*Q.* Can you, at a distance of two or three years, testify as to what you said?

*A.* I can remember some things four or five years.

*Q.* When Schanck began this attachment suit, he attached a horse, as the property of your father-in-law, and you brought an action of replevin to recover that horse from Schanck?

*A.* Yes. 30

*Q.* You swore in that action of replevin that horse was yours?

*Mr. Dixon.* Don't let us go into the trial of that action of replevin again.

*The Court.* I think it is admissible to show that he made claim for that horse.

*Mr. McGee.* I propose to show by this witness that when

a horse was attached, as the property of Griffen, he came and brought an action of replevin, and swore that the horse was his, and that he bought it; and I propose to show by the record, after a thorough trial the Court decided that that allegation of his was not true, and determined that the property was not his, but the property of Griffen, and that that decision was not a decision of mere constructive ownership, but a question of fact as to the truth. I offer it for the purpose of going to the credibility of the witness.

10 *The Court.* That is not competent. The fact of the replevin suit being brought may be shown, but I would not allow the witness to be discredited by showing what he swore to in another suit, and then giving, as against that, the verdict of the jury on that testimony.

(Defendant excepts.)

To which ruling of the said Justice the defendant, by his counsel, excepted, and prayed that this, his bill of exception, might be sealed, and it is sealed accordingly.

M. M. KNAPP, J. [L. S.]

And thereupon the witness further testified :

Q. In that replevin suit you had the horse that was replevined, hadn't you?

A. I had my horse; that is, the mare.

Q. You got it by the replevin suit?

A. Yes.

Q. You remember that you took the mare in the replevin suit, and you gave a bond for her return in case you were beaten in the replevin suit?

*Mr. Dixon.* It is not a cross-examination in any sense.

*The Court.* It is a matter of defense, and if it is objected to, it is not strictly admissible at this time. The defendant  
30 would have a right to recall this witness, and the Court would give him permission to examine him as if on cross-examination.

*Mr. Dixon.* I am entirely willing that he should recall him.

*The Court.* Your objection now would be good.

*Mr. McGee.* I propose to ask by this question where the money come from that paid that judgment, for the purpose of showing that it came from Griffin.

*The Court.* That is a matter of defense, and it will save 10 a great deal of confusion if counsel will bring that in in defense.

And thereupon the plaintiff, further to maintain the issues on his part, called as a witness

*David Taylor*, who being sworn, testifies as follows :

*Direct examination* by Mr. Dixon.

I reside in Jersey City ; I am a soap maker in the firm 20 of Colgate & Co., York street, between Green and Hudson, in Jersey City.

*Q.* Do you remember having a horse of Griffin in 1869 ?

*A.* I recollect the horse.

*Q.* How came you to get him ?

*A.* Mr. Lawrence had him ; he called my attention to the horse and said he was for sale ; he asked me to buy him, and I took him on trial ; I think I had him three or four days ; he was a very large brown horse—a pretty good horse ; I didn't buy him, however. 30

*Q.* Why ?

*A.* He was hardly fast enough ; I put him in a double truck, and he was not fast enough for the other horse, and he asked me too much money for him.

*Q.* How much did he ask you for him ?

*A.* \$400.

*Q.* How much would you have been willing to give for him ?

(Objected to as immaterial.)

*Mr. Dixon.* It is offered as evidence of the character of the horse.

*The Court.* I don't think the character of the horse would be illustrated by what he would be willing to give for it.

*Q.* What kind of business did you want him for ?

*A.* For a double truck to cart soap.

*Q.* Was there anything else the matter with him than he was not quite fast enough ?

10 *A.* I didn't see anything the matter with him.

*Q.* Was he sound ?

*A.* As far as I could tell, he was ; but I don't know ; I hadn't him long enough.

*Q.* Was he kind ?

*A.* He worked well enough.

*Q.* A good horse, was he ?

(Objected to.)

20 *Q.* Have you bought horses before ?

*A.* Yes.

*Q.* For that purpose ?

*A.* Yes.

*Q.* What do you think he was fairly worth ?

(Question objected to.)

(Admitted.)

*A.* If Cyrus Lawrence had asked me \$325 for him, I  
30 would have bought him ; he first asked me \$400, and I asked him again, and, says he, "\$350 ;" and I wouldn't buy him ; if he had said \$325, I think I would have bought him.

*Q.* You had him three or four days ?

*A.* Yes.

*Q.* Did you use him all that time ?

*A.* Yes ; all the time.

*Q.* Had you any other horse of Cyrus Lawrence ever on trial ?

*A.* No, sir.

*Cross-examination.*

Q. You didn't drive this horse?

A. Yes.

Q. Didn't see him during the day while he was being used, did you?

A. I did; I saw him and got reports from him.

Q. How often in the day did you see that horse?

A. I couldn't say that.

Q. Once a day or twice a day?

A. Yes; I seen him in the stable more than once a day. 10

Q. I mean when he was hitched to a big truck?

A. I saw him driving, and rode on the truck with him, and I saw him going around.

Q. When the truck was loaded or empty?

A. It was empty.

Q. You didn't ride on it when the truck was full?

A. No.

Q. And you don't know how he behaved when he was hitched to a loaded truck?

A. I do. 20

Q. By sight?

A. By seeing him go.

Q. What is the extent of your knowledge? You say you saw him go; tell us when you saw him go, and under what circumstances?

A. I saw him go without a load, with a truck and another horse; I saw him go with a load in a truck and another horse.

Q. You saw him start off?

A. Yes. 30

Q. Did you at any time see him go more than a block or two?

A. No; I didn't more than a block.

Q. You didn't attempt to drive him to a single truck, did you?

A. Not to my knowledge; I think not.

Q. Didn't drive him to a coal cart?

A. No, sir.

Q. Any sort of a cart?

A. No, sir. 40

Q. What is the difference of the construction between a cart and a truck ?

A. One has two wheels and the other four.

Q. And, in addition to that, how are the shafts of a cart fixed to the cart and to the horse—what is the difference on the horse between a cart and a truck ?

A. I can't describe.

Q. Isn't there a difference in horses, between being driven in a one-horse cart and being driven to a two-horse  
10 truck ?

A. Yes, some.

Q. Have you ever known of horses that would drive first-rate to a truck that wouldn't drive at all to a cart ?

A. I have.

Q. Is that customary ?

A. Some horses work better single, and others work better double, and some will work both ways, and some will work no ways.

Q. Are there not plenty of horses that will work first-  
20 rate double that will not work at all single ?

A. I think so.

Q. You don't know whether this horse would have been kind driven to a cart or not, do you ?

A. I don't.

Q. You only know that he was kind when driven to a truck ?

A. Yes.

Q. Did you ever have a horse that you owned that was first-rate double that wouldn't go at all single ?

30 A. Yes.

Q. Did you ever have a horse that was first-rate double and would go good, and wouldn't go at all single ?

A. Yes.

Q. Tell us about that horse.

A. I know of one such horse ; in all my life, and I never did know but one ; I bought him in January, 1873, and I paid \$450 for him. I worked him two years, and he worked too fast ; he worked in a double truck all the time, and he pulled the load nearly all himself and pulled the  
40 flesh off his bones. I tried to sell him, and they tried him

in New York single and they said he wouldn't work at all, and I had to take him back and I have him now.

Q. Didn't you try to sell him two or three times?

A. No, sir, never but once.

Q. The only difficulty was he wouldn't work single?

A. So they told me.

Q. But he was a first-rate horse double?

A. Yes.

And further to maintain the issues on his part, the plaintiff recalled as a witness

*Willet Griffin*, who in his own behalf testifies as follows: 10

*Direct examination* by Mr. Dixon.

Q. Give us the whole of the conversation between you and Schanck, when he came up to your place after the death of the horse?

A. He came up there, and the first thing he said the horse was dead; I asked him what ailed the horse; he said he didn't know, but he was dead, and I think he asked me to give back his note; I told him that that wasn't according to the contract; I then told him the contract was that 20 if the horse wasn't as I represented him, then I was to change with him and give him another horse, provided he returned the horse to me as good as he was when he took him; "well," says he, "the horse is dead;" "well," says I, "you don't return him;" says I, "if he is dead, he is your horse;" and he acknowledged there to me and others that that was the agreement—that he was to return that horse to me as good as he was when he took him; he said he worked the horse; the horse was a little awkward—probably never had been to a cart before—but he had worked 30 him all the time, every day, up to the day of his death.

Q. Was this before the note came due or after?

A. That was before the note came due, I think, about a few days, and he said that he would not pay the note; I told him I had had the note discounted; he said he would not pay the note, and the note was protested.

Q. How long did the conversation take?

A. We had quite considerable talk.

Q. How long was he there ?

A. I should think two or three hours.

Q. Did he take a meal there ?

A. I think he did with me ; I invited him to take dinner with me at the hotel where I was stopping at.

*Cross-examination* by Mr. McGee.

Q. You had passed the note out of your hands before  
16 that time ?

A. I had had the note discounted very soon after I got it—within a day or two.

Q. The note was finally collected by the bank ?

A. The note was collected by the bank.

Q. When Mr. Schanck came up there didn't he first say the horse didn't suit him, and he wanted you to give him another horse for him ?

A. The first thing he said to me was, says he, "that horse I bought of you is dead ;" that was the first remark he made, if my memory serves me.

Q. Didn't he tell you the horse didn't suit him ?

A. No, sir ; he told me the horse worked good ; that he  
20 was a little awkward, he says, probably like all horses that never had been to a cart ; he probably never had been to a cart before ; but he says he was true to pull, and had worked up to the day before he died.

Q. You told him you wouldn't do anything ?

A. I told him as he had bought the horse, and had had him, I considered it was his loss.

Q. Didn't you say, when he said the horse didn't suit him, "I will come down to Jersey City, and I will see what I can do about it ?"

A. No ; he kept hanging on for me to come down, and,  
30 says I, "I am coming down one of these days, and I will see you."

Q. Didn't you finally leave him with the understanding that you were to come down to Jersey City, and see if you could not arrange the matter ?

A. I said I would ; I was coming down and I would see him.

*Q.* Didn't you let him go away with the understanding that you would come to Jersey City and see if you could not compromise the matter in some way?

*A.* Compromise it how?

*Q.* By making some arrangement whereby each of you would lose a part of the horse?

*A.* There was nothing said about a compromise.

*Q.* Didn't you express yourself as willing to lose a part of the horse?

*A.* I think I said this: "Mr. Schanck, I am very sorry," 10  
says I, "I don't know but I would throw off a little off the horse provided you would be satisfied, but for me to lose the whole, I shant."

*Re-direct examination :*

*Q.* And that was by way of a settlement of the disputes?

*A.* I thought it was pretty hard for a man to lose a horse and I would have been willing to give him \$25.

*Q.* Did that willingness rest upon any idea that you were obliged to do it, or by way of a compromise?

*A.* No, sir; I didn't say that I would give anything. 20

*Q.* The question is as to what you said about any arrangement was based in your mind upon any idea or obligation on your part to bear part of the loss, or upon the idea of adjusting disputes that was existing between you?

(Question objected to.)

(Admitted.)

*A.* I told him plainly and positively that I would not bear any of the loss; he kept at me all the time and wanted me to come down; "Well," says I, "I will come down in a few days and I will see you;" I done that by way of pleas- 30  
ing him more than anything else; I didn't consider I was under any obligation to him whatever.

*Q.* (*By the Court.*) Did you see the defendant, Schanck, any time between the time of the horse's death in Jersey City and the time when he stated the horse was dead?

*A.* No, sir; I went west a few days after he gave me the

note and I didn't come back again—I think I got back a day or two before he came up.

And further to maintain the issues on his part the plaintiff called as a witness

*Edward B. Lane*, who, being sworn, testifies as follows:

*Direct examination* by Mr. Dixon.

Q. Where do you live?

A. Westchester County, New York.

Q. You know Mr. Griffen?

10 A. Yes, I have known him forty years probably.

Q. What is your business?

A. Mostly on my farm.

Q. Do you know Schanck?

A. I do, by sight.

Q. When did you first see him?

A. In the Spring of 1870 or 1871,—four or five years ago, at Sing Sing.

Q. About what matter?

A. The first I saw of him was in conversation with Mr. Griffen in regard to the horse at the Union Hotel, Sing Sing, where Griffen was putting up.

Q. Did you hear the conversation between them?

A. I did.

Q. State it, as accurately as you can.

A. Schanck said to Griffen, "the horse I have bought of you is dead." Griffen remarked, "Why, how is that, has he been sick?" No, he said, he was all well enough; he had worked him every day, nearly, along—worked him all day the day before, and put him in the stable all right at night, and the next morning found him dead. I think Griffen said then, "Schanck, the horse worked good enough, didn't he?" "Yes," he said, he had no fault to find with the horse at all; the horse worked right enough and was well enough, but he was dead, and didn't want to pay for him. Griffen says, says he, "I can't help the horse dying; he was all right when I let you have him; you have been

using him now some three weeks and I don't feel any responsibility in the matter." Schanck complained a good deal about the horse being dead, and he oughtn't to pay for him—finally said he wouldn't pay for him and wanted his note back. Griffen said he couldn't do anything of the kind; he had negotiated the note and considered the horse was his—didn't feel any responsibility in the matter and couldn't do anything about it. I think that is about the sum and substance of the conversation I heard between them. 10

Q. Do you remember whether anything was said in reference to the terms of the bargain at which the horse was sold?

A. I think that Schanck referred to something that was said here in Jersey City—that Griffen would let him have another horse if he didn't suit him; and Griffen said he told him he would let him have another horse, provided he would return him all right—let him have another horse in his place, but he considered that horse was Schanck's.

Q. How long was Schanck and Griffen together there? 20

A. I should think they were probably two hours; they took dinner together.

Q. Did you take dinner with them?

A. I did; I sat on one side of Schanck, and, I think, Griffen on the other, and heard the conversation.

Q. Did you hear anything said about Griffen's coming to Jersey City?

A. I don't think I did; I don't remember.

Q. Did Schanck find any fault with the way in which the horse had worked? 30

A. Nothing that I heard; I did hear him say that the horse worked all right and was satisfactory, had no fault to find with the horse, only he was dead, and didn't want to pay for him.

*Cross-examined :*

Q. What time of the year was that?

A. It was in the spring of the year; I think in the month of March, or early in April.

Q. Who else was present?

A. I don't remember.

Q. Didn't see anybody else?

A. There were several around the table; I don't recollect who they were; the proprietor, I know, was around; I don't know whether he was at the table or not.

Q. Anybody else in that party?

A. No; none closely by them at the time; they might have been, but I don't remember.

Q. Anybody else taking part in the conversation?

10 A. No, sir.

Q. This that Schanck referred to—about the conversation in Jersey City—didn't he say that he bought the horse of Griffin on the understanding that if the horse didn't suit him Griffin was to take him back and give him another?

A. No; not that I remember.

Q. What did he say about that?

A. All I heard him say was that if the horse didn't suit him, "you was to let him have another horse;" Griffin acquiesced in that, saying, "Of course, I told you if the  
20 horse didn't suit you, if I had another horse I would exchange for you."

Q. The first thing Schanck said when he got there was, the horse was dead?

A. That is the first thing I heard him say.

Q. How did you happen to be there?

A. I live close by the village; I am there every day; I was looking at Griffin's horse.

Q. How far away do you live?

A. About a mile a way.

30 Q. Do you dine at the hotel every day?

A. No; I think I took dinner at the invitation of Griffin, as Schanck did.

Q. Were you with Griffin when Schanck came up, and were you expecting Schanck?

A. Oh, no.

Q. What were you doing when he came?

A. I can't tell; we were standing around, probably, near the door.

Q. Were you and Griffin talking together?

40 A. I am not certain about that.

Q. Are you sure you was with Griffin when Schanck first came?

A. I think I was.

Q. Don't remember what you were doing?

A. Standing there, I presume; I think I was.

Q. What time of day was it?

A. I think it was nearly the middle of the day; I know it was a very short time before dinner.

Q. What is your business?

A. My time is mostly occupied in my farming operations; 10 and surveyor and civil engineer in my early days.

Q. Do you deal in horses?

A. No, sir; I buy and sell for my own use.

Q. You are a neighbor of Griffen's?

A. I think he lived at that time within about a mile or so of me.

Q. You had been intimate with him for a long time?

A. I had known him more or less a great many years, as a neighbor.

Q. When was the next you heard about this matter of 20 the horses after that?

A. I couldn't tell you; I think Mr. Griffen referred to it once or twice—that Schanck wouldn't pay the note, or something like that.

Q. How long after was that?

A. That I could not tell.

Q. This is five years ago, isn't it?

A. Yes.

Q. You haven't had your mind called to it particularly since? 30

A. Occasionally I have; I think Griffen has mentioned the fact that he had some difficulty with Schanck afterwards.

Q. Griffen has narrated the circumstances to you two or three times, hasn't he, and asked you if you remembered it?

A. I don't know as he has particularly.

Q. When did he come to see you about coming down here to testify in this business?

A. I think I saw him a week or ten days ago.

Q. What did Griffen say to you at that time? 40

A. I think he asked me if I remembered any conversation that took place between him and Schanck at Sing Sing that Spring in regard to that horse.

Q. Did he tell you of what nature?

A. No, sir.

Q. Did he repeat any of the conversation?

A. No; he asked me what I recollected about it and I recollected that distinctly; I recollected that circumstance distinctly from two reasons; one was it was discussed after  
10 Schanck went away, and another was the unreasonableness of the demand; the next was, more particularly, an impediment in Schanck's speech.

Q. Did you understand what Schanck said at the time?

A. I understood it; he sat beside me at the table.

Q. They were together two hours—do you mean to say that during the whole of that time you were present with him?

A. I was, nearly all the time; I was a while before dinner and during dinner; it took probably three-quarters of  
20 an hour, and soon after dinner I think Schanck left?

Q. You didn't hear all the conversation?

A. I think I heard nearly all.

(Plaintiff rests.)

And thereupon the said defendant to maintain the issues on his part, called as a witness

*John W. Schanck*, defendant, who being sworn in his own behalf, testifies as follows:

*Direct examination* by Mr. McGee:

Q. Where do you reside?

30 A. Jersey City.

Q. What is your business?

A. Coal and wood business.

Q. You have lived in Jersey City how long?

A. About fifteen years.

Q. How long have you been in the coal and wood business?

A. Twelve or thirteen years in Jersey City.

Q. Narrate to us this interview with Mr. Griffin.

A. About May 1st, 1869, I was going up Hudson street and I was hailed by Cyrus Lawrence. Says he, "Do you want to buy a horse?" Says I, "Not at present, I will after a while—after I change my yard." He introduced me to Griffin, his father-in law. After I was introduced to Griffin we talked about the horse as we usually talk about horses—he is so old and worth so much, and so on. I told him right away, says I, "I don't buy any horse without a trial," and 10 as he was a stranger to me I wouldn't buy one of him. After talking over the matter, as we generally talk horse business, anyhow, he asked me \$325. Says I, "I will give you \$300 if we make arrangements." After a while we came to an agreement of \$312.50. Says he, "You give me your note for thirty days." Says I, "If I do that it will be all right, I presume; I am not buying him; I am taking him on trial," and then says he, turning around, "If the horse don't suit you report it to Cyrus Lawrence." After I put the horse in the stable, it was two or three days, I pre- 20 sume, and I told my driver to try him, and after trying him he told me he wouldn't suit at all, he had bad tricks, he would back—

(Interrupted by objection as to what he was told.)

I reported to Cyrus Lawrence that the horse didn't suit, after about a weeks time; this was on a Friday afternoon when I told Lawrence; says he, "I am going up to Sing Sing to-morrow or Sunday and I will see Mr. Griffin and I will see what he says." He returned on Monday or Tues- 30 day and I went to see him; I was anxious to hear from him because he was to be the medium; he came back and I says to him, "Cyrus, what is the report?" another thing I said to him, "Tell him, also, that I will not pay the note; the horse don't suit." He came back and told me these words: "Mr. Griffin is going west for horses, and when he returns he will give you a horse in the place of him." This was about a week after I had took the horse on trial; I went up a week or ten days after—I says to Cyrus, "Have

you heard from Mr. Griffen; has he got back from the west?" That was after he told me he had gone west; I went to Cyrus and asked him once or twice if he had got home; he said he hadn't heard; it went on twenty-two or twenty-three days after I took the horse on trial and I found the horse one morning dead in the stable; I says to Cyrus, "the horse is dead;" says I, "has Griffen got home from the west?" Says he, "I don't know; I guess the best plan is to go up to Sing Sing and see him," and I starts the next  
 10 morning, and took a friend with me to go and see Griffen.

Q. Who was that friend?

A. W. C. Hamilton, city clerk of Bayonne. I got to Sing Sing about half past eleven o'clock, and we jumped off the stage at the hotel where I was informed Griffen would be found. I saw Griffen, and says I, "Have you got any horses in the stable you mean to let me try?" says he, "I have got some good horses in the stable;" says I, "the horse is dead;" "Oh," says he, "he is dead, is he?" says I, "yes;" "now," says he, "we will talk over this  
 20 matter after a while; we will go for some dinner;" but as for any remarks about the horse was all right, I positively deny; says I, "it is a hard case for his death;" says he, "let the matter rest, and I will come down in a short time to Jersey City, and I will try to fix it;" we sat down to dinner, and I don't remember there was ten words said about the horse at all, except that the horse was dead; after that we then talked about other horses; but there was very little said about the matter, because he was coming down to Jersey City to have the matter fixed up there, because  
 30 Cyrus was a witness of these facts, and says he, "Cyrus knows all about this case, and we will settle it there better than any other place;" the idea that I wanted Griffin down there because Cyrus was, I presume, Griffin's agent in the matter; after a short time he came down, and I met him at Cyrus Lawrence's store; then says I, "Griffin, what shall I do? let us compromise this matter;" oh, well, he didn't know; he hemmed and hawed a little about it, and I made some remark about horse dealers being sharp on us poor fellows, and he turned angry and wouldn't settle at  
 40 all; after that he was down to Jersey City, and I met him,

and says I, "can't we arrange that matter?" says he, "we must fix it up somehow or other;" says he, "I am willing to fix it up;" says I, "so am I;" he didn't do anything for a year, and I commenced suit in New York; the note came due, and I wouldn't pay it; they sent it back to the bank and sent me notice; I sent word back I thought I had a good defense in the matter, and I wouldn't pay it; he then sues me in New York, and I didn't know it till I found there was a sheriff after me; I wrote to him, and I found I had to pay it anyhow, because it was in the hands 10 of third parties; it was paid to this attorney of the bank; they claimed it as their note; then I couldn't do any more; so I went and sued in New York for the damages which I had paid and which I oughtn't to pay; after the trial I heard one day that Griffin had a horse in New Jersey, and I thought the surest way to get my just dues was to attach the mare in Jersey City, and I done so.

Q. You had first sued Griffin in New York?

A. Yes.

Q. In that suit was there a trial?

20

A. No, it never came to trial; it was put off so long I discontinued it; then I began the attachment in New Jersey; there is one more matter—when we were making the bargain about the horse Cyrus Lawrence says, "He has been tried by Crocker & Smith, coalmen, and he has worked first rate," and he said something about Taylor, but I wasn't looking for a team horse; I wanted a cart horse; I told them that morning that I wanted a horse for a coal cart and nothing else.

Q. Did you try the horse?

30

A. I put him in charge of my driver to try him.

Q. What was the result of that trial?

*Mr. Dixon.* Don't tell us what the driver said.

A. I didn't see him driving.

Q. Did your driver report to you the actions of the horse?

A. He did.

Q. Did your driver report to you that the horse was not satisfactory for that business?

(Mr. Dixon objects to the question.)

*Mr. McGee.* I want to show that the driver who had charge of the horse reported to him that the horse didn't suit—reported to him in what particulars he didn't suit; that Schanck then went and stated to the agent of this plaintiff that the horse didn't suit and gave the reasons, and that the reasons he gave were the reasons given to him by the driver. I propose to show that the communication made to Schanck was made by Schanck to the plaintiff's  
10 agent.

*Mr. Dixon.* We don't object to communications between Schanck and Lawrence, but we do object to conversations between the driver and Schanck.

*The Court.* I shall admit that evidence—not to prove the truth of what the driver said, but as a part of the transaction occurring between these parties.

(Plaintiff excepts.)

[Last question read by the stenographer.]

*A.* Yes.

20 *Q.* Did he state to you in what respect?

*A.* Yes he said he had very bad tricks—attempted to throw himself in the cart, and if he started to back he would back overboard—nothing would stop him, and other minor tricks. Those are the two most important things.

*Q.* Did you report that to Cyrus Lawrence?

*A.* I did; the reasons why he didn't suit; I told Lawrence the horse had very bad habits—throwing himself in the cart, and also backing very much—when he took to backing couldn't hold him up.

30 *Q.* Do you know what the habit of horses is—whether horses that are good in a team are always good in a cart, or sometimes good in a team are bad in a cart?

*A.* I don't know it by experience; I have heard of it; I never heard of a horse acting *that way*?

*Q.* When hitched to a cart the weight of a load or some part of it comes on a horse?

*A.* It is very hard for a horse to work in a cart because the whole weight hobbles so much—going from side to side and knocks the horse back and forward.

*Q.* Are you in the habit of buying horses?

*A.* I am; I have bought for the last fifteen years a good many horses.

*Q.* What is the custom with regard to taking horses to try? 10

*Mr. Dixon.* We object to the question. Custom cannot effect the bargain.

*The Court.* The question is, what was this specified bargain. I understand all the parties say there was some specific bargain made in regard to this matter. That cannot be changed one way or the other by reason of any custom.

*Q.* What is the custom in this section of the country in the selling of horses about giving the purchaser a specific time in which to try the horse before the bargain is final— 20 before the sale is finally closed?

(Question objected to.)

(Overruled.)

(Defendant excepts.)

To which refusal of the said justice to admit said question the defendant by his counsel excepted, and prayed that this his bill of exceptions might be sealed, and it is sealed accordingly.

M. M. KNAPP. [L. s.]

And thereupon the witness further testifies as follows: 30

*Q.* How long did you work this horse?

*A.* After I put him in the stable he was stabled two days before we worked him at all; I told my driver to try him,

I should judge, off and on, for two weeks; and after reports came from him as to his habits, says I, "Try to work him, he is a good-looking horse, and if he could be broke it would be all right;" but he said it was no use, his habits was so bad you couldn't use him; we would take a half a ton out, and a quarter of a ton out with him, and he would fling himself in the cart with a load.

*Q.* Was he worked very hard?

*A.* No, sir.

10 *Q.* How much was he worked?

*A.* I can't say; my driver knows more about that than I do; I told him not to work him much; I didn't want him only to try if he could possibly break him.

*Q.* What sort of treatment was he subjected to, as compared with your other horses?

*A.* The same treatment; fed well every day, in the same stable, and had the same care.

*Q.* Did you go into the stables?

*A.* I went into the stables every day; I saw him in the  
20 stable, and saw him hitched up to the cart.

*Q.* Did any of the other horses die?

*A.* Not then.

*Q.* Then, after the horse was dead you reported it to Cyrus Lawrence, and then you went to Sing Sing?

*A.* Yes.

*Q.* At Sing Sing did you see Mr. Lane?

*A.* I don't remember seeing him at all.

*Q.* Do you remember whether there was any third party with you?

30 *A.* Only my friend William C. Hamilton.

*Q.* Do you remember any third party engaging in the conversation?

*A.* Not that I knew of.

*Q.* Why is it that Hamilton is not here?

*A.* He could not be here to-day; he is in Bayonne; he is city clerk; I took him on purpose to hear what was said.

*Q.* Was he here on Monday?

*A.* Yes, he was here on Monday.

*Q.* That was the first day this case was down for trial?

40 *A.* Yes.

*Q.* Do you remember how much you received from this attachment suit?

*A.* \$381, I believe, with the costs.

*Cross-examination :*

*Q.* Where is Hamilton now?

*A.* Bayonne.

*Q.* Where was he yesterday?

*A.* He was at Bayonne yesterday.

*Q.* Had you, before your conversation with Mr. Griffin, said anything to Theodore B. Smith about your wanting a 10 horse?

*A.* I don't remember.

*Q.* Had you been looking for a horse prior to that?

*A.* I had been looking for a horse sometime previous; I was going to change my yard from the end of Grand street, where I was then, up to the foot of Essex street.

*Q.* When did you change?

*A.* I think about the 1st or 10th of June; somewhere along there.

*Q.* Did you change before or after this horse died? 20

*A.* After.

*Q.* How long before you saw Griffin had you been looking for a horse?

*A.* I don't know; perhaps one or two weeks, and might have been only a day or two; I don't know.

*Q.* In the conversation you say you said to Griffin you never bought a horse without trying him?

*A.* Yes.

*Q.* Do you remember whether you said that to him before or after Lawrence had said Crocker & Smith had tried the 30 horse?

*A.* I don't remember, but it was made before any arrangement was made about the horse.

*Q.* Do you remember whether it was before or after they told you Taylor had had the horse?

*A.* When they spoke of Crocker & Smith, then at the same time they spoke of Taylor.

*Q.* You can't recollect whether that was before or after you said you never bought a horse without trying?

A. No, sir ; I don't remember.

Q. About how long was that interview between you and Griffen ?

A. I should say about ten minutes ; perhaps longer.

Q. Did you examine the horse ?

A. I looked at him ; he was a very good horse ; I thought if he turned out to be all sound and right he would be just what I wanted.

Q. Did Griffen tell you where he had got the horse ?

10 A. No, sir ; I never knew.

Q. Did he tell you how the horse had been used before ?

A. All the remarks that was made there was in reference to Crocker & Smith and Taylor.

Q. Didn't he tell you at that time that he had seen him before he bought him used at a watering cart or a plough ?

A. No, sir.

Q. Anything said about his age ?

A. I knew his age pretty near myself.

Q. About what age did you judge him ?

20 A. Seven or eight years.

Q. Did they say anything to you about his age ?

A. No.

Q. Did they say anything about his being a little green in the city ?

A. I don't remember. They said he had been tried and worked first rate.

Q. Did they tell you why Mr. Taylor hadn't bought him ?

A. No.

30 Q. Did they tell you he was not quite fast enough for Taylor ?

A. I don't know that they did ; they said he didn't suit him.

Q. Did they tell you why Crocker & Smith hadn't bought him ?

A. No, I didn't ask them why.

Q. Your note which you gave was a negotiable note ?

A. Yes.

Q. Have you it ?

40 A. I have not.

*Q.* Payable in thirty days ?

*A.* Yes, at the First National Bank, Jersey City,

*Q.* And Griffin told you he was going West and wanted to use the money ?

*A.* I don't remember that ; he was going West, but he didn't say anything about using the money, not as I understood him ; he wanted the note ; my idea was not to buy the horse out and out, and I wanted him to distinctly understand I would give him the note under no consideration as buying him out and out, but I should have an opportunity to try the horse. 10

*Q.* It was an absolute note ?

*A.* Yes ; and the only way I could do it ; he didn't know me, he said.

*Q.* Wasn't it that talk about the horse suiting you—hadn't that reference to his giving you another horse in his stead if he didn't suit you ?

*A.* The remark was, Griffin, says he, " if the horse don't suit you, tell Cyrus, and he will report to me ;" then Cyrus was to tell me what he said. 20

*Q.* Was there any arrangement beyond that, " that if the horse don't suit you, tell Cyrus "—what then ?

*A.* He was to report to his father-in-law, and then he was to report back to me ; if there was anything wrong he would make it right.

*Q.* Was the talk then about giving you a horse that would suit you ?

*A.* Yes ; " if this horse don't suit you, I will replace him—give you a horse that will suit you."

*Q.* Was anything said about the condition in which you should return the horse ? 30

*A.* Not one word, where there was any change to be made at all.

*Q.* Was there anything said by Griffin in regard to the condition in which you should return that horse, in case he didn't suit you ?

*A.* No, sir ; nothing said.

*Q.* You put him in your stable and kept him two days before using him ?

*A.* Yes.

Q. And you had him in your possession about twenty-one or two days.

A. From twenty to twenty-three days.

Q. Didn't you use him on the very day before the morning on which you found him dead in the stable?

A. Yes, so I am informed by my driver.

Q. He was driven to your cart up to that time?

A. Yes, trying to break him.

Q. He had been driven as you required him right up to  
10 that time?

A. No, we tried to break him.

Q. Do you know how often he had been driven up to the time of his death?

A. I don't know.

Q. Did you at any time during that three weeks take the horse back to Cyrus Lawrence?

A. No, sir.

Q. How often before the death of the horse did you go to Cyrus Lawrence about him?

20 A. Two or three times to hear if Griffen had got back from the West yet; I was waiting for that.

Q. What did you tell Cyrus Lawrence about him?

A. I told him he had very bad tricks; I told him the horse would throw himself in the cart and would back.

Q. I don't understand what you mean by throwing himself in the cart.

A. Throw himself down, and it is a very dangerous thing for a horse to do for the man that drives him and the cart too.

30 Q. Do you know of what he died?

A. No, sir.

Q. He was found dead in the stable in the morning?

A. Yes.

Q. You hadn't known of anything being the matter with him before?

A. No, sir.

Q. Do you know how he was tied in the stable at the time of his death?

A. I don't know anything about it.

40 Q. Where was he when you first saw him after his death?

A. He was in his stable; he was swelled up very much; I judge he had the belly-ache.

Q. About how long were you at Sing Sing?

A. I should judge an hour and a half, or two hours.

Q. Do you remember whether Hamilton dined with you?

A. Yes; Griffen asked us both in to dinner.

Q. When you discontinued your suit in New York, wasn't it on the eve of trial, and wasn't it just ready for trial when you discontinued? 10

A. No; I think my lawyer told me it would be three or four months before it would be up; he couldn't tell when.

Q. (*By the Court.*) I understand you, in speaking of the fact—throwing himself—that was merely what was reported to you; you had no knowledge of it yourself?

A. I had no knowledge of it myself.

*Re-direct examination:*

Q. Did Griffen ever give you another horse?

A. No, sir.

Q. Was anything said, at the time you bought the horse, 20 about your returning him in good condition if he didn't suit?

A. No, sir.

Q. You were simply to report to Lawrence?

A. Yes; they were very anxious to sell the horse right there in the street.

*Defendant's Counsel.* I offer in evidence the papers in the case of Mount at the suit of Lawrence; and also the rule for judgment in that case, page 505, rule 4,133, of Minutes No. 12 of the Circuit Court of this county; and 30 also Judgment Book, Liber 18, page 241.

And I also offer in evidence a Commission in a case in the State of New York, in which John W. Schanck was plaintiff and Willett Griffen defendant—a commission to take testimony in New Jersey, directed to William Muirheid, appointing him as Commissioner to examine several witnesses—that which Mr. Muirheid proved yesterday. I want to offer this document and these papers.

*Mr. Dixon.* I object to them for these reasons, and what I have to say has reference to this entire instrument; this is a commission, which, they say, is issued out of a suit pending in New York; it can be competent only as part of a record of proceedings between these same parties; there is no evidence that this was ever returned, and in order to make this competent, it must have been returned to the court, and be a part of the record, and come here as part of the entire record, properly exemplified under an act of  
10 Congress; it cannot be here otherwise; it is not admissible to offer a portion of a record of a suit between the parties; the whole record must be here, if it is offered as a record; my objection does not go to the deposition of Cyrus Lawrence.

*Mr. McGee.* I don't offer it as a record of a court; I offer it as the sworn declaration of one of the witnesses in this cause, made in a matter in which these same parties were concerned.

*The Court.* Then your offer now is the deposition of  
20 Cyrus Lawrence.

*Mr. McGee.* Yes, sir; I offer to read the deposition of Cyrus Lawrence, and the interrogatories upon which that deposition is founded—upon matters that have been inquired about.

*The Court.* You may do that.

The court instructs the jury that this deposition is not put in as evidence; it is put in for the purpose of contradicting the witness on what he said when he was on the stand.

30 *Mr. McGee.* I don't read this deposition as part of the record of a suit, but simply that it is a sworn statement of the witness.

*The Court.* How does it appear, unless we have something to show us what that cause was about, that it is a matter that is involved in this inquiry?

*Mr. McGee.* It appears by the testimony of Mr. Griffen and Mr. Lawrence and Mr. Schanck that such a suit was begun, and by the testimony of Mr. Lawrence that he was examined in that suit, and by the testimony of Lawrence and Schanck that the subject matter under discussion was the same subject matter now under discussion.

(Defendant's Counsel offers in evidence the book of evidence, which shows the judgment in that replevin suit.)

(Mr. McGee reads the deposition of Cyrus Lawrence, signed February 28th, 1871.) 10

And further to maintain the issues on his part the defendant called as a witness

*Thomas Mahon*, who being sworn, testifies as follows :

*Direct examination* by Mr. McGee :

Q. What is your business?

A. I work on freight for the Adams Express Co.

Q. Where do you live?

A. 233 Wayne street, Jersey City.

Q. How long have you lived in Jersey City?

A. Ten years. 20

Q. Did you ever work for Mr. Schanck?

A. I did; about two years, in 1869 or 1870, somewhere around there.

Q. Do you remember this horse that is in discussion?

A. Yes; I am the man that drove him; I drove for Schanck at that time.

Q. Do you remember the day he brought this horse home?

A. I do.

Q. Tell us what you did with the horse.

A. Schanck told me to try him in the cart, and take him 30 out first without any coal—with the empty cart; I took the horse out with an empty cart and he acted a kind of green—didn't want to go in certain places; if you wanted to turn around a corner from one street to another he didn't want to go there; didn't want to cross horse railroad tracks; didn't want to cross the steam tracks.

Q. This time you took him was with an empty cart?

A. That was just a trial, around three or four blocks.

Q. The next time that you took him out, how did you try him then?

A. Worked him for half a day hauling coal; put on half a ton once and then put a ton on.

Q. What is the customary load for a horse?

A. A ton generally; I was sent across the railroad with a ton of coal and when he came to the railroad he turned  
10 around and backed so quick that he fell over on the shafts; he had done that with me several times after, but if I took notice of him I used to jump out and catch him by the head, and he would back always till something would stop the cart—something that he could not push over.

Q. How often would that occur in the course of a day?

A. That is according to the places you went.

Q. Whenever you went to cross a horse car track or railroad track this occurred, did it?

A. Yes; or coming down Morris street, it always occurred, where there was empty or full hogsheads; he didn't want to pass them.

Q. What else did he do besides backing?

A. Sometimes, when we wanted to back, he would take his notion and wouldn't back at all; he would stand right still, and stand there half an hour; you couldn't do nothing with him; you couldn't get your coal in without backing, and I told Schanck how it was afterwards.

Q. What next?

A. Schanck told me he would tell Mr. Lawrence.

30 Q. How long did you drive him the first day you tried him?

A. Three or four blocks—just around a few blocks; that was with the empty cart.

Q. When you put on the cart full of coal?

A. Half a day the first day.

Q. How much on an average did you drive him after that?

A. Mr. Schanck told me to get some flesh on him—to work him half a day; I had three horses at the time, but

two drivers would take this black horse I was driving to go in his stead the other half.

*Q.* Did you drive him a whole day?

*A.* Yes.

*Q.* How long did you have the horse?

*A.* About three weeks.

*Q.* How many of these days did you drive him all day?

*A.* In three weeks he has not worked more than six or seven full days.

*Q.* Do you mean that six or seven days he worked all 10 day, or that all the time he worked would not equal six or seven full days?

*A.* I mean the working days; he might work six full days in three weeks—I might say the first week he didn't do anything much at all.

*Q.* You mean that he worked six or seven days all day each day?

*A.* No, not each day; this other horse worked one day and he worked the other.

*Q.* Then besides these six or seven full days did he work 20 some parts of days?

*A.* Yes, that was the first week.

*Q.* Did he get any better of these bad tricks?

*A.* No, sir.

*Q.* How did you treat him?

*A.* I treated him the best I could—as I would treat my own horse.

*Q.* How long have you been driving horses?

*A.* Since I was fifteen years old.

*Q.* How old are you now?

30

*A.* Thirty-eight.

*Q.* What did you notice about the horse's health while you had him?

*A.* I reported to Mr. Schanck, I thought he was a very ravenous eater—eat very greedy.

*Q.* Did he seem to be sick?

*A.* No.

*Q.* And you found him in the morning he was dead?

*A.* I did.

*Q.* Who left him at night?

40

A. Both me and the other man together.

Q. How was he tied?

A. About two feet of halter—the same as I did every other horse in the stable—a regular halter, tied the same as he always was.

Q. What was his appearance the next morning?

A. He was lying in the stall swelled up.

Q. What seemed to be the matter of him?

A. I couldn't say.

10 Q. Any bruises on him?

A. No, no bruises on him at all; I examined him and there was no bruises on him.

Q. Did he seem to be well when you left him?

A. He was eating his feed when I left him.

Q. Had he been working that day?

A. Yes, half a day; he worked the first half of a day, and stayed in the stable in the afternoon.

*Cross-examination:*

Q. He was a good feeder?

20 A. He was a kind of greedy.

Q. How much did he get?

A. Four quarts of oats twice a day, and a pail of cut feed at night.

Q. Cut feed made of what?

A. Cut hay and meal mixed up the same as you would fix it for any other horse.

Q. Did he get any other hay than that?

A. He got loose hay—just take an armful and give it to the horse in his rack.

30 Q. Did he always eat his feed?

A. He didn't eat for a couple of days after coming there, but after that he eat very well; any horse coming to a strange place won't eat.

Q. How long after you got him before you began to work him?

A. I should judge about two days and a half; the first day Schanck got him he tried him on the cart, and then he lay in the stable a day or two.

Q. You used to work him all day?

- A. At times; work him one day and rest him the next.
- Q. Is that the way you worked the other horses?
- A. No; the horse I drove before him, I drove him one day, and the other one day.
- Q. How many loads, about, would you take with him in a day?
- A. That would depend upon how far you went to; some days three or four, and some days twenty.
- Q. With every load didn't you have to back him some?
- A. Yes. 10
- Q. Didn't you succeed in getting your load in every time?
- A. When I found out how it was going, I took the other horse in contrary places—where there was contrary backs, or across the railroad; he didn't like crossing the railroads; if he took a fit he would back, and I took this other black horse for such places; sometimes he would take a backing and I couldn't stop him; I had him by the head one time, and I couldn't stop his backing, and he backed through the fence over the sidewalk.
- Q. Didn't you jerk him pretty hard? 20
- A. No; I used my own judgment on that.
- Q. Didn't you jerk him pretty hard when he backed across the sidewalk?
- A. No, sir.
- Q. Didn't you give him a pretty hard jerk on the jaw?
- A. No, I didn't; it would take four men like me to jerk him with the bit I had.
- Q. How often did you drive him across the car tracks?
- A. I couldn't tell you; it was when I couldn't help it.
- Q. What car tracks were those? 30
- A. The steam engine tracks; I generally crossed Washington street.
- Q. About how many feet is it across the track from the nearest rail to the farthest?
- A. About 150 feet across.
- Q. Engines running up and down there all the time and standing and blowing and whistling?
- A. Yes.
- Q. Did you use him on the day before his death?
- A. The first half of the day. 40

Q. Did you use him on the day before that ?

A. I couldn't be positive ; I might have used him some of the day, but he didn't work the whole of the day ; he has never worked two whole days in succession. We had three horses and only two drivers.

Q. What do you mean by contrary backing ?

A. He hadn't contrary backing over the sidewalk—by that I mean the backing was not hard to back. The time he run through the fence I mean it was only just the grade  
10 of the street. When he would take this fit he would back in spite of you and you couldn't hold him.

Q. What is the reason you drove the horse as much as you did ?

A. To see would he get any better ; to see would he mend his habits ?

And further to maintain the issues on his part, defendant called as a witness

20 *Edward Kelly*, who being sworn, testifies as follows :

*Direct examination* by Mr. McGee.

Q. Do you remember this horse ?

A. Yes.

Q. What is your business ?

A. Laboring man.

Q. Who were you driving for ?

A. Mr. Crocker.

Q. You know this horse that is in question ?

30 A. Yes.

Q. Did Mr. Crocker have that horse ?

A. Yes.

Q. Did you drive the horse ?

A. Yes.

Q. Tell us what you know about him ?

A. I went, by orders of Mr. Crocker, down to Mr. Lawrence's store for the horse, and I got the horse out of Mr. Lawrence's yard, and I fetched the horse down to Mr. Crocker's yard, and the first load we put on the horse was half a ton of coal, and he pulled it pretty fair, but the next

load he didn't pull at all—badly—it was a ton ; he wouldn't pull all the time exactly as he ought to ; he would sometimes stand in the street and back up against the sidewalk on me ; and I was going after a load of coal one day down to Schanck's yard with this horse, on the corner of Essex and Hudson streets, and he lay down twice with me, and I had to come back with him and take another horse ; I didn't try him after he lay down twice ; I didn't try him any more after that day.

*Q.* How long did you drive him ? 10

*A.* Going on three weeks.

*Q.* Was he any better at the last than he was at the beginning ?

*A.* No.

*Q.* Tell us how he acted throughout the whole of that time ?

*A.* Sometimes he would lay down in the street with the cart ; I couldn't get him to go across a railroad ; he would turn around.

*Q.* Where was it he lay down ? 20

*A.* He laid down one day twice at the corner of Essex and Hudson streets ; there is no railroad there ; Mr. Schanck was moving a stable from his old yard to his new yard, and I suppose the house moving frightened him ; the corner of Barrow street and Railroad avenue he backed ; there is a railroad there.

*Q.* Anywhere else ?

*A.* Yes.

*Q.* More than once ?

*A.* Yes. 30

*Q.* How many times ?

*A.* I couldn't say.

*Q.* What else did he do besides lay down and back ?

*A.* When I was pulling sometimes I couldn't hold him ; he would go back.

*Q.* How was he about going backwards when you wanted him to go back ?

*A.* Sometimes when I tried to pull him he would back up in spite of me and I never could get him to back up to the sidewalk as I wanted him, to put in the coal. 40

Q. Where was the horse next that you saw him ?

A. I saw him with Mr. Schanck.

*Cross-examination.*

Q. You drove him two or three weeks ?

A. Yes.

Q. How often did you drive him during that two or three weeks ?

A. Sometimes I might drive him half a day ; sometimes we were slack of business and I would not drive him none  
10 at all for a day—depending upon the business.

Q. You drove him more or less every day during those two or three weeks ?

A. No, I don't think I did.

Q. Had you any other driver besides you ?

A. Not at that time.

Q. Did you drive him about even with the other horses you had at that time ?

A. No, I drove the other horses more.

Q. How soon after you began to drive him was it he laid  
20 down on the corner of Hudson and Essex streets ?

A. Three or four days.

Q. There was a stable in the street being moved ?

A. Yes ; he was not quite as far as the stable when he laid down.

Q. Do you mean that he fell down, or that he laid down ?

A. He laid down ; he backed up against the sidewalk before he laid down.

Q. Then you got him up ?

A. Yes ; and he backed again, and went down again.

30 Q. It was in the backing that he went down ?

A. I don't know, but he laid down anyhow.

Q. Don't you know whether he laid down on his haunches first or not ?

A. I don't know that.

Q. He must have gone on his haunches if he fell down ?

A. Yes.

Q. Did he go on them first ?

A. Yes, I think he did.

Q. And on the corner of Barrow street and Railroad

avenue he backed again, as you were going up to the railroad?

A. Yes.

Q. Any locomotive there?

A. Not at the time.

Q. Any cars?

A. No, sir.

Q. Was the gate up or down?

A. The gate was up.

Q. Any locomotive about?

10

A. No, sir.

Q. Did you ever drive him across the tracks at any other time than that?

A. Yes.

Q. How often did you drive him across the tracks?

A. Five or six times; I had to lead him by the head across.

Q. You always dumped your coal with him?

A. Yes.

Q. Sometimes he would back a little too freely?

20

A. Yes.

Q. Do you recollect how long ago this is?

A. I think it is along about 1869 or the beginning of 1870.

Q. Do you recollect what kind of a horse this was?

A. A stout built horse—kind of a dark bay or brown.

*Re-direct examination:*

Q. You were examined in some other suit about this horse?

A. Yes.

30

Q. Before Mr. Williams?

A. Yes; on Montgomery street.

Q. What made you lead that horse across the railroad?

A. He wouldn't go if I sat in the cart; he would turn back.

Q. Did you have trouble with him every time you went across the railroad?

A. Yes.

Q. (*By the Court.*) Was he afraid of the railroad?

A. I don't know what his idea was; he wouldn't go across it very easy.

And further to maintain the issues on his part defendant called as a witness

*Cyrus Lawrence*, who being sworn, testifies as follows :

*Direct examination* by Mr. McGee :

Q. You were the plaintiff in this replevin suit that has been spoken about ?

A. Yes.

10 Q. In which the sheriff was the defendant ?

A. Yes.

Q. The horse or mare that you replevied there was the one attached as the property of Mr. Griffin ?

A. Yes.

Q. No execution was ever issued in that case, was there—that is, the sheriff didn't come and take the mare ?

*Mr. Dixon*. The record will show all that.

*Mr. McGee*. I want to show that the money in that case was paid voluntarily, and I want to show that the money  
20 came from Mr. Griffin and was paid voluntarily.

Q. The money on that replevin suit, the value of the mare was paid over without execution ?

A. The money was paid without any suit.

Q. Did you pay that money ?

A. I paid it, and then I looked to Mr. Griffin for the money.

Q. Did you get it from Mr. Griffin ?

A. No, sir, I had the money.

Q. Did you get it from Mr. Griffin afterwards ?

30 A. Yes, I got my money back. I paid him for the mare when I bought her, and what I paid out I looked to Griffin for.

Q. It was so understood wasn't it, that he was to make you whole for all the expenses of that suit ?

A. I understood it to be so—whatever it cost me he would make up to me, because I paid him for the mare when I bought her. It was so understood between him and I that he would give me whatever I had to pay out.

Q. (*By the Court.*) You say you had bought this horse from him?

A. Yes, I had bought the mare of him and paid him for her.

Q. (*By Plaintiff's Counsel.*) The money you paid the auditor you got from Mr. Griffin? 10

A. Yes, afterwards.

Mr. McGee. The money paid to the auditor was the amount of the principal of the bond with interest.

Mr. McGee. I move that the plaintiff be nonsuited on the ground that where a judgment has been obtained in attachment by a plaintiff against a defendant, and the money paid thereon, or recovered thereon, that the judgment places the question between the parties, as to the liability of the defendant to the plaintiff for the debt recovered *res adjudicata*, and that the defendant cannot again open that question in any wise excepting in the suit in which the judgment was obtained, that a judgment at common law is an end of all dispute, and that a judgment under a statute is also an end of all dispute between the parties as to that question, unless there be some express statute to the contrary; and that when John Schanck recovered a judgment against Willet Griffin on the matter now in dispute in this case, whether in attachment or otherwise, that ended the question, and Willet Griffin could only open that question again in that suit on a motion to open judgment, or in such other proceeding as might be had in that suit, and that an action to recover back again money paid by virtue of that judgment, will not lie in this or any other court; and that the judgment in attachment being in evidence in this case, and it appearing that the matter is the same discussed here as was discussed there, this plaintiff is estopped from maintaining this action and must be nonsuited. 20 30

The court declines to nonsuit, and allows the defendant an exception.

To which refusal of said judge to order judgment of nonsuit for the reason aforesaid, the defendant by his counsel excepted, and prays that this, his bill of exceptions, be sealed, and it is sealed accordingly.

[L. s.]

M. M. KNAPP.

*By Mr. McGee:—*

I ask a nonsuit on the further ground that, although a judgment in attachment may not always be more than a judgment *in rem*, and that, although it may be held that a  
 10 judgment in attachment, where no appearance has been entered, is not final as between the parties, yet if, in a suit in attachment, the defendant shall enter his appearance or file a plea or be heard in the action, that then the action loses its character of one *in rem*, and obtains the force of an attachment in *personem*, and is a conclusion of the matter and an estoppel of the parties; and further, that if in any action the defendant in attachment shall know of the attachment proceedings in time to have entered an appearance and defended the suit, and shall then volun-  
 20 tarily allow judgment to pass against him in the attachment and proceedings be taken to make the money, that that operates as an estoppel against him from seeking to recover back that money in any collateral proceeding; and it appears in this case that Griffin knew that this attachment suit was pending from within three weeks after it was begun till the time of judgment, and that he deliberately sat still, knowing the suit was pending, and allowed the suit to go to judgment and voluntarily paid the money, which was recovered under the attachment to the auditor,  
 30 and that he is thereby estopped from maintaining this action, and on that ground I ask a nonsuit.

The court declines to nonsuit, and allows the defendant an exception.

To which refusal of the court to order judgment of nonsuit for the reasons last aforesaid, the defendant by his counsel excepted, and prayed that this, his bill of exceptions, might be sealed, and it is sealed accordingly by

[L. s.]

M. M. KNAPP.

GENTLEMEN OF THE JURY:—The amount of money involved in this case is not very large, but has resulted in the cropping out of questions that present some difficulties in their settlement. The case is a novel one; I don't remember seeing another like it. I have had some little doubts as to whether a recovery could be had in this action—at least upon one of the grounds that the plaintiff has put his case, until by some proceeding the attachment under which the money was drawn from the plaintiff was first set aside. But I understand that this matter has been before the 10 Supreme Court on a demurrer to the declaration of the plaintiff, and in looking into the declaration it seems to me that the matter was sufficiently before the court to control my action at the circuit, and I shall treat it as if there were no such question in the case.

The plaintiff sues for the recovery from the defendant of the sum of \$481.81 and interest from March 9th, 1874, and he bases his claim upon the ground that the defendant in 1871 sued out an attachment in the circuit court of this county against the plaintiff as a non-resident debtor, and 20 caused property of the plaintiff to be seized under the attachment, and out of the proceeds of that property received from the auditor in attachment \$481.81, when, in fact, there was nothing due and owing from Griffin to Schanck, and having so received it that there is an obligation on the part of the defendant here, the plaintiff in the attachment,—an implied promise in the law to repay the plaintiff this money,—and he claims that he can recover back this money so received if either the attachment was 30 wrongly issued, that is, if the claim is one for which an attachment would not lie in the law, or if the amount or a part of it, although the attachment would lie, was not fairly and honestly due at the time. Now, if the plaintiff has succeeded in showing a state of facts that brings him within either of these views—that is, if the attachment was issued for a claim that it could not lawfully have been

issued for, or if it having been issued upon ground which would properly and legally support the attachment, the plaintiff still received from the auditor or through the proceedings in attachment, more money than was justly due to him, then the plaintiff is entitled to recover whatever he can show that he has improperly paid or that the defendant has improperly received.

Now, the plaintiff, to prove his case, puts in evidence the proceedings in attachment. They show that a horse was  
 10 seized as the property of the defendant; and it is admitted that the auditor received, as the result of the attachment proceedings, \$481.81, of which sum \$381.77 was paid by the auditor to the plaintiff in attachment, Mr. Schanck, and to his attorney the sum of \$100.04, for costs. Now, the plaintiff goes into further evidence to show that the claim  
 on which the attachment proceedings was based was a transaction respecting the sale of a horse by Griffin to Schanck, and he claims that he made an absolute sale and delivery of the horse, for a price agreed upon, and at the same time  
 20 took the promissory note of defendant in payment, or to secure payment of that price, and that the title of the horse passed to the defendant, and that the plaintiff became owner of the note for valuable consideration—in other words, that that transaction was a complete sale of the horse, and the price adjusted by the promissory note of the defendant. That is the plaintiff's insistent.

The defendant says that there was no sale; that the horse was simply left for trial, and that he remained the property of the plaintiff, and the note given was without considera-  
 30 tion, that when the horse died it was the plaintiff's loss; that the defendant, as between himself and the plaintiff, was not called upon to pay the note—I mean by that, that if the note had remained in the hands of Griffin, and he had sued the defendant on it, that, as between them, there could have been no recovery, because the note was given for nothing, without any consideration; that it was recovered on because it was passed to other hands. That is what the defendant is insisting; and he insists that, if obliged to pay it in the hands of an innocent holder, for value—which was  
 40 the case—that he, Schanck, should recover back the amount

paid from the plaintiff—should recover back from Griffin the amount which he had to pay for that promissory note.

Now, gentlemen, just here, in illustrating the question of whether the attachment was properly issued, it is well settled in this State that an attachment will not lie for anything except a debt, or a liability founded on contract. *It must be a specific sum*; it will not lie for unliquidated damages. If a man has made a contract with you other than payment of money and failed to perform the contract, and this entitles you to recover damages in a court against him, you cannot, till you have recovered judgment for those damages in court, commence proceedings by attachment against the defendant, even if he is a non-resident. The amount must be fixed before you can use that proceeding to sequester the property of an absent defendant. And in this case, if the right of Schanck was simply to recover damages for any breach of warranty in the contract between them as to the quality of this horse, if his right was simply to recover damages, then he made a mistake when he undertook to base proceedings by way of attachment on it. Such proceedings would not lie; and if they had been met by the defendant at the time, they could have been set aside and annulled without any difficulty whatever. But if, on the other hand, the insistment of the defendant is true that no title had passed for that horse, and that this note was without consideration, and the defendant had to pay it because it was in the hands of a third party, he would have had a right, as a debt, to recover back that sum, and it would have been a proper foundation for a proceeding in attachment. So that the test of whether that attachment was a proper proceeding or not depends upon the fact, as you shall find it, of whether this transaction in Jersey City was a sale or not. If it was a sale, then, although there may have been deceit or fraud—not fraud to vitiate the whole contract that might set it aside—but there may have been deceit even; there may have been a warranty and a breach of warranty; Griffin may have said the horse was sound and he may have been unsound; he may have said he was kind and he may have been vicious; he may have said he was true and he may have proved to be baulky—that would not give him a

right to proceed by way of attachment. His right to proceed by way of attachment could only have been in that case on the ground, either that this promissory note was without consideration and that he paid it in their hands and therefore had a right to recover the amount back from the defendant, or upon the further ground that, being a sale, there was such conditions in the sale that the defendant had a right to return that horse and rescind the contract of sale and did so return it and so rescind it, or that the parties  
 10 agreed to the rescinding of the contract. And if the title to that horse was in the defendant, Schanck, no action could lie by way of attachment for anything growing out of it. Therefore, that is important, as a foundation of proceeding upon the claim as the plaintiff makes it, that the attachment was void and therefore he has a right to recover here because it was not due and owing.

Now, then that, gentlemen, is a question of fact for you. The witnesses on this point and the parties are not agreed as to how the fact is. The plaintiff says that there was a  
 20 sale of the horse and a delivery upon the price agreed, and a promissory note taken for the payment. That is his version of it. Mr. Lawrence, I think the name is, the son-in-law, says that he was present at the time of this transaction, and you will remember what he says in regard to the sale. There is further testimony, on the part of the plaintiff, by Lane, a gentleman from Westchester County, who gave you his version of the conversation which, he alleges, took place between the defendant and the  
 30 plaintiff in regard to this matter. And the testimony generally, I think I may say fairly, of all those witnesses goes to show that there was a completed transaction, that there was a sale of the horse, and that this promissory note was given as the price. If their testimony is true in the main, then the title to this property was in Mr. Schanck after the delivery and was not in Mr. Griffin.

Now, the defendant says that is not so; it is a mistake; he says it was not intended to be a sale. He gives a different version of his visit to Sing Sing. He had a friend with him; his friend is not here; so that we are obliged to  
 40 rely entirely upon what the defendant says about that; of

course we cannot assume what Hamilton would say if he were upon the stand ; he may have confirmed the witnesses of the plaintiff or may have confirmed the statements of the defendant ; all that we can say about him is that he is not here—there it is, the testimony of the defendant upon his recollection against the testimony of the plaintiff and the witnesses I have named, and between those, and out of that you are to get at the truth of that thing. I assume that these witnesses all mean to tell the truth, but we know a few years will affect the 10  
recollection of persons about these transactions. There is one significant fact about which there is no dispute. There was a promissory note given ; it was not a conditional note ; it was not a note given simply to Griffin ; it was a note given to him in such a way, as witnesses state, as to be negotiable ; it was payable at a bank at a certain time ; these gentlemen were both business men ; they knew what they were about. Mr. Schanck gives a promissory note payable in thirty days at a bank—makes it negotiable. If you can find any other reasonable hypothesis than that it 20  
was given in payment for this horse, that is for you to determine. But if you find, as a matter of fact, that the weight of evidence in this case shows that there was a sale of that horse at the time, then the courts charge to you, gentlemen, is, that that attachment could not have been maintained ; because, even if there had been an agreement in the transaction by which the defendant was to return the horse and cancel the debt, he didn't do it ; the horse died, and he died as the property of the defendant, and he must bear the loss ; because in this case whichever was the 30  
owner of the horse at the time he died, is to bear that loss. Therefore, there was no rescinding of the contract, and the plaintiff in attachment had simply a right to damages if any breach of warranty. Those damages were unliquidated, and until he had recovered a judgment for those damages, attachment in New Jersey would not lie, and his proceedings, therefore, were not well founded in law. It is suggested in this case that, although it is true the attachment would not lie in case of unliquidated damages, yet, that this payment by the plaintiff was a voluntary payment, 40

and therefore he has not a right to recover it back. Now, it is true, if Griffin had paid this money after the attachment had been issued, although illegally issued, he had voluntarily paid this money to the auditor, without any coercion, it would have been a settlement of this whole thing, and he could not have recovered it back again. In this case, I think, the evidence is to the effect that an action of replevin had been brought for this horse that was attached. The horse was found to be the property of the defendant, and  
 10 therefore the attachment in that respect was proper. He had seized the defendant's property, but it turned out, as is in evidence in this cause not contradicted, that the person who instituted that replevin suit was the owner of the horse by purchase from Mr. Griffin, who had been paid the price of that purchase, and yet by the judgment of the court trying that replevin suit, the horse was adjudged to be the property of the defendant in attachment.

That was conclusive, so far as that went, of the question, whether that was the horse of the defendant or not; when  
 20 that was settled by the verdict of that jury, it became in law the property of the defendant, but it turned out that that was property which the defendant had sold to somebody. If the defendant had had no connection with that transaction he might very well have folded his hands and stood still and let it go, but it turned out that he had sold that same horse to the plaintiff in replevin, and in selling him the horse he, in law, warranted its title and he was bound, if his purchaser lost it, by reason of any claim of that sort, to make it good; and therefore when he came for-  
 30 ward to redeem that horse he was doing that which he was legally obliged to do, and it could not be considered a voluntary payment. The plaintiff must therefore, for the purposes of this suit be regarded as if he had been a purchaser of that horse or redeeming it from the auditor by an arrangement between them, and it is not voluntary payment. Now, the act which provides or recognizes the right of recovery in a suit like this says that a bond shall be given, and the bond shall be upon the condition that the plaintiff or creditor  
 "shall appear to any suit that may be brought against him  
 40 "by the said defendant within one year next after the date

“of the said bond, and shall pay unto such defendant any sum of money which, by the judgment or decree of the Court, shall appear to have been received by him, and not due or owing, with costs of suit, which bond shall be filed by the clerk for the benefit of said defendant.” This recognizes the right to sue. If the attachment had been set aside I should have had no question at all about the common law right to sue. But under this act, I will assume for the purposes of this case and hold that he has the right to sue. 10

The question comes now, what is he to recover, if he recovers at all? Suppose you find that this transaction of sale of the horse was a valid sale, and that the title passed to Mr. Schanck, and when the horse died it was his loss, when he issued his attachment and got his money back he got it wrongfully and must repay. Now, what must he repay? What is the claim of the plaintiff here? There is some evidence in the case, gentlemen, that this horse was not of the character represented by the plaintiff when he sold him, if he did sell him; that he recommended him to be true, and there is some testimony going to show that he was not; and this testimony could only be in this case for the purpose of showing that there was a breach of warranty, that the defendant was entitled to have some allowance made to him because the horse was not what he was represented to be. No very distinct issue was made about that. The defendant didn't put himself distinctly upon the ground that there was any contract even from which a warranty could arise. But the evidence in the case, on the part of the plaintiff, shows that there was some representations on the part of the plaintiff and although the defendant denies there was any contract. Yet the plaintiff shows on his part there was a contract, and makes the proof that the defendant would have made if he were suing for himself for damages. Now, the question is raised, can there be any abatement in this claim by reason of that circumstance. It is insisted by the plaintiff that there cannot be for the reason that this suit is for a specific debt—for money had and received, and that the damages, by reason of the breach of contract, are unliquidated and cannot therefore 40

be set up by way of set-off against this claim. Generally, that would be so; but for the purposes of this case, my charge to you will be, that this must be treated by you as if the plaintiff were seeking to recover the price of that horse, and the defendant is at liberty to show, as against that recovery, any fact which will reduce, by way of damages, that price agreed to be paid. That is to say, we must treat the case as if the plaintiff were suing for the price of the horse; and the rule is, where a party sues for the price  
 10 of a horse, or other property, and there has been a warranty or a representation that has failed, he is at liberty to set up against that price such damages as he can show he received by reason of the failure of those representations, and by reason of the deceit, or by reason of a failure of warranty. In this case, if you find upon the evidence (and, gentlemen, there is reason why this matter should be settled; the law abhors multiplicity of suits, even if the parties do not; the object of courts is to settle disputes, and settle them as satisfactorily as possible)—if you find there has  
 20 been any any misrepresentation, for which the seller of this horse would have been liable in damages, you shall consider that; you shall ask what those damages are, and deduct them from any sum which you may find the plaintiff is entitled to recover of the defendant by reason of the payment that was improperly made through that attachment. I want you, in regard to this question of damages, to deal with this case precisely as if you were trying a horse case on a suit for the price. You are considering this question of whether there is a breach of warranty, or misrepresenta-  
 30 tion, or deceit.

The rule is in determining what damages are to be given in such case to take the difference between the price of the horse, as agreed to be paid, and what the evidence shows the horse is actually worth. If the horse is diminished in value by reason of any failure of quality as represented, then that diminution is to be taken from the price agreed to be paid for the horse—that would be the difference between the value of the horse and the price agreed to be paid. That would be the measure of damages to make good the  
 40 parties in the transaction, and such sum you shall find—if

you find anything as damages—which the defendant suffered by reason of misrepresentations in regard to this horse, you will deduct from the amount you find, that otherwise the plaintiff would be entitled to recover in this suit.

Now, question is made as to the right to recover costs in this attachment suit. It is insisted that the defendant didn't receive the costs himself; that it was paid to his attorney; that he only received the sum of \$381.77—the other was fees and expenses, \$100.04. In regard to that, gentlemen, my charge to you is that if the plaintiff is entitled to recover at all in this case—that is, if you find that the property was the property of the defendant, Schanck, after this transaction, which will entitle the plaintiff to recover—then the amount which he is to recover is to be the amount, not only of that he actually paid to the plaintiff, and which the plaintiff put in his own pocket, but it is also to be the amount that was paid to the attorney of plaintiff for his costs; because, if he is liable at all, he is liable for the costs as well as the other—it was money in law paid to him. The plaintiff was liable for his costs when he commenced his suit in attachment; if he didn't succeed it was his debt; he was the person to be looked to for those costs, and when the payment was made of the costs it was a payment made to him; though paid to his attorney is no circumstance to change that transaction; the plaintiff and the attorney in that matter are one, and there is to be no distinction made between the costs and the debt. The reason of that in attachment is obvious and clear and founded upon just principles. An attachment is an extraordinary proceeding; it seeks to deal with the property of the plaintiff when he is not within the reach of process—when not within the jurisdiction of the court—seeks to take and sequester his property for the purposes of paying the claim, and the plaintiff, in attachment, puts himself upon the right to seize and take the property of an absent debtor, and he must be a debtor; and when the plaintiff undertakes that extraordinary proceeding he must be sure he is right; it is his business to see to it that he is right, and if he takes a false ground and it turns out so afterwards he cannot complain that the consequences of that fall upon him. The

costs are a legitimate part of the consequences ; the costs of that suit came out of the plaintiff, and he has to pay an account of that proceeding, and if he is entitled to recover at all, he is entitled to recover that as much as he is the debt.

Now, gentlemen, it is after all, as far as you are concerned, a question very much as counsel have said ; it comes down to the fact of the horse transaction ; you are to say upon the evidence whether this was a transaction that concluded with a sale, and the title passed to the defendant, or  
10 whether it remained in Griffin—in other words, which side of this case you believe, and as you believe so your verdict will be.

And thereupon the defendant, by his counsel, requests the court to charge the jury that they are entitled to take into consideration, in weighing the evidence of Cyrus Lawrence, the conflict between his testimony on the stand and that in the deposition.

*The Court.* Yes, I meant to have spoken of that. Cyrus Lawrence, one of the witnesses in this case, is sought to be  
20 impeached by the introduction of depositions made by him in another suit touching this same transaction. The question is for you, what credibility Mr. Lawrence is entitled to. A man may be attacked in his testimony by the introduction of contradictory statements made outside ; he may be asked upon the stand whether he has not said otherwise upon other occasions ; he may be asked whether he has not sworn otherwise upon other occasions ; and if he denies that he has, and it is shown, in answer to his denial, that he has actually made different statements, the jury take that into  
30 account, and say how far the man is to be believed. If he admits them, and explains them, it may have very little effect upon the testimony ; but you are to consider that ; it is not to be regarded as throwing his testimony out of the cause ; it simply is taken for what it is worth to effect his credit. If there is any serious contradiction, and it is not explained by him, or is not explainable by you—because you must not assume that a man lies unless you see some evidence of it—if his story is reasonable, his explanations of

his testimony reasonable and satisfactory, it may have no weight whatever. A man may make other statements outside, and explain the reason why he does it; but if you find in the fact that he made contradictory statements, and that he is not a man to be believed, you have a right to treat his testimony as you think it deserves; but you give to him just such weight as you think, under all the circumstances he is entitled to; you saw him on the stand, you saw his manner of testifying, and you saw how far the testimony given against him contradicts his statements here, if it does 10 contradict him, and on the whole case you judge of his credibility, and give such weight to his testimony as you think it is entitled to.

And thereupon defendant by his counsel prays that an exception may be allowed to that portion of the charge of the Court which instructs the jury that the plaintiff can recover back if the attachment would not lie, and that if Schanck received money not due and owing; and prayed that this, his bill of exceptions, might be sealed, and it is 20 sealed accordingly.

[L. s.]

M. M. KNAPP.

Defendant's counsel also prays an exception to so much of the charge of the Court in which the Court, in speaking of the sale, said the testimony of the plaintiff's witnesses goes to show there was a sale if their testimony was true then the title is in Schanck—there is one significant fact which you must take into consideration in making up your judgment, &c.; to the language of the Court regarding that I ask an 30 exception.

*The Court.* I cannot give counsel an exception to the statement of the testimony. If I have mistated the testimony, if counsel will call my attention to it, I will correct it.

And thereupon defendant by his counsel also prays an exception to that part of the charge of the Court which instructs the jury as follows: "And it turns out and is not contradicted that the replevined horse was not the property

of the plaintiff in replevin by purchase, but was described by judgment to belong to Griffin, therefore Griffin was obliged to warrant the title; when he came forward and paid he was doing what he was legally compelled to do and it was not a voluntary payment; and defendant by his counsel prays that this, his bill of exceptions, might be sealed and it is sealed accordingly.

[L. s.]

M. M. KNAPP.

And thereupon defendant by his counsel also prays an ex-  
10 ception to so much of the charge of the court as instructed the jury that, if the plaintiff is entitled to recover at all in this case, the amount is to be the amount paid to Schanck and costs also, and the payment to the Sheriff is a payment to the party in that action; and prayed that this, his bill of exceptions, may be sealed, and it is sealed accordingly.

[L. s.]

M. M. KNAPP.

Defendant's counsel prays an exception to the refusal of the court to nonsuit when the motion was made.

*The Court.* It was not a proper time to raise the question  
20 to nonsuit, and I have purposely raised those questions in the charge, and counsel has his exceptions.

As to the point of estoppel, I am willing to put it in this shape; that defendant's counsel requests the court to charge that laches of the defendant in not appearing to the attachment when he knew of it, should work an estoppel. I decline to make such a charge, and counsel may have his exception.

And thereupon defendant by his counsel excepted to the declination of the court to charge as requested as last above  
30 set forth, and prayed that this, his bill of exceptions, might be sealed, and it is sealed accordingly.

[L. s.]

M. M. KNAPP.

All these exceptions are subject to the language of the court.

M. M. K.

## NEW JERSEY COURT OF ERRORS AND APPEALS

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JOHN W. SCHANCK.  
*Pltff. in error.*  
 vs.  
 WILLET GRIFFIN,  
*Deft. in error.*

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*In Error.*  
*Assignment of*  
*Errors.*

Afterwards, that is say on the second Tuesday of March, 1875, in the Court of Errors and Appeals, in the last resort in all causes in the state of New Jersey comes the said John W. Schanck by Muirhead & McGee, his attorneys, 10 and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bills of exceptions and in the verdict and judgment aforesaid, there is manifest error in this to wit:

That the declaration aforesaid and the matters therein contained are not sufficient in law for the said Willet Griffin to have his aforesaid action thereof against the said John W. Schanck.

There is also manifest error in this, to wit: That on the trial of the said cause in the Supreme Court Circuit, held 20 in and for the County of Hudson, the justice before whom said cause was tried admitted incompetent and illegal evidence produced by said Willet Griffin and objected to by said John W. Schanck, whereas by the law of the land said evidence was illegal and incompetent, and ought not to have been admitted therefore, in that there is manifest error.

And also that there is manifest error in this, to wit: That on the trial of the cause as aforesaid the justice before whom said cause was tried refused to admit and ruled out 30 legal and competent evidence offered by the said John W.

Schanck, whereas by the law of the land said evidence was legal and ought to have been admitted, therefor in that there is manifest error.

And also that there is manifest error in this, to wit : That on the trial of said cause, and after the testimony on behalf of the plaintiff, said Willet Griffin, was closed, the justice before whom said cause was tried refused to order judgment of non-suit thereon, although moved so to do by the defendant through his counsel, and although by the law of the  
10 land a judgment of non-suit ought to have been ordered ; therefore in that there is manifest error.

And also that there is manifest error in this, to wit : That the said justice before whom said cause was tried, at the trial of said issue so joined as aforesaid, after the evidence was in on both sides, charged the jury as follows : And he claims that he can recover back this money so received if either the attachment was wrongly issued—that is, if the claim is one for which an attachment would not lie in the law, or if the amount or a part of it, although the attach-  
20 ment would lie, was not fairly and honestly due, at the time. Now, if the plaintiff has succeeded in showing a state of facts that brings him within either of these views—that is, if the attachment was issued for a claim that it could not lawfully have been issued for, or if it having been issued upon ground which would properly and legally support the attachment, the plaintiff still received from the auditor, or through the proceedings in attachment more money than was  
30 justly due to him, then the plaintiff is entitled to recover whatever he can show that he has improperly paid or that the defendant has improperly received,” whereas by the law of the land the said justice should not have so charged ; therefore in that there is manifest error.

And also that there is manifest error in this, to wit : That the said justice before whom, &c., at the trial, &c., after, &c., charged the said jury to the effect following : And it turns out and is not contradicted that the replevined horse was not the property of the plaintiff in replevin by purchase, but was described by judgment to belong to Griffin, there-  
40 fore Griffin was obliged to warrant the title; when he came forward and paid he was doing what he was legally compel-

led to do, and it was not a voluntary payment, whereas by the law of the land said justice should not have so charged; therefore in that there is manifest error.

And also that there is manifest error in this, to wit: That the said justice before whom, &c., at the trial, &c., after, &c., charged the said jury as follows: "Now, question is made as to the right to recover costs in this attachment suit. It is insisted that the defendant didn't receive the costs himself, that it was paid to his attorney; that he only received the sum of \$381.77, the other was fees and expenses \$100.04. In regard to that, gentlemen, my charge to you is that if the plaintiff is entitled to recover at all in this case—that is, if you find that the property of the defendant, Schanck, after this transaction, which will entitle the plaintiff to recover, then the amount which he is to recover is to be the amount, not only of that he actually paid to the plaintiff, and which the plaintiff put in his own pocket, but it is also to be the amount that was paid to the attorney of plaintiff for his costs, because, if he is liable at all he is liable for the costs as well as the other; it was money in law paid to him. The plaintiff was liable for his costs when he commenced his suit in attachment; if he didn't succeed it was his debt; he was the person to be looked to for those costs, and when the payment of was made of the costs it was a payment made by him, though paid to his attorney is no circumstance to change that transaction. The plaintiff and the attorney in that matter are one, and there is to be no distinction made between the costs and the debt. The reason of that in attachment is obvious and clear and founded upon just principles. An attachment is an extraordinary proceeding, it seeks to deal with the property of the plaintiff when he is not within the reach of process, when not within the jurisdiction of the court; seeks to take and sequester his property for the purposes of paying the claim; and the plaintiff in attachment puts himself upon the right to seize and take the property of an absent debtor, and he must be a debtor; and when the plaintiff undertakes that extraordinary proceeding, he must be sure he is right, it is his business to see to it that he is right, and if he takes a false ground, and it turns out

so afterwards, he cannot complain that the consequences of that fall upon him. The costs are a legitimate part of the consequences. The costs of that suit came out of the plaintiff, and he has to pay on account of that proceeding, and if he is entitled to recover at all, he is entitled to recover that as much as he is the debt." Whereas, by the law of the land, the said justice should not have so charged, therefore, in that there is manifest error.

There is also manifest error in this, to wit: That the said  
 10 justice, before whom, &c., at the trial, &c., after, &c., upon being requested by the counsel of said defendant John W. Schanck, to charge the jury that the laches of the defendant in the attachment suit, said Willet Griffin, in not appearing to said attachment suit, when he knew of it, should work an estoppel; therefore, in that there is manifest error.

There is also manifest error in this, to wit: That, by the record aforesaid, it appears that judgment in the plea aforesaid was given for the said Willet Griffin against the said John W. Schanck, when by the law of the land judgment in  
 20 the said plea, ought to have been for the said John W. Schanck against said Willet Griffin; therefore, in this there is manifest error.

And the said John W. Schanck prays that the judgment aforesaid, for the errors aforesaid in the said record and proceedings being, may be reversed, annulled, and altogether for nothing holden, and that he may be restored to all things which he has lost by occasion of said judgment.

MUIRHEID & MCGEE,  
*Attorneys for Plaintiff in error.*

## EXHIBIT I.

TO CYRUS LAWRENCE.

*First Interrogatory.* What is your name, age, residence and business ?

*Second Interrogatory.* Do you know the parties to this action, and what relation or connection are you to the defendant therein ?

*Third Interrogatory.* State whether, on or about the third day of May, in the year 1869, you was in company <sup>10</sup> with said defendant upon Hudson street, in Jersey City, N. J. ?

*Fourth Interrogatory.* State who joined you at that time and place, and, if the plaintiff, what induced him to join you ?

*Fifth Interrogatory.* If, in answer to the last above interrogatory, you say that plaintiff joined you by reason of your request to do so, state by whose directions or at whose instance, if anybodys, you made such request ?

*Sixth Interrogatory.* State for what purpose plaintiff was <sup>20</sup> requested to join you ?

*Seventh Interrogatory.* State what conversation took place at that time and place between plaintiff and defendant in your hearing, or between plaintiff and yourself ?

*Eighth Interrogatory.* If, in answer to the last preceding interrogatory, you say that any conversation took place between plaintiff and yourself, state who was present and heard such conversation, and if defendant, state whether he objected or expressed any dissent from the same ?

*Ninth Interrogatory.* State what, if any, propositions were made to plaintiff at said time and place by said defendant or on his behalf?

*Tenth Interrogatory.* If, in answer to the last above interrogatory, you say that a proposition or propositions were made as therein inquired, state what answer plaintiff made thereto?

*Eleventh Interrogatory.* State what, if any, representations in regard to the quality of the horse mentioned in the  
10 complaint herein, were made to plaintiff by defendant or on his behalf?

*Twelfth Interrogatory.* State what, if any, further representations were made or inducements held out to plaintiff to take said horse by or on behalf of said defendant, and what, if any, offer or agreement was made by or on behalf of said defendant, in case said horse should not suit said plaintiff?

*Thirteenth Interrogatory.* If, in answer to the last preceding interrogatory, you say that any further or other  
20 representations, inducements, offers or agreements were made or held out by or on behalf of defendant, state plaintiff's answer thereto, and whether plaintiff accepted said horse, and if he accepted it, whether such acceptance was absolute or conditional, and if conditional, what was the condition or conditions of such acceptance?

*Fourteenth Interrogatory.* State what, if anything, plaintiff gave to defendant upon the acceptance of said horse?

*Fifteenth Interrogatory.* If, in answer to the last above  
30 interrogatory, you say that plaintiff gave his promissory note to the defendant therefor, state what, if any, agreement or arrangement was made between plaintiff and defendant in regard to the payment of said note?

*Sixteenth Interrogatory.* State what, if any, notification

was given to you by or on behalf of the plaintiff in respect to said horse after the delivery aforesaid and when it was given to you ?

*Seventeenth Interrogatory.* If, in answer to the last above interrogatory, you say that you received a notice from or on behalf of the plaintiff, state by whose authority or direction such notice was received by and given to you ?

*Eighteenth Interrogatory.* State to whom you communicated such notice, and if to defendant, state what, if any, directions or instructions you received from defendant in 10 relation thereto ?

*Nineteenth Interrogatory.* If, in answer to the last above interrogatory, you say that you received any directions or instructions from defendant, state to whom you communicated the same ?

*Twentieth Interrogatory.* State defendant's whereabouts during the the month of May, 1869, so far as you know, and, if you say that he was in the west during that month, state how long after said delivery of said horse he left for the west and when he returned ?

20

*Twenty-first Interrogatory.* If, in answer to the nineteenth above interrogatory, you say that you communicated any directions or instructions to plaintiff, state by whose direction you so communicated them ?

*Twenty-second Interrogatory.* State any other facts or circumstances within your knowledge that may be of benefit to the plaintiff in this action as fully and particularly as though you had been specially interrogated in respect thereto ?

FEBRUARY 28th, 1871.

*Cyrus Lawrence*, of Jersey City in the State of New Jersey, grocer, aged twenty-seven years and upwards, being duly and publicly sworn pursuant to the directions hereto annexed, and examined on the part of the plaintiff doth depose and say as follows :

*First.* To the first interrogatory he saith : Cyrus Lawrence ; age, twenty-seven ; business, grocer ; residence, 39 Montgomery street, Jersey City.

10 *Second.* To the second interrogatory he saith : I am acquainted with the parties to this action ; the defendant is my father-in-law.

*Third.* To the third interrogatory he saith : I was.

*Fourth.* To the fourth interrogatory he saith : The plaintiff joined us ; I spoke to him.

*Fifth.* To the fifth interrogatory he saith : One Theodore B. Smith told me Schanck wanted to buy a horse.

*Sixth.* To the sixth interrogatory he saith : To buy the horse ; Griffin wanted him to buy the horse.

20 *Seventh.* To the seventh interrogatory he saith : As soon as I introduced plaintiff and defendant ; defendant told plaintiff he had a horse to sell that he thought would suit him ; he told him his age and that he was sound ; I don't remember what was said after that.

Plaintiff said to me—defendant is a stranger to me, but I know you and suppose the thing is all right ; I told him Griffin was a responsible man ; I told him I had used the horse and worked with him and found him all right ; I told him the horse acted a little green ; he was a young horse

and just came from the country, and was not used to the city—aside from that he was all right.

*Eighth.* To the eighth interrogatory he saith : I don't remember of anyone being there but Schanck, Griffin and myself ; I don't think Griffin objected or dissented to what I told Schanck.

*Ninth.* To the ninth interrogatory he saith : Defendant told plaintiff that that horse was just as he said he was, and

W. MUIRHEID,  
Com'r.

after he had had the horse—well, he guaranteed the horse 10 to be just as he said he was ; then he sold the horse to Schanck ; Schanck said he was a little short and asked Griffin if he would as soon take his note for thirty days and Griffin said he would ; Griffin offered to sell Schanck the horse for \$325.50.

*Tenth.* To the tenth interrogatory he saith : Defendant offered plaintiff \$300, and they split the difference.

*Eleventh.* To the eleventh interrogatory he saith : Defendant saith that the horse was sound and kind—was a good, strong horse, and thought he would be just the thing 20 for Schanck ; thought he would suit Mr. Schanck.

*Twelfth.* To the twelfth interrogatory he saith : I don't remember any further inducements, except that defendant 30 agreed to take Schanck's note for thirty days, in payment for the horse. Griffin told Schanck that if the horse did not suit him, after a reasonable time, and he wasn't as he represented him, he would exchange him.

*Thirteenth.* To the thirteenth interrogatory he saith : Plaintiff told defendant he would take the horse on these conditions—the conditions specified in my answer to the twelfth interrogatory.

*Fourteenth.* To the fourteenth interrogatory he saith: Schanck gave Griffin his note.

*Fifteenth.* To the fifteenth interrogatory he saith, he knoweth not.

*Sixteenth.* To the sixteenth interrogatory he saith: I don't remember of Schanck ever saying anything to me about the horse until he came and told me the horse was dead; I do now remember that Schanck did tell me the horse didn't suit; as near as I can remember this was a  
10 short time before the note was due.

*Seventeenth.* To the seventeenth interrogatory he saith he knoweth not.

*Eighteenth.* To the eighteenth interrogatory he saith: I told Griffin what Schanck told me when I saw him; I don't remember what Griffin said.

*Nineteenth.* To the nineteenth interrogatory he saith: I did not receive any; don't remember of receiving any; I think I told Schanck that if the

W. MUIRHEID,  
Com'r.

20

horse didn't suit him, defendant would make it all right with him when he came back from the West.

*Twentieth.* To the twentieth interrogatory he saith: He was in the West; I don't know when he went or when he got back.

*Twenty-first.* To the twenty-first interrogatory he saith: I told him so on my own responsibility.

*Twenty-second.* To the twenty-second interrogatory he saith: That he knoweth not any other facts or circum-  
30 stances of benefit to the plaintiff in this action.

CYRUS LAWRENCE.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 28th day of February, A. D. 1871, before me,

W. MUIRHEAD,  
*Com'r.*



