

New Jersey Court of Errors and Appeals

WILLIAM S. FANSHAWE,
Plaintiff-Respondent,

vs.

AMY B. RAWLINS,
Defendant-Appellant.

Action at
Law.
On Appeal
from New
Jersey Su-
preme Court.

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BRIEF FOR DEFENDANT APPELLANT.

This is an action to recover the amount alleged to be due plaintiff from defendant for the care and board of defendant's horses. The plaintiff's claim was admitted. The real controversy was the question of the lack of care of the mare Marshmallow, a valuable brood mare which died while in the charge of plaintiff and became a complete loss to the defendant. The value of Marshmallow was counterclaimed by defendant against the account of the plaintiff.

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The plaintiff, Fanshawe, employed one Hughes as the manager of his farm. The mare was turned out to pasture in the first or second week in May 1914 (Hughes, p. 22, line 2).

While in the exclusive charge of the plaintiff, the mare sustained a serious injury. The doctor who examined her on June 26th, 1914, found her with a large cut above the heart about 1½ to two inches long and over six inches deep; the lung was perforated, the ribs were broken, and at that time the wound was discharging serum and pus

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very freely. There were maggots in the pus indicating that the sore had been there several days before the doctor saw it (Case, pp. 33, 34, 35).

It required great force, in the doctor's judgment, to cause a wound of this character (Case, p. 36, line 2).

The lung had been penetrated by something (Case, p. 51, line 20).

10 The first notice defendant had that any ill had befallen the mare, was a telephone message on June 26th, 1914, from the manager (Case, p. 59, line 20).

Hughes, the manager, was not able to fix the day when he first noticed that something was wrong with the mare (Case, p. 73, lines 20-30).

No explanation of the injury was offered by plaintiff.

20 At the first trial the Judge directed a verdict in favor of the plaintiff which this court set aside on June 14th, 1915. This was the second trial of the case.

The grounds of appeal are the refusal of the trial judge to charge in accordance with the following requests:

30 1: The hole in the mare's side, in the absence of explanation by the plaintiff, raises a presumption of negligence. If there are any facts inconsistent with negligence, it is the plaintiff's duty to prove them. The burden is on Mr. Fanshawe.

2: Unless the plaintiff has satisfied you by affirmative proof, that he and his men used reasonable care in guarding the mare from injury, your verdict on the counter claim should be for the true value of the mare.

40 While counsel for the defendant was summing up to the jury and pointing out, as he contended, the facts which would make the doctrine or *res ipsa loquitur* and the presumption of the plain-

tiff's negligence applicable to this case, the trial judge stopped him saying:

"I think it is only proper to stop you in your statement as to the doctrine of *res ipsa loquitur* and what the court will say to the jury about the presumption of negligence. I intend to charge the jury that the doctrine of *res ipsa loquitur* does not apply in this case."

This fact appears by stipulation of counsel, copy of which is annexed to this brief.

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POINT I.

The requests to charge set forth in the grounds of appeal should have been granted.

The doctrine of *res ipsa loquitur* applied.

In the case of *Jackson v. McDonald*, 41 Vr., 594, the defendant had hired plaintiff's mare, and when delivered she was in a sound condition. When returned by defendant, she was injured in such a way that blood poisoning ensued, from which she died. There was no proof as to how the injury was caused. The Supreme Court held that

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"When chattels are delivered to a bailee in good condition and are returned in a damaged state, or not returned at all, the law will presume negligence to have been the cause, and casts upon the bailee the burden of showing that the loss did not occur through his negligence; or, if he cannot affirmatively do this, that at least he exercised a degree of care sufficient to rebut the presumption of it."

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And, in *Sheridan v. Foley*, 29 Vr., 230, it was held that,

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10 “While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases, the maxim, *res ipsa loquitur* is held to apply, and it is presumed, in the absence of explanation, by the defendant, that the accident arose from want of reasonable care. * * *

20 “The facts in the present case bring it within the application of this principle. The bricks were in the custody of the defendant’s servants at the time when this one fell, and it was their duty to so handle them as not to endanger others who were engaged in other work upon the same premises. This brick could not have fallen of itself, and the fact that it did fall, in the absence of explanation by the defendant, raises a presumption of negligence. If there are any facts inconsistent with negligence, it is for the defendant to prove them.”

30 The mare was wholly within the control of plaintiff. Defendant had no right or means of access to the plaintiff’s property for the purpose of supervision of the mare. Defendant had no knowledge of the injury to the mare, until notified by plaintiff. Defendant had no means of ascertaining the conditions existing in the fields in which the mare, from time to time, was pastured. The injury to the mare was of such a character that, in the ordinary course of things, it could not have occurred if those having the management and control of her had used proper care. It was not such an injury as could be said
40 to have resulted from the inherent vice or natural tendency of an animal to injure itself. It

was not like a broken leg or a superficial laceration of the skin. It was a deep and extensive wound, two inches or more in length, an inch in diameter inside, and penetrating into the lung. Such an injury, in the very nature of things, could not have occurred without the presence of some keen and dangerous instrumentality, the very presence of which bespeaks a lack of proper care for the safety of the mare, upon the part of those who were paid a compensation for her care and safety.

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What was this instrumentality? The defendant does not know, and has no means of ascertaining.

The plaintiff should know, if he had used reasonable care to inspect the fences and the fields of his farm. If he did not know of the presence of such an instrumentality, it must be because he did not use reasonable care to inspect the premises and enclosures in which the mare was confined.

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Plaintiff, however, makes no explanation whatever of the situation, nor does he produce any testimony to rebut the presumption of negligence, resulting from the proof of the facts as established at the conclusion of the defendant's case.

As was said by Mr. Justice Collins in *Newark Electric Light & Power Company v. Ruddy*, 33 Vr. 505, quoting Baron Channell, in *Bridges vs. North London Ry. Co.*, L. R. 6 Q. B. 377-391,

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“ ‘And where it is shown that the accident is such that its real cause may be the negligence of the defendant, and that, whether it is so or not, it is within the knowledge of the defendant, and not within the knowledge of the plaintiff, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances and thus raising a presumption that if the defendant does not choose to give the explanation, the

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real cause was negligence on the part of the defendant. * * *

10 "And, in the case before us" (continues Mr. Justice Collins) "how could the plaintiff have shown that the wire parted, without any apparent reason other than its own weakness? He had no control over, or power or opportunity to examine and test it. Proof that the fracture must have come from external violence was, peculiarly within the province of defendant. It could have proved when and how the wire was put up; to what usage it had been subjected, how often, how carefully and how recently it had been inspected, and what its appearance after disruption indicated, in short, the defendant could have exonerated itself from the *prima facie* case made against it, if exoneration had been possible. The plaintiff was not called on to
20 conjecture and disprove possibilities of exoneration."

The first request which was refused, was based on *Sheridan v. Foley (supra)*.

The second request was based on *Levine v. D. Wolfe & Co.*, 49 Vr. 306, in which the Court said:

30 "When, therefore, the plaintiff proved the
"delivery of the chattels in good condition
"to defendant, and their destruction there-
"after by fire upon defendant's premises, the
"law presumes negligence of the bailee to be
"the cause of the loss, and this presumption
"could be rebutted only by *affirmative* proof
"of reasonable care upon defendant's part."

40 These requests correctly stated the law. The propositions contained in each of the requests were pertinent to the issue that had been tried. The jury had not been fully instructed on the law governing the case. The court in no part of the

charge enlightened the jury on the question of presumption of negligence in these cases and the burden resting on the bailee to establish by affirmative proof that he exercised due care in dealing with the subject matter of the bailment.

Consequently the new trial which was ordered by this court on setting aside the direction of verdict, was rendered nugatory so far as the defendant was concerned.

The trial judge, though stopping counsel and announcing to the jury that he intended to charge that the doctrine did not apply, nevertheless charged a request of defendant which, hinted at the doctrine (Case, p. 129, lines 20-30). This request did not fully embody the law applicable to the case. 10

The result must, in the nature of things, have been confusing to the jury. The jury could not deal fairly with the issue without proper instruction concerning the presumption of negligence and the burden of proof. The refusal to charge the requests was error prejudicial to the defendant. 20

Van Veheten v. N. Y. & N. J. Tel. Co., 42 Vr. 45;

Franklin v. Freihofer Baking Co., 42 Vr. 112;

Waskiewicz v. P. S. Ry. Co., 51 Vr. 694;

Talmage v. Davenport, 2 Vr. 561;

Scott v. Mitchell, 12 Vr. 346;

Mellon v. Victor Talking Machine Co., 48 Vr. 670. 30

A situation closely paralleling the action of the trial judge in stating to counsel while summing up that he would charge that the doctrine of *res ipsa loquitur* did not apply, is in the case of *Van Veheten & N. Y. & N. J. Tel. Co.*, (*supra*). There was a proper request to charge and the court said that each of the propositions contained in the request was pertinent, and the second of them had been rendered especially pertinent by a bill of 40

exceptions allowed during the progress of the trial. The judge, in admitting a question over the objection of the defendant, had laid down for the governance of counsel an incorrect rule of law.

The Appellate Court observed that the witness's answer to the specific question had done no injury to the defendant, but the rule of law stated had application to the conduct of the cause generally within the issue that was submitted to the jury. Hence, when the defendant requested the court to instruct the jury correctly upon this point, it was the defendant's right to have its request in substance granted—*i.e.*, to have the law correctly stated so that the erroneous ruling of the court to that extent might be corrected and the impression made by it removed as far as possible from the mind of the jury.

So in the case at bar. The doctrine of *res ipsa loquitur* is a rule of evidence based on common sense, and when explained is instantly intelligible to a jury. Consequently when counsel is in the middle of such an explanation of the facts from which such a rule of law must be drawn, and the court stops him and says it is going to charge the jury to the contrary, and then refuses to make the charges requested, the error is not only prejudicial theoretically but actually.

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POINT II.

It is submitted, therefore, that a venire de novo should be awarded.

Respectfully submitted,

VREDENBURGH, WALL & CAREY,
of Counsel with Defendant-Appellant.

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Stipulation.

NEW JERSEY SUPREME COURT.

WILLIAM S. FANSHAWE,
Plaintiff,

vs.

AMY B. RAWLINS,
Defendant.

Action at
Law.
Stipulation. 10

STIPULATED, that while Mr. Wall was summing up to the jury in behalf of the defendant and pointing out, as he contended, the facts which would make the doctrine of *res ipsa loquitur* and the presumption of the plaintiff's negligence applicable to this case, the trial Judge stopped him, saying in effect: 20

"I think it is only proper to stop you in your statement as to the doctrine of *res ipsa loquitur* and what the court will say to the jury about the presumption of negligence. I intend to charge the jury that the doctrine of *res ipsa loquitur* does not apply in this case."

JOHN S. APPLGATE & SON, 30
Attorneys of Plaintiff.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

Washington

THE SECRETARY OF THE ARMY

WASHINGTON

1864

ADJUTANT GENERAL

WASHINGTON

General, I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,
Your obedient servant,
A. A. [Name]

I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,
Your obedient servant,
A. A. [Name]

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New Jersey Court of Errors and Appeals.

WILLIAM S. FANSHAW, E,
Plaintiff-Respondent,

vs.

AMY B. RAWLINS,
Defendant-Appellant.

**ACTION AT
LAW.**

**Brief of Plaintiff-
Respondent**

Plaintiff sued to recover moneys due from defendant for board, care and keep of defendant's horses from November 1, 1912, to July, 1914, amounting to \$1,526.95, with interest from July 10, 1914. Defendant admitted the reasonableness of plaintiff's charges and the correctness of his book account but as a defense relied on a counter claim, namely, in the sum of \$2,500.00, the alleged value of a mare, named Marshmallow, owned by defendant and boarded by plaintiff with other horses of defendant, and injured while at pasture at plaintiff's stock farm, death ensuing as the result of the injury.

The case has been twice tried. At the first trial, the trial judge directed a verdict in favor of plaintiff, from which judgment defendant appealed to this court, resulting in a reversal on the ground that whether negligence was to be inferred from the proven facts was a jury question. The case is reported in 87 N. J. L. page 667.

The second trial, which is the present case, resulted in a verdict for the plaintiff for the full amount claimed.

At the trial, the plaintiff having testified of the

amount claimed by him to be due from defendant for the keep and care of defendant's horses including the mare "Marshmallow", rested his case. Defendant then undertook to establish her counterclaim through the testimony of several witnesses as to the kind of care and supervision given defendant's mare by plaintiff and his servants.

It appeared from the evidence that the mare was pastured at plaintiff's stock farm in different fields at different times, with running water, of good pasture and enclosed with rail fences. The mare was turned out about the second week in May 1914 and left in the field day and night during good weather. In stormy weather she was stabled. The horses of defendant including "Marshmallow" were looked over by various servants of plaintiff as they passed the field where the mare was pastured, on their way to work. It was their duty to do that and report to plaintiff's manager if they noted anything wrong. In the morning of June 24, 1914, plaintiff's manager, one George Hughes, while on his way to work, noticed for the first time that the mare "Marshmallow" was not acting right. In the afternoon he examined her and found a wound on her right side. She was then taken to the barn and put in a box stall and the wound treated. The next day Hughes endeavored to get in communication with defendant by phone, but was unsuccessful. On June 26th he talked with defendant with the result that she sent a veterinary to examine the mare. He treated her, but as he stated was not impressed with the seriousness of the wound. The next day he made a more careful examination and found that the mare's lung had been punctured. The mare died June 28th, 1914. The veterinary testified that he might have saved the mare if he had realized the seriousness of the wound upon the occasion of his first examination of it. He also stated that the lung was punctured to a depth of an inch and a half or two inches, and that from a punctured lung a horse very seldom recovers.

After the injury to the mare, the plaintiff and his manager endeavored to ascertain what caused the injury to the mare, but were unsuccessful. (107, line 30-40). The manager testified he did not know how the mare received her injury. (83, lines 35-40). There was testimony that it was customary to leave at pasture thoroughbred horses through the summer season, taking them to the stables only in stormy weather and giving them no grain while at pasture.

On the other hand there was testimony on the part of defendant that a charge of \$20.00 per month warranted a grain diet and stabling at night, and also a daily supervision.

It was contended on the part of defendant that the mare should have been stabled nights, fed grain and given daily supervision or examination, and that such attention was the degree of care required of plaintiff; that if such attention had been given the mare, either she would not have been injured or, if injured, the injury would have been discovered in time to save her life.

The question of negligence and whether, if any, it was the proximate cause of the injury in question, was left to the jury. A verdict was returned in favor of plaintiff for the full amount claimed.

At the conclusion of the testimony, defendant's attorney in view of the fact that the plaintiff's claim was admitted and that defendant relied on a counterclaim as a defense or set off, contended he should be permitted to have the opening and closing address to the jury. (Page 116-119). The request of defendant's attorney was granted by the court.

II.

The defendant submitted to the trial court three requests to charge. The first, the court charged as requested. The second and third, the court refused to charge. An exception was taken to the court's refusal to charge as requested, which re-

fusals constitute the grounds of appeal assigned by defendant.

The following are the three requests to charge submitted by defendant:

1. If on the evidence the jury finds that the injury to the mare was an injury that in the ordinary course of things would not have happened if proper care had been used, your verdict so far as the value of the mare is concerned must be for the defendant, unless the plaintiff explains the matter in such a way as to exonerate himself and his employees from blame. (This request was charged).

2. The hole in the mare's side in the absence of explanation by the plaintiff raises a presumption of negligence. If there are any facts inconsistent with negligence it is the plaintiff's duty to prove them. The burden is on Mr. Fanshawe. (This the court refused to charge except as already charged).

3. Unless the plaintiff has satisfied you by affirmative proof that he and his men used reasonable care in guarding the mare from injury, your verdict on the counterclaim should be for the true value of the mare. (This the court refused to charge except as already charged).

The court had already charged the jury that for the defendant to recover upon her counterclaim it must appear that Mr. Fanshawe or his servants were negligent. That the negligence complained of by defendant was plaintiff's lack of shelter and care by reason whereof the defendant's mare died. "If you find that fact by a preponderance of the evidence, that is, by the greater weight of the evidence in the case, for the burden of establishing that claim by evidence, that is, that the plaintiff failed to give this mare proper shelter and care—is upon the defendant, then if that resulted in the death of the mare the defendant is entitled to have deducted from the amount of Mr. Fanshawe's bill the value of the mare" &c. (Page 121, lines 5-40).

Again, "Mr. Fanshawe was the bailee of this mare and as such was under a legal duty to exer-

give reasonable care for her safety and when sick or injured to give her such treatment as reasonable care and skill would dictate, or promptly and with reasonable diligence notify the owner that the mare had been injured, so that the owner might take measures for her safety and relief. Has it been shown by the greater weight of the evidence that he did not perform that duty?" (Page 121, line 40. Page 122, lines 1-10).

Again, the court said in its charge referring to the measure of duty on the part of Mr. Fanshawe toward the mare, "Has it been shown by the greater weight of the evidence that he did not perform that duty?" (Page 122, line 10).

Again—"If you decide that the plaintiff Mr. Fanshawe or his employees were negligent in the care of this mare, that is, in failing to go to the fields with sufficient frequency to examine and see their condition, if you find that to be established, or from any other reason involving care which would have discovered this injury, and that they failed to take such care as either, to prevent the injury in the first place, if it could have been prevented by reasonable care, or to take such care of the mare after she was injured as would have resulted in saving her life, if it could have been saved, then you come to the consideration of damages and not until then." (125, line 35. 126, line 10).

Again—"As I have already stated I again repeat that before you can set off against Mr. Fanshawe's claim the value of this horse, it must appear either that his negligence or the negligence of his employees resulted in the injury itself or that their failure to take proper care of the mare after they discovered her injury resulted in her death." (129, lines 5-10).

And finally—"I have been requested by the plaintiff to charge that the burden of proving that the mare died as the result of negligence on the part of plaintiff rests upon the defendant. I have already charged you that." (129, lines 15-20).

The charge of the Court embraced all the law applicable to the facts of the case.

In view of the admission by defendant of plaintiff's claim (page 116, line 31) the only issue left for determination by the jury was that raised by defendant's counterclaim, namely, that by reason of plaintiff's lack of shelter and care said mare died. (Case 8). As charged by the court the defendant had the burden of proving this. She was the moving party in the case presented by the counterclaim as though she had been the plaintiff in a suit brought to recover the value of the mare. She had the affirmative of the proposition presented by the counterclaim, namely, whether the mare's death was the result of negligence (lack of care and shelter) of plaintiff. Unless defendant proved negligence on the part of plaintiff she was not entitled to recover. She proved the fact of injury to the mare and her death while at plaintiff's farm, and introduced some evidence of the manner in which the mare was kept, not brought up to stable nights, not fed grain, etc. The plaintiff's witnesses in reply testified to the injury of the mare and her death while at the Fanshawe place, that the kind of care and shelter she received was proper and that plaintiff had no knowledge as to the cause of the mare's injury although he had endeavored to ascertain.

The court properly charged the jury that, ^{the burden of proving} the mare died as the result of negligence on part of plaintiff rested on defendant. The defendant was the plaintiff in the counterclaim.

"This right of the defendant to have his plaintiff bear the burden of the affirmative is a substantial one and not a mere matter of form."

Bien v. Ungor, 64 N. J. L. 596.

See the case of Wood v. Remick, 143 Mass. 453.

The plaintiff sued to recover damages for death of a heifer pastured with defendant. Plaintiff re-

quested the trial court to charge the jury "that if the jury found that steers or wild animals got inside the pasture and killed the heifer, or if cows in said pasture did or caused injuries, defendant would be liable". The judge declined so to charge. The Supreme Court said "A man who takes cattle to pasture is bound to use reasonable and ordinary care to protect them from injury. If a plaintiff contends that his cattle are injured by the negligence of the agistor, the burden of proof is upon him to show such negligence. In the case at bar therefore the Court rightly ruled that under the plaintiff's second count, this burden was upon her."

The defendant under her counterclaim charged negligence and it was for her to prove it. If a presumption arose through the fact that the injury to the mare and the resultant death occurred while she was in possession of plaintiff, on the theory of bailment, the effect of such a presumption would not be to shift the burden of proving negligence, but only to shift the duty of going forward with the evidence, in this case, of plaintiff giving some explanation of the cause of injury, consistent with due care, if he could, or if the cause of injury was unknown, that due care was exercised, in spite of which the injury was received. If after having proven the fact of injury while in possession of plaintiff as bailee, the defendant had rested her case and the plaintiff had offered no proof in reply, but had also rested, the court would not have been justified in directing a verdict for the defendant on the theory that negligence was presumed and the burden of proving exculpation was on the plaintiff. Whether negligence was to be inferred from the facts was a jury question, but the jury was not necessarily required to find negligence.

Defendant relies on the case of *Jackson v. McDonald*, 41 Vr. 594. In that case the negligence of defendant consisted of working the horse he had

hired of plaintiff after he had discovered the horse's lameness, which use resulted in blood poisoning. There the court says, "Where chattels are delivered to a bailee in good condition and are returned in a damaged state, or not returned at all, the law will presume negligence to have been the cause and casts upon the bailee the burden of showing that the loss did not occur through his negligence or, if he cannot affirmatively do this, that at least he exercise a degree of care sufficient to rebut the presumption of it." By this the Court meant nothing more than that proof of injury to property while in possession of bailee shifted the duty of going forward with the evidence from the plaintiff to defendant, a rule of evidence only, not that the burden of proof shifted in the sense of relieving the party having the affirmative of the issue from establishing his case by a preponderance of the evidence. (See *Hughes v. Atlantic City & R. R. Co.* 56 Vr. 212.)

The court properly refused to charge defendant's second and third requests. As drawn they both might well be taken to mean that the burden of proof rested upon the plaintiff. Assuming it to be the law that the wound in the mare's side, in the absence of explanation by the plaintiff, raised a presumption of negligence, it was not such a presumption requiring the jury as a matter of law, in the absence of explanation by the plaintiff, to find that plaintiff had been guilty of negligence. The effect of the presumption, if any, was to relieve the defendant from proving the cause of the injury. It was *prima facie* evidence only of want of care, but not proof. It was not the plaintiff's **duty** to prove facts inconsistent with negligence, nor to furnish affirmative proof that he had used reasonable care, in the words of the requests. There was no duty on his part to submit any proof in order to exculpate himself from the charge of negligence. Without any proof on his part the jury could lawfully conclude that the inference of negligence was not sufficient

to warrant a finding of negligence on the part of plaintiff.

The jury might well have concluded from these requests, if they had been charged, that the burden rested on the plaintiff to exculpate himself from the charge of negligence, that is, that he had the burden of proof.

Furthermore, with the acquiescence and insistence of defendant's attorney the case was tried on the theory that the burden of proof (using that term in the sense of having the affirmation of the proposition in dispute) was on the defendant. The plaintiff's claim was admitted and at the close of the case defendant's attorney insisted upon the right to open and close to the jury and was permitted so to do. This, on the theory that the burden of proof was on defendant. The requests to charge were, in effect, contrary to the theory advanced by her attorney upon which he claimed and was given the right to open and close to the jury and were improper, and defendant is now estopped from alleging error on the court's refusal to charge said requests.

The court charged defendant's first request, namely:

"If on the evidence the jury finds that the injury to the mare was an injury that in the ordinary course of things would not have happened if proper care had been used, your verdict so far as the value of the mare is concerned must be for the defendant, unless the plaintiff explains the matter in such a way as to exonerate himself and his employees from blame."

This request is in effect the same as requests two and three and in our judgment should not have been charged, for the reasons already given, namely, that it required the jury to find negligence unless the plaintiff exculpated himself from blame, thereby imposing on plaintiff the burden of proof and **requiring** instead of **permitting** the jury to find negligence, (see *Hughes v. Atlantic City & R. R. Co.* *ibid.* *Niebel v. Winslow* 95 Atl.

Rep. 995), and also because it was not applicable, the case not calling for the application of the doctrine *res ipsa loquitur* involved in said request; nevertheless, having been charged, and being in effect the same as requests two and three, the refusal to charge which is assigned as error, the defendant has not been prejudiced by such refusal.

THE DOCTRINE OF RES IPSA LOQUITUR
HAS NO APPLICATION TO THE PRES-
ENT CASE.

The mere happening of the injury to the mare raised no presumption of negligence on the part of plaintiff. The mare may have been hurt through the carelessness or wilfulness of a third party without fault on part of plaintiff. There was no proof as to what caused the injury or how it occurred, no one knew. To authorize the application of the principle *res ipsa loquitur* it is always necessary to show circumstances by direct evidence to justify the inference of negligence. "It takes more than the mere happening of an accident to set the rule in operation. It must be shown that the act was of such a character as in the light of ordinary experience, it is without explanation except on the theory of negligence. * * * There must be some proof of negligence for the law does not presume negligence. The rule does not obtain in cases where upon proof of the occurrence, without more, the matter rests only in conjecture." Thompson on Negligence, Vol. 8, Section 7635.

"The mere happening of the accident raised no presumption of the negligence of the defendant. It was necessary to show by direct evidence that the defendant was responsible for the accident, or to show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and

would exclude the idea that it was due to a cause with which the defendant was unconnected.”

Bayntre v. Bridgeton &c. Trac. Co., 38
Vroom 619.

In every case where the doctrine has been applied there has been direct proof not only of the occurrence but of the instrument of the injury, proving that it is a doctrine only of circumstantial evidence.

Murphy v. Great Northern R. Co., 68 Minn.
526.

See Pascell vs. North Jersey, 46 Vr. 836.

In the present case nothing more appeared than that the defendant's mare was found injured. Nothing to connect plaintiff with the injury. Nothing to show the instrument which caused the injury or that the instrument was within plaintiff's control, and the doctrine has no application unless it appear that the thing causing the accident was under the control of the plaintiff.

In all the cases cited by the defendant in support of the doctrine of *res ipsa loquitur* the instrument causing the injury complained of was in the possession or under the control and management of the defendant, and the reason underlying the principle made the rule applicable in those cases, namely, where the explanation lies within the knowledge of the party sought to be held responsible and the instrument causing the injury is within his control, he having both use and inspection. In the present case no one knew what caused the injury, therefore it could not be proven that the instrument was within the control of the plaintiff.

The fact that a man is found dead in the highway adjacent to a building in course of construction without more does not give rise to the doc-

trine. Nor that a passenger on a train is found dead in his seat with a wound in his head. There must always be some fact or facts constituting a circumstantial case of negligence against the party sought to be charged.

EVEN ASSUMING THE DOCTRINE OF RES IPSA LOQUITUR TO BE APPLICABLE THE REQUESTS WERE PROPERLY REFUSED.

“The importance of the rule which finds expression in that maxim (*res ipsa loquitur*) is found in the province of the trial judge, and not in the province of the jury. He is called on in the first instance to say whether there is any evidence of negligence to go to the jury: in the absence of direct evidence he may, in cases where the maxim applies, hold that the circumstances are such as will, unexplained, permit the jury to draw the inference of negligence; but that inference is still one for the jury and not for the court. They may not believe the witnesses; the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do; they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury, and in any event they may render a verdict for the defendant. This is within their province even when there is no explanation by the defendant. When there is such explanation, it is for the jury to decide just as in the ordinary case of whatever kind, what the actual facts are, and what inference should be drawn therefrom. The most that is required of the defendant is explanation, not exculpation, and that explanation may leave the mind in equipoise, in which case the defendant would be entitled to a verdict because the plaintiff has failed to prove his case by the weight of the evidence.” * * *

“The inference of negligence from the mere happening of the accident may be a legal infer-

ence in the sense that is permitted by law, but it is not a legal inference in the sense that it is required."

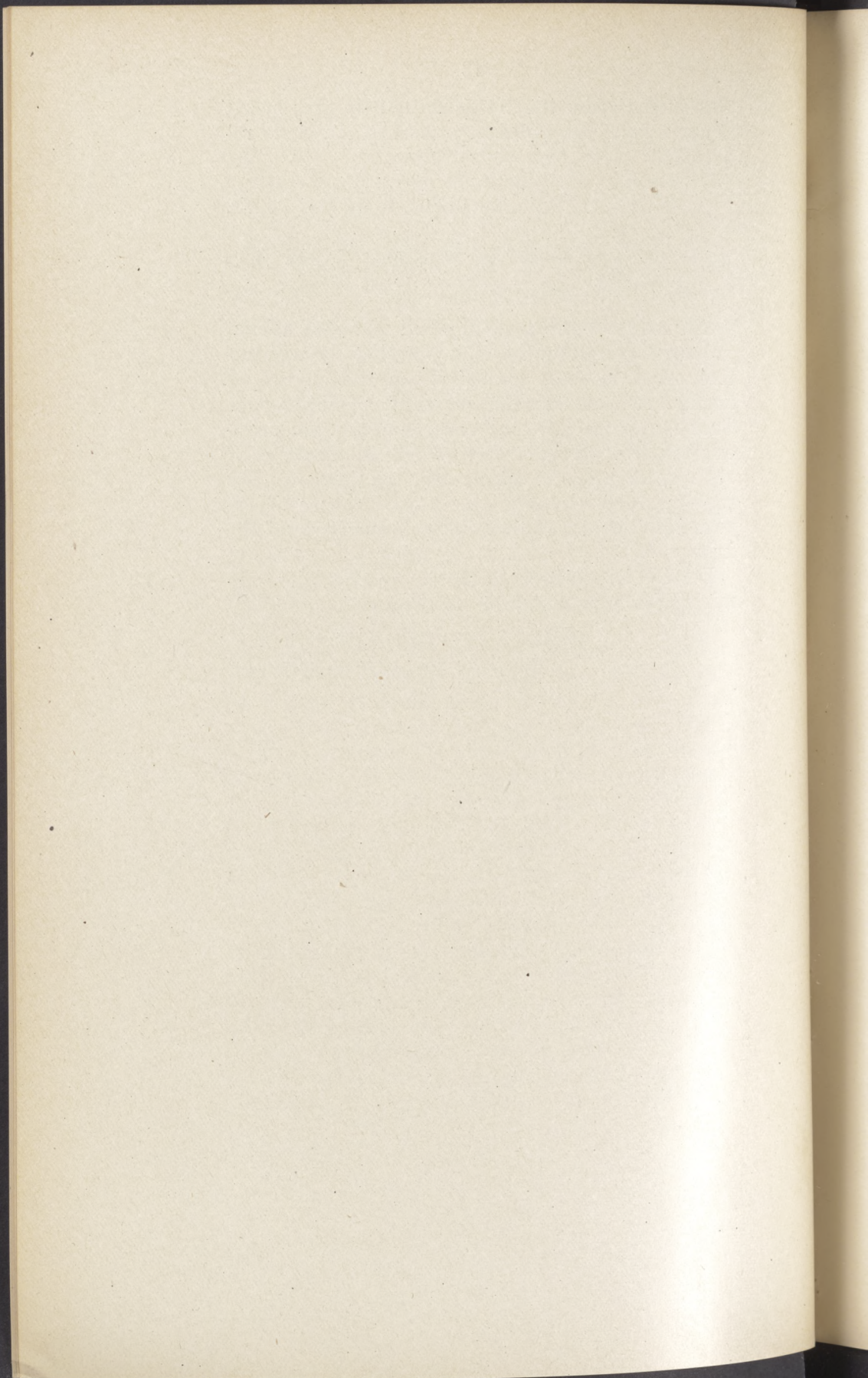
Hughes v. Atlantic City & R. R. Co., 56 Vr. 212.

See also Niebel v. Winslow, 95 Atl. Rep. 995.

The requests to charge in effect stated as a legal proposition that unless the plaintiff by affirmative proof relieved himself from the charge of negligence he must be found guilty of negligence. Such is not the law, and the requests were properly refused. Even in cases where the doctrine of *res ipsa loquitur* is applicable, the jury are not required to find negligence in the absence of explanation by defendant as to the occurrence of the injury.

For the foregoing reasons it is respectfully submitted the appeal should be dismissed.

JOHN S. APPLGATE & SON,
Attys. of Plaintiff-Respondent.



Notice of Appeal.

NEW JERSEY SUPREME COURT.

WILLIAM S. FANSHAWE,
Plaintiff-Respondent,

vs.

AMY B. RAWLINS,
Defendant-Appellant.

10

Action at Law.

Notice of Appeal.

20

To

JOHN S. APPLGATE & SONS,
Attorneys of Plaintiff.

TAKE NOTICE, that the defendant appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes, from the whole of the judgment entered in this cause.

Dated November 10th, 1915.

30

Yours, &c.,
VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

40

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	<p style="text-align: center;">WILLIAM S. FANSHAWE, <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">AMY B. RAWLINS, <i>Defendant-Appellant.</i></p>	<p>Action at Law.</p> <p>On Appeal from New Jersey Supreme Court.</p> <p>Grounds of Appeal.</p>
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The above named defendant-appellant, AMY B. RAWLINS, assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above cause:

Because the trial judge, upon the trial of said cause, refused to charge as follows in accordance with defendant's requests:

1: The hole in the mare's side, in the absence of explanation by the plaintiff, raises a presumption of negligence. If there are any facts inconsistent with negligence, it is the plaintiff's duty to prove them. The burden is on Mr. Fanshawe.

2: Unless the plaintiff has satisfied you by affirmative proof, that he and his men used reasonable care in guarding the mare from injury, your verdict on the counter claim should be for the true value of the mare.

Dated November 30th, 1915.

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant-Appellant.

Service of a copy of above grounds of appeal is acknowledged this 1st day of December, 1915.

JOHN S. APPLGATE & SONS,
Attorneys of Plaintiff-Respondent.

Recognizance.

NEW JERSEY SUPREME COURT.

WILLIAM S. FANSHAWE,
Plaintiff-Respondent,

vs.

AMY B. RAWLINS,
Defendant-Appellant.

Action at Law.
On Appeal.

Recognizance.

10

KNOW ALL MEN BY THESE PRESENTS, That we, G. FOSTER RAWLINS, husband of the said Amy B. Rawlins, as principal, and AMERICAN SURETY COMPANY, a corporation of the State of New York, authorized to become surety upon bonds required or used in judicial proceedings within the State of New Jersey, as surety, jointly and severally are held and firmly bound unto WILLIAM S. FANSHAWE in the sum of Thirty-four Hundred and Twenty-two Dollars (\$3,422.) for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. 20

IN WITNESS WHEREOF, said principal has here-to affixed his hand and seal, and said surety has caused these presents to be signed in its corporate name by its Resident Vice President and attested by its Resident Assistant Secretary, and its corporate seal to be hereto affixed. 30

The condition of this obligation is such that WHEREAS the said Amy B. Rawlins has taken an appeal from the Supreme Court of the State of New Jersey to the Court of Errors and Appeals of said State, to remove a certain judgment obtained by said William S. Fanshawe in an action 40

Recognizance

at law in said Supreme Court, as appears of record therein.

Now THEREFORE, if the said appellant, AMY B. RAWLINS, shall prosecute said appeal with effect and also pay and satisfy, if said judgment be affirmed, all the damages and costs adjudged in said former judgment, and all costs and damages to be awarded for delay of execution, then this obligation shall be void; otherwise to remain in full force.

G. FOSTER RAWLINS (SEAL)

Sealed and delivered }
in the presence of }

GEORGE W. FLAACKE.

(SEAL) AMERICAN SURETY COMPANY,

Attest

By

W. A. MARTIN,

Res. Vice President.

ARTHUR SNEIDER,

Res. Asst. Secretary.

Taken and acknowledged this Eleventh day of November, 1915, before me.

GEORGE W. FLAACKE,

*Supreme Court Commissioner
of New Jersey.*

I hereby approve the above recognizance as to form and sufficiency of surety.

GEORGE W. FLAACKE,

*Supreme Court Commissioner
of New Jersey.*

50 50

(Stamp Stamp)

Complaint.

(Filed July 16, 1914.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

WILLIAM S. FANSHAWE,
Plaintiff,

vs.

AMY B. RAWLINS,
Defendant.

10

Action at Law.

Complaint.

Plaintiff, residing at the village of Shrewsbury,
County of Monmouth and State of New Jersey,
says that: 20

1. At and during the times hereinafter designated the said plaintiff did at the request of the said defendant take for board and hire, the horses of said defendant and did cause said horses to be pastured upon the lands of said plaintiff, and did provide them with proper food, shelter and care, for a reasonable consideration, which the said defendant did agree to pay therefor. 30

2. Defendant has not paid the same.

Plaintiff demands, as damages, \$1526.95 with interest thereon from July 10th, 1914.

JOHN S. APPELGATE & SONS,
Attorneys of Plaintiff.

40

Complaint

(BILL OF PARTICULARS.)

The following is a copy of the account mentioned in the within complaint.

Mrs. G. A. RAWLINS,
To SILVER BROOK FARM, Dr.
For Keep of Horses.

10

1912.

Nov.	Keep of two horses at \$20.00 each.....	\$40.00
"	" " " mares with colts at \$25.00.....	50.00
Dec.	" " " horses at \$20.00 each.....	40.00
"	" " " mares with colts at \$25.00 each...	50.00

1913.

Jan.	" " four horses at \$20.00 each.....	80.00
"	" " two yearling colts at \$15.00 each.....	30.00
"	Ointment, cotton and powder used on colts leg.	1.75
20 Feb.	Keep of four horses at \$20.00 each.....	80.00
"	" " two colts at \$15.00 each.....	30.00
Mar.	" " four horses at \$20.00 each.....	80.00
"	" " two colts at \$15.00 each.....	30.00
April	" " four horses at \$20.00 each.....	80.00
"	" " two colts at \$15.00 each.....	30.00
May	" " four horses at \$20.00 each.....	80.00
"	" " two colts at \$15.00 each.....	30.00
"	" " one mare five days at \$20.00 per mo..	3.30
30 June	" " five horses at \$20.00 each.....	100.00
"	" " two colts at \$15.00 each.....	30.00
July	" " five horses at \$20.00 each.....	100.00
"	" " two colts at \$15.00 each.....	30.00
Aug.	" " four mares at \$20.00 each.....	80.00
"	" " two colts at \$20.00 each.....	40.00
Sept.	" " five horses at \$20.00 each.....	100.00
"	" " one horse 18 days at \$20.00 per mo...	12.87
Oct.	" " two colts 15 days at \$20.00 per mo....	20.00
"	" " three mares at \$20.00 each.....	60.00
40 Nov.	" " three mares at \$20.00 each.....	60.00

Amount carried forward.....\$1367.92

Complaint

		Amount carried forward.....	\$1367.92	
1913.				
Dec.	Keep of three mares at \$20.00 each.....		60.00	
1914.				
Jan.	“ “ three mares at \$20.00 each.....		60.00	
Feb.	“ “ three mares at \$20.00 each.....		60.00	
Mar.	“ “ two mares at \$20.00 each.....		40.00	
“	“ “ one mare 20 days at \$20.00 per mo....		13.60	10
April	“ “ two mares at \$20.00 each.....		40.00	
May	“ “ two mares at \$20.00 each.....		40.00	
June	“ “ one mare		20.00	
“	“ “ one mare 28 days at \$20.00 per mo....		18.76	
July	“ “ one mare 10 days at \$20.00 per mo....		6.67	

Total.....\$1726.95

Cr.

For one mare purchased by William E. Fanshawe of Mrs. Amy B. Rawlins in May, 1914 200.00 20

Balance.....\$1526.95

Judgment will be claimed for the sum of one thousand five hundred and twenty-six dollars and ninety-five cents with interest thereon from July 10th, 1914, together with costs of suit.

JOHN S. APPLGATE & SON,
Attorneys of Plaintiff.

30

Answer.

(Filed July 30, 1914.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

10	WILLIAM S. FANSHAWE, <i>Plaintiff,</i>	}	Answer.
	<i>vs.</i>		
	AMY B. RAWLINS, <i>Defendant.</i>		

This defendant, residing in the Village of Shrewsbury, in said county, says:

20 1: She admits that at the time designated in the complaint, said plaintiff did, at her request, take for board and hire the horses of this defendant, and that she agreed to pay said plaintiff a reasonable consideration for the proper food, shelter and care of said horses.

30 This defendant denies that said plaintiff provided said horses with proper food, shelter and care, and says that the said plaintiff, by his servants and agents, took so little and such bad care and afforded so little and such bad shelter to this defendant's mare "Marshmallow," that by reason of plaintiff's lack of shelter and care, said mare died on or about the 28th day of June, 1914, while in charge of said plaintiff, and became a complete loss to this defendant, to this defendant's damage Twenty-five Hundred Dollars (\$2,500.); and this defendant, by way of counter claim, asks that said damages for said mare shall

40 2: This defendant admits Paragraph 2 of the complaint.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Reply.

(Filed August 18, 1914.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

WILLIAM S. FANSHAWE,
Plaintiff,

vs.

AMY B. RAWLINS,
Defendant.

Action at Law 10
Replication.

Plaintiff denies the truth of the matters contained in the second paragraph of paragraph 1 of Defendant's answer. 20

JOHN S. APPLGATE & SON,
Atty. for Plaintiff.

30

40

Postea.

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

10

WILLIAM S. FANSHAWE,
Plaintiff,

vs.

AMY B. RAWLINS,
Defendant.

Action at Law.
Postea.

20

This case was tried before his Honor, Judge Nelson Y. Dungan, with a jury, at the Monmouth Circuit, commencing October 27th, 1915 and concluding October 28th, 1915.

The jury returned a general verdict against the defendant and in favor of the plaintiff for one thousand six hundred and forty six dollars and five cents (\$1646.05).

NELSON Y. DUNGAN,
Circuit Court Judge.

30

40

Judgment.

NEW JERSEY SUPREME COURT.

<p>WILLIAM S. FANSHAWE,</p> <p style="text-align: center;"><i>vs.</i></p> <p>AMY B. RAWLINS.</p>	<p>Action at Law.</p> <p>On Postea. 10</p>
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It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of one thousand six hundred and forty-six dollars and five cents besides costs to be taxed *nisi*.

20

Entered November 3, 1915,

On motion of

JOHN S. APPLGATE & SON,
Attys.

30

40

Testimony.

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

10	<p style="text-align: center;">WILLIAM S. FANSHAWE, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">AMY B. RAWLINS, <i>Defendant.</i></p>	}	Action at Law
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Freehold, N. J., October 27, 1915.

20 WILLIAM S. FANSHAWE, Sworn for plaintiff.

Direct Examination by Mr. Applegate:

Q. Mr. Fanshawe, you reside where? A. Silver Brook Farm, Shrewsbury, New Jersey.

Q. How long have you resided there? A. About eleven or twelve years.

Q. That farm is now under lease, is it not? A. Yes.

30 Q. You are not living on it? A. Yes, I am living there but it is only the grass and stables that are under lease.

Q. Do you know Mrs. Rawlins? A. Yes.

Q. Did she have some horses at your place? A. Yes.

Q. What sort of business were you conducting there? A. Well, I had a stockfarm there but Mrs. Rawlins' horses were there boarding. We do not usually take boarding horses but hers were there.

40 Q. And at whose request did you take her horses? A. Mr. Rawlins.

William S. Fanshawe, for Plaintiff—Direct

Q. And do you remember when they started to keep horses at your place? A. Well, no, I couldn't tell exactly when they started; 1910, I think. I am not sure about that.

Q. Did they keep horses at your place in 1910 and 1913? A. Yes..

Q. And part of 1914? A. Yes.

Q. And have you presented a bill to Mrs. Rawlins for the keep of those horses? A. Presented every month. 10

Q. And the amount that you claim as due from Mrs. Rawlins is what, do you know? A. About \$1,600, which was the result of her not paying her bills when they were presented.

Mr. Wall: He doesn't mean that, does he? He doesn't mean that the bill was the result of her not paying?

The Witness: Yes, I do, exactly. 20

Q. You don't mean that you charged Mrs. Rawlins this money because she didn't pay it, do you? A. No, I mean that the bill was presented every month and she didn't pay it and it ran up to those figures and that is the way it accumulated.

Q. The original amount of her bill was \$1,726.95? A. Yes, sir.

Q. And you give Mrs. Rawlins credit for a mare that you purchased from her? A. \$200, that is credited. 30

Q. And the amount that you sue for is \$1,526.95? A. Yes, sir.

Q. With interest from July 10, 1914? A. Yes, sir.

Q. Now among the horses that you had on your place belonging to Mrs. Rawlins was a mare by the name of Marshmallow, was there not? A. There was.

Q. And do you remember when she came to your place? A. No, I do not. 40

William S. Fanshawe, for Plaintiff—Cross

Q. Do you remember about when, approximately? A. I really don't know. My manager can do that.

The Court: Why do you go into that, Mr. Applegate?

10 Mr. Applegate: I am perfectly willing not to but I understood the plaintiff would contend this mare Marshmallow had not received proper care. I will withdraw that question.

Q. The sum that you have mentioned, Mr. Fanshawe, of \$1,526.95, is that due and owing you? A. It is.

Q. For what? A. For the keep of those horses.

Cross Examination by Mr. Wall:

20 Q. Now at what rate was the keep for the mare Marshmallow charged in this bill? A. \$20 a month, I presume, the same as the others.

Q. You were not in the business at this time of boarding horses? A. No, I was not in the business boarding horses. I took Mr. Rawlins' horses as a favor to him, because he asked me to. He said that the place that they pastured on they received very bad care and asked me to take them.

Q. You needn't say that. You were saying you took them as a favor? A. Yes, sir.

30 Q. It was a kind of German favor, wasn't it, \$20 a month? A. Well, I considered it much less than it was worth.

Q. You considered it much less than it was worth? A. Yes.

Q. Why? A. Because I didn't care about taking them. It cost that to keep the horses.

Q. Did it cost you that to keep the mare Marshmallow? A. I think it cost me more.

40 Q. For the fifteen days that she was down in that meadow and never was brought back to the

William S. Fanshawe, for Plaintiff—Cross

stable at night, what would you say, while she was being fed on grass, that it cost you during that period to keep her? A. Well, I should say your statement was not correct.

Q. Well, assume that for fifteen days she was in the meadow or the field and she was not fed anything except the pasturage that she got herself; what in your judgment was the cost to you during that period of her keep? A. I don't assume anything of the kind. The mares were looked after by my men who were employed, and were fed when they needed it; not probably in the summer time, because nobody feeds brood mares in the summer time, it is not good for them. But as an average every month I should say that I lost money at \$20 a month keeping her; and I repeatedly requested Mr. Rawlins to remove them on that account, which he didn't do. 10

Mr. Wall: I ask to have all that stricken out as not responsive. 20

The Court: All of it will be stricken out.

Q. What was your business during this period?

A. What do you mean?

Q. Oh, you know what I meant when I asked you what your business was. Were you a blacksmith or a banker? A. I am a broker.

Q. Well, that is what I mean. We ought not to have any difficulty about such things as that. 30

Where are you a broker? A. New York.

Q. Wall Street? A. Yes.

Q. You didn't know anything about the business of boarding horses, did you? A. What do you mean the business of boarding horses?

Q. What do you mean by the business of boarding horses? A. I am asking you and I want to reply to you.

Q. What do you mean by the business of 40

William S. Fanshawe, for Plaintiff—Cross

brokerage? A. Well, that is a different matter. I understand that.

Q. You understand the difference between brokerage and boarding horses? A. I don't know what you mean by boarding horses.

10 Q. If you understand the difference just tell us what the difference is and then we will understand? A. I had nothing to do with boarding horses. They were taken and turned out the same as mine were. That is all I know.

Q. You don't know anything about what care this mare got? A. Yes, I know everything.

Q. Then tell us about it. What do you know yourself? A. Because once or twice a week I went over the entire farm and saw every horse that was on it.

20 Q. Tell us when you saw the mare Marshmallow? A. I don't remember.

Q. Now what you mean to say is that you yourself don't know personally anything about the care that was given to this mare? A. I don't mean to say anything of the kind. I saw the mare the day that she was brought in hurt. I saw her every day afterwards and I used to see her before that whenever I walked through the field, with the other horses.

30 Q. Do you now say under oath that you saw the mare Marshmallow at any time before the day she was hurt? A. Yes. Let me explain. I wouldn't know the mare from any one of the other hundred horses that were there.

Q. Then you don't know that you saw her, do you? A. I presume that I saw her with the others. I saw them all. I wouldn't know one from the other.

40 Q. But just because you saw the horses and mares on the place you assume that you must have seen this mare, although you have no independent

William S. Fanshawe, for Plaintiff—Cross

memory that you ever saw this mare until she was hurt; that is right, isn't it? A. No, it is not. I have seen the mare going through the stables with Mrs. Rawlins, when she was there looking at them.

Q. Then you did know this mare before she was hurt? A. I wouldn't have known her if I had been alone and nobody with me.

10

Q. You wouldn't? A. No.

Q. Then when you were making your tours around the place you don't know whether you saw her or not, do you? A. I presume I did. I saw all the horses.

Q. But you don't know? A. I wouldn't swear that I saw any one particular horse, no.

Q. And you personally didn't have anything to do with the care of the mare, did you? A. No, I did not.

20

Q. Now you say you saw her when she was hurt. You don't know what day she was hurt, do you? A. No, it was the day, because my manager telephoned me about it and I went down and saw her when I came home that evening.

Q. You know that you saw her after she was hurt but you don't know when she was hurt? A. No.

Q. Did you examine the wound? A. No.

Q. When did you discontinue boarding any horses? A. About that time, 1914. I can't tell you the exact date.

30

Q. You never boarded any other horses? A. No.

Q. After that date? A. No.

Q. Well, before that date you boarded other horses, didn't you, besides the horses for Mrs. Rawlins? A. We never boarded horses. We had mares that came there to breed and things of that sort, which we kept there for the time being, but never made a business of boarding horses.

40

William S. Fanshawe, for Plaintiff—Cross

Q. And then doing it as a favor but charging a monthly rate? A. I don't think so, no. There may have been one or two, I don't know.

Q. Can you be sure about that? A. No, I can't.

Q. You don't know whether you ever got any money for taking care of horses other than the horses of Mrs. Rawlins on the Silver Brook Farm? A. Yes, I think we did; mares that came there to be bred and things of that sort.

Q. How about polo ponies? A. We never boarded polo ponies; we may have rented grass to people that had polo ponies and given them the privilege of turning them out there. We never boarded them.

Q. You rented grass? A. Yes, I think I did.

Q. At what rate? A. I don't remember. I don't know, because we didn't board but a few of them. I don't know what rate.

Q. What do you mean, you raised grass and they ate the grass? A. Rented the fields to a man and he turned whatever he liked out there.

Q. You didn't have anything to do with the amount that was charged for the horses then? A. No.

Q. You rented the land? A. Yes, I rented the land.

30

Plaintiff Rests.

Recess Till 1.30 P. M.

(Trial of the cause resumed at 1.30 P. M.)

Defendant's Testimony.

40

George Hughes, for Defendant—Direct

GEORGE HUGHES, Sworn for defendant.

Direct Examination by Mr. Wall:

Q. Mr. Hughes, you worked for Mr. Fanshawe, didn't you? A. Yes, sir.

Q. During 1912, 1913 and 1914? A. Yes, sir.

Q. And you are attending court here under subpoena from Mr. Fanshawe, aren't you? A. 10
Yes, sir.

Q. On his side of the case? A. Yes.

Q. Do you recollect the mare Marshmallow, belonging to Mrs. Rawlins? A. Yes.

Q. She was a thoroughbred mare, wasn't she? A. Yes, sir.

Q. Did Mr. Fanshawe have any other horses at his place while the Rawlins horses were there which were being charged for their keep? A. 20
Well, Mr. Fanshawe had horses of his own there.

Q. No, I mean horses that belonged to other people. A. He had other horses there; yes, sir.

Q. What did he charge for those horses? A. Well, some horses that were there he charged \$20 a month for.

Q. Those were Mrs. Rawlins' horses? A. Besides Mrs. Rawlins.

Q. What did you charge for the other horses? A. Well, we had horses there that we used to rent a field to. 30

Q. No, but I mean just for the keep of the horses? A. We never had any horses that way only them.

Q. You didn't have any polo ponies there? A. Not boarding there. He rented a field to a man and he could turn horses out and eat it, but I didn't have anything to do with the horses. I never looked in there. All I did was to keep account of how many was turned in.

Q. Why did you keep account of the number of 40

George Hughes, for Defendant—Direct

horses that were turned in if that field was rented? A. He charged so much a horse for the field.

Q. How much did he charge him? A. Charged him three dollars a horse for the pasture for the field. I gave him one field and he could turn one or twenty in. Sometimes he would have as high
10 as eighteen or twenty horses in there.

Q. How big was the field? A. I judge somewhere around twelve acres or ten. I couldn't state exactly.

Q. All those horses got was just grass? A. That was all they got, that was in that field.

Q. Just grass? A. Yes, I never had anything to do with them.

Q. Three dollars a horse or three dollars a month? A. Three dollars a horse a month.

Q. Do you recollect when the mare Marshmallow came there? A. Well, I couldn't tell exactly to the date.
20

Q. Before we go into that— A. I think it was in 1911, in the fall.

Q. It was the 31st day of October, wasn't it? A. I wouldn't be sure about the date, because I haven't got them dates now. I am through with Mr. Fanshawe and I done away with all those papers now, because I would have no use for them.
30

Q. You say you are through with Mr. Fanshawe? A. I say when I got through with Mr. Fanshawe and straightened out with him, all those old papers, I done away with them.

Q. You say you are through with Mr. Fanshawe? A. When Mr. Fanshawe leased his place he had no further use for me.

Q. Did he owe you any money? A. No, sir.

Q. Do you recall testifying for Mr. Fanshawe in this case on the previous trial? A. Yes, sir.
40

George Hughes, for Defendant—Direct

Q. On that occasion do you recollect being asked this question and making the following answer: "Q. Now the succeeding next summer after she had the colt how did you feed her then?

A. When the mare was barren, from the time the weather got good in the spring, I should say about the second week in May, I should say the mares was turned out and they wasn't fed no grain, they was fed grass." Do you recall being asked that question and making that answer?

10

(Objected to. Objection sustained.)

Q. Do you remember what you testified to in this case on a previous trial?

(Objected to. Objection sustained.)

Mr. Wall: Can't I ask him what he testified to on a previous trial?

The Court: Not at all. He is your own witness and unless the emergency for it should appear during the course of his examination—I do not say that that situation may not arise; it has not arisen yet.

20

Q. Mr. Hughes, you were Mr. Fanshawe's superintendent, you say? A. Yes, sir.

Q. When was the mare Marshmallow turned out to pasture in the year 1914? A. Well, them mares is let out all winter, every day, you know, and they are brought up to the stables; and then when the weather gets good along about the second week in May they are let out in the night, so as to be out night and day.

30

The Court: The entire answer will be stricken out. You are asked with reference to Marshmallow, Mr. Hughes. We are not going into the matter of other mares.

A. That mare Marshmallow was turned out the

40

George Hughes, for Defendant—Direct

first or second week in May, according to the kind of weather it was, night and day.

Q. Well, she was turned out the second week in May and was she ever fed any grain between the time she was turned out in May, 1914, until she died? A. If it was—

10 Q. No, answer that question yes or no. A. She was fed grain if it was a bit stormy and the mares was brought up.

Q. I am asking you whether your testimony is that she was fed grain or not. A. She was fed grain if she was brought up in a storm.

Q. No, not if she was. Was she? A. Yes, she was fed grain any time we brought her up, I am saying.

20 Q. Do you say that she was brought up? A. She was brought up in a bad storm. I can't tell you what day it was, but any time there was a bad storm them mares was brought up; that mare was brought up with the others.

Q. You mean if there was a bad storm she was brought up? A. There was bad storms, cold rains, through that June and May, and they was brought up, but I can't tell you when they was brought up. And other horses—

30 Q. Do you say that between the second week in May and the time she died that you of your own knowledge know that that mare ever got any grain? A. Yes, sir.

Q. Well, now when? A. Well, I couldn't tell you when, but whenever she was brought up. They was brought up in bad storms. I don't remember what day it was, sir.

Mr. Wall: Now I ask leave to call the witness' attention to this testimony that he previously gave, for the purpose of giving him an opportunity to refresh his recollection.

40 The Court: Upon this precise point?

Mr. Wall: Yes, sir.

George Hughes, for Defendant—Direct

Q. Do you recollect testifying in this case—

The Court: It should be rather put in that form, rather as refreshing his recollection, than seeking to contradict him, to impeach his present testimony.

Mr. Wall: Well, of course he is a witness on the other side.

The Court: It doesn't make any difference. 10
You are now calling him as your witness.

Q. Do you recollect giving this testimony at a previous trial of this case and making the following answers to the questions which I shall read to you: "Q. Now the succeeding next summer after she had the colt how did you feed her then?

A. When the mare was barren, from the time the weather got good in the spring, I should say about the second week in May, I should say the mares was turned out and they wasn't fed no grain, they was fed grass." A. Yes, sir; I said that, sir. 20

Q. And this question: "Turned out to pasture; is that right? A. Yes, but them mares had about a hundred acres to run over, different fields. Each field has from eight to twenty acres in." A. Yes, I said that, sir.

Q. Now that is true, Mr. Hughes, isn't it? A. Yes, sir.

Q. And refreshing your recollection with that statement made by you on a previous trial of this case, do you now say that you have a distinct recollection that that mare was or was not fed any grain between the second week in May and the day she died? A. Do I say she was not fed any? 30

Q. Which do you say about it? A. I say that the mares during any storm—that mare with the others, any cold rain storm, was brought up, and that evening they was fed and that morning they was fed before they was turned out, and then they 40

George Hughes, for Defendant—Direct

might be out for a week or ten days before they would be brought up again, but they was fed if they was brought up.

Q. You mean if there was a storm then that is the way you treated them? A. Yes, but I know there was storms during that period. I know there was storms but I can't tell you what day they was, sir.

Q. Then you are sure she was brought in between that period? A. I am sure she was brought up.

Q. Now tell us when. A. I don't know when; I couldn't tell you that.

Q. Tell us who brought her in. A. I couldn't remember who brought her in.

Q. Did you bring her in? A. I helped to bring them in. The men on the place brought them in. I was always there on the place when they was brought in.

Q. And if she was not brought in when there was a storm that would be entirely contrary to the way that place was being run, wouldn't it? A. If she was not brought up?

Q. Don't you understand that? A. That was the rules there, when it looked like a storm the horses was brought up.

Q. Who made the rules there? A. I made them.

Q. Fanshawe hadn't anything to do with them, eh? A. Well, I made it before Mr. Fanshawe's time and some of the same men was there then, before Mr. Fanshawe owned the place.

Q. Now during this period, during the summer of 1914, was Marshmallow ever brought up to the stable? A. Yes.

Q. Now are you telling us what you know or what you think must have been the case? A. No, sir; I am telling you what I know, sir.

George Hughes, for Defendant—Cross

Q. I call your attention to the testimony which you gave in this case before: "Q. During the summer how often did you bring Marshmallow up to the stable and put her in the stable? A. Never brought them up." Do you recollect that question and that answer? A. No, sir; I don't remember saying that, sir.

Q. You don't remember saying that? A. The only time they was brought up was during a storm. 10

Q. I am only asking you about this question and answer. And you don't recollect ever saying that? A. No, sir. I might have said it but I don't recollect it.

Cross Examination by Mr. Applegate:

Q. Mr. Hughes, in regard to the ponies in the field of which you have spoken, did you have any care or attention in regard to them? A. No, sir. 20

Q. After they were taken out in the field by the owner of the ponies you had no jurisdiction over them at all, did you? A. No, sir; I had nothing at all to do with them.

Q. It was not your duty to take them up or look after them or see that no harm came to them or anything else, was it? A. No, sir.

Q. You stated that in a bad storm you would bring the mare Marshmallow up and feed her; is that true? A. Yes, if it looked like a storm the mares was brought up, Marshmallow and every other mare that I had charge of, and horse. 30

Q. Did that practice continue while Marshmallow was on the farm? A. Yes, sir; all the time, sir.

Q. And were there any bad storms between the first of May, in the first two weeks of May? A. Well, I don't know how many there was. I know there was storms. 40

George Hughes, for Defendant—Redirect

Q. Were there any? A. There was storms but I don't know how many. I couldn't say how many.

Q. You brought Marshmallow up during those storms, did you? A. Yes, they was all brought up, her and all the rest of them.

10 Q. When you stated, as has been read to you, that during the summer time—"How often did you bring Marshmallow up to the stable and put her in the stable?" and your answer was, "Never brought them up." What do you say now as to whether Marshmallow was brought up to the stable during the summer of 1914? A. Why do I say it?

Q. What do you say? Was she brought up during the summer of 1914? A. Well, if there was any storm she was brought up.

20 Q. That is what I mean. A. Yes, sir; every horse on the place that I had anything to do with, when it looked like a storm, was brought up, but I couldn't say when, but they was. If there was a storm during that time they was brought up.

Redirect Examination by Mr. Wall:

30 Q. But you don't remember whether there was a storm or not; that is the point? A. Well, I don't remember whether there was a storm or not, but I say that if there was a storm they was brought up and every horse on the place that I had anything to do with.

Q. That was your rule? A. That was my rule and when I wasn't there it was done just the same.

Q. Well, that is the rule, it was to be done just the same? A. Yes, sir.

40 Q. Of course you don't know whether that was done or not when you were not there?

*George Hughes, for Defendant—Recross**Recross Examination by Mr. Applegate:*

Q. By leaving the mare Marshmallow out in the field, Mr. Hughes, and not bringing her in any time unless there was a storm or some extraordinary circumstance, was there any possible way that the mare could receive injury?

Mr. Wall: I object. It is outside the limits of the direct; not a word about injury, but there is in regard— 10

The Court: Well, he is making him his own witness.

Mr. Applegate: There is some testimony as to whether the mare was brought up out of the field during the first two weeks in May or some other time. Now why was this question asked? It must have been for the purpose of showing that by the failure to bring the mare up it was an improper course to pursue. Now I will withdraw the question that is asked, with your Honor's permission, and ask another question. 20

Q. Mr. Hughes was there anything improper in your course in leaving the mare Marshmallow in the field and not bringing her up excepting in case of storm?

Mr. Wall: I object. This man was not produced as an expert witness to testify as to the care of horses; he was produced for the purpose of testifying to what was done not what should have been done. 30

(Objection overruled.)

(Objection noted for defendant.)

Q. Will you answer that question? A. Say it over again.

Mr. Wall: I think I have the right to examine him on his qualifications if he is to 40

Franklyn P. Stryker, for Defendant—Direct

be made an expert right in the middle of my calling him. I did not call him as an expert and my friend is going to make him an expert now and have his testimony.

The Court: I am inclined to think it is proper cross-examination.

10 Mr. Wall: May I examine him on his qualifications?

The Court: Not now.

Mr. Wall: I ask leave to examine him on his qualifications to give his expert conclusions as to what care is proper for a horse.

The Court: The application will be denied.

(Objection noted for defendant as ground of appeal.)

(Question repeated.)

20 The Court: Let me make this suggestion, Mr. Applegate. Isn't this really a matter which would more properly come in for the rebuttal, which is really the defence in the case?

Mr. Applegate: Well, acting upon your Honor's suggestion we are perfectly willing to reserve the question until it comes our rebuttal.

30 The Court: I think that is the proper way.

FRANKLIN P. STRYKER, sworn for defendant.

Direct Examination by Mr. Wall:

Q. Mr. Stryker, what is your business? A. Livery stable.

40 Q. Are you familiar with the care of horses and the prices for keep of horses that are regularly charged throughout Monmouth County? A. Yes, sir.

Franklyn P. Stryker, for Defendant—Direct

Q. How long have you lived in Monmouth County? A. All my life.

Q.. What is the rate for pasturage?

Mr. Applegate: One moment. I would like to ask the witness a question.

The Court: You may do so.

By Mr. Applegate:

Q. Mr. Stryker, have you ever conducted a stock farm? A. No, sir. 10

Q. You run a livery stable? A. Yes, sir.

Q. All the horses that come under your supervision and charge are kept in the livery stable, are they not? A. Yes, except horses we pasture ourselves.

Q. Pasture out? A. Yes.

Q. And horses that you pasture out are pastured under what conditions? Just simply turned out in the field? A. Yes, sir. 20

Q. And where would you pasture horses? A. Well, we have pastured some—

Q. Where do you pasture horses? A. We have pastured horses different places. We have pastured them on the Field farm.

Q. Tom Field's farm? A. We have pastured a few there. We have pastured them with the other Fields.

Q. What kind of horses, your own horses? A. They were our own horses, yes. 30

Q. Horses that you were driving hacks and omnibuses with and carting and so on? A. Yes.

Q. Any thoroughbreds? A. No, sir.

Mr. Applegate: I object to the witness' qualifications.

(Objection overruled.)

(Question repeated.)

A. Six to eight dollars a month is what we pay. 40

Franklyn P. Stryker, for Defendant—Direct

By Mr. Wall:

Q. Mr. Stryker, what sort of care, so far as feeding is concerned, does a charge of \$20 a month for caring for a horse presuppose in Monmouth County?

10 Mr. Applegate: I object. It does not appear that he knows anything about what \$20 is for the keep of a horse. He says six to eight.

Mr. Wall: He says that is the pasturage.

Mr. Applegate: He says in his experience.

The Court: Yes, I think he ought to qualify as to his knowledge relating to conditions similar to those in this case.

20 Q. Have you any knowledge as to the cost per month of taking care of horses where they are fed grain? A. Yes, sir.

Q. And how do you get knowledge? A. We board horses at our stable.

Q. And when they are boarded there what are they fed? A. We feed them three times a day.

Q. Nothing but grain? A. Grain and hay; yes, sir.

Q. Grain and hay? A. Yes, sir.

Q. And what is the prevailing charge for such a diet, a horse kept under those circumstances?

30 Mr. Applegate: I object, because the conditions are entirely dissimilar to the conditions in this case. The proof says that Mr. Fanshawe ran a stock farm, not a livery stable; that the horses were out in the field, not kept in. There is no proof that they were fed grain three times a day. There is no proof that this witness has any knowledge as to what care or attention is required in regard to keeping thoroughbreds or in relation
40 to a livestock farm.

Franklyn P. Stryker, for Defendant—Direct

Mr. Wall: The point is, your Honor, that a stock farm is after all just a farm, and it is a field, and these horses were in that field. Now they either got grain or they got grass, presumably, and this witness has already testified as to what it cost, the prevailing charge here, for mere grass pasturage.

The Court: You think it makes no difference the class of horses that are cared for? 10

Mr. Wall: Of course it does, but if we are going to arrive at the special care that is to be given to a particular kind of horse it seems to me that we ought to start with the prevailing prices for ordinary horses. This is a horse first and a thoroughbred afterwards. Now if we show what the charges are for a grain diet—I am not now going into the question of how much greater care should be given to a thoroughbred than the care which should be expended on a horse of less value; I am directing it solely to the question of feed. Now the purpose of my question is to bring out that a high charge calls for a high degree of care and I want to show what kind of charge this is. Of course it would be higher, I presume that the cost of taking care of a thoroughbred is a higher cost than the cost of taking care of a very much inferior horse, but I am now on the grain question as opposed to pasturage. You see it is right at the root of this case. 20 30

The Court: I think the question will be permitted.

(Objection noted for plaintiff.)

(Question repeated.)

A. \$25 a month.

Franklyn P. Stryker, for Defendant—Cross

Cross Examination by Mr. Applegate:

Q. Mr. Stryker, you are in the livery business?

A. Yes, sir.

Q. And what you have stated applies to what it costs to keep your horses in your livery stable, doesn't it? A. Yes, sir.

Q. And that is all? A. Yes, sir.

10 Q. And when you stated that you pay from six to eight dollars a month for pasturing horses did that cover the charge for feeding the horses three times a day? A. No, we don't—

Q. Answer my question? A. No, sir.

Q. It did not? A. No, sir.

Q. You do not expect a horse at that charge to be taken to the barn and fed three times a day, do you? A. No, sir.

20 Q. When your horses were turned out at the rate of six to eight dollars a month they were kept turned out, weren't they? A. Yes, sir.

Q. And not taken and put under shelter unless extraordinary circumstances required it; isn't that so? A. Yes, sir.

By the Court:

30 Q. Who cared for them in cases of storm, Mr. Stryker, or was there any care given? A. I don't believe there was very much care given in case of storm.

Redirect Examination by Mr. Wall:

40 Q. Well, in case of storm would a six to eight dollar charge throughout this county call for taking them in? A. Well, that would entirely rest with the man you were boarding them with, but to my recollection there was never any agreement for the horses to be turned out, because it was always in the summertime, in warm weather, when we turned them out.

Dr. William Gall, for Defendant—Direct

By Mr. Applegate:

Q. You did not expect them to be taken in for that price, did you? A. Well, I never gave it much thought one way or the other, Mr. Applegate.

DR. WILLIAM GALL, sworn for defendant.

10

Direct Examination by Mr. Wall:

Q. Doctor, what is your occupation? A. Veterinary surgeon.

Q. Living at Matawan? A. Yes, sir.

Q. And how long have you practiced your profession as a veterinary? A. Twenty-one years.

Q. Whereabouts? A. In Matawan and in New York. I have been in Matawan twenty years and New York one year. 20

Q. And did you graduate from any college? A. New York College of Veterinary Surgeons.

Mr. Applegate: We will admit the doctor's qualifications.

Q. Did you know the mare Marshmallow? A. I did.

Q. Did you ever take care of her? A. I did.

Q. When was it? A. On the 26th and 27th and 28th of June. 30

Q. Of what year? A. 1914.

Q. Where was she when you first saw her? A. At the Silver Brook stock farm.

Q. That is Mr. Fanshawe's place, eh? A. Yes, sir.

Q. And what condition did you find her in? A. I found her in bad condition, found her with a big cut on the left side of the body.

Q. Is that near the heart? A. Above the heart. 40

Dr. William Gall, for Defendant—Direct

Q. Above the heart? A. A little above the heart.

Q. And when you say big just describe it. A. Well, it was about an inch and a half to two inches long and very, very deep.

Q. Well, by very deep do you mean, an inch? A. Oh, yes, more than that. I couldn't get my
10 finger in far enough to touch it. I couldn't get to the bottom of it.

Q. With your finger? A. Yes, I touched the lung when I went into it.

By the Court:

Q. You probed it with your finger? A. Yes, and then with a probe.

By Mr. Wall:

20 Q. How far did the probe go in? A. Well, it went in over six inches.

Q. And it was still deeper than that? A. Deeper than that, yes.

Q. Was the lung perforated? A. The lung was perforated and the ribs were broken.

Q. How many ribs broken? A. Two ribs.

Q. And what was the condition of the wound? A. Discharging very freely.

Q. Discharging what? A. Serum and pus.

30 Q. You treated it? A. Yes, I did.

Q. That day? A. I did that night.

Q. When did you see the mare again? A. On the following day, on the 27th.

Q. What did you do to the wound that day? A. Opened it up.

Q. Did what? A. Made it larger and lanced it.

Q. That was for the purpose of what? A. Letting the discharge come out, give it a free drainage.

40 Q. And was there any discharge that came out? A. Yes, several quarts of it.

Dr. William Gall, for Defendant—Direct

Q. What was the condition of the discharge?

A. Matter and pus and serum and maggots.

Q. What did the presence of maggots indicate? A. That the sore had been there for some time before I had seen it.

Q. When you say some time, how soon will the maggots generate in a wound of that kind, in your experience? A. Well, it would take several days in that time of the year. 10

Q. Several days? A. Yes, sir.

Q. Well, then you saw it again when? A. On Sunday, on the 28th.

Q. And what was the condition of the mare then? A. Bad then. I told them that she was dying then.

Q. And when did she die? A. She died in a few hours after I was there.

Q. What was the cause of her death? A. Septicemia and blood poisoning, caused by this hurt that she got. 20

Q. That wound? A. This wound.

Q. Well, now, Doctor, is the skin of a horse an easy thing to perforate or is it tough? A. Well, it depends on how it is penetrated. Sometimes it is easy and sometimes it is very hard. It depends where the object is and when they are going to hit it.

Q. How wide was this wound? A. When I saw it the first night? 30

Q. Yes. A. An inch and a half or two inches.

Q. In diameter? A. Yes, crossways.

Q. And how wide was it the other way? A. It wasn't so wide the other way. The skin sort of ripped. It was cut this way and you had to put the probe in it that way to get into it. (Indicating.)

Q. In your judgment would it have taken a blow of considerable force in order to make the 40

Dr. William Gall, for Defendant—Direct

character of wound that you found there? A. Yes, it required great force to do that.

Q. Have you treated horses for the owners of thoroughbreds? A. I have; yes, sir.

Q. Other than this one? A. Yes, sir.

Q. Whereabouts? A. I have treated them down at Harry Payne Whitney's Brookfield Farm.

10 Q. Have you ever bought and sold any thoroughbreds? A. Only what I owned myself.

Q. Are you familiar with the value of such horses? A. Well, that all depends on the breeding and the pedigree and what they have got.

Q. You mean that goes with the causes that make the value variable? A. That is what makes the price variable; yes, sir.

20 Q. In your judgment how old was Marshmallow? A. Marshmallow was foaled in 1903.

Q. And that would make her in 1914 eleven years old? A. Eleven years old; yes, sir.

Q. And what kind of a mare was she? A. A bay mare.

Q. And what purpose was she being used for? A. For breeding purposes.

30 Q. And is eleven years old a good age for a brood mare in the sense of getting good colts from them at that age? A. Yes, that is a good age.

Q. What would the fair expectancy be of such a mare in the way of colts? I mean how many colts would you expect that a mare eleven years old would have, foals, rather?

(Objected to.)

Mr. Wall: This is a question of fair expectancy. Here is a brood mare; she is used for that purpose.

40 The Court: It may be if he says there is such expectancy, Mr. Wall.

Dr. William Gall, for Defendant—Direct

Mr. Wall: Well, in common knowledge. Common knowledge would give a man some opinion.

The Court: That has not been in my knowledge, and I have had some experience in that.

Mr. Wall: Well, your Honor's view is that there is no common knowledge as to breeding? 10

The Court: Well, I would not put my view against that of a veterinary surgeon if he says there is, if he says there is any expectancy in a mare eleven years of age or at any other age in the matter of getting colts. He has not said so.

Q. What do you say as to that, Doctor? Maybe I am out of my ignorance putting a very difficult question. A. There are lots of mares produce very good colts at the age of eighteen or twenty years old. 20

Mr. Applegate: I object and ask that that be stricken out.

The Court: It will be stricken out.

Q. The question is whether or not there is any expectancy recognized among horse breeders as to the number of colts which a mare eleven years of age will have. A. Well, that is a hard question to answer. Some may have a foal every year and some might not have one at all. 30

Q. Do you know whether this particular mare had ever had any foals? A. Three as far as I know.

Mr. Applegate: Unless he knows of his own knowledge.

The Court: You may ask if he does. 40

Dr. William Gall, for Defendant—Direct

By Mr. Applegate:

Q. Do you know of your own knowledge whether this mare ever had any colts or from what somebody told you? A. I have seen some of her colts.

10 Q. How do you know they were her colts? A. The way the pedigree ran I was told they came out of that mare and I have seen it in the American Stud Book.

Q. Were you ever present when these colts were born? A. No, sir.

The Court: He has given the source of his knowledge and I think that may stand. He says it comes from the American Stud Book, which is a recognized authority.

By Mr. Wall:

20 Q. What is the American Stud Book?
(Objected to. Objection overruled.)
(Objection noted for plaintiff as ground of appeal.)

A. It is a book that is kept for that purpose, of keepings records of pedigrees of all brood mares and horses.

30 Q. Is it the recognized method of ascertaining which horses in America are thoroughbreds or not? A. It is.

Q. I show you a book entitled, "American Stud Book," and ask you if that is the book to which you have reference. A. Yes, that is the book I have reference to.

Q. See if you can find anything in that book about the mare Marshmallow. A. Right here. (Indicating.)

Q. Read what it says.

(Objected to. Objection sustained.)

40

Mr. Wall: I offer the book.

Dr. William Gall, for Defendant—Direct

The Court: Any objection?

Mr. Applegate: I object to the book; yes, sir.

The Court: The book will be admitted.

(Objection noted for plaintiff as ground of appeal.)

Mr. Wall: I offer specifically page—well, I will offer the book, and particularly page 729 thereof. 10

Q. "Marshmallow, b."—stands for "born" Doctor? A. Yes, stands for "born."

Mr. Wall: (Reads:) "b. 1903. Bred by Stanhope Brothers. Owned by Mrs. G. Foster Rollins, Red Bank, New Jersey. By Sempronius; first dam Marechal Niel, by Hanover; second dam Margerine, by Algerine. 1907, b. c. by Golden Garter." 20

Q. "B. c." stands for what? A. Bay colt.

Mr. Wall: "1909, ch. c."

Q. What does that stand for? A. Chestnut colt.

Mr. Wall: "Chestnut colt by Golden Garter; 1910, by Sandringham."

Q. Are those names that I have just read, or rather are those last items that I have just read with the dates 1907, 1909 and 1910, are those the three colts? A. Yes, sir. 30

By the Court:

Q. Of Marshmallow? A. Of Marshmallow; yes, sir; she is the dam.

By Mr. Wall:

Q. And assuming that at the time you saw her she had had three colts and that she was eleven 40

Dr. William Gall, for Defendant—Direct

years old; what would you say as to the chances, the fair expectation of being able to get further colts from her?

Mr. Applegate: I object, on the ground that it does not lie within this witness' knowledge. He cannot possibly tell.

10 Mr. Wall: Here is a mare, here is a brood mare—

By the Court:

Q. Can you answer that question, Doctor?
(Question repeated.)

A. She had a good chance to have more colts.

By Mr. Wall:

20 Q. What in your opinion was the value of the mare, Doctor? A. That is a very hard question to answer, what I think she was worth.

Q. Well, what do you think she was worth at that time? A. At that time she ought to be worth about \$2,500.

Q. Are you able to say, Doctor, whether that Hanover that is referred to by the pedigree that I have read from the stud book there is the well known race horse Hanover?

30 Mr. Applegate: I object. It is immaterial in this case what the colts of this mare have accomplished.

Mr. Wall: Oh, no, that was not the colt, that was the sire.

Mr. Applegate: Well, it is immaterial what the sires have accomplished.

(Objection overruled.)

Q. Was it just some other Hanover or was it the great Hanover? A. It was the wonderful horse Hanover, the great horse.

40 Q. One of the great American thoroughbreds,

Dr. William Goll, for Defendant—Cross

wasn't he? A. One of the great American thoroughbreds.

Cross Examination by Mr. Applegate:

Q. Doctor, you are Mrs. Rawlins' veterinary, aren't you? A. No, sir.

Q. And you attend to practically all her business? A. Not all.

Q. I said practically all. A. Practically all, yes. 10

Q. And you have for some time past? A. I have.

Q. And she requested you to come over to Mr. Fanshawe's place, did she not? A. Yes.

Q. And that was about June 24th or 25th? A. 26th.

Q. The 26th of June? A. Yes, sir.

Q. That is the first time that you went there— 20
A. That is the first time I went there.

Q. Pardon me a moment. The first time you went there to look after the horse Marshmallow?
A. Yes, sir.

Q. Had you seen her before that time? A. No, not before that time.

Q. You didn't know the mare Marshmallow before that day? A. Yes.

Q. One moment, please. Did you know the mare Marshmallow before that day when you went 30
to see her? A. Yes, sir.

Q. You had seen her at Mrs. Rawlins' place?
A. I have seen her at Mrs. Rawlins' place and I have seen her at E. R. Thomas', at Holmdel, when she was there.

Q. This wound which you found in her right side, almost over the heart— A. On the left side.

Q. And you say that the lung was penetrated?
A. Yes, sir.

Q. Where the lung of a horse or mare is pene- 40

Dr. William Goll, for Defendant—Cross

trated it is very difficult to save her, isn't it? Now yes or no, please. A. It is hard to save a horse in that condition.

Q. And you also said that two ribs were broken, didn't you? A. Yes.

Q. You didn't tell us anything about the two ribs being broken at the previous trial, did you?
10 A. I showed them to Mr. Hughes. The ribs were cracked and broken.

Q. You didn't say anything about that in the previous trial, did you? A. I don't know that I was asked.

Q. You were here to tell what you knew for the sake of Mrs. Rawlins, weren't you? A. Sometimes you forget some little things.

Q. Is your memory any better now, a year since then, than it was then? A. I remember as well
20 now as I did then.

Q. Is your memory better now than then? A. I don't know whether it is or not.

Q. You say that you found maggots in the wound? A. I did.

Q. Did you find the maggots upon the occasion of your first visit? A. The second visit.

Q. You didn't find any on the first visit? A. I did not; no, sir.

Q. If they had been there you would have found them, wouldn't you? A. I might. No, it was dark
30 that night when I was there.

Q. Then on the occasion of your first visit you didn't make a very careful examination? A. I did. I washed it out as well as I knew how.

Q. You washed it in the dark? A. I had a lamp. It was light when I got there.

Q. Washed it out by lamplight? A. It was light.

Q. You could find no maggots that night? A. No, I didn't get through everything.
40

Q. You didn't see any, did you? A. I didn't get so far as I did the next afternoon.

Dr. William Goll, for Defendant—Cross

Q. You didn't see any that night, did you? A. Because I didn't open up the wound.

Q. You didn't see any that night? A. No, I didn't.

Q. On the next day you went there you were a little more careful in regard to the attention given to the wound than you had been the night before, weren't you? Pardon me. Please answer yes or no. A. I opened up the wound the next day.

10

The Court: The answer will be stricken out.

A. I did. I opened it up more.

Q. The weather was warm, Doctor? A. It wasn't so warm at that time.

Q. It was spring time? A. It was June.

Q. Summer time then? A. Yes, sir.

20

Q. And you know, of course, Doctor, from your experience in your profession that maggots breed more quickly in a warm season than they do in cold, don't you? A. I know that.

Q. Do you know what had been done in looking after the mare before you got there the first time? Do you know, Doctor, is the question. A. I know what had been done.

Q. Now what had been done? A. Mr. Hughes informed we that he had washed it out and put in powder and things like that.

30

Mr. Wall: By what he had been informed.

Q. Do you know of your own knowledge what had been done? A. Well, that is what I was told.

Q. Only what was told you? A. What he told me, yes.

Q. You put your finger in the wound, did you?

A. I did after I had it all cleaned up.

40

Dr. William Goll, for Defendant—Cross

By the Court:

Q. When, the first occasion or the second? A. The second occasion.

By Mr. Applegate:

Q. Did you put your finger in the wound on the first occasion? A. No, I did not.

10 Q. Then you didn't probe the wound on the first occasion? A. I probed it on the first occasion and washed it out.

Q. Did you use your finger in probing the wound on the first occasion? A. Not the first occasion.

Q. What did you probe it with? A. The regular probe that I have for that business.

Q. A regular probe? A. Yes.

20 Q. Why did you use your finger on the second occasion? A. Because I wanted to feel more about it.

Q. Could you feel better with your finger than you could with the probe? A. No, I could feel the condition of the tissues inside better than I could with the probe.

Q. Then you neglected to take that precaution upon the occasion of your first visit, did you? A. I didn't know what was necessary the first time.

30 Q. You hadn't seen the mare between your first visit and the second visit, had you? A. No, I had not.

Q. That was in the daytime, your second visit? A. The second time.

Q. And you could see better? A. Yes.

Q. Did you call for extra light upon your first visit? A. We had a lamp.

Q. Did you call for an extra lamp? A. We had all the light we required.

40 Q. You had all the light you needed? A. All that we needed that time.

Dr. William Goll, for Defendant—Cross

Q. All that you needed that time? A. Yes.

Q. And you could see all that was there to be seen, could you? A. Seen all that could be seen that night under the circumstances.

Q. Now you say that when you saw the mare upon the occasion of your second visit she was dying then? A. Not the second.

The Court: The third visit.

10

A. The third visit.

Q. Wasn't she dying upon the occasion of your second visit? A. I said there was no hopes of her.

Q. On the occasion of your second visit? A. The second visit, yes.

Q. So that you thought she was dying then? A. I knew she was dying.

Q. And now, Doctor, looking back to the experience that you had of your three visits, you are very confident that she was dying upon the occasion of your first visit, aren't you? Now answer my question. A. No, I didn't exactly know how badly she was hurt that first night. I couldn't find out.

20

Q. No, but, Doctor, that is not my question. My question is that having now in mind—

Mr. Wall: I object to that as immaterial. What difference does it make? We know now that she died of her injuries. Now whether she began to die the moment she was struck or began to die sometime later, she died; that is the point; she died from that injury; and the itinerary of her dying is not of any importance, or the schedule; she is not a train.

30

The Court: I suppose you think we all begin to die when we are born.

Mr. Wall: Exactly, sir.

40

Dr. William Goll, for Defendant—Cross

(Question repeated.)

(Objection overruled.)

Q. Now the answer is no, is it? A. No.

Q. And you think then that she might have been saved, do you? A. Well—

10 Q. Now do you? Pardon me, please. Yes or no.

Mr. Wall: You are asking what he thinks. He has got a right to express what he thinks.

Mr. Applegate: And it calls for an answer yes or no.

The Court: I think it does.

A. If I could say one word—

Q. One moment—

20 Mr. Applegate: I ask that the witness be instructed.

The Court: Yes, Doctor, I have already stated that when questions can be answered yes or no they should be answered that way, if they can be answered that way, and you should answer the question responsively.

(Question repeated.)

Q. Upon the occasion of your first visit you might have saved her, might you? A. Yes.

30 Q. Doctor, you have bought and sold thoroughbreds? A. Only a few, what I have owned myself.

Q. Are the thoroughbreds that you owned in this book or a book similar to this that you produce? A. Yes, there is one in here that I used to own.

Q. Are the others in this book that you owned? A. No, sir.

Q. They are thoroughbreds? A. No, sir.

40 Q. Why aren't they in this book?
(Objected to.)

Dr. William Goll, for Defendant—Cross

By the Court:

Q. Had you answered your question? A. No, sir; I had not.

Q. Proceed.

By Mr. Applegate:

Q. Why are they not in the book then? Now, one moment. Don't be quite so eager. Why are they not in the book then if, as you say, all thoroughbreds are in this book? A. Well, I had one or two die young before they were registered. There is one in the book. 10

Q. Then all thoroughbreds are not in this book, or records of them? A. They register them when they are six months old now.

By the Court:

Q. Well, Doctor, there are no thoroughbreds mentioned in this book that are not actually registered, are there? A. No, they are registered in that book. 20

Q. This book is the list of registered thoroughbreds, isn't it? A. Yes, sir.

By Mr. Applegate:

Q. And were all your horses registered?

Mr. Wall: He has already said that, your Honor.

Mr. Applegate: I don't think he has. 30

A. There is four of them registered in this book.

By the Court:

Q. Four of yours? A. Yes, some are dead now.

By Mr. Applegate:

Q. Where did you get your opinion, Doctor, as to how much this horse Marshmallow was worth?

A. Well, she had— 40

Dr. William Goll, for Defendant—Cross

Q. Where did you get it from? Upon what is it based? A. Just from experience, what a horse is worth, when I see them at sales and what price they bring.

Q. Weren't you told by the Rawlins that this horse was worth \$2,500 before you came here to testify at the previous trial? A. Yes.

10 Q. Weren't you told just prior to your testifying at the previous trial by the Rawlins the value that they put upon this horse? A. Yes.

Q. They told you \$2,500, didn't they? A. Yes.

Q. Do you know the mare's pedigree? A. I don't know it by heart now.

Q. Did you know it at the previous trial? A. I have seen it read off in the book.

20 Q. No, at the previous trial did you know it? When you testified here at the previous trial did you know the pedigree? A. I heard it at that time but I can't keep all those pedigrees by heart myself.

Q. You don't know it now, do you? A. Well, I forget it now.

Q. When you are giving this value of \$2,500 on the mare then you have got her pedigree in mind, have you? A. I can by looking at it.

Q. Then give it if it is in your mind. A. I can go to the book and get it.

30 Q. You didn't have the book before you when you gave the value as \$2,500, did you? A. No, sir; but what I have been told.

By the Court:

Q. Do you know what the horse's sire was? A. I forget now.

By Mr. Applegate:

40 Q. And did you know that the amount that Mrs. Rawlins is suing for in this case as a set-off in

Dr. William Gall, for Defendant—Redirect

their declaration is \$2,500? A. I don't think I did what he is suing for; no, sir.

Q. Were you here in the courtroom when counsel for Mrs. Rawlins opens to the jury? A. I was.

Q. You heard his speech, did you? A. Yes, sir.

Q. Did this mare Marshmallow ever win a race?
A. I couldn't tell you that.

Q. You don't know? A. No, sir. 10

The Court: Do you know whether she had any record? She could not win a record without a race?

Mr. Applegate: Without a race; no, sir.

Q. You don't know of her ever having won a race, do you? A. I couldn't answer the question; no, sir.

Q. You stated on direct examination when you were asked if you knew the value of the mare that it was a hard question; to answer, I suppose you meant, didn't you? A. Yes, it is. 20

Q. And you still think so, don't you? A. It is a hard question to tell what the price of a horse is.

Q. And the value of that mare so far as you know may be less than \$2,500, may it not? A. It may be less and it may be more.

Q. But you don't think it is more, do you? A. Well, I wouldn't like to say. 30

Redirect Examination by Mr. Wall:

Q. Doctor, in your judgment is the statement of \$2,500 as the value your judgment or somebody else's judgment? A. Well, the colts that she had—

The Court: Oh, no, no.

A. Well, Mr. Rawlins told me that he valued her at \$2,500. 40

Dr. William Gall, for Defendant—Recross

Q. You saw her, didn't you? A. I saw the mare; yes, sir.

Q. What is your value?
(Objected to.)

A. I thought she ought to be worth that.

10 Q. What? A. I thought she ought to be worth \$2,500, a brood mare.

Q. Now then, counsel asked you something about whether you might have saved her that first time you saw her. What did you mean by that, Doctor? A. The first time I saw her, I said before that I was scarcely able to tell how badly she was hurt, because I didn't know how soon she might have a change that would terminate in death very soon. It was hard to say how a case is going one day, the first time you see it, it is im-
20 possible for any one to tell.

Q. Do you mean now that you know of anything that you could have done that would have saved her? A. I couldn't have done any more than I did that night.

Q. Was there anything, so far as your knowledge of the veterinary art goes, that could have been done, with all the knowledge you have now of it, the hindsight you have, which would have saved that mare if it had been done the first time you
30 saw her? A. Nothing that I know of; no, sir.

Q. Why not? A. Because I did all that anybody could do and all I knew how; and the case, as I have already said, was in such condition that you couldn't tell how it was going to terminate. You can't tell these things sometimes.

Recross Examination by Mr. Applegate:

40 Q. Just one question, Doctor. Did you ascertain upon the occasion of your first examination that the mare's lung had been punctured? A. I did not, not the first time.

Dr. William Gall, for Defendant—Recross

Q. If you had known upon the occasion of your first examination that the mare's lung had been punctured, was punctured at that time, you would have been very sure that nothing could have saved her life, wouldn't you? A. Put that again, please.

Q. If you had been sure upon the occasion of your first examination that the mare's lung had been punctured you would have been very sure that you could not have saved her life? A. I would; yes, sir. 10

By the Court:

Q. Doctor, was any post-mortem examination made? A. Yes, I held that Sunday afternoon after she died.

Q. And what did that disclose? A. I found that one of the lungs, the left lung, had been penetrated with something, but I couldn't find anything inside the body. I expected to find a stick or something like that, but found nothing at all. 20

Q. Well, what was the extent of the penetration? A. The extent of the penetration, it went about two inches, an inch and a half or two inches, into the lung.

Q. And did the post-mortem examination disclose any other injury except the injury to the lung? A. The lung and the ribs. I knew they were fractured before. I opened her up and the inside of her was in a terrible condition, heart and lungs and everything else. 30

Q. Now when you went there on the 26th what was the external appearance of the mare? A. The external appearance did not look so awful bad to me that night.

Q. Just what was it? A. Well, she had a fever of 104 or 103.

Q. I am speaking now of just the external appearances, what you could see. A. The external appearance was a sore two inches long up and down this way. 40

Luther Schenck, for Defendant—Direct

Q. Any swelling? A. Very little swelling.

Q. Any oozing from it? A. Yes, a little oozing.

Q. To what extent? A. Oh, just running a little right along all the time.

By Mr. Applegate:

10 Q. Doctor, in regard to her condition when you saw her at that time, did she look like a mare that had been properly taken care of, irrespective of the wound? Irrespective of the wound that you found upon her did she appear to have had very good care? A. Seemed to be doing the best they could.

Q. She was fat? A. Fair condition.

20 LUTHER SCHENCK, SWORN for defendant:

Direct Examination by Mr. Wall:

Q. Mr. Schenck, where do you live? A. About two miles and a half from Holmdel.

Q. How long have you lived in Monmouth County? A. All my life.

Q. What is your business? A. Farmer.

Q. Have you ever had any connection with any stock farm? A. Yes, sir.

30 Q. What one? A. Brookdale.

Q. Where is that? A. Between Holmdel and Red Bank.

Q. Are you familiar with the prevalent charges for the keep of horses in Monmouth County? A. Yes, I am.

Q. What is the prevalent charge for the keep of horses where it is mere pasturage?

Mr. Applegate: May I ask a question, if your Honor please?

40 The Court: Yes.

Luther Schenck, for Defendant—Direct

By Mr. Applegate:

Q. Mr. Schenck, your duties on the Brookdale farm consisted of what? A. All thoroughbreds, superintendent of the farm in charge of thoroughbreds.

Q. Were you there when Mr. Harry Payne Whitney leased the farm? A. Yes.

Q. And he didn't take in, did he, for board, horses of other people? A. No, I did before that time. 10

Q. Before that time whom were you under? A. I took horses for different trainers from the tracks in Long Island.

Q. You took them for yourself, you mean, for your own profit? A. For the Brookdale Farm.

Q. And you charged for them, did you? A. Yes.

Q. Or the Brookdale Farm charged for them? A. Yes. 20

Q. Which? A. Brookdale Farm.

Q. And you know what prices were charged, do you? A. Yes.

Q. These horses that were kept, as you say, were they kept out in the field or were they brought in and fed grain three times a day? A. They were brought in night and morning, that is, in cold weather; and in hot weather they were brought in in the morning and turned out in the evening. 30

Q. Were they fed grain? A. Yes, sir.

By Mr. Wall:

Q. How often were they fed grain? A. Night and morning.

Q. What months of the year would that kind of care be given them? In the summer, for instance, what months in the summer? A. Well, they had given it to them the year round. All through the summer, in flytime, we would bring them in in the 40

Luther Schenck, for Defendant—Direct

morning about eight o'clock and send them out again about five; not feed them when they came in in the morning, feed them before they went out.

Q. Is June flytime? A. Well, about the beginning of it.

Q. How about along towards the 20th of June on? Is that in flytime? A. Yes.

10 Q. And what were their prevalent charges for the mere pasturage of a horse, not feeding it grain? A. That would be from \$6 to \$12 a month.

Q. And what would be the charge for taking care of a horse in the way that you have mentioned, that is, feeding at night and morning and turning it out at evening and taking it in in the morning? A. We always got \$20 for those.

Q. And is that the kind of care that a \$20 charge would attach to in Monmouth County?

20 (Objected to.)

The Court: Upon what ground, because it is leading?

Mr. Applegate: No, sir; the question is whether or not that is the kind of care that would warrant a charge of \$20. It is for the jury to say, it seems to me, whether or not that is the kind of care that would warrant a charge of \$20.

Mr. Wall: I am asking for the custom.

30 The Court: Well, I suppose it is proper to ask this witness when a charge of \$20 a month was made under those circumstances what care is involved.

Mr. Wall: Your Honor's question puts it a great deal better.

40 Q. What kind of care on a stock farm does a charge of \$20 involve in the month of June? A. Well, I consider that that would be a box-stall and well cleaned and rebedded every day and fed night and morning and a good paddock to run in.

Luther Schenck, for Defendant—Cross

Q. And then it would be turned out, as you explained, in the late evening and taken in in the morning? A. Yes.

Q. What was the purpose of that? A. To keep the horses in good condition when the flies were bad.

Q. Is there any advantage to a horse in being fed with grain, that is, outside of the advantage that it gets from nutriment of the grain? Do you see what I mean? 10

The Court: Nourishment.

A. Outside of what it gets from the grass, you mean?

Q. Yes, outside of the nourishment from the grain, what advantage is there in feeding a horse night and morning besides the advantage that it gets from the grain itself? A. I don't understand you. They do much better with the grass and grain. 20

Q. Well, what I mean is this: does the feeding of a horse necessitate any examination of the horse? A. No.

Q. Well, isn't a man more apt to look over the condition of a horse if he feeds it than if he doesn't? A. Of course he comes in contact.

Mr. Applegate: I object to the leading questions. 30

Mr. Wall: Very good.

Cross Examination by Mr. Applegate:

Q. Mr. Schenck, did you have any special agreement with the owners of these horses that you are speaking of to take them in nights and feed them?

A. Well, that was—

Q. No, answer the question. Did you or didn't you? Was there any special agreement in relation to that matter? A. Oh, sure. 40

Luther Schenck, for Defendant—Cross

Q. There was a special agreement, wasn't there? Before they brought the horses there they requested that to be done, didn't they? A. They never asked me about that.

Q. Wasn't there a special agreement that covered that? A. They supposed it would be that way.

10 Q. How do you know they did? A. Well, that was the rule we always made, that is all.

Q. And that rule that you always made applied to those particular horses, didn't it? A. Yes.

Q. And they were mares, weren't they? A. All kinds.

Q. Wasn't most of them mares? A. Colts and mares.

20 Q. Well, colts and mares; and they were brood mares, weren't they? A. They were racing horses, some brood mares.

Q. And they were mares and racing horses that were being trained for the track; isn't that true? A. Out of training when they came to me.

Q. But the mares were brood mares at the time? A. Yes.

Q. And in foal, weren't they? A. Yes.

30 Q. And wasn't your real reason for taking those mares up nights and letting them out again in the morning and giving them grain because they were in foal? That was the principal reason for doing it, wasn't it? A. Not necessarily.

Q. No, not necessarily. Don't you pay more attention to a mare that is in foal than to one that is not? A. Not if the people desire it.

Q. And you did according as people desired, did you? A. In some cases.

Q. And in some cases did you charge more than \$20? A. For certain horses.

40 Q. And because those horses were more valuable? A. Yes, sir.

Luther Schenck, for Defendant—Cross

Q. So that your rate of charges depended somewhat upon the value of the horse or mare, as the case might be, didn't it? A. Some had to have a separate paddock always.

Q. You, but your price which you charged for the keep and board and so on depended somewhat upon the value of the horse, didn't it? A. Not exactly, no.

10

Q. Well, you did charge more for some horses than others, didn't you? A. Yes, but some horses you couldn't let run with others.

Q. And why not? A. You couldn't let colts run with the mares.

Q. Did you let any of the horses run in the pasture without taking them in? A. No, sir.

Q. None at all? A. Not to my knowledge.

Q. Well, might they have run there and you not know about it? A. No, sir.

20

Q. So that you brought up every horse, did you, every night? A. Yes.

Q. That was left with you? A. Yes.

Q. And your charge for every horse was \$20, was it? A. Yes..

Q. And no more? A. Yes, more.

Q. More? A. For some.

Q. How much more? A. \$5.

Q. \$25 then it might be in some cases? A. In some cases; but they were not brood mares.

30

Q. Mr. Schenck, you know Mrs. Rawlins? A. Yes.

Q. You have known her some little time? A. Yes.

Q. And you have got horses in your place now that belong to her? A. I have one.

Q. You have got one? A. Yes.

Q. What sort of a horse is it? A. A mare with foal.

Q. And what are you charging for it? A. \$20. 40

*Luther Schenck, for Defendant—Redirect
Amelia B. Rawlins, for Defendant—Direct*

Q. How long has it been there with you? A. About a year and two months.

Q. A year and two months? A. Yes, sir.

Q. You have been charging \$20 a month all that time, haven't you? A. Yes, sir.

Q. And you expect to keep her some time longer,
10 don't you? A. I can't say.

Q. But you hope to, don't you? A. Why, it is all right; yes, sir.

Redirect Examination by Mr. Wall:

Q. What kind of care do you give that horse?

(Objected to as immaterial. Objection overruled.)

Q. What kind of care do you give that horse?
20 A. She is brought in every night and morning now, brought in every night now and let out in the morning.

Q. What kind of feed do you give her? A. Oats.

Q. For her noonday meal she gets pasture? A. Gets pasture.

Q. You said that for the horses where you charged more than \$20 at the Brookdale farm there were special reasons? A. Yes.

Q. What were those reasons? A. They were
30 stallions.

Q. But the price for brood mares was what?
A. \$20.

AMELIA B. RAWLINS, sworn for defendant.

Direct Examination by Mr. Wall:

Q. Mrs. Rawlins, you owned Marshmallow? A.
40 I did own her.

Amelia B. Rawlins, for Defendant—Direct

Q. And had you had other horses with Mr. Fanshawe before the horses for the keep of which he now sues? A. I did.

Q. And did you pay him for those horses? A. I paid for them for about a year.

Mr. Applegate: I object to whether she paid for a year and for horses in which this suit is not concerned.

10

Mr. Wall: Well, counsel opened as though—

The Court: I think it can do no harm in the case because it is sort of introductory.

Q. Now, then, your place is how far from Mr. Fanshawe's place, Silver Brook Farm? A. I should say about a mile and a half.

Q. And when did you first hear that anything was wrong with Marshmallow? A. It was on Friday, the 26th of June, 1914. I think it was about six o'clock in the evening.

20

Q. And how did you hear it? A. Mr. Hughes called me on the telephone.

Q. Mr. Hughes was Mr. Fanshawe's manager, wasn't he? A. He was his manager.

Q. And what steps, if any, did you take to act then? A. I called to Dr. Gall and Dr. Gall went over there that evening.

Q. Do you recollect what Mr. Hughes said to you over the telephone? A. He told me the mare had been injured and that he had taken care of her and he thought she was getting worse and I had better get a doctor.

30

Q. Did he say how she had been injured? A. I don't recollect his saying so then.

Q. Now, then, about the colts. Did you ever sell any colts that Marshmallow was the dam of? A. I sold three of Marshmallow's colts, and that first colt that appears there in the stud book I never owned. That was sold at the same time that

40

Amelia B. Rawlins, for Defendant—Cross

I bought Marshmallow, separately from Marshmallow, and I believe afterwards the price paid for it was \$1,500.

(Objected to.)

The Court: Yes, that will be stricken out.

10 Q. Did you ever sell any of Marshmallow's colts? A. Yes, I sold two of them in England, one for \$1,000 and the other one for \$1,500, and I sold a fourth colt, which does not appear in the stud book because it was too young to be registered at that time, I sold in New York for \$500 and an interest in the races that he wins.

Q. That is, you made an arrangement that you would have an interest in the races that he won besides \$500 cash which came to you? A. The \$500 cash which came to me.

20 *Cross Examination by Mr. Applegate:*

Q. When did this mare Marshmallow last appear on the track? A. I don't know that she ever appeared on the track.

By the Court:

30 Q. Mrs. Rawlins, to what extent does the sire enter into the value of the colts, as compared with the consideration of the mare? A. Well, I suppose that makes a good deal of difference, in the sire. But can I just tell you about Marshmallow?

Q. Oh, no, not about Marshmallow, but just that. I want to know whether it does not make—
A. Of course it makes a difference.

Q. And that is particularly so, is it not, with a mare that has no racing record herself? A. I don't understand, I think.

Q. Well, never mind that. It is unimportant.

Amelia B. Rawlins, for Defendant—Redirect
James Cooley, for Defendant—Direct

Redirect Examination by Mr. Wall:

Q. If a mare has never been on the track herself and never won any races then does not the value of the sire, the question of how valuable the sire is, enter more into the value of the foal than it would if the mare had a racing reputation of her own?

10

(Objected to. Question withdrawn.)

Recross Examination by Mr. Applegate:

Q. Mrs. Rawlins, there was another question I wanted to ask you. You said that Mr. Hughes called you on the phone? A. Yes.

Q. And told you that the horse was ill? A. Yes.

Q. And then did you send a veterinary to attend the mare? A. I sent the veterinary.

20

Q. And had you been up to the farm and seen the mare before she was injured? A. No, I had not been there for a long, long time.

Q. How long? A. I can't answer that. I don't know.

Q. Had you ever been over and seen the mare? A. Oh, yes.

Q. And when you saw her she was out in the field? A. Yes, out in the field.

Q. And was her condition good at the time that you saw it? A. Seemed to be.

30

JAMES COOLEY, sworn for defendant.

Direct Examination by Mr. Wall:

Q. Where do you live, sir? A. Westbury, Long Island.

Q. What is your occupation? A. Well, I have got two or three. I am a journalist; I write for

40

James Cooley, for Defendant—Cross

the magazines, and I also do a business with horses, polo management and horse broker.

Q. Are you familiar with the value of thoroughbreds? A. Pretty familiar with them; yes, sir.

Q. Do you know of your own knowledge of any sales of thoroughbreds? A. Yes, sir.

10 Q. Have you any connection with the Meadowbrook Hunt Club? A. Yes, sir.

Q. What? A. I am manager of the polo there. I also help with the hunting there.

Q. Do your duties as manager of polo bring you in contact with thoroughbred horses? A. Well, to a certain extent, yes. Well, not so much thoroughbred horses; it brings me in connection with thoroughbred polo ponies. There are not very many of those, though.

20 Q. Ponies as distinguished from horses? A. Yes.

Q. Did you know the mare Marshmallow? A. Yes.

Q. What in your judgment was she worth in 1914?

Mr. Applegate: May I ask a question?

The Court: Yes.

By Mr. Applegate:

30 Q. May I ask where you saw the mare Marshmallow? A. It was at Mr. Thomas' sale down at—I have forgotten where. It was down here somewhere. I came down for that sale.

Q. Is that the only time you ever saw her? A. Yes.

Q. What did you say she was worth? A. I think she was a mare worth about \$3,000.

Cross Examination by Mr. Applegate:

40 Q. You were present at the sale? A. Yes.

Q. When the mare was sold? A. Yes.

James Cooley, for Defendant—Cross

Q. What did she bring?

(Objected to.)

Mr. Applegate: We submit that the answer is some evidence. not possibly as a measure of damages, but as a guide for the jury, and also, if your Honor please, it is permissible under cross examination. The witness said that she was worth \$3,000 in his opinion. Now I ask him how much that mare brought at that sale. It is some evidence to go to the jury. 10

Mr. Wall: It will have to be shown whether it was an auction sale or not. If it was a sale by way of auction or had any forced feature connected with it, if it was held by a sheriff and so on, of course the decisions are clear that it is not a test of value; that the only kind of sale that can be used as a standard is a sale by a seller willing but not obliged to sell and a purchaser willing but not obliged to buy. 20

Mr. Applegate: There isn't any question but that the price she brought at that sale would not be a measure of value but it might be some testimony that the jury might take into consideration.

Mr. Wall: I make another objection. It is outside the limits of the direct. 30

The Court: The objection is overruled.

(Objection noted for defendant on the ground of appeal.)

A. Well, I can't remember. It was under \$150. It was either \$125 or \$135, I think.

Q. She brought under \$150 at the sale? A. To my recollection. I wouldn't swear to that. I think it was some time ago. 40

*James Cooley, for Defendant—Redirect**Redirect Examination by Mr. Wall:*

Q. What kind of a sale was this? A. It was a sheriff's sale.

Q. And was she sold with other horses? A. Oh, yes, there were a lot of horses sold, the whole farm, as I remember.

10 Q. The whole farm? A. Yes, stallions, mares and yearlings and every thing.

The Court: Well, I think if that is true that the suggestion made by Mr. Wall that we should have first inquired into that is a very pertinent one; but I think that testimony should be stricken out.

Mr. Wall: The trouble is that that testimony may do an awful lot of harm.

20 The Court: That testimony will be stricken out and I now say to you, gentlemen, that you should absolutely disregard it, because the price paid at a sheriff's sale is absolutely no criterion of value for any place.

Mr. Applegate: Your Honor will allow an exception?

The Court: An exception will be noted.

Mr. Applegate: And also to your Honor's remarks to the jury?

The Court: Yes.

30 (Objection noted for plaintiff as ground of appeal.)

Recross Examination by Mr. Applegate:

Q. How do you know this was a sheriff's sale? A. It was some time ago and I can't—

Q. How do you know it was? Why do you say it was a sheriff's sale if it was some time ago and you can't remember it? A. I know it was a sheriff's sale.

40 Q. How do you know? Whose property was being sold? A. Mr. Thomas'.

James Cooley, for Defendant—Recross

Q. Under a sheriff? A. I think so. I am positive it was a sheriff's sale, yes. At least, I don't want to swear to it, but I think it was as I remember it. I know that I was told it was a sheriff's sale.

Q. That is all you know about it, isn't it? A. It certainly was a sheriff's sale.

Q. But you won't swear it was a sheriff's sale? A. No, I wouldn't swear that; I am almost certain it was. 10

Mr. Applegate: Now we ask that the evidence remain in.

The Court: No, I think it must stand as it now is.

Mr. Applegate: He has stated that he cannot swear it was a sheriff's sale; all he knows about it is what somebody told him.

The Court: Well, I think the suggestion of Mr. Wall in the first place was probably the correct one, that it ought to have been shown that it was a proper sale, that it was such a sale as that the price brought would be some guide of value to the jury. I think that perhaps ought to have been shown in the first place, and until that is shown the testimony will stand as stricken out. 20

Mr. Applegate: I don't want to unnecessarily argue it, but don't you think— 30

Mr. Wall: I think we ought to have a mistrial if this thing is to be urged, your Honor. I am dreadfully afraid of the effect of that sort of thing.

Mr. Applegate: My remarks were about to be that it is the defendant's attorney's duty to bring out what kind of a sale it was. It was not our duty.

The Court: You have your exception to the court's ruling and if there is any error you may take advantage of it. 40

G. Foster Rawlins, for Defendant—Direct

By Mr. Wall:

Q. Do you recall where the sale was held? Was it held at Mr. Thomas' farm? A. It was held at Holmdel, yes.

Q. At the farm? A. Yes.

10

G. FOSTER RAWLINS, sworn for defendant.

Direct Examination by Mr. Wall:

Q. Mr. Rawlins, you are the husband of the defendant in this case? A. Yes.

Q. Did you have anything to do with this looking up the facts about this mare after she was injured? A. No.

20 Q. Did you go to the Silver Brook Farm? A. No. Yes, I did after she was injured and taken away, yes.

Q. Did you see Mr. Hughes on that occasion? A. Yes.

Q. What did you do then? A. I went over the field with Mr. Hughes where the mare was when she was supposed to have been hurt.

Q. Did Mr. Hughes make any statement to you about the injury to the mare? A. He thought—

30 Mr. Applegate: I object. We do not think that any statement by the agent Hughes can be binding upon Mr. Fanshawe in this case, any more than the statement made by the conductor of a street car or a railroad car is admissible evidence, and the cases all hold it is not unless it is part of the *res gestae*.

40 Mr. Wall: Mr. Fanshawe said that he didn't know anything about this thing, that Mr. Hughes was his manager. Now so far as the case has proceeded Mr. Hughes is the one that knew most about the situation, the care

G. Foster Rawlins, for Defendant—Direct

of the mare and so on. Now a statement made by him immediately after or soon enough after the injury to the mare, at the place of her presumed injury, would seem to me to be a part of the *res gestae*.

(Objection sustained.)

Q. Were you at the sale that Mr. Cooley spoke of? A. No. 10

Q. You were not there? A. No.

Q. Did you know about it? A. Yes.

Q. What did you know about it?

Mr. Applegate: I object. In the first place the question is entirely too general; secondly, it is heresay. He was not there, he said.

The Court: I think the question is too general, Mr. Wall.

Q. Who was Mr. Thomas? A. Mr. Thomas was an owner of a lot of racehorses and brood mares and stallions. 20

Q. Did you know anything about his string of horses? A. I did at the time, yes.

Q. At that time? A. Yes, I knew he owned horses.

Q. Did you see any advertisements of the sale? A. No.

(Objected to.)

The Court: He says no. 30

Q. Did you know of any sale to be held there? A. I heard there might be one.

Q. Did you know anything about the character of the sale? A. No.

By the Court:

Q. When was the sale held, Mr. Rawlins? A. It was held about, to the best of my knowledge, about six years ago. 40

G. Foster Rawlins, for Defendant—Direct

By Mr. Wall:

Q. Do you know of any relations amongst famous horses that the dam of Marshmallow had?

A. Any relations?

Mr. Applegate: If your Honor please, we object to that question because the question is do you know of any famous horses? I do not think that this witness can express whether a horse is famous or whether he was not.

10

Mr. Wall: I will withdraw the question. I will put it this way:

Q. Do you know the name of any horse that ever won the English Derby? A. Yes, sir.

Q. Who was related to the dam of Marshmallow?

(Objected to.)

20

Mr. Wall: That is an element of value.

Mr. Applegate: I object to it that it does not appear how far back that relation ran. It might go back a thousand years.

The Court: Oh, it might not amount to anything if it does, but I think that as a preliminary question that is proper.

(Objection noted for plaintiff as ground of appeal.)

30 Q. What horse have you reference to that won the English Derby?

Mr. Applegate: I object, because it does not appear just how close that relation is.

The Court: It may all appear.

Q. What was the name? A. Orby.

By the Court:

40 Q. When was that, Mr. Rawlins? A. Well, I couldn't tell you.

G. Foster Rawlins, for Defendant—Direct

By Mr. Wall:

Q. Not just the year but about when? A. About four years ago, I should say.

Q. How close or remotely was he related to Marshmallow? A. Orby's dam was a full sister of Marshmallow's dam.

Q. What was the name of Orby's dam? A. Rhoda B. 10

Q. And what was the name of Marshmallow's dam? A. Marechal Niel; a full sister.

Q. So really Orby and Marshmallow were first cousins if they had been people, eh? A. Yes.

Q. You are not familiar with racing, are you? A. A little bit.

Q. Have you ever raced horses? A. No.

Q. Have you ever interested yourself in racing? A. Yes, more or less, through my wife.

Q. Has she ever owned racehorses? A. Yes. 20

Q. That raced? A. Yes.

Q. Whereabouts?

(Objected to as immaterial.)

The Court: I do not see the materiality of it.

Mr. Wall: I just wanted to lay a foundation for him to show what the English Derby is.

Q. Is the English Derby the blue ribbon racing event of the world? A. I should say so. 30

Q. Is there any other racing event that gives a horse an equal standing as winning the English Derby?

(Objected to. Objection sustained.)

Q. Well, what racing event gives a horse the greatest standing, winning?

(Objected to. Objection sustained.)

George Hughes, for Plaintiff—Direct

The Court: I think we are whittling it down to a little too fine a point.

Defendant Rests.

Plaintiff's Testimony in Rebuttal.

10 GEORGE HUGHES, recalled for plaintiff.

Direct Examination by Mr. Applegate:

Q. Mr. Hughes, you were working for Mr. Fanshawe in the months of May and June, 1912?

A. Yes, sir.

Q. And 1914? A. Yes, sir.

Q. And you have been working for him how long? A. Since the spring of 1908, about eight or nine years.

20 Q. And in what capacity were you employed? What did you do there? A. I managed his farm and horse department and the whole place.

Q. And had you had any experience before going there as a horseman? A. Yes, sir.

Q. Whereabouts? A. In America and England both.

Q. And what was that experience? A. Well, thirty-five years, all my life with horses.

30 Q. What were you doing with horses when you were with them? A. Well, looking after them, exercising them when a boy and looking after horses when I grew up too heavy to exercise.

Q. Did you ever have anything to do with taking care of horses on a stock farm? A. Yes, sir.

Q. Other than Mr. Fanshawe? A. Yes, sir.

40 Q. Where? A. I was on Mr. Fanshawe's place when Mr. Appleby owned it for eighteen or nineteen years; and down at Lexington, Kentucky, for Mr. Belmont, a little over three years.

George Hughes, for Plaintiff—Direct

Q. What Belmont? A. Mr. Perry Belmont; and when Mr. Pierre Lorillard owned Rancocas five or six years.

Q. You were with him five or six years? A. Yes, sir.

Q. Now are you familiar with the proper care to be given horses which are boarded or pastured on a livestock farm? A. Yes, sir. 10

Q. Marshmallow, the mare, you have testified, was at Mr. Fanshawe's place? A. Yes, sir.

Q. And where was she kept? A. Well, she was in the barn nights in the winter-time, any time the weather was bad, and out in the daytime, and any time the weather was bad in the winter they was not out in the daytime; and the bad days they never was let out, in any cold storms, snow storms or rain storms. When the weather was good and after the first or second week in May, they was left out. 20

Q. And continued out how long? A. Well, they was out all the summer unless there came a bad storm, it got cold or a rain storm, they was brought up.

Q. And is that the way the other horses were kept? A. That is the way all the mares was.

Q. And why not the horses? A. Well, all the horses on the place was that way except mares with colts, and they was brought up in the day-time. 30

Q. Now in regard to feeding what do you say? A. Well, that mare wasn't fed that summer, as she was barren, when she was out in the field, only grass.

Q. She was not in foal? A. No, sir.

Q. Now when she was in foal. A. She was brought up and fed twice a day and the colt was fed twice a day, two boxes. The mare was tied up; she had one manger and the colt had the other one. 40

George Hughes, for Plaintiff—Direct

Q. Now the fields where the mare was kept, what kind of fields were they? A. They was different sizes, fifteen acres, ten, as big as thirty-five acres sometimes.

Q. Were they enclosed or not? A. All fenced in, sir.

10 Q. What kind of fence? A. Chestnut rails and locust posts.

Q. Did you ever see any broken rails or splintered rails or anything of that kind? A. Well, I have seen broken rails.

Q. I mean splintered rails. A. I have seen rails broke but we fixed them right up as soon as we noticed them. But there was no broken rails in the lot where the mare was.

20 Q. Was there any water in these lots where the mare was kept? A. Yes, there was a brook ran through.

Q. And water in the brook? A. Yes, sir.

Q. Does that apply to the time, to the months of May and June? A. No, sir; that mare was turned on different lots. The lot she was in when she got hurt, I suppose she was in there about fifteen days. I couldn't tell you how many different lots she was in, because I changed them every eight or ten days from one lot to the other.

30 Q. Was there water in that field where she was fifteen days? A. Yes, water in every field on the place.

Q. Water that she could get at to drink? A. Yes, sir.

Q. What kind of pasture, good or bad? A. Good pasture, sir.

Q. What kind of care did you say this mare Marshmallow received while she was on Mr. Fanshawe's farm?

40 Mr. Wall: I object. He can't characterize it before he has told us what kind of care she did receive.

George Hughes, for Plaintiff—Direct

Mr. Applegate: He has told us everything else.

The Court: I think the objection is good, Mr. Applegate.

Mr. Applegate: I thought he had already told that she was kept in certain fields and what she was fed.

The Court: He did. 10

Mr. Applegate: I thought the gentleman's objection was that he had not yet told. I didn't understand the objection.

The Court: The objection was that he is asked now to characterize.

Mr. Applegate: And not having told?

The Court: Yes.

Q. When did you first know that the mare was hurt? A. I couldn't tell you the day of the month now, I forget; but the mares was looked at every day. 20

Q. Pardon me, please. It was in June that she was hurt? A. It was in June, sometime in June. I don't just remember now.

Q. And where did you discover her? A. Well, I was driving a hay rake that I was afraid to let the boy drive and I went down the lane and I noticed this mare didn't act quite right.

Q. What way was she acting? A. Well, she was standing still and everything, but she didn't have the spring about her she always had. She was a highstrung mare and she never was very gentle. And this day she stood there with her head down and she didn't have the same appearance she always had every other day. And when I came back through this field I went along and I didn't go through the same gate where this mare was in, where I went through, I went back the other way, and I noticed her as I went along standing the same way, but the mare didn't seem to have any- 40

George Hughes, for Plaintiff—Direct

thing the matter with her, didn't look like she was hurt, just looked like she was a little wrong somewhere.

Q. And then what did you do? A. Then right after dinner I came down and drove in after my rake and drove in the lane and drove up to the mare and looked at her; but she didn't seem as though she had much the matter with her. And I
10 drove around on the other side of the mare and discovered that she had a puncture in her side, and then I brought her right up to the stable.

Q. Then what did you find after you brought her up? A. Well, I looked the wound all over, and washed it with creolin and took some veterinary cureall and absorbent cotton and poked it in the hole and then dusted iodoform all over the outside of it to keep the flies off; and it didn't seem as though she was hurt so very bad, the mare didn't,
20 not as though she was real bad hurt.

Q. Did you know at that time how big the wound was? A. No, sir.

Q. Then what did you do? A. Then the next day I telephoned. I didn't telephone but my daughter telephoned to Mrs. Rawlins and she was in New York.

Q. Never mind that. As the result of some telephone communication— Oh, you attempted to get
30 Mrs. Rawlins and couldn't; is that it? A. Yes.

Q. Then what? A. I never got her that day, but the next day I got her.

Q. On the phone? A. On the telephone.

Q. What did you say to her? A. I told her about the mare, how she was hurt, about this cut in her side.

Q. What did she say? A. Well, she didn't seem to think it was very serious.

Q. What did she say, is the question, Mr.
40 Hughes? A. She asked me what I had done for

George Hughes, for Plaintiff—Direct

it and I told her what I had done for it; and she wanted to know if she should get a doctor.

Q. What did you tell her? A. I didn't know what to tell her but I told her, well, she could suit herself. She didn't get no doctor.

Q. The second day? A. The next day is the day she got the doctor. I telephoned again to her. That was the day she got the doctor.

10

Q. And then Dr. Gall came out, did he? A. Yes, sir.

Q. Now before the day that you found the mare was looking a little out of condition had you or had you not seen that mare every day? A. Well, I hadn't seen her myself, but other men—

Q. One moment. You hadn't seen her yourself. Now that is enough. How often did you see her before she was hurt? A. Oh, I would see her two or three times a week, and some weeks every day in the week. In fact, you could see them every day from the stables, all the horses.

20

Q. How many men did you have under you whose duty it was to look after the horses? A. Well, there was four men; every one of them.

Q. From your experience that you have related here, Mr. Hughes, as a horseman, when horses were placed out for board and pasture as Mrs. Rawlin's horse was under the evidence, is it customary to take those horses to the barn every night and feed them? A. Not in the summer time, sir, not in bad weather. I mean only in bad weather, they are put there in the barn.

30

Q. During bad weather did you take up Marsh-mallow? A. Yes, sir.

Q. Do you know, or are you familiar with the value of racehorses, thoroughbreds? A. Well, there is a big difference—

Q. No, are you familiar, is the question; do you know? A. Yes, I know.

40

George Hughes, for Plaintiff—Direct

Q. How do you know? A. Well, I know from experience and sales I have read about.

Q. What has been your experience? A. And of the sales I have attended.

Q. You have attended sales, have you? A. Yes, sir.

Q. Have you ever bought thoroughbreds? A. No, sir.

Q. Either for yourself or other people? A. Yes, I have bought them for other people, not for myself.

Q. Have you ever sold them for other people? A. Yes, sir.

Q. What, in your judgment, was the mare Marshmallow worth? A. Well, she was worth then, that year, I should judge, somewheres around \$300, the way horses were selling then.

Q. Did you attend the sale at which Marshmallow was purchased by Mrs. Rawlins? A. Yes, sir.

Q. And where was it? A. It was on the Gideon and Daly Farm, which was leased by Mr. E. R. Thomas, in Holmdel.

Q. Do you know who conducted the sale, who had charge of it? A. I think Mr. Easton was the auctioneer.

Q. Who is Mr. Easton? A. Mr. William Easton. He has died now.

Q. Who was he? A. He was the auctioneer at the sale of the American thoroughbreds. He was the auctioneer at the sale.

Q. And were you at the sale at the time it opened? A. Yes, sir.

Q. Was the sheriff of the county or any of his deputies there? A. I don't know anything about that, sir.

Q. Do you know what kind of a sale it was? A. No, I don't know what kind of a sale it was, sir.

*George Hughes, for Plaintiff—Cross**Cross Examination by Mr. Wall:*

Q. When you say that the mare was only worth \$300, what do you base it on? A. Well, I base it on the way horses were selling that year, sir. They have went up like anything since then.

Q. They have what? A. They have went up since then.

Q. What year are you talking about? A. The year that mare got killed thoroughbred horses was very cheap. 10

Q. What would such a horse have been worth now? A. Well, I don't know what they would be worth now. They have gone up since then. These here horses is high, thoroughbred horses, because racing has come back.

Q. Would it influence your judgment of her value if you were told she had had a foal that sold for \$1,500? A. Not at that time, sir; not at that present time it wouldn't, not if I was told that same year. 20

Q. Well, if you learned that previous to that year she had had two colts, one of which sold for \$1,000 and the other for \$1,500, would you still say that she was only worth \$300? A. That same year I would, sir.

Q. You would, eh? A. In them times, the way horses were selling that year.

Q. Those were pretty hard times, weren't they? A. Well, it was hard to give a thoroughbred away, let alone sell them. 30

Q. Don't you know, as a matter of fact, that she was being held to breed for some English races? A. No, sir.

Q. Didn't know that? A. No, sir.

Q. When did you see that horse before she was injured? The first time before she was injured now that you saw the horse. A. I seen that mare 40

George Hughes, for Plaintiff—Cross

some weeks every day a week and some weeks three and four days a week.

(Question repeated.)

A. Well, I couldn't say for sure.

Q. Was it two weeks or a month? A. Oh, no; it was maybe the day before. I couldn't say.

10 Q. Not maybe; when? A. Well, it is so long I have forgotten.

Q. You don't know, do you? A. Yes, I do know.

Q. Then tell us. A I seen her very nearly every day in the week.

By the Court:

Q. The question is when you first saw this mare Marshmallow to know her before the accident. A. I couldn't say for sure.

20 By Mr. Wall:

Q. You don't remember when you first saw her? A. I couldn't say positive whether it was yesterday—

Q. When next before the accident did you? A. As it happened today I couldn't say I seen the mare yesterday or the day before; I couldn't say for certain.

30 Q. It wasn't any part of your duty to go and examine the mare, was it? A. No, it wasn't my duty to go and examine the mare.

Q. And you say it was not necessary to even take her in at all unless there was a storm at that season of the year, don't you? A. It was not necessary to bring her in the barn in nice weather.

Q. Well, to take her out of the field? A. But there was some men on that farm seeing them horses every day, twice a day, morning and night.

40 Q. But you don't know who it was, do you? A. I can't say sure who it was, but some of the men on the place.

George Hughes, for Plaintiff—Cross

Q. Well, you didn't, anyhow, did you? A. Well, now I couldn't say for sure whether I seen her yesterday or the day before it happened.

Q. Now, when you testified before in this case do you recollect being asked the question with reference to Marshmallow and the other horses: "When were they fed? A. In the winter time and early spring and late fall"? A. Yes, sir.

10

Q. You made that answer, didn't you? A. Oh; yes, sir; I said that.

Q. It was true, wasn't it? A. Yes, sir.

Q. You didn't say anything in that last trial about taking them in in times of storm or anything like that, did you? A. I wasn't asked anything about it.

Q. As a matter of fact, Mr. Hughes, you don't say now that the mare Marshmallow was ever taken in in a storm? You say that there was a rule that they should be taken in; isn't that right? A. Yes. I didn't say that she was took in, because I don't know what day she was, but I say that was the rule, if there was any storms during that time the mare was took in.

20

Q. Now, do you say that \$20 a month is the customary price charged in Monmouth County for the keep of a thoroughbred horse at a stock farm when she does not get anything but grass? Is that your testimony? A. Well, when you are boarding a horse by the year—

30

Q. No, you can answer that question yes or no. A. Yes, it is customary, \$20 a month.

Q. For that kind of care? A. If you take a horse to board for a man by the year they charge him \$20 a month, and in the summertime as a rule they don't get grain, only the mares that have got colts.

Q. Did you have any talk with Mr. Rawlins or Mrs. Rawlins about the terms under which the

40

George Hughes, for Plaintiff—Cross

horse was left with you? A. When they first came there?

Q. Yes. A. Well, Mrs. Rawlins sent them mares there through Mr. Fanshawe's daughter.

Q. I am asking whether you did or did not have any talk with them. Did you? A. No, I didn't have no talk with Mr. Rawlins or Mrs. Rawlins.

10 Q. Now you said that you could see the horses from the barn. How far was the barn from the field that Marshmallow was in the day that she was hurt? A. I should judge about three-eighths of a mile.

Q. Three-eighths of a mile? A. Yes, sir.

20 Q. And that look at her from the barn was one of the examinations that you spoke of, was it? That was one of the regular examinations of the horses? A. No, sir; you walk by the barn, you could see every horse in the field all the way over the place.

Q. And you think as an expert horseman looking at a horse three-eighths of a mile away is a fair way to examine her to see whether she is in condition or not, eh? A. No, you can't tell about good condition. You can tell whether they act as if there was something wrong with them at that distance.

30 Q. It has to be something pretty bad, doesn't it, to show at three-eighths of a mile away with the naked eye? Well, if you know a horse and know his ways and see him act different from what you ever saw him before you will know something is the matter with them.

Q. Now that is the way you took care of them at that time? A. Well, I went down in the fields and looked them all over, but the man looked them over every day, some of the men.

40 Q. And when do you recollect ever seeing Marshmallow between the time she went in there

George Hughes, for Plaintiff—Cross

and the time she was killed? A. Oh, I seen her every day, sir.

Q. This three-eighths of a mile view; that is what you mean, isn't it? A. No, I seen her every day, as far as seeing the mare.

Q. Well, when you say you saw her, how near to her were you? A. Well, I could see the mare just as plain from the barn as I can see anybody 10
in this courthouse right now.

Q. Good eyes. A. No, not any better than anybody else's, but I could see that mare anyhow in the field, just as you can see a horse driving along the road.

Q. Do you recollect saying that the injury was on her right side in the previous trial? A. No, sir; I don't recollect.

Q. Where was it? A. Well, now, the injury was on the off side of the mare. 20

Q. Well, which is the off side? A. The off side is that side, if the horse has got his head this way, that is what you call the off side, this way. (Indicating.)

Q. Then you would say that the off side was the right side, wouldn't you? A. This is supposed to be the right side of a horse. If you go up to a horse you go up on this side. That is supposed to be the right; as you get on a horse's back you get on on that side. 30

Q. You just play you were a horse and tell us which is your right and which is your left. A. This side here is the right side. (Indicating.) The near side is supposed to be the right side.

Q. You said it was on the off side? A. On the off side of the mare, yes.

Q. The wound was on the off side? A. Yes, I am pretty sure it was on the off side.

Q. Now, then, Mr. Hughes, aren't you wrong when you say that Mrs. Rawlins didn't get a vet 40

George Hughes, for Plaintiff—Cross

just as soon as you asked her to? A. No, sir. Now I mostly forgot, it has been so long—

Q. Isn't this what happened? Didn't you try to call her up and you couldn't get her? A. I tried twice one day.

Q. And you couldn't get her. Now then the next day you got her? A. Yes, the next day.

10 Q. And just as soon as you got her she got a vet; isn't that the truth of it? A. No, sir; not that day.

Q. Didn't he come that night? A. No, sir; not that first day, I don't think.

Q. When did you first learn that the mare was injured? A. When I brought that mare up out of the field, the day I noticed her I brought her up out of the field; I noticed her about half-past ten or eleven o'clock, I think.

20 Q. When did you telephone Mrs. Rawlins? A. And that next day I telephoned Mrs. Rawlins, at least my daughter did through my telephone, telling her twice.

Q. Why didn't you telephone her the first day or the day of the injury? A. Because the mare was injured before and looked twice as bad as that, and Mrs. Rawlins never called there. I attended her myself and I took eighteen stitches in her. They never had any veterinary. I sewed
30 eighteen stitches in the mare's quarter.

Q. Not a serious wound? A. Well, that serious that it took eighteen stitches to sew that up.

Q. Just in the muscle? A. Yes.

Q. Why didn't you, when you couldn't get Mrs. Rawlins on the telephone, send somebody? It was only a mile and a half, was it? A. I didn't suppose it was serious. I was like the veterinary surgeon that looked at it first, I didn't think there
40 was much the matter with it. When the veterinary first looked at it he thought it didn't amount to anything.

George Hughes, for Plaintiff—Cross

Q. Did you ever know of the sale of a brood mare eleven years old, that had had two colts, one of which sold for \$1,000 and the other for \$1,500, that sold for \$300, as low as that? A. Did I ever know of that?

Q. Yes. A. Yes, and knowed them to bring \$25.

Q. Which one? A. Now, I can't just think of the name, but I could easy find out for you. I don't know the name now. It would take me too long to look that up. I haven't got the book here. All the thoroughbreds wasn't in that book. That is only one volume of the stud book. There are ten or twelve volumes of the stud book. That is only one. 10

Q. You understand my question? A. Yes, I understood you.

Q. I asked you if you ever knew of a brood mare ten or eleven years old that had had two colts, one of which brought \$1,500 and the other \$1,000, which had sold as low as \$300. A. Yes, sir. 20

Q. You are sure you have, have you? A. Oh, I know several.

Q. You can't tell us any names? A. I can't think of the mare's name now, but I know several.

Q. You can't tell us any names? A. I can't think of the mare's name now, but I know several.

Q. Take your time and think of just one of them. A. Well, I can't think, but if I had time I could show you, but I ain't got time the way I am fixed right now here. I could show you where they brought \$25 and had colts that would bring twice as much, \$3,000, and the mare brought \$25 afterwards. 30

Q. You don't know how that mare Marshmallow was injured, do you? A. No, sir; I haven't got the slightest idea.

Q. Did you see how deep the wound was? A. Yes, sir. 40

Florence Dean, for Defendant—Direct

Q. Were you there when the doctor probed it?

A. I was holding the mare by the head when he probed it when I seen how deep it was, when he opened it. I don't know whether it went that deep when he was cutting it with the knife or when he started it or not.

10 Q. You didn't really think he was going to cut unnecessarily deep into the mare, did you? A. No, when the mare was dead. That is, it was when he opened the mare when she was dead. That is when I knew how deep it was. But I say, I don't know whether it was that deep before the mare died or whether he made it that deep opening the mare; see? That is what I mean.

20 FLORENCE DEAN, sworn for defendant.

Direct Examination by Mr. Wall:

Q. Where do you live, Mr. Dean? A. Shrewsbury.

Q. Are you working for Mr. Fanshawe? A. No, sir.

Q. Did you used to work for him? A. Yes, sir.

Q. Were you working for him at the time that the mare Marshmallow was hurt? A. Yes, sir.

30 Q. Do you know what kind of care and attention the mare got? A. Yes, sir.

Q. What? A. As good care as could be expected for a brood mare.

Q. No, where was she kept? A. She was kept in the field, about a fourteen acre field.

Q. What sort of pasture in that field? A. Good pasture.

Q. Was there water in the field? A. Running water, clear running water.

40 Q. Of what time are you speaking, how long be-

Florence Dean, for Defendant—Direct

fore the accident or the injury? Was she kept in the same field all the time? A. No, she was not.

Q. Well, was she kept in different fields? A. Yes, sir.

Q. Well, was the pasture in all the fields good?

A. The pasture in all the fields all over the farm.

Q. Was there running water in all the fields?

A. Yes, sir.

Q. Were these fields enclosed? Did they have a fence around them? A. All enclosed with post and rail fence.

10

Q. Did you know the mare Marshmallow when you saw her? A. Yes, sir.

Q. How often did you see her? A. Well, I couldn't say how often I seen her, but I know I seen her the day she was hurt anyhow.

Q. How do you know you saw her the day she was hurt? A. The day before she was hurt.

Q. You mean the day before she was found hurt?

20

A. Yes, sir.

Q. Did you see her the day before? A. I seen her the day before. I walked through the field.

Q. How was she then? A. She looked all right.

Q. Did you notice anything wrong about her?

A. No, sir.

Q. What was her condition as to weight? A. Her condition was all right, so far as I could see.

Q. At the time you saw her the day before the accident did she appear to be suffering from any injury? A. No, she was pasturing around the field the same as all the rest of the horses.

30

Q. How often would you see the horses in the fields? A. Well, I don't know; sometimes I would see them twice a day. I would be going from one place to another, you know. I was cowman and I would be going from the corn field, across that field with the cows to bring the cows in.

Q. Some days you said you would see them

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Florence Dean, for Defendant—Direct

twice a day. How often besides that did you see them? A. Sometimes I would go through that field. Then every time I went through the fields I would make it my business to go through the horses and see they were all right.

Q. How many times a week would you see the horses? A. Well, I couldn't say that.

10 Q. Well, not exactly but approximately. You have some idea, haven't you? A. Well, probably I would see them ten times a week. Probably I wouldn't see them more than five times a week.

Q. How long have you been familiar with horses? A. Oh, I have been familiar with horses very long.

Q. How long? A. I never worked in the stables till I went with Mr. Clyde.

20 Q. You never worked with horses until you worked for Mr. Clyde? A. Not racehorses. I worked with working horses, but not with racehorses.

Q. How many rails were there to the fences around the field? A. There was some of them four and some of them five.

30 Q. Do you know whether this mare Marshmallow was a quiet, gentle mare or whether she was unruly? A. Well, sometimes I would go through the field and she was coasting all around, and sometimes she would be pasturing all right.

Q. What do you mean? A. Going around the field.

Q. How going around, walking around? A. Why, galloping around.

Q. When one approached her, undertaking to pet her or anything of that kind, was she gentle or not? A. Oh, I don't know anything about that. I never led her only on one occasion.

40 Q. How many other horses were kept in the same field with the mare? A. I think there were four others.

Florence Dean, for Defendant—Cross

Q. Was she ever in a field all by herself, all alone? A. No, sir; not while I was there.

Q. Were you with Mr. Hughes when the mare was taken up to the box-stall? A. Yes, sir.

Q. After she was hurt? A. Yes, sir.

Q. What did Mr. Hughes do? A. Why, he got some warm water and washed and scraped it and then he got some stuff called creolin and washed her with that. 10

Q. Where did he keep her that night? A. He kept her in a box-stall.

Q. Do you know whether she was fed that night or not? A. No, sir.

Q. You don't know? A. No, sir.

Cross Examination by Mr. Wall:

Q. Mr. Dean, you said you were a cowman? A. Yes, sir. 20

Q. What do you mean by that? A. Well, I milk the cows and see to them night and morning.

Q. Your going through the field was to get to the cows where your business was? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And when you say you saw this mare sometimes as you went through the field you couldn't help but see her; is that right? A. Well, yes, in one sense that is right. In one sense I was authorized by Mr. Hughes every time I went through a field to examine the mares. 30

Q. Examine them? A. Yes, sir.

Q. What examination did you ever make of the mare Marshmallow? A. Nothing at all but walk through and see whether I could see anything wrong with them.

Q. How close were you to her? A. Well, I don't know how close I was now. It is pretty hard, a working man, to know like that a day afterwards. 40

Patrick Callery, for Plaintiff—Direct

I never thought it would be brought up this case anyhow.

Q. You testified in this case a year ago, didn't you? A. Yes, sir.

Q. And didn't you say on that occasion in answer to this question: "Did you see Marshmallow the day before?" A. Yes, sir.

10 Q. Just wait; I will read you the questions and answers and then you can say if you testified that way. "Did you see Marshmallow the day before? A. I did positive. I think it was Friday she was hurt. Q. How close were you to her the day before? A. Well, probably I might be two or three hundred yards away from her." You testified to that, didn't you, in that way? A. Well, I suppose I did if you say so.

20 (Adjourned till October 28, 1915, at 9:30 A. M.)

Freehold, N. J., October 28, 1915.

(Trial of the cause resumed at 9:30 A. M.)

PATRICK CALLERY, sworn for plaintiff.

30 *Direct Examination by Mr. Applegate:*

Q. Mr. Callery, in the year 1914 you were working for Mr. Fanshawe? A. Yes, sir.

Q. And what were your duties at that time? A. Taking care of the horses, sir.

Q. Did you know the mare Marshmallow? A. Yes, sir.

Q. She was on the place, was she? A. Yes, sir.

Q. Where was she kept on the place? A. Kept out in the fields in fine weather.

40 Q. And what about bad weather? A. She was took up to the stable.

Patrick Callery, for Plaintiff—Direct

Q. Do you know when she was turned out in the season? A. About the first or second week in May.

Q. And what sort of pasture did she have? A. Good pasture, sir.

Q. Other horses run with her? A. Yes, sir.

Q. How many in the field? A. Four and five.

Q. And what about water in the field? A. Running water. 10

Q. Brooks? A. Yes, sir.

Q. What sort of fences around the fields where she was kept? A. Post and rail fences.

Q. And while she was in the fields did you see her? A. Yes, sir.

Q. How often would you see her? A. Every day sometimes, sir; sometimes three and four times a day.

Q. How long before the injury was discovered did you see her? A. I wouldn't say, sir, to that. 20
I might see her the day before.

Mr. Wall: I move that that be stricken out.

The Court: It will be stricken out.

Q. Do you know what caused the injury to the mare? A. No, sir.

Q. Were you present when Mr. Hughes discovered the injury? A. No, sir.

Q. Did you see the wound in the mare? A. Yes, sir. 30

Q. Where was it? A. On her right side, I think. I wouldn't be sure now was it on her right side.

Q. And how big a wound was it? A. About a couple inches, sir.

Q. What was the depth of it? A. Long, about two inches long, sir.

Q. Well, was it a hole or a slit or what? A. It looked more like a hole than a slit, sir.

Q. The other horses that were in the field with this mare, do you know who owned those? A. Mr. Fanshawe, sir. 40

Patrick Callery, for Plaintiff—Direct

Q. Can you say whether or not the same care and attention was given the mare Marshmallow that was given Mr. Fanshawe's horses?

Mr. Wall: I object. That is not a true standard. He might have been willing to be careless with his own mares. That did not have any effect on the standard of his duty towards Mrs. Rawlins' mare.

10

The Court: Isn't that so, Mr. Applegate?

Mr. Applegate: I think, if your Honor please, that the cases seem to hold that a man is required to give the same care and attention to the animals that are in his charge as he gives to his own animals, and it is some evidence upon the question of the degree of care used, whether or not he gave the same care and attention.

20

(Objection sustained.)

(Objection noted for plaintiff as ground of appeal.)

Q. Do you know anything about the value of thoroughbreds? A. No, sir.

Q. You don't? A. No, sir.

Q. Any time when you looked at the horses, as you say, did you take hold of the mare Marshmallow and examine her, go over her? A. Well, sometimes, sir; not all the time, sir.

30

Q. Did you ever? A. Yes, sir.

Q. Why did you do that? A. Well, that was the rule, we would go and look at them, examine them, see that there was nothing the matter with them.

Q. Upon any occasion when you so examined this mare Marshmallow did you discover anything wrong with her?

40

Mr. Wall: I object to that as too general, not fixed as to time so that it would be of any evidential value as to this accident.

Patrick Callery, for Plaintiff—Cross

The Court: Well, it should be somewhere near the time, I suppose.

Q. Did you examine this mare as you have described at or about the time that she was discovered to have been injured? A. Well, maybe a few days before she was injured. I wouldn't say how many; maybe three or four days.

Q. Well, when you so examined her did you discover anything wrong with her? A. No, sir.

Q. What was her condition as to appearance? A. In good condition, sir.

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Cross Examination by Mr. Wall:

Q. Mr. Callery, you recollect testifying in this case before, don't you, when it was tried? A. Yes, sir.

Q. Now, on that occasion, calling your attention to page 41, on that occasion were you asked the following questions and did you make the following answers: "Q. She simply had been turned out in those fields with other horses since the first of May and had been eating grass? A. Yes, sir. Q. Do you remember the last time you actually went up to her and took hold of her and examined her? A. No, sir; I don't." Were you asked those questions, and did you make those answers? A. Yes, sir.

20

Q. And those answers were true? A. Yes, sir.

Q. "Did you do that at all while she was in the field? A. Not while she was in that field I don't think I did." Did you make that answer to that question? A. Yes, sir.

30

Q. Then on page 40: "Q. How long had she been out? A. She might have been in that field about fifteen days, maybe twenty days. Q. She had not been stabled in that time, had she? A. No, sir. Q. She had been fed no corn in that time,

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Patrick Callery, for Plaintiff—Redirect

had she? A. No, sir. Q. All she had was grass contained in the field; is that right? A. Yes, sir."

"Q. Did you examine her at any time during that fifteen days' period? A. I looked at them, sir, to see that they were all right. Q. But you didn't go over them, did you? A. No, sir. Q. Just go down in the field and look at the five or six
10 horses there and then go on to some other field; is that right? A. Yes, sir." Were you asked those questions and did you make those answers in reference to the mare Marshmallow on the previous trial? A. Yes, sir.

Q. And your answers were true? A. Yes, sir.

Redirect Examination by Mr. Applegate:

Q. Mr. Callery, referring to your examination on the previous trial were you asked this ques-
20 tion and did you answer: "Q. Did you at any time while she was in the field take hold of her? A. Yes, sir." Did you so testify? A. Yes, sir.

Q. Were you also asked this question: "And examine her? A. Yes, sir." Did you so answer? A. Yes, sir.

Q. Were you also asked this question: "How long would you say that the last time you did that was before you found that the mare was hurt?
30 A. We would always look at them, sir, when we would go in the fields." Did you so answer? A. Yes, sir.

By Mr. Wall:

Q. It was supposed to be a part of your duties, wasn't it, Mr. Callery, for you to look that mare over frequently and examine her, take hold of her? A. Yes, sir.

Emerson E. Burnett, for Plaintiff—Direct

EMERSON E. BURNETT, sworn for plaintiff.

Direct Examination by Mr. Applegate:

Q. Mr. Burnett, whereabouts do you live? A. I live on the Silver Brook Farm at present, Shrewsbury, New Jersey.

Q. And that is Mr. Fanshawe's place? A. Yes, sir.

Q. Are you employed by any one? A. By Mr. Thomas Clyde and Mr. J. E. Weidner.

Q. Are you in the employ of Mr. Fanshawe in any way? A. No, sir.

Q. Did you ever work for Mr. Thomas? A. Yes, sir.

Q. Did Mr. Thomas at any time own the mare Marshmallow? A. Yes, sir.

Q. And who bought that mare of Mr. Thomas? A. Mrs. Rawlins.

Q. And do you know when it was that the mare was purchased? A. In September, 1908.

Q. How old was the mare? A. The mare then, I think, as near as I can remember, was six years old.

Q. How long have you been in the horse business? A. Thirty years.

Q. And have you bought and sold thoroughbreds? A. Yes, sir.

Q. How often? A. Well, I have sold them every time I got a chance.

Q. How many would you say that you had bought? A. Well, that would be hard to say, the exact number.

Q. Well, approximately; whether one or five or what. A. Well, I should say I have handled probably two hundred.

Q. And have you sold as many as that? A. At different times, yes, altogether, yes, probably.

Q. Had you known the mare Marshmallow long? A. For about three years.

10

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40

Emerson E. Burnett, for Plaintiff—Direct

Q. Do you know where Mr. Thomas bought her or got her? A. I do not. He bought her somewhere in New York, around the racetracks.

Q. What was that mare worth at the time she was sold to Mrs. Rawlins?

Mr. Wall: I object. That is not the test. The test is at the time of her death.

10

(Objection overruled.)

Q. What was the value of that mare at the time she was sold to Mrs. Rawlins? A. I should say about \$300.

Q. Did you see the mare while she was at Mr. Fanshawe's place? A. No, sir.

20 Q. If the mare was worth \$300 in 1906, from your knowledge, from your experience in selling and buying thoroughbreds and handling thoroughbreds, what do you say as to whether or not she was worth any more than \$300 in 1913? A. Well, I don't think she would be on account of increasing age.

Q. Are you familiar with the matter of boarding and pasturing horses? A. Yes, sir.

Q. Thoroughbreds particularly? A. Yes, sir.

Q. Have you done that in your business? A. Doing that now.

30 Q. And what is the practice or custom in Monmouth County in regard to the keeping of thoroughbreds on a stock farm, as to whether or not they are turned out in the summer and kept turned out during the good weather? A. Mares that have no foals are usually turned out about the first of May and kept out until the first of November or later if the weather is not bad.

Q. Are they brought up at night? A. No, sir.

Q. Left out, are they? A. They are left out. They are turned out.

40 Q. Are they fed grain during that time? A. No, sir.

Emerson E. Burnett, for Plaintiff—Cross

Q. What is the prevailing price, if you know, or do you know the prevailing price for pasturing thoroughbreds? A. \$20 a month for brood mares is the prevailing price.

Q. And does that price include grain or not? Is that price including feeding the horses or not? A. In the winter, yes, but not in the summer.

Cross Examination by Mr. Wall:

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Q. Mr. Burnett, how old do you say this mare was in 1914? A. In 1914 I should say she was fourteen or fifteen years of age, as near as I can tell.

Q. And your ideas of her value, your testimony as to her value, are based on the fact that you assume she was thirteen or fourteen years old at that time? A. Yes, sir.

Q. Now does she get more valuable or less valuable as she grows older? A. Less. 20

Q. Well, would she have been more valuable if she had been say twelve years old instead of thirteen? A. Yes, sir.

Q. How much more would you have said that her value would have been? A. Every year of increasing age will take so much off their value.

Q. Could you say how much with a mare like that? A. No, I couldn't say exactly in dollars and cents just how much it would be. 30

Q. Well, you take something off for her age, don't you? A. Yes, sir.

Q. Well, now, why can't you put something on for her age, if it were less than that? Do you see what I mean? A. No, not exactly.

Q. Well, you said that she was worth \$300 because she was thirteen or fourteen years old? A. Yes.

Q. If she had been younger she would have been worth more? A. Yes. 40

Emerson E. Burnett, for Plaintiff—Cross

Q. Well, now you take something off because she has gotten older? A. Well, if I was buying horses I would take off a hundred dollars for each year anyhow.

Q. You would? A. Yes, sir.

Q. Well, now, that is so; you would put it on or take it off? A. Yes, sir. It would work both ways.

10

Q. Well, now, suppose the American Stud Book said she was born in 1903. You would not set up your notion of how old she was against the stud book, would you? A. That is correct, the American Stud Book is correct.

Q. Now I call your attention to page 729 of the stud book. A. I don't dispute the stud book.

Q. In which it reads that the mare Marshmallow was born in 1903. A. Yes, I take that as correct.

20

Q. Well, now, if she was born in 1903 in 1914 she would be eleven years old by actual elapsed time? A. Yes.

Q. Is it a fact that they count the age of a horse a little different way, that they count them as— A. They count horses' ages from the 1st day of January. If a horse is born on the 31st day of December he is a year old the 1st day of January. They rate horses' ages from January 1st.

30

Q. Then that being so you would rate her, with this information before you, either ten or eleven years old? A. If she was foaled in 1903 she would be eleven years old.

Q. She would? A. Yes, sir.

Q. Eleven years old? A. Yes, sir.

40

Q. Then your valuation of \$300, being for a fourteen year old horse, and you saying that you ought to add on \$100 for each year, the difference between fourteen and eleven being three you would have to make the value of the horse \$600, after looking at that stud book? A. Owing altogether to what horse it was.

Emerson E. Burnett, for Plaintiff—Cross

Q. Well, now, owing altogether? A. Yes, sir.

Q. Isn't it Marshmallow we are talking about?

A. Yes.

Q. Have we been talking about any other horse?

A. No, I said as a rule they take off \$100 for each year.

Q. You said you would do it, not they. A. Well, I mean outside, in the horse business.

10

Q. Well, take a hundred dollars a year, take it off because it is Marshmallow. A. What?

Q. What do you say now? A. I say \$300.

Q. And you don't care anything for the \$100 a year for the three years? A. No.

Q. Well, does that same principle follow all your testimony through? A. I have told you.

Q. Is all your testimony built on that principle?

A. Which principle.

Q. Heads I win, tails you lose. Now are you boarding any thoroughbred horses? A. Yes. 20

Q. Now? A. Yes, sir.

Q. And you charge \$20 a month? A. I do.

Q. And you let them run loose in the fields? A. Yes.

Q. And you don't exercise any supervision over them? A. I see them every day.

Q. Do you examine them every day? A. I walk through the fields and look over them.

Q. Do you take hold of them? A. No, sir. 30

Q. How close do you get to them? A. Close enough to see them.

Q. How close is that? A. As close as from here to you.

Q. And you give them such an examination as would instantly reveal to you any serious hurt that they had? A. Yes, sir.

Q. And you do that daily? A. Every day, sir.

Q. And you don't leave them to a cowman or some other man, you do that yourself? A. Not all the time. I send a man through the fields. 40

Emerson E. Burnett, for Plaintiff—Cross

Q. You send a man through the fields? A. Yes, sent one this morning.

Q. And that was because you were at court testifying as to values, eh? A. No, sir.

Q. Taking off and putting on? A. No, sir.

Q. Well, yesterday did you examine the horses?

A. I did.

10 Q. And the day before? A. Yes, sir.

Q. And you did it yourself each time? A. Yes, sir.

Q. You are a real farmer, not a gentleman farmer, aren't you? A. No, I am not a gentleman farmer.

Q. There is a good deal of difference in real farmers and gentleman farmers, isn't there? A. I think there is.

20 Q. How much would you take off from the value of an examination as made by a real farmer as compared with one made by a gentleman farmer? (Objected to. Objection sustained.)

Q. Now \$20 a month— A. Yes, sir.

30 Q. —For the care of a thoroughbred horse, and in the month of June in Monmouth County, you would consider that you were giving full value to the owner of that thoroughbred horse if you put the horse in a field and just let this mare, for instance, eat grass and get no grain at all? A. In those fields down there; yes, sir.

Q. You would consider that that was all that the owner of the horse was entitled to in the way of food for that thoroughbred horse? A. On that place; yes, sir.

Q. This is your place now? A. Yes, sir.

Q. Different from other places? A. It is quite different from others.

W. S. Fanshawe (recalled), for Plaintiff—Direct

WILLIAM S. FANSHAWE, recalled for plaintiff.

Direct Examination by Mr. Applegate:

Q. Mr. Fanshawe, you testified yesterday? A. Yes, sir.

Q. You are the owner of the place where the Marshmallow mare was kept? A. Yes, sir.

Q. And when Mrs. Rawlins' horses, including the mare Marshmallow, were sent to your place did you have any arrangement with Mrs. Rawlins as to the manner of keeping them or not? A. The manner of keeping them? 10

Q. Yes. A. No.

Q. No special arrangement made? A. As to price, yes.

Q. That was what? A. \$20 a month.

Q. And at the time that you agreed upon the price was there anything said as to the manner of keeping the mare, how she was to be fed or what she was to be fed? A. No. 20

Q. Are you familiar with thoroughbreds? A. Yes, sir.

Q. And have you bought and sold thoroughbreds? A. Yes, sir.

Q. How long? A. Oh, a great many years.

Q. And are you familiar with the manner of keeping thoroughbreds on a stockfarm? A. Yes, sir. 30

Q. You have kept them on your farm, have you? A. Yes, sir.

Q. You own horses as well as others? A. Yes.

Q. What is the practice, Mr. Fanshawe, in Monmouth County in regard to the keeping of thoroughbreds on a stockfarm as to whether or not thoroughbreds are turned out in the pasture about the first of May and remain out during good weather? 40

Mr. Wall: I object. This witness testified

W. S. Fanshawe (recalled), for Plaintiff—Direct

on his first examination that he was not in the business of boarding horses, that he did this as a favor to Mrs. Rawlins at \$20 a month.

(Objection overruled.)

Mr. Wall: He has not shown that he has ever done it at any other place.

10

The Court: Objection will be noted.

(Objection noted for defendant as ground of appeal.)

(Question repeated.)

A. Brood mares are always turned out in the summertime, because it is better for them to get grass than it is to keep them up in the stable and feed them. They are brought in in bad weather and taken care of, but the grass is all they need.
20 If they didn't get grass they couldn't raise foal.

Q. Did you see the mare Marshmallow at or about the time she was injured or the injury was discovered? A. Before it was discovered?

Q. Yes. A. No, I saw her just after she was brought up and it was discovered.

Q. How long before the injury was discovered had you seen her? A. Oh, I don't know.

Mr. Wall: He has already testified to that, your Honor.

30

The Court: I think only upon your cross examination.

Q. Did Mrs. Rawlins come to your place while the mare Marshmallow was at your farm? A. Oh, yes.

Q. Frequently or not? A. Frequently.

Q. And do you remember what time of the year that was, whether it was after the mare was turned out to pasture? A. Oh, all the time, she came
40 there at all times.

W. S. Fanshawe (recalled), for Plaintiff—Direct

Q. Well, did she come there while the mare was out to pasture? A. Yes.

Q. Did she see the mare at pasture? A. Certainly.

Q. Do you know if she knew whether or not the mare was kept at pasture and not brought in nights? Do you know it, is the question, whether she knew or not? A. She must have known—

10

Q. The question is do you know. Yes or no. A. I couldn't answer anything about what Mrs. Rawlins' knew. She ought to have known it; she was there.

Mr. Wall: I object and ask that be stricken out.

The Court: That part will be stricken out.

Q. Did she ever have any talk with you, Mr. Fanshawe, in regard to leaving the mare out at pasture or in regard to bringing her in at night? A. Never.

20

Q. At the time that the mare Marshmallow was turned out, as testified, about the first week in May, to pasture, were there any other horses of Mrs. Rawlins there at that time? A. One other, I think.

Q. One other of Mrs. Rawlins? A. Yes.

Q. And what did you do in respect to that horse? Was that horse kept out at pasture? A. Yes.

30

Q. And not brought in at nights or not? A. Yes.

Q. When you saw the mare after the accident or after the injury was discovered do you know what condition the mare was in, irrespective of the wound? A. Very good condition.

Q. Have you bought and sold thoroughbreds? A. Yes.

Q. Many of them? A. Very many.

Q. Covering a period of how long? A. Fifteen or sixteen years; twenty years, I should think.

40

W. S. Fanshawe. (recalled), for Plaintiff—Cross

Q. What was the value of the mare Marshmallow? A. I should say about \$200.

Q. Prior to the bringing of this suit by you against Mrs. Rawlins did Mrs. Rawlins ever make any claim or demand upon you for payment for the mare Marshmallow? A. No.

10 *Cross Examination by Mr. Wall:*

Q. Mr. Fanshawe, in valuing the mare at \$200 her age enters into it, of course? A. Not with me.

Q. It doesn't, eh? A. Well, I think a mare, a brood mare, from eight to twelve years old is worth just the same. It wouldn't make any difference to me as to her value covering the period.

20 Q. How do you figure the value? How do you arrive at that valuation for her? A. I arrive at the valuation because I bought about that time mares which were infinitely better bred than Marshmallow and which had winners that sold for very high prices, for that price, \$200.

Q. Name the best one you bought. A. I bought the mare Gracelle; she was the dam of Turk, which sold at auction for \$200.

Q. How old was she? A. She was, I think, about that age.

30 Q. What age? A. In the neighborhood of nine or ten. I can't, owning fifty mares, carry every age in my mind. I can give you other instances, if you wish.

Q. I was not asking you to carry the ages in mind. I was asking you for the basis of your value. A. Well, I have given you it.

Q. For this particular horse? A. She was a young mare, Gracelle was.

40 Q. You didn't take into account at all that this mare Marshmallow was first cousin of Orby, that won the English Derby, did you? A. I don't think it makes the slightest difference. If you are

W. S. Fanshawe (recalled), for Plaintiff—Cross

familiar with thoroughbreds you know that yourself.

Q. Well, now just leave me out of it. I play no part in this at all. Your testimony is that it doesn't enter in any way whatsoever into the value of a brood mare that she is of a strain that has had Derby winners in that strain? A. No, I don't think it does.

10

Q. It does not? A. No.

Q. In other words, a brood mare which is kept for the purpose of selling her foals has no additional value because her foals have the finest strains known to the turf in their viens? A. It is a very wide difference, you know, when you take the dam of a mare. This mare Marshmallow didn't come out of a mare who bred a Derby winner, she came out of a connection of a mare who bred a Derby winner.

20

Q. The sister? A. Yes, a full sister. It has got nothing to do with it.

Q. You don't consider that a close connection? A. No, sir; not in breeding.

Q. Don't you know that in a mare the maternal strain is considered a more important strain in the breeding of horses than the male strain? A. I certainly do not.

Q. Don't you know that the Arabs in breeding their horses are indifferent as to the stallion and they think that it makes so little difference about the male strain that they only follow it through the female strain? Don't you know that? A. I don't know anything about that. The Arab horses have always been refused entry in the stud book because of their breeding.

30

Q. Then your idea is that the Arab horses are no good; is that it? A. No, I don't say that. They are not high bred horses; they are not entered in the stud book.

40

W. S. Fanshawe (recalled), for Plaintiff—Cross

Q. What is the Hambletonian strain in this country? A. Trotting horses. I don't know anything at all about it.

Q. Isn't that an Arab strain? A. I don't know.

Q. You do know, Mr. Fanshawe, that it is an Arab strain, don't you? A. I do not, no.

Q. Never heard of Hambletonian? A. Yes, but
10 I don't know anything about the strain. The Hambletonians are trotting horses. I know nothing whatever of trotting horses.

Q. Do you mean to say that there is a great strain of horses in which there is not a strain of Arab blood? A. I don't know anything about it.

Q. You don't know whether there is an Arab strain in any fine horses? A. Not that I know of. The stud book doesn't tell you so.

Q. Now, then, you testified that Mrs. Rawlins
20 did not say anything in particular about the kind of care that was to be given to this horse. A. I didn't mean to say particular. She didn't say anything at all.

The Court: That is what he said, she said nothing.

Q. Very good, she said nothing. Is it your idea
30 that because she said nothing that she was not entitled to have good care taken of that horse? A. She had excellent care taken of her.

Q. I didn't ask you that. A. She was entitled to it and she had it.

Mr. Wall: I ask that that be stricken out, that she had it.

The Court: That part should be stricken out.

Q. You were not in the business of boarding
40 horses, were you? A. No.

Q. Where had you boarded horses? A. I had

W. S. Fanshawe (recalled), for Plaintiff—Cross

boarded them at different places around Holmdel. I don't remember the names of the farms.

Q. Had you ever boarded thoroughbred horses?

A. Yes. You mean I had boarded my own horses out?

Q. Out, yes. A. That is right, yes.

Q. And your testimony is that all that is necessary in summer with a brood mare is simply to turn it out in pasturage; and how about examination? What do you say as to that? A. If the pasturage is good that is all that is necessary. 10

Q. You need not examine it at all? A. Oh, no. A horse ought to be looked to once in a while to see if anything has happened to them.

Q. How often? A. Once every few days.

Q. You would not be able to make it any closer than that? A. I think that is sufficient.

Q. Once in every— A. Few days. 20

Q. Well, few; two or three? A. Yes, two or three.

Q. Now then, you spoke of the fact that this mare was in good condition, that she had grass. Having grass had nothing to do with this injury, did it? A. Oh, no.

Q. Well, that doesn't make any difference one way or the other, whether she had grass or not, does it? A. No. I don't know what you mean.

Q. I am trying to find out from you— A. I understood you to ask me what was the general condition of the mare, whether she was in good condition or not, irrespective of the wound. 30

Q. I ask you what her good condition, so far as her feeding was concerned, has to do with this injury. A. Nothing whatever.

Q. Now suppose she had been fed grain twice a day; that in order to feed her grain a man would have had to go so near her that he would have been apt to find out anything the matter 40

W. S. Fanshawe (recalled), for Plaintiff—Cross

with her if there had been anything the matter with her, wouldn't he? A. No.

Q. He wouldn't, eh? A. No.

Q. The examination is not aided one way or the other whether he goes near her or not? A. You asked me if to feed her grain he would have to go near enough to make an examination. I
10 said no.

Q. What is the method of feeding grain? A. You feed brood mares in the field where they are turned out, you have long troughs put along in them and the grain is put in those troughs and the mares come up and eat out of these long troughs that are on stilts.

Q. And if she was taken up to the barn, as some of the witnesses testified should have been done, would the man who was to feed her corn
20 then have necessarily had a better opportunity for examination? A. If the man took the mare and led her up and put her in the barn and led her out and didn't see it he certainly would not be attending to his duty.

Q. Mrs. Rawlins paid you about \$1,400 for the keep of horses before this last bill, didn't she?

(Objected to. Objection sustained.)

Mr. Wall: Before your Honor overrules
30 that, going back to the defendant's testimony as to what was said between him and Mrs. Rawlins, now these are the relations of the parties in dealing with the boarding of horses. Now it certainly enters into those relations if previous to this time Mrs. Rawlins had paid him \$1,400 for the care of horses. It shows that these parties had dealt with one another in the regular way. But just to start it from
40 the time when this particular mare was put there—or at least his questions seemed to me

W. S. Fanshawe (recalled), for Plaintiff—Cross

to imply that to my mind—that it went back and took in the time for which Mrs. Rawlins paid \$1,400. It seems to me that I am entitled to bring out just the bare fact that she had paid him that.

The Court: An exception will be noted.

(Objection noted for defendant as ground of appeal.)

10

Q. You had had dealings with Mrs. Rawlins before the mare Marshmallow was put in your field, hadn't you? A. I never had any dealings with Mrs. Rawlins.

Q. What do you mean by that? A. Exactly what I say.

Q. Did you ever make any money from her? A. For the board of these horses she has paid, yes, at different times.

20

Q. Well, doesn't that come under the name of dealings in Wall Street, to take money for services? A. I never came in contact with Mrs. Rawlins. Everything that she did about it was done through my manager.

Q. But it was her money just the same, wasn't it? A. Exactly. I presume so. I don't know.

By the Court:

Q. Do you know whether after the injury to Marshmallow was discovered there was any examination made of this pasture? A. I know that there was.

30

Q. Did you make it? A. No, I went down with my manager and walked all around it to see if we could find out, ascertain how the wound had occurred, but we couldn't.

40

Clifton Barrett, for Plaintiff—Direct

CLIFTON BARRETT, Sworn for the plaintiff.

Direct Examination by Mr. Applegate:

Q. Where do you live, Mr. Barrett? A. Well, I have been in New York for about twelve years.

Q. Where are you living now? A. My home is in Kentucky.

10 Q. What is your business? A. I am assistant to the President of the Hudson & Manhattan at present, this tunnel system in New York.

Q. Are you familiar with horses? A. Yes, I have been raised with them all my life.

Q. What sort of horses? A. Running horses and trotting horses.

20 Q. What has been your experience? A. I have a farm near Louisville, Kentucky, that my mother owned, but I have always had the control of it. I have some horses myself and I have had a good deal of experience in buying horses for others. I have never done it as a business, never made a five cent piece out of it, but I have always done it. In 1906 Mr. Fanshawe was in business in a banking house in New York and one morning he came to me and asked me—

Q. Never mind that. Are you familiar with thoroughbreds? A. Yes, sir.

30 Q. Have you bought and sold thoroughbreds? A. I have bought a good many; I have had very little to do with the selling of them. I have bought them for friends.

Q. And did you know the mare Marshmallow? A. Yes, sir; many times.

Q. When did you first see her? A. The first I heard of Marshmallow—

Q. No, when did you first see her? A. I first saw her on Mr. Fanshawe's place.

40 Q. When was that? A. Well, I was down—I usually go down to Mr. Fanshawe's—

Clifton Barrett, for Plaintiff—Direct

Q. Can't you answer briefly? When was it, about? A. The end of 1912, I would say, or 1913, the beginning of 1913.

Q. Where was she when you saw her? A. She was out in a small paddock. It was in the winter time when I first saw her and she was then brought up at night and on sunny days in the winter she was led out. There was some snow on the ground. 10

Q. What was the value of Marshmallow? A. Well, I can only go—

Q. No, can't you just give us the amount if you know? A. I would say \$250.

Q. Are you familiar with the manner of keeping thoroughbreds on a stock farm? A. Well, I know how it is done, how they do it in Kentucky.

Mr. Wall: I object, it is a different climate and different conditions. It is too remote. 20

Q. Do you know how they do it in Monmouth County? A. Yes, I know how they do it on Mr. Fanshawe's farm.

Q. Do you know, is the question. A. Yes, I have seen it myself. Always got up at daylight—

(Objected to.)

The Court: I think it is unobjectionable whether or not he knows.

Mr. Wall: Well, as long as he does not go ahead and say— 30

The Court: No, he must not do that.

Q. Is your knowledge based upon any other experience than that relating to the way Mr. Fanshawe keeps them? A. Yes.

Q. What other experience? A. I have had horses of my own.

Q. I mean in Monmouth County I am speaking of now. A. I have seen how they do it on other farms, over at Mr. Whitney's place. 40

Clifton Barrett, for Plaintiff—Cross

Q. Any other place? A. Not in Monmouth County that I know of.

Mr. Wall: Now I would like to ask a question about Mr. Whitney's place.

The Court: It may be answered.

Cross Examination by Mr. Wall:

10 Q. Mr. Barrett, when was the question of the valuation of Marshmallow first called to your attention? A. I don't want to say too much.

Q. All you have got to say is the truth. A. Well, I will say the truth, sir.

Q. I am not talking about that. A. She was given to Mr. Thomas by Mr. Hitchcock because she was no account as a racehorse.

Mr. Wall: I object and ask that that be stricken out.

20 The Court: The answer will be stricken out.

Q. What is the difficulty about it, Mr. Barrett? Speak out. Go ahead. A. Well, you haven't asked me the question.

Q. Yes, you haven't answered it.

The Court: The question is when the question of the value of this mare was first called to your attention.

30 A. Well, I noticed in the newspaper that the mare Marshmallow brought \$130 at the Thomas sale, with a colt at her side.

Q. That was the first time? A. Yes.

Q. Do you know anything about the Thomas sale? A. Yes. I was not present, but I knew, as every man looks over the results of a sale that is interested in thoroughbreds.

40 Q. Did you know Thomas? A. Yes, sir. I had not an intimate acquaintance, but I knew him. He married—

Clifton Barrett, for Plaintiff—Cross

Q. Where was the sale held? A. Held at Holmdel, I think, or out in Monmouth County here.

Q. Do you know what kind of a sale it was? A. Yes, sir.

Q. What kind of a sale was it? A. Well, it was a sale, you know E. R. Thomas failed and it was a sale conducted by Mr. Easton, who is the best auction thoroughbred man in America. It was under the auspices of the Fasic-Tipton Company, but Easton held the auction and he was the best man on thoroughbreds in America. 10

Q. It was a sale for the benefit of creditors? A. Yes, I take it I think it was.

Q. Now does the fact that the mare Marshmallow had had one colt that brought \$1,500 and another colt that brought \$1,000 to your mind impart any value whatsoever to her? A. Yes, sir. 20

Q. Did you know those facts when you put that value on? A. I have seen her, looked her record over in the stud book many a time.

Q. Did you know those facts when you put that value on her? A. Yes, sir.

Q. Well, now, it cost, we will say, \$20 a month to keep a thoroughbred horse; that is right, isn't it? A. Well, that is in Monmouth County.

Q. Well, assume then that it costs \$20. A. Yes, sir. 30

Q. And a horse ten or fifteen years old has an expectancy of ten or fifteen years, hasn't it, anyhow, of life; probably live that long, won't it? A. Now you want to know how I get at the value?

Q. No, I am not asking about the value now. A. Well, I have got to answer you another way. The mare had been barren two years before she was hurt.

Mr. Wall: I ask that that be stricken out.

The Court: Strike it out. 40

Clifton Barrett, for Plaintiff—Cross

Q. What is your business now? A. I am assistant to the President of the Hudson & Manhattan Railroad.

Q. How long have you been engaged in that business? A. I have been with them since the road was built, since Mr. McAdoo left there.

10 Q. Are you a friend of Mr. Fanshawe? A. I am, sir, a friend of Mr. and Mrs. Rawlins too.

Q. You are? A. I am.

Q. Do you know the age of a horse, the probable age of a horse? A. Yes, I can tell a horse's age.

Q. The probable life of a horse? A. Yes.

Q. What is the probable life of a horse? A. Well, now, brood mares, I can go into history, sir, and say trotting horses twenty years old—

20 Q. I am asking you generally. A dog lives thirteen years, doesn't it? How long does a horse live on the same kind of average? A. It depends altogether on how long they live; no way of telling. Some good brood mares have colts at twenty years old.

30 Q. Do you mean to say that in your experience as assistant to the President of the Hudson & Manhattan Railroad that you never have had anything to do with the study of averages? A. I have nothing to do with the study of averages. There is no way of telling about a mare.

Q. Do you mean to say that there is no average expectancy for the life of a horse or a mare? Is that your testimony? A. You couldn't expect, you couldn't count on this mare, because she had been barren two years.

Q. I am not asking you about this mare.

40 The Court: You are not asked anything about the probability of her getting colts. The question embraces simply the expectancy of her life, how long she would probably live; that is it.

Clifton Barrett, for Plaintiff—Cross

A. No, sir; I know nothing about it.

Q. You don't know? A. No, sir.

Q. You don't know whether a horse lives two hundred years, as a turtle does, or whether a horse is more apt to have an expectancy of twenty-five or thirty years, do you? A. I can tell you only that some horses live to be as old as men do and some horses die young.

10

Q. They are the ones with good lives. And that is as near to it as you can get, eh? A. Well, I understood the best racehorse this country ever saw lived to be twenty-six. I can only tell you that.

Q. That is all you can tell us about averages for the life of a horse? A. Yes. Mr. Whitney lost a mare here two days ago five years old, one of the best mares he had. How can I tell?

Q. And you assume to get up there before this jury to give the valuation on horses when you have no knowledge whatsoever as to the average life of a horse?

20

The Court: Is that intended to be a question?

Mr. Wall: Yes, I am asking that.

A. Your horse insurance companies will tell you all that, but I don't know because I never examined that.

Q. So your valuation of \$250 is based on the idea that this horse would probably live how long?

30

A. No, sir; my valuation is not based on any age.

Q. It is not? Age has nothing to do with it? A. No, sir; not with me.

Q. Now what is there that is so peculiar, Mr. Barrett, about a brood mare, that it is different from anything else in the universe? Now if a man could go out and buy a device that in the short space of four or five years would net him \$2,000 or \$3,500, and all it cost to run that device was \$20

40

Thomas Field, for Plaintiff—Direct

a month, and it was still in good condition, why wouldn't you naturally suppose that it would be worth something? A. Yes, sir; but a brood mare—

Q. Now here we call it a brood mare, but here is a device that God has made that has brought some things into the world, one of them that sold for
10 \$1,500 and the other for \$2,000, and it is still a brood mare that is only ten or eleven years old. What is there that changes it from everything else that we have to do with and makes it so that it is worth nothing? A. The right kind of brood mare there is very little difference whether she is from eight years old to fourteen; they are worth just about the same. They are in their prime condition.

Q. Does your work actually keep you in the tunnel? A. Yes, sir.

20 Q. Do you have to stay in the tunnel a great part of the time? A. Yes, stay there about seven hours a day.

THOMAS FIELD, Sworn for plaintiff.

Direct Examination by Mr. Applegate:

30 Q. Mr. Field, where do you reside? A. Middle-town.

Q. And about how far from Shrewsbury? A. About four miles.

Q. What is your business? A. I am a farmer.

Q. Anything else? A. And keep boarding horses.

Q. How long have you been in that business? A. Oh, twenty years.

Q. Have you had thoroughbreds as well as other kinds of horses? A. Yes, sir.

40 Q. Do you know the manner of keeping thor-

Thomas Field, for Plaintiff—Direct

oughbreds on stock farms in Monmouth County?

A. Yes.

Q. In regard to whether they are turned out certain parts of the year and left out during good weather? A. They are turned out during the summer months.

Q. Do you know is the question. A. Yes.

Q. Now what is the practice? A. Why, mares that haven't got colts, we turn them out in the summer time and let them go if there is good pasture; or when there is good pasture we always let them be out. 10

Q. Do you bring them in at night? A. Not unless there comes a bad storm.

Q. Do you feed them grain? A. Not without the horse is not doing well.

Q. What is the prevailing charge charged for such keep? A. We get \$20 for thoroughbreds. 20

Q. \$20 a month? A. Yes, sir.

Q. In regard to looking the horses over that are on your place. A. Well, I generally take a trip around every day and look at them or else send a man.

Q. What? A. I either look over them myself every morning or else send a man to look at them.

Q. When you say you go and look them over what do you mean by that? How close do you get to them? A. Just right around among them, just look them over. 30

Q. Examine them? A. If a horse is sick you can tell by looking at them very quickly.

Cross Examination by Mr. Wall:

Q. You said \$20 for a thoroughbred. Why is the price for a thoroughbred higher? A. Well, I judge they are more valuable and need more attention than another horse.

Q. What kind of attention? A. Well, going 40

Thomas Field, for Plaintiff—Direct

and looking them over. Thoroughbreds don't run as quiet as other horses.

Q. And they need more care in every way, don't they? A. Yes, sir.

Q. Your idea is that they ought to be looked over pretty carefully once a day? A. Yes, it is a good thing to look them over, yes.

10 Q. That is what you say? A. As a general thing; yes, sir; either I or one of the men.

Q. Well, I mean you do it or see that your man does it? A. Yes, sir.

Both sides rest.

Mr. Wall: Now I presume, your Honor, in this kind of a case that I would have the close, as the real issue here—there are two suits, practically—

20 The Court: That was my object in asking you whether there was any question about the plaintiff's account, that you required proof of it.

Mr. Wall: Oh, no, I did not require proof of the plaintiff's account.

The Court: Well, I so understood from what you stated. I asked you if the plaintiff's account was admitted and you did not say that it was.

30 Mr. Applegate: The case has been tried on that theory.

Mr. Wall: It was admitted.

Mr. Applegate: No, that we have proven the value of the keep of the mare.

40 Mr. Wall: As I see it, there are two branches of the case. We have not disputed the fact that \$20 a month was the proper price for the care of a thoroughbred mare, if she got the kind of care that \$20 called for; and we have not disputed one single question as to this \$1,500 that they claim, so far as

Thomas Field, for Plaintiff—Direct

computation of it goes, so far as the days that he charged for. To all that we say yes, that is true; they would be entitled to the \$1,500 if they had taken proper care of this mare Marshmallow. They did not take proper care of her; she was worth \$2,500. So we say give him the \$1,500 that they say on that score and give us our \$2,500 for the value of the mare, or \$900 difference. Now if we had disputed the items what would we have disputed? Why, we would have said that the kind of care that you gave those horses and charged \$20 for, you ought not to get it on any of the other mares. But we have not said a word about it. The only thing that I held back on when your Honor spoke to me was that I said we did not get the kind of care for this mare. The others we did not say anything about. Nothing happened to them. We did not get the kind of care for this mare that she ought to have had for \$20. They have not proved that account. We admit all that. They have not produced any books, there has not been a murmur about the account. Mr. Applegate asked me here in court, "Is it necessary to do anything more than that?" and he just put in the total.

Now that being the case, it seems to me that it would be manifestly a hardship to us to have them have the closing as to this question of the care of the mare Marshmallow. Of course as to everything else in the case except what has to do with Marshmallow they would be entitled to the opening and closing if they want that; but as to that we simply ought to have it. But I do not see that there is anything else in the case, because we have admitted all that. We admit that they are

Thomas Field, for Plaintiff—Direct

entitled to the \$1,500 on the one side and we say we are entitled to \$2,500 on the other, and the balance is \$973 in our favor.

The Court: With that admitted do you dispute the right of Mr. Wall to close?

10 Mr. Applegate: If your Honor please, irrespective of the question raised as to whether or not the book account has been admitted, it practically has been, I am free to confess that. Certainly now it has been, in view of the statement of counsel. Now this is an action brought to recover a certain amount of money. The defence is that "We should not pay this money because you negligently kept the mare, so that she died." Now it seems to have been held in this case that there was a certain duty on the part of the plaintiff in regard to the keep of that mare, in view of the fact that the plaintiff was what 20 is termed in the law an agister or bailee, with a certain duty with respect to taking reasonable and ordinary care of horses in his charge; and we must make out a prima facie case of care, as I read the cases; and the burden is on us of making our prima facie case. And after all the evidence is on both sides we must have sustained our duty of 30 making out a prima facie case. But the burden of proof of establishing the defence that we were negligent is upon the defendant, because the defendant's defence is an affirmative one, in the nature of a counterclaim; and like contributory negligence the burden is upon the defendant of establishing it. But after all the evidence is in, after the case is closed, while the burden of proof has shifted, yet I think that the burden is still on the 40 plaintiff of establishing that he has the right

Thomas Field, for Plaintiff—Direct

to recover. Now if that is true then it seems to me, irrespective of the question of account, we have the right to close the argument of the case.

(Mr. Wall replies.)

The Court: There would be no question in this case but that if the pleadings admitted the plaintiff's affirmative case, or if at the beginning of the case the plaintiff's bill were admitted and the only question left was the question of whether or not the defendant should succeed in his counterclaim, but that the defendant would have the right to reply. But the perplexity which I now have is brought about by the suggestion which I made at the opening of this argument, for the purpose of ascertaining just the exact status which would be occupied by the two sides in such emergency. I asked counsel whether or not the plaintiff's bill was admitted, and I did not understand that such an admission was made. However, with the plaintiff's bill now admitted, then I cannot see what different situation there would be than if the plaintiff's bill had been admitted in the pleadings or at the outset of the case. The question is whether or not the defendant shall succeed with her counterclaim. That is the sole question in the case by virtue of this admission now made by Mr. Wall, her attorney; and the burden of proof being upon her, that being the affirmative of the case now, I think Mr. Wall is entitled to reply.

(Objection noted for plaintiff as ground of appeal.)

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Gentlemen, this suit when it was started by the plaintiff Mr. Fanshawe against Mrs. Rawlins was for a bill for the board and care of horses of Mrs. Rawlins upon his stock farm. I say when it was started. That is his present claim; that is the claim as it now stands; and it is admitted by Mrs. Rawlins in open court here that she owes to Mr.

10 Fanshawe the amount of that bill, which is \$1,526.95, with interest from July 10, 1914, amounting to \$119.10, making altogether \$1,646.05. And perhaps it would be well for at least one of the members of the jury, if you have a pencil and paper, to take down that amount. That is the amount that Mrs. Rawlins admits she owes Mr. Fanshawe, and if nothing else appeared in this case it would be the duty of the court to direct

20 you to return a verdict against Mrs. Rawlins and in favor of Mr. Fanshawe for that amount, \$1,646.05.

But the defendant has interposed what it called a counter-claim, a claim against Mr. Fanshawe, alleging that Mr. Fanshawe did not provide the horses with proper food, shelter and care. That, however,—that is, the fact that proper food was not provided,—is not an element to be considered by you in this case, because the failure to provide food is not the basis of the defendant's claim

30 against Mr. Fanshawe; and therefore, notwithstanding the fact that there has been considerable evidence given in this case as to the proper method of feeding a horse or a mare under these circumstances, it should have no bearing upon your determination of this case except in its relation, perhaps, to what may be proper care, such as the examination and inspection of horses, and enabling or permitting more careful examination and inspection. But even upon that point Mr.

40 Fanshawe says that when brood mares are

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grained, when they are given grain, that such grain is fed by standing troughs in the field, and that no closer inspection is had of them than is ordinarily made when they are at pasture.

The negligence complained of—and the word negligence is the proper word to use, because if the defendant is entitled to recover upon her counter-claim it must appear that Mr. Fanshawe, or rather, his employees, for whose actions he was responsible, were negligent; and the negligence of which they complain is that by reason of the plaintiff's lack of shelter and care the mare died on or about the 28th day of June, 1914. It is, as you will observe, for the neglect on the part of Mr. Fanshawe or his employees to provide proper shelter and care for this mare that they seek to recover damages for her death, for her value at the time of her death, from Mr. Fanshawe. And, gentlemen, if you find that to be established, that is, that the death of this mare was due to the negligent shelter and care, to negligently caring for this horse or failing to shelter the horse properly, if you find that fact by a preponderance of the evidence, that is, by the greater weight of the evidence in the case—for the burden of establishing that claim by evidence, that is, that the plaintiff failed to give this mare proper shelter and care, is upon the defendant—then if that resulted in the death of the mare the defendant is entitled to have deducted from the amount of Mr Fanshawe's bill the value of the mare; or, if that value was greater than the amount of Mr. Fanshawe's bill, then she is entitled to a verdict against him for the excess of value above the amount of his bill.

The measure of duty of Mr. Fanshawe has been passed upon by our highest court in this very case. Our Court of Errors and Appeals have said that Mr. Fanshawe was the bailee of this mare and as

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such was under a legal duty to exercise reasonable care for her safety and when sick or injured to give her such treatment as reasonable care and skill would dictate, or promptly and with reasonable diligence notify the owner that the mare had been injured, so that the owner might take measures for her safety and relief.

- 10 Has it been shown by the greater weight of the evidence that he did not perform that duty? There is no contention as a basis of damage in this case, as I have before suggested, that Mr. Fanshawe did not provide sufficient food. I have already suggested the only importance of that testimony in the case. Nor is there any contention that she did not receive the right kind of food or that her general condition was not good at the time she was injured, no contention of that.
- 20 The only contention, as I have before suggested, was that she died because of the failure of Mr. Fanshawe to see that she was properly sheltered and cared for. By caring for would mean properly examined and inspected according to the practice in that locality of caring for horses of that class.

- It appears that this mare was turned out at the time her injury was discovered in a fifteen acre pasture fields, which all the witnesses who testify upon that point say was good pasture and well watered; that is, that there was running water in the field; that fact is not denied in the case; and
- 30 George Hughes, the manager at that time for Mr. Fanshawe, says that on June 24, 1914, while driving through the field or an adjoining field—you will remember which—with a hay rake, he noticed for the first time that Marshmallow did not look nor act quite right. He came back that way and noticed that same thing. This was in the forenoon. He says that in the afternoon he went down
- 40 into the field and made a more careful examination

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and found out she had a cut on her right side. Right here, gentlemen, I think it well to state that there is no proof in this case, it does not appear anywhere in the case how this mare received this injury. She evidently received it in this pasture or in some other pasture. She had been in this pasture, I think the evidence states, about fifteen days. However, your recollection of the testimony is to be brought to bear upon your consideration of the facts of the case rather than that of the court. And Mr. Fanshawe says that after learning of the injury to this mare they went down to the pasture field and went around it and examined it and could not discover anything which would cause such an injury to the mare. 10

Hughes says that when he discovered this condition of the mare he then drove her up to the barn and put her in a box-stall; and I will describe to you his treatment of her in his own words. He says, "Well, I looked the wound all over, washed it with creolin and took some veterinary cureall and absorbent cotton and poked it in the hole and then dusted iodoform all over the outside of it to keep the flies off; and it didn't seem as though she was hurt so very bad, the mare didn't, not as though she was real bad hurt." He did not endeavor, apparently, that day to reach Mrs. Rawlins, but he says that the next day he made one, or I think he says two attempts, through his daughter, to reach Mrs. Rawlins, but was unable to get her on the telephone; that the next day he did get her on the telephone—this was on the 26th—and discussed with her the subject of sending up a veterinary. The result was that she did send a veterinary, Dr. Gall, who says that he made an examination that night. He said that was by lamplight and he describes the wound. He does not state that there was any lump upon the out- 30 40

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side, but he said it presented the appearance of a cut about an inch and a half or two inches long, from which some matter at that time was oozing; and he says that at that time, at this first examination, he was not impressed with the seriousness of the wound. The following day he came there and again made an examination of the wound, probed
10 it, he says, with his finger and with a probe and discovered it was a very deep wound. He let the matter out of it, which amounted in quantity to several quarts; and in this matter he says were maggots, indicating that the wound was of several days' standing.

There is some testimony on the part of the various witnesses who have been produced here that in the care of thoroughbreds it is the practice to go or send some one to look them over every day.
20 This does not appear to require a critical examination, but they say that the practice is to go into the field where the mares are and to look them over or send some one to look them over every day. Mr. Fanshawe's witnesses, Mr. Hughes and the man who describes himself as the cow man and another man who is the horseman, say that they received instructions, in going to and from other fields and through the fields where the mares were pasturing—and it appears from their testi-
30 mony that there were three or four other mares in the field with this one—to examine these mares, that is, as they expressed it, to look them over, and they say it was their practice to go two or three times a week. And they say that these mares, including Marshmallow, were looked over at least that many times and very frequently much oftener than that.

I shall not attempt, gentlemen to recite the
40 testimony in detail. It has been fully argued and you are the judges of the facts, not the court. It

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is the duty of the court to instruct the jury in the law applicable to the particular facts. That I have already done in this case partly. And it is for you to remember the facts and apply to them the law as it is defined to you by the court.

Now while the doctor does say that at the first examination he was not impressed with the seriousness of the wound, he does not say with any positiveness that even though the wound had been discovered and had been promptly reported to Mrs. Rawlins the mare would have recovered from the effects of it. But he did say that if he had realized the seriousness at first, that is, at his first visit, he thought he might have saved her on that occasion; but he says that he found upon this second visit the wound was a very deep wound, deeper than he could reach with his finger, and that he had to reach it with a probe, and that after this mare died there was a post-mortem examination from which it appeared that the lung was punctured to a depth of an inch and a half or two inches, he says. And he says that from a punctured lung an animal, a horse, very seldom recovers.

So, gentlemen, unless you find that the injury itself was caused through some negligence on the part of Mr. Fanshawe, then even though a mistake was made by Hughes in his subsequent care of this horse, even though he was careless, even though he was negligent, if you believe the horse would have died anyway as the result of the injury, then the defendant is not entitled to recover the value of her mare.

Now, gentlemen, if you decide that the plaintiff, Mr. Fanshawe, or his employees were negligent in the care of this mare, that is, in failing to go to the fields with sufficient frequency to examine and see their condition, if you find that to be estab-

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lished, or from any other reason involving care which would have discovered this injury, and that they failed to take such care as either to prevent the injury in the first place, if it could have been prevented by reasonable care, or to take such care of the mare after she was injured as would have resulted in saving her life, if it could have been saved, then you come to the consideration of the question of damages, and not until then. If you find that the defendant is entitled to recover against Mr. Fanshawe and to have set off against the amount which is admittedly due to him the value of the mare, then you should consider the testimony with reference to her value at the time she died.

Dr. Gall, to whose testimony I have already called your attention in another matter, says that he has been a veterinary surgeon for some years, having practiced one year in New York and a number of years in Monmouth County; that he has had considerable experience with the treatment of thoroughbred horses and that he thinks, he says, he knows their value; and he gives it as his opinion that the value of this mare at the time she died was \$2,500. But upon cross-examination he admits that Mr. Rawlins in a conversation with him told him, Gall, that that was the value of the mare. But he adds, "I thought she ought to be worth that." Now Dr. Gall's opinion, in order to be of value, must be his own opinion; it must not be the opinion of Mr. Rawlins. It is a matter of common knowledge and experience that we are often apt to value our own property higher than others who are disinterested are apt to value it. So to the extent that Dr. Gall's opinion is his own opinion and you find he is qualified to give an opinion, it is entitled to be considered by you and to that extent is entitled to weight.

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James Cooley, who says that he is the polo manager of the Meadowbrook Hunt Club, and who at first said that he was acquainted with the value of polo ponies, subsequently thought, he said, that he was acquainted with the value of thoroughbreds; and he gave it as his opinion that this mare was worth at that time \$3,000. That is the actual evidence of value I recall on the part of the plaintiff. If there was other you will remember and consider it. 10

George Hughes, to whose testimony I have adverted, and who says, as I have before stated, that he was the manager for Mr. Fanshawe at that time, and who has been among thoroughbred horses for a great many years, says that in his opinion the mare was worth at that time \$300. Mr. Emerson Burnett, who had been many years, he says, familiar with thoroughbred horses, gives it as his opinion that the mare was worth about \$300. Mr. Fanshawe himself has told you what experience he has had with thoroughbred horses and gives it as his opinion that the value was \$200. But in considering and weighing Mr. Fanshawe's testimony you have a right, of course, to take into consideration with that experience the fact that he is an interested party in this suit. Clifton Barrett, who says that he is the assistant to the President of the Hudson & Manhattan Railway Company, and who says that he has been familiar with thoroughbred horses in Kentucky, gives it as his opinion that the value was \$250. 20 30

Now there crept into the testimony in this case, through the witness Barrett, a statement regarding the sale of this mare Marshmallow. It also came into the case at the time Mr. Cooley was giving his testimony. The court struck it out and whatever Mr. Cooley said, by reason of its having been stricken out, must be entirely disregarded by 40

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the jury. I told you that at the time, you will remember. But Mr. Barrett said that he knew about the Thomas sale. He said that Mr. Thomas to sell out and that he saw in a newspaper that Marsmallow at that sale sold for only \$130. Well, gentlemen, in the first place I ought to say that the fact that Mr. Barrett saw that in the newspaper is no proof that that was the amount for which she was sold. But he also said that this was a creditors' sale; that Mr. Thomas failed and that he thought that this was a creditors' sale. And if that be true, even though the mare had at that time sold for \$130., that would not be properly receivable as evidence of the value of the horse under those circumstances. A forced sale, a sheriff's sale, a price brought at a sheriff's sale or at a bankrupt sale or a creditors' sale, is not a proper criterion of value to be received in any case. I felt that I ought to call your attention to that, even though the testimony given by Mr. Burnett does not amount to a statement that that was the actual price for which Marshmallow sold at that sale.

Now, gentlemen, I have called your attention to the opinions of value given by Dr. Gall and by James Cooley on the one side and by Hughes and Burnett and Mr. Fanshawe. But you must remember that these are opinions. This is what is called opinion evidence; and opinions are only valuable where the person expressing that opinion has had experience and knowledge of the subject about which he testifies; and to the extent to which these various witnesses have had experience with this class of horses, that is, have had experience with the purchase and sale or have had knowledge of purchases and sales, all other things being equal, their testimony is entitled to weight to that extent. Of course I said all other things being

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equal. You have a right to take into consideration in that connection the interest of the witness testifying and any other matters which may affect his credibility.

As I have already stated I again repeat, that before you can set off against Mr. Fanshawe's claim the value of this horse it must appear either that his negligence or the negligence of his employees resulted in the injury itself or that their failure to take proper care of the mare after they discovered her injury resulted in her death.

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I have been requested by the plaintiff to charge that the burden of proving that the mare died as the result of negligence on the part of plaintiff rests upon the defendant. I have already charged you that.

I am requested by the defendant to charge:

1. If on the evidence the jury finds that the injury to the mare was an injury that in the ordinary course of things would not have happened if proper care had been used your verdict so far as the value of the mare is concerned must be for the defendant, unless the plaintiff explains the matter in such a way as to exonerate himself and his employees from blame.

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I charge you that. The second and third requests to charge I decline to charge except as I have already charged.

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(The defendant's requests refused by the court were as follows:)

2. The hole in the mare's side, in the absence of explanation by the plaintiff, raises a presumption of negligence. If there are any facts inconsistent with negligence it is the plaintiff's duty to prove them. The burden is on Mr. Fanshawe.

3. Unless the plaintiff has satisfied you by affirmative proof that he and his men used reasonable care in guarding the mare from injury your

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verdict on the counter-claim should be for the true value of the mare.

Defendant's exception.

The defendant excepts to the refusal of the court to charge requests 2 and 3 as requested.

Plaintiff's exceptions.

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The plaintiff excepts to that part of the charge wherein the court charged that the testimony of the witness Cooley as to the price the mare sold for at the Thomas sale cannot be considered, or whatever the court did say on that subject.

The plaintiff also excepts to the charge of the court that the testimony of the witness Burnett as to the price of the mare as seen by him in the newspaper is not proof that the mare sold for that price.

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The plaintiff also excepts to the charge that the price brought at a sheriff's sale or at auction is not a criterion of value.

The plaintiff also excepts to the court's charging the first request of the defendant as charged.

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