

New Jersey Court of Errors and Appeals.

I. WHILDEN MOORE,

Defendant in Error,

vs.

WILLIAM H. RICHARDSON,

ET AL,

Plaintiffs in Error.

On Error to Supreme Court.

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BRIEF OF WALTER H. BACON (WITH WHOM
WAS F. B. BRACKEN OF THE PHILADELPHIA BAR)
FOR PLAINTIFFS IN ERROR.

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STATEMENT OF FACTS.

In the fall of 1899, Moore lived at Bridgeton, N. J., and
Richardson & Baldwin lived at Baltimore, Md.

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They became acquainted in Washington in November or
December, 1899 and shortly thereafter entered into the agree-
ment, Exhibit P. 1, Pg. 234. This agreement was made in
Baltimore, at Mr. Baldwin's office. (Pg. 52)

It is in the following words, viz:—

“Bridgeton, N. J.

“This Agreement made the above date between I.
 “Whilden Moore, party of the first part, of Bridgeton, N. J.,
 “and Richardson and Baldwin, parties of the second part, of
 “Baltimore, Maryland.

“Party of the first part agrees to furnish parties of the sec-
 “ond part Cobs and driving horses under the following con-
 “ditions:

10 “That parties of the second part are to care, feed, sell and
 “assume the responsibility after horses have left the stable of
 “party of the first part. Party of the Second part agrees to
 “assume responsibility in case of accident or death to the
 “amount of actual cost to the party of first part horse and
 “horses; and it is also agreed by parties of the second part to
 “pay party of the first part upon the sale or exchange the
 “amount of actual cash as specified by parties, amount of ac-
 “tual cost as specified by parties of the first part, with one-
 “half of profit above amount of actual cost to party of first
 “part.

20 “And it is further understood, that the said horses are the
 “property of the party of first part until paid for as agreed up-
 “on as in this agreement. This contract is subject to annull-
 “ment at option of party of first part.

“Witness.

I. Whilden Moore (Seal)

“ (Seal)

“S. D. Richardson.

Richardson & Baldwin, (Seal)

(Pg. 234)

30 Under the terms of this agreement Moore shipped a num-
 ber of horses to Richardson & Baldwin, and on January 12,
 1900, Baldwin sent Moore an itemized statement of account,
 in full to January 1, 1900, showing transactions to that date
 and exhibiting a balance in Moore's favor of \$214., for which
 a check was enclosed and which check was accepted by Moore,
 without objection.

See Exhibit D 1, page 235, 236, 237 and testimony of Bald-
 win page 118, et seq.

On January 26, 1900 plaintiff filed an affidavit to procure a writ of attachment out of the Supreme Court, alleging a debt of \$10,000. to be due him from defendants, and a writ thereupon issued.

A number of horses were attached in possession of Baldwin at Jersey City, *en route* from Baltimore to New York City.

Of these, part were horses shipped by plaintiff and part were horses obtained from others. (Pgs. 38, 39.)

Plaintiff claims that there was a conversion by defendants, on or about January 25, 1900, of all the then unsold horses. 10 He bases his present right of action on such alleged conversion and sues for the recovery of a list price, arbitrarily fixed by him on all the horses shipped Richardson & Baldwin.

Defendants deny the conversion and insist that no right of action accrued to plaintiff until after the New York sale, which took place January 30, 1900.

They also dispute the measure of their liability to account for the horses received by them.

I

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THE LIMIT OF DEFENDANTS' LIABILITY UNDER THIS CONTRACT WAS "TO PAY PARTY OF THE FIRST PART UPON THE SALE OR EXCHANGE THE AMOUNT OF ACTUAL CASH AS SPECIFIED BY PARTIES, AMOUNT OF ACTUAL COST AS SPECIFIED BY PARTIES OF THE FIRST PART, WITH ONE-HALF OF PROFIT ABOVE AMOUNT OF ACTUAL COST TO PARTY OF FIRST PART."

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Defendants insist that this agreement was a contract of joint venture in horse dealing; under its terms defendants did not become liable to plaintiff for the cost price of the horses

unless they were sold or exchanged by defendants or unless they were injured by accident or died. In case of sale or exchange defendants' liability was to account to plaintiff for the actual cost price, plus one-half the profits above amount of actual cost to plaintiff; hence, in order to recover in this suit, plaintiff must prove the actual cost price of the horses and the fact of their sale or exchange by defendants.

Defendants so requested the Court to charge the jury, (Pg. 222) which request was refused, (Pg. 223) and exception thereto duly taken and sealed, (Pg. 229) and error assigned thereon (Pg. 247).

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The construction put upon the contract by the trial Court gave no meaning whatever to the word "actual." This word is used to modify the word "cost" in four places in the contract.

"Actual" means, "In full existence; real; denoting that which not merely can be, but is; opposed to potential, apparent, constructive and imaginary," *Century Dic.*

Hence, defendants were to pay plaintiff, on sale or exchange, the real cost to him of the horses; not some imaginary, speculative figure at which he had hoped they might be sold.

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There is not a word about any "list" price in the contract.

Defendants were dealing with a shrewd horse jockey and the words "actual cost" were deliberately used to limit their liability.

The charge of the Court on this point was as follows:

"If you do so find that, you may include in your verdict in
 "this case the valuation of the plaintiff's horses so converted.
 "The only evidence of value in such case is that fixed by these
 "parties in the agreement, the cost price; so that if you reach
 30 "the conclusion that I have stated, you may assess the value
 "at such cost price as specified by the plaintiff at the time of
 "the consignment of the horses to the defendants."

Exception was duly taken (Pg. 227) and error assigned (Pg. 244). See *Wyckoff v. Bodine*, 65 N. J. L., 95.

II.

THE COURT BELOW ERRED IN INSTRUCTING THE JURY THAT UNDER THE AGREEMENT THE PLAINTIFF WAS ENTITLED TO RECOVER THE COST PRICE OF HORSES AS FIXED BY THE AGREEMENT, WHICH HAD BEEN EXCHANGED BY THE DEFENDANTS FOR OTHER HORSES, THE LATTER NOT HAVING BEEN SOLD AND BEING IN THE POSSESSION OF THE DEFENDANTS AT THE TIME THE SUIT WAS BEGUN.

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The agreement under which the Court held that such recovery could be had is inartificially drawn, but it clearly permitted and authorized either the sale or the exchange of horses furnished by the plaintiff to the defendants, pursuant to their joint enterprise of horse dealing, and, with regard to settlement, the same language is made applicable to sales and exchanges, the agreement providing as follows:

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"And it is also agreed by parties of the second part to pay
 "party of the first part upon the *sale or exchange*, the amount
 "of actual cash as specified by parties, amount of actual cost as
 "specified by parties of the first part with one-half of profit
 "above amount of actual cost to party of first part."

Here, it is plain, that the parties contemplated profits, not only from the sale, but, also, as a result of the exchange of horses, and if so, they could not possibly have had in contemplation, that the defendants were obliged to account to the plaintiff for horses exchanged until the sale was made of the 30
 horses received by them in such exchanges and the profits to be divided thereby ascertained. If any other view be taken, then the defendants having the right to make exchanges could, by doing so in respect to all of the horses received from

the plaintiff, and paying the cost price thereof to the latter, deprive him of all profits in the enterprise. To carry out, therefore, the plain intention of the parties as shown by the agreement, it is necessary to hold that by exchanging horses furnished by plaintiff for other horses, as defendants were authorized to do under the agreement, there was simply a substitution of property, the horses received by defendants in exchange becoming the property of the plaintiff until finally disposed of by sale.

The settlement which was made by the defendants with the
 10 plaintiff on January 12th, 1900 (see Exhibit D 1, page 235) was based upon this interpretation of the agreement, and it is in evidence that the plaintiff took no exception to the statement furnished by the defendants in connection with this settlement, but received the check enclosed and referred to in said statement, without comment.

We submit, therefore, that our interpretation of the agreement was that upon which the parties themselves acted.

The Court was requested to charge the jury in accordance with this construction of the contract (Pg. 223, *et seq.*). The
 20 Court declined to so charge, and error was assigned on such refusal (Pg. 247, *et seq.*).

III.

CONVERSION NOT ESTABLISHED BY THE EVIDENCE.

The verdict rendered by the jury in this case necessarily in-
 30 volved the finding by them that the defendants had converted to their use, prior to the commencement of this suit, certain horses belonging to plaintiff, and it must be set aside, if, as we contend, there was no evidence offered by the plaintiff sufficient in law to establish such a conversion.

It is admitted that the horses, alleged to have been converted, had been consigned by the plaintiff under a written contract which was never annulled by the plaintiff, and that these horses were in defendants' custody and care, unsold, at the time of the commencement of this action.

The proposition was, however, advanced by the plaintiff and affirmed by the learned Trial Judge, that the evidence showed such a course of conduct on the part of defendants, with respect to these unsold horses, as would justify the jury in finding a conversion. As the plaintiff in an action for the conversion of property must recover, if at all, upon the strength of his own title, we submit that the proposition of plaintiff, as stated, cannot be successfully maintained for two reasons: 10

1st. The plaintiff wholly failed to establish his right to the possession of the horses at the time their alleged conversion took place, and

2nd. There was no evidence of a demand by the plaintiff, upon the defendants, for the horses, and a refusal by the latter to surrender them. 20

The following definition of conversion is given in the *A. & E. Ency. of Law*, (Vol. 26, 714): 20

"A conversion, in the sense of the law of trover, is any unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or by which one having the right of possession is deprived of all substantial use of the goods, permanently or temporarily."

And further it is stated by the same authority that,

"A plaintiff in trover must recover upon the strength of his own legal title; and there must be a concurrence both of the right of property, general or special, and of the actual possession or the *right to immediate possession*." (*Id.* p. 744.) 30

See also to same effect *Jones v. Miller*, 1 N. J. L. J. 113.

Cooley, in his work on Torts (*p. 521*), affirming the doctrine that plaintiff must show right of possession, says,

"In illustration of cases in which a showing of title is not sufficient, those may be instanced in which the owner has parted with the right of possession for a time under some contract of lease or bailment. In such a case, if the term has not expired, or the bailment been terminated at the time conversion took place, the owner cannot sue in trover, because not having had the right to possession, his only injury is in his reversionary interest, and in suing for that, he must count on the special case, and not on a conversion."

10 And again the same writer says (*Id. p. 527*),

"In any case the act of a bailee that shall amount to a conversion must be inconsistent with the bailment and known by him to be so. Therefore, a commission merchant, who continues to make sales after his authority has terminated, but without notice to him of the fact, is not guilty of conversion, but is liable only for an accounting." (*Citing Jones vs. Hodgkins, 61 Me. 480.*)

"Plaintiff must prove property in himself and a wrongful conversion."

20 *Bigelow Co. v. Heintz, 53 N. J. L., 74.*

"But it is fundamental in trover that the plaintiff must have had his right, whatever its character, at the time of the conversion."

Collins, J., in *Gaskill v. Barbour, 62 N. J. L., 530.*

"To constitute a conversion of goods there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel."

30 Depue, J. in *Woodside v. Adams, 40 N. J. L., 417*, quoted with approval by Dixon, J. in *Frome v. Dennis, 45 N. J. L., 515*. In the last mentioned case Mr. Justice Dixon, after citing English cases says,

"It is apparent, I think, from the perusal of these judg-

"ments, that every judge based his opinion of the defendants' guilt on the question whether he had done any act which amounted to a repudiation of the plaintiff's title, or to an exercise of dominion, i.e., ownership over the goods. Less than this would constitute a trespass, but not a conversion, so long as the character of the chattels remain unchanged."

Applying these principles to the present case, was plaintiff entitled to the possession of the horses at the time of their alleged conversion?

These horses had been consigned by plaintiff to defendants, under an agreement expressly providing that they were to remain the property of the plaintiff "until paid for," according to its terms, obviously meaning until they had been disposed of by the defendants. Under the agreement, therefore, the defendants become bailees of the horses for purposes of sale, and by the terms of the bailment, acquired a certain interest in the horses, they being entitled to receive as their only compensation for the care, keep and sale of the horses, a share of the profits to be realized from their sale. This compensation, consisting in a share of the profits, could be secured by the defendants only upon the sale of the horses, and it must, therefore, have been the intention of the parties to the agreement that all the horses consigned thereunder to defendants should continue to remain in their possession until the time of sale. To hold otherwise, would be a wholly inequitable interpretation of the agreement, since if the plaintiff were entitled to reclaim possession of the horses, without condition, at any time in advance of their sale, he had it in his power to deprive the defendants, not only of all compensation for expenses necessarily incurred by them under the agreement, but also of all advantage therefrom in the way of profits. Such a harsh interpretation of the agreement will surely not be enforced when its terms are plainly susceptible of the fair and reasonable interpretation for which we contend.

It is true, the agreement contains the provision,

"This contract is subject to annulment at option of party of first part,"

but this provision was evidently intended to have reference to the continuing obligation assumed by the plaintiff,

“to furnish parties of the second part cobs and driving “horses.”

It was a joint enterprize in horse dealing, upon which the parties had entered, the plaintiff engaging to furnish horses from time to time, to be sold by the defendants, or exchanged on joint account. By the provision quoted, the plaintiff reserved the right to withdraw from the enterprise and discontinue furnishing horses, but he was not by that provision enabled to deprive the defendants of all rights in respect to horses which had already been in fact consigned to them under the agreement. As to these, defendants acquired a certain interest, arising from the expense of their care and keep, and had the right to share in profits derived from their sale, and were, therefore, clearly entitled to detain the horses in their custody, until sold, or, at least, until plaintiff, if he wished to reclaim them, should reimburse the defendants for the expenses incurred in and about the care and custody of the horses. If this view of the agreement, based, as we consider it, upon sound reason and justice, be accepted, then it follows necessarily that at no time after the horses alleged to have been converted had been consigned to the defendants, was the plaintiff entitled to their possession, and he was not, therefore, in a position, under the authorities cited, to maintain an action against the defendants for their conversion. But even if the contrary view be taken, namely, that the defendants could, under the annulment clause of the contract, terminate it and thereupon acquire the right to the possession of horses consigned under it to defendants, the plaintiff is still in no better position, because the evidence did not show that he ever exercised his option to annul the contract, but, on the contrary negated the idea that there had been any such annulment. Thus a letter of the plaintiff referred to in the testimony as “Exhibit D 2”, (Pg 238) addressed to George S. Baldwin, one of the defendants, only three days before the commencement of the action, contained

the plaintiff's expressed intention to continue to furnish horses "on the same terms as at present."

In answer to the request of defendants' Counsel, to charge the jury as follows,

"The contract was not subject to annulment by the plaintiff at his option, unless he reimbursed defendants for the care and feed of the unsold horses in their hands at the time of the annulment,"

the learned Trial Judge said,

"I decline to charge that because there is no question in the case as to the annulment of the contract. That is not a question." (Pg 223) ¹⁰

Assuming, therefore, as we must under the evidence, that no annulment of the contract had been even attempted by the plaintiff, it follows that upon no interpretation of the contract whatever had he at any time become entitled to possession of the horses in question after they had been consigned to the defendants. Upon what theory then, did the learned Trial Judge permit the jury to find a conversion? In the course of his charge he said, ²⁰

"Of course—the horses consigned to the defendants by the plaintiff, so long as the contract was in existence and being recognized and so long as the defendants were in good faith acting under its provisions, they were lawfully in the possession of the defendants, although the plaintiff retained, as I said, the title to the property until there was a sale. Now so long as these relations of the parties to this property continued there could manifestly be no conversion established, and the plaintiff could not recover from the defendants for the value of the horses unsold, at cost price or otherwise; and before the plaintiff can recover in this suit for the value of the horses which were being shipped to New York to be sold and were in transit at the time of the attachment, he must satisfy you by the weight of the evidence that the defendants had changed their relationship toward these horses from that of custodians and care-takers for the purpose of sale under the agreement to that of trespassers who had de- ³⁰

"terminated to repudiate the terms of their agreement, which
 "required them, as you remember, to pay to the plaintiff, up-
 "on the sale or exchange, in cash, the actual cost price of the
 "horses as specified, and to proceed and sell the horses and
 "apply the proceeds to their own use. That is, it must ap-
 "pear that, instead of being custodians and caretakers under
 "the agreement, they must have repudiated its terms and
 "have proceeded with the view of selling the horses and apply-
 "ing the proceeds to their own use. In other words, in order
 "to justify such recovery by the plaintiff for the cost price of
 "horses then in transit to New York, you must find from the
 "evidence that the defendants had determined to repudiate the
 "plaintiff's right to this property and to be paid for the same
 10 "at the cost price in cash upon the sale thereof, and had de-
 "termined to appropriate this property, the horses and the
 "proceeds of the sale thereof, to their own uses and purposes
 "and that at the time of the attachment they were then mov-
 "ing the horses to New York with this unlawful purpose in
 "view."

From this language it clearly appears that the jury were al-
 lowed to find a verdict, not because of any overt tortious act
 done by defendants with respect to the unsold horses, inconsis-
 tent with the terms of the bailment, but solely because of
 20 their alleged determination to repudiate the terms of the
 agreement, in respect to the proceeds of the sale of the horses
 in the future. There was not a scintilla of evidence to the ef-
 fect that the defendants had expressly or openly repudiated
 the contract, and so far as concerns the horses now under con-
 sideration, there was no pretence made that anything had
 been done necessarily inconsistent with the agreement. The
 trial Court, therefore, in effect, permitted the jury to find a
 conversion on the ground that the defendants had mentally
 resolved to disregard the terms of the agreement in selling
 the horses and in making settlement therefor, and allowed
 30 evidence of the sale of the horses in New York, though made
 after this action was begun, to be considered by the jury up-
 on the question of the alleged fraudulent purpose to repudiate
 their contract on the part of defendants.

It is a singular proposition indeed to advance that an un-executed intention of the bailee, not openly expressed by him, to commit a breach of the contract of bailment, amounts to a conversion of the property bailed, and yet, this is substantially the proposition affirmed by the learned Trial Judge in his charge to the jury. That this is a perfectly fair statement, will appear from a consideration of the facts. At the time the action was begun, the horses as to which conversion is alleged, were in the custody of defendants, and in transit to New York for purposes of sale. The learned Judge admitted in his charge that the taking of the horses to New York for purposes of sale, was not of itself inconsistent with the agree-
ment under which they were held by defendants, and as
nothing therefore was openly done or said by the defendants
inconsistent with, or in repudiation of the agreement, the
learned Judge in sustaining the plaintiff's contention was
obliged to hold in effect, as he did, that if the defendants
formed the purpose or intention, concealed though it was, to
appropriate to their own use the proceeds of the sale in New
York, a conversion resulted when the intention was formed.

This position of the learned Judge wholly ignored the elementary doctrine that conversion is in no wise dependent upon
fraudulent intent or purpose on the part of the wrong doer,
and only consists in an overt tortious act necessarily involving
a denial and repudiation of the claim of the owner, who is en-
titled to possession,

A. & E. Ency. of Law, Vol. 26, p. 717.

Heald vs. Carey, 21, L. J. C., P. 97.

and thus disregarded the real meaning of the action of trover, which as stated by Martin B. in the leading case of *Burroughs vs. Bayne, 5th Hurlstone and Norman 296*, is,
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"an action whereby a person entitled to the possession of
"goods wrongfully detained from him was entitled by law to
"recover damages for their detention."

But even accepting the theory of the learned Judge as sound, there still was no evidence to submit to the jury upon the question of conversion, because there was no testimony to show an intended or actual repudiation of the agreement on the part of defendants.

The only testimony pertaining to the alleged conversion is that of Carl W. Toboldt and the plaintiff himself, and consists in the narrative of an interview between them and Richardson, one of the defendants, held in Baltimore on the day preceding the issuing of the writ in this case.

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According to this testimony, Richardson instead of repudiating the agreement, expressly admitted his co-defendants' liability to Moore thereunder, and promised payment to the plaintiff, in accordance with its terms, out of the proceeds of the New York sale of the horses. It is true that, according to their testimony, the plaintiff requested Richardson to consign the horses to New York in the plaintiff's name, or in the alternative to give the plaintiff an order on the Auctioneer for the proceeds of the sale, and that Richardson refused both of these requests; but in this refusal, there was no repudiation of the agreement, but on the contrary, a mere insistence on its terms, which gave the defendants the right to conduct the sale of the horses wherever made, and to retain their share of the profits realized from the sale. Not only does the evidence show conclusively that the defendants were acting under the agreement, but also that they were proceeding with the New York sale in perfect good faith, since they had a letter of the plaintiff written three days before this action was begun, expressly approving of this New York sale.

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We respectfully urge, therefore, that there was no evidence to submit to the jury on the question of conversion, even as defined by the learned Trial Judge.

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IV.

NO EVIDENCE OF DEMAND AND REFUSAL.

Taking up our second point in support of the proposition that there was no evidence of conversion, we contend that even if the plaintiff was entitled to possession of the horses at the time of their alleged conversion, it was necessary to show a demand by him upon the defendants for the horses, and a refusal of the latter to surrender them, to establish a conversion, and that evidence of such a demand and refusal is wholly lacking in the case. 10

It is elementary law that where the defendant came lawfully into possession of property, proof of a demand by the plaintiff for the property, and a refusal by the defendant to surrender it, is generally necessary to establish a conversion,

Cooley on Torts, p. 530.

and both the demand and refusal must be definite and unequivocal. 20

Ware vs. First Cong. Soc'y, 125 Mass. 584.

Richards vs. Pitts, 37 Hun. N.Y. 1.

In *Storm vs. Livingston 6 Johns (N.Y.) 44* the Court said,

"The defendant came lawfully by the horse, by the purchase at the Constable's sale. No demand was made of him before the action was commenced, and so there was no conversion. The sale of the horse by the defendant, after the suit was brought, cannot avail, as evidence of a conversion. 30
"The rights of the parties must be determined as they stood before the commencement of the suit."

The evidence in this case shows, conclusively, that the plaintiff never made a definite demand for the horses alleged

to have been converted. The learned Trial Judge himself must have entertained this view as he made no reference in his charge to any such demand.

In the testimony of Moore, the plaintiff, there is no reference whatever to any demand made by him for the horses, and the only testimony in the case indicating that he ever expressed even a desire to have them, is that of Toboldt (pg. 19), when in detailing the conversation between himself, the plaintiff, and Richardson, on the day preceding the issuing of the attachment he said,

- 10 "So then we recalled the fact again that we came for a
"settlement, that we wanted the money for the horses that had
"been sold and wanted the horses that had not been sold."

In this, there was certainly no definite demand for the horses, and even if there were, it was not persisted in, because as Toboldt explains, the plaintiff later in the course of the interview varied his suggestion, and requested that the horses be consigned to him in New York, or that he be given an order on the Auctioneer for the proceeds of the sale. The exact testimony of the witness is as follows, namely:

- 20 "Q. What did he say as to sending the horses to New
"York for sale?

- "A. He said, 'We are going to send the horses to New
"York for sale,' and he related that Mr. Baldwin was out
"through the country scouring for other horses, and while the
"account that was due Mr. Moore, if the horses that belonged
"to Mr. Moore didn't bring it, whosever horses would be sold
"would be added to this and Mr. Moore would be paid first.
"I says, 'I don't think it is policy to send horses to New
"York under those conditions.' I asked him first, 'Who are
"you sending these horses to?' He says, 'I am consigning
"them to the New York Horse Exchange,' I think it was. I
"says, 'If you want to be fair, and you say Mr. Moore is going
30 "to get his money, why not consign these horses to I. Whilden
"Moore in care of the horse exchange?' He wouldn't consent
"to that. I says, 'Well, I will be fair to you this way. You
"take the cost price of the horses and give Mr. Moore a writ-
"ing, an agreement that he can collect from this firm the
"amount of cost on the horses that are sold at the sale.'

"This he refused to do. So we couldn't get any satisfaction."

This testimony clearly shows that there was no demand by the plaintiff for possession of the unsold horses as a matter of right, but that his request to be given possession in New York, jointly in connection with the Auctioneer, was for the purpose of insuring himself as against the possible failure of defendants to make settlement according to the terms of the agreement, which he thereby expressly affirmed. If he considered himself entitled to have the horses surrendered to him, unconditionally, he should have so expressed himself to defendants, but having failed to do so, he never made any demand, the 10 refusal of which would, if without justification, be evidence of a conversion.

V.

ADMITTING, HOWEVER, THAT THERE WAS SUFFICIENT EVIDENCE OF CONVERSION TO GO TO THE JURY, THE PLAINTIFF WAS NEVERTHELESS NOT ENTITLED TO RECOVER IN THIS CASE, FOR THE REASON THAT THE PROPERTY CONVERTED 20 HAD NOT BEEN SOLD OR IN ANY MANNER DISPOSED OF BY THE DEFENDANTS, PRIOR TO THE COMMENCEMENT OF THIS ACTION.

It was admitted at the trial that the horses as to which the conversion was alleged, were in the possession of defendants at the time of the beginning of the action, but the learned Trial Judge instructed the jury that if they found a conversion, they might include in their verdict the value of these horses as 30 fixed by the contract, on the ground that the plaintiff was entitled to waive the tort and sue in assumpsit. We submit that the learned Court was in error, and that he should have instructed the jury that, under no circumstances, could there be

a recovery for the value of the horses in the possession of defendants at the time the action was begun. It is true, that in some instances of conversion, the tort may be waived and the action brought in *assumpsit*, but only when the property has been sold or disposed of.

"Where the defendant has sold or otherwise disposed of the property, the plaintiff may waive the conversion and sue in *assumpsit*, but only when it has been sold or disposed of, and he can recover only the amount actually received by the defendant."

10 *A. & E. Ency. of Law, Vol. 26, p. 792.*

In the case of *Budd vs. Hiler*, 27 *N. J. L.* 48, the Court recognized this rule by declaring it error to reject evidence offered by the defendant to show that he had not received money for the note which defendant had taken in exchange for the property.

Again it was recognized in the case of *Randolph Iron Company vs. Elliott*, 34 *N. J. L.* 184, where the Court, Van Syckel J. said,

20 "After demand of the ore and refusal to return it, or after actual conversion, trover would lie; or, after sale of the ore by defendant, the tort might be waived and *assumpsit* maintained."

In *Jones vs. Hore*, 5th *Pick. (Mass.)* 290, Harper J. said,

"The whole explanation of the doctrine as gathered from the books, seems to be that one whose goods have been taken from him or detained unlawfully whereby he has a right to an action of trespass or trover, may, if the wrong-doer sells the goods and receives the money, waive the tort, affirm the sale, and have an action for money had and received for the proceeds."

30 (See notes to this case for a review of authorities on the question.)

A very distinguished English writer speaks of the doctrine as follows, namely:

"We have cases in which an obvious tort is turned into a
 "much less obvious breach of contract, with the undisguised
 "purpose of giving a better and more convenient remedy.
 "Thus, it is an actionable wrong to retain money paid by
 "mistake, or on a consideration which has failed, and the like,
 "but, in the eighteenth century, the fixing of a promise, 'im-
 "plied in law' to repay the money so held was introduced, and
 "afforded a very extensive and beneficial remedy, applicable to
 "almost every case, where the defendant has received money,
 "which *ex aequo et bono*, he ought to refund, (3rd *Blackstone*
 "163), and even to cases where goods taken or retained by
 "wrong had been converted into money. The plaintiff was
 "said to 'waive the tort' for the purpose of suing in *assumpsit*
 "on the fictitious contract. Hence the late Mr. Adolphus 10
 "wrote in his idyllic poem, 'The Circuiteers,'

'Thoughts much too deep for tears subdue the Court
 'When I *assumpsit* bring, and god-like, waive a tort.' "

(*Pollock on Torts* p. 507)

In *Fuller vs Duren*, 36 Ala. 73 (76 Am. Dec. 318), it was
 held that the tort could not be waived and recovery had in *as-*
umpsit where the defendant had simply exchanged the prop-
 erty alleged to have been converted, and had not sold or
 otherwise disposed of the property obtained in the exchange. 20
 The rule which was followed in the above quoted decisions is
 supported by the decided weight of authority, and it is only
 among a few of the earlier decisions that the contrary doc-
 trine was seemingly affirmed. The rule itself, is based upon
 the principle that where a man derives a pecuniary advan-
 tage from the unlawful use of the property of another, the
 latter may elect to affirm the act of the wrong-doer, and make
 him, as it were, a trustee liable to account to the real owner
 for the proceeds in his hands derived from the converted
 property. It is manifest that these principles must be made
 applicable to a case like the present, where the defendants had 30
 not, up to the time of the beginning of the action, derived
 any profit or advantage whatsoever from the horses of the
 plaintiff in their possession, and alleged to have been con-
 verted by them. The mere fact that contractual relations

existed between the plaintiff and defendants with respect to these horses, did not, as the learned Trial Judge seemed to think, make the principle inapplicable. In order to allege a conversion, the plaintiff was obliged to disaffirm the contract, and he certainly was not in a position to hold the defendants bound by any of its terms after such disaffirmance, and yet the learned Trial Judge very inconsistently, we think, held that the contract must be taken as fixing a definite measure of damages for the conversion alleged. The fallacy of his view cannot be better shown than by reference to the case of *Slevins vs. Low, 2 Hill (N. Y. 132)*. In this case, the vendee of
 10 goods received them at a stipulated price, payable in certain endorsed notes, on condition that within a given period he should deliver the notes, or return the goods, but afterwards refusing to do either, the vendee sued him for the goods in trover. Held, that the measure of damages was the actual value and interest, and that the vendee was not concluded by the agreed value.

The Court said in the course of its opinion,

“The plaintiff above could, however, disaffirm the contract
 20 “of sale as he had a right to do, and treat the defendant as
 “having wrongfully converted the goods to his own use.
 “The action was trover, which goes for the actual value with
 “interest. The defendant was the clear wrong-doer, and
 “seems to have acted without excuse in refusing to deliver
 “the notes or the goods, as he agreed, yet, I do not perceive
 “any principle upon which he was estopped to explain the
 “value of the goods.”

“Take even a stronger case: The vendee agrees to return
 “a horse to the vendor, if the former pays \$100.00, and that in
 “the meantime, the property shall not be deemed to pass.
 “He refuses to return the horse, and is sued in trover, the
 30 “horse not being worth over \$10. The vendor thus throws
 “his contract entirely away, and must content himself with
 “the \$10.00.”

Discussing the principle that a tort can be waived and suit brought in assumpsit, only where the property converted has

been sold by the wrong-doer, the Court in *Noyes vs. Loring* 55 Me. 408, said,

"It is only in favor of the action for money had and received, which has been likened in its spirit to a bill in equity, that the rule is relaxed that the evidence must correspond with the allegations and be confined to the matter in issue, and this relaxation, by which a party is allowed to aver a promise and recover for a tort, being a departure from principle, and the correct rule of pleading, ought not to be extended to new cases."

VI.

10

TRIAL ERRORS.

Plaintiff based his right of recovery on the alleged conversion.

In his effort to show this change of heart on the part of defendants, his counsel offered illegal testimony, which was admitted by the trial court, over repeated and strenuous objection by defendants.

The first of these errors was the admission of the testimony of Toboldt, detailing a conversation with an unknown and unnamed colored man, at Baldwin's stable, on January 25, 1900. (Pgs. 15, 18.) Exception was duly taken and error assigned (Pgs. 240, 241). 20

The trial Court, at the conclusion of the evidence, attempted to rectify this error and ordered this testimony stricken out, but the harm had evidently been done and the impression made by this testimony was equally strong on court and jury for, without it, there was nothing to go to the jury on the question of conversion, and no evidence from which the jury might legally find that there had been a conversion. 30

This testimony was introduced in such manner as to leave a strong conviction in the mind that the horses were being secretly groomed and prepared for shipment, in a clandestine

manner, from Baltimore to New York; that such action was without plaintiff's knowledge and consent and much to his surprise, hence, its evidential force as showing conversion.

With this conversation out of the case, the testimony of plaintiff was this:—On January 22, 1900, three days before this conversation, he wrote Baldwin (Exhibit D 2, Pg. 238).

10 *"Mr, Richardson and I are going to New York to sell the
"balance of the Baltimore stock x x x x x Mr, R, has agreed to
"see that the horses are shipped and go to N, Y, with them
"hoping to see you there tuesday and expecting to re-
"lize good prices. I remain very respect, I, Whilden Moore."*

On cross-examination, (Pg. 50) Moore said he knew before he went to Baltimore that the horses were to be shipped to New York. It was no surprise to him to find that they were ready for shipment.

20 On page 56 he said "He (Richardson) came to me and stated that he had dissolved with Baldwin, that he had difficulty in keeping Mr. Baldwin from making an assignment, and as he felt friendly toward me he wanted me to try and get my money and he was going to do all he could to help me get it, and he didn't see any other plan excepting the plan as stated, to send the horses to New York, and wanted to know whether I cared whether he did or not?"

On January 25, Richardson wrote Moore (Exhibit P 2, pg. 235) "Will have 18 good ones in N. Y. Sunday donte you "fail to meete me Sunday the 28 in N. Y. important. I have
"got everything in good shape now so as you will get all of
"your money."

30 See also Richardson's cross-examination on page 194, not denied by Moore, "My understanding, sir, with Mr. Moore was that these horses were to be shipped to New York."

With this testimony in the case and the other out, the trial Court should have charged the jury as requested in defend-

ants' third, fourth, fifth, eighth and ninth requests. (Pgs. 222, 223.) Error was assigned on such refusal (Pgs. 244, 245, 246.)

In further attempt to prove conversion, plaintiff offered evidence tending to show the sale of the horses in New York, and other matters occurring after the commencement of this suit.

As to this it may be said that such evidence was wholly inadmissible for the purpose of proving conversion, because all that was done by Baldwin at and after the New York sale was equally consistent with the theory that he was performing his contract with Moore. 10

The testimony of Toboldt as to the contents of the alleged advertisement was inadmissible because it was not the best evidence and because there was no proof that defendants, or either of them, had ever authorized such advertisement.

Objection was made to this testimony (Pgs. 22, 23) and error assigned, (Pg. 241).

The trial Court also required Baldwin to testify as to the fact of his receiving the proceeds of the New York sale (Pgs. 160, 161) and, in his charge, commented adversely to defendants, on their failure to show payment to plaintiff of the proceeds of such sale, (Pg. 216). 20

Now as to this, it must be borne in mind that the sale in New York took place at least five days after this suit was brought. The trial Court admitted the testimony on the ground that "it was only a circumstance that might be explained two ways." It was inadmissible to show conversion because if the intent was to convert the money or proceeds of the sale, that intent was not formed until after suit was brought and plaintiff was in the position of showing that his cause of action arose after suit was brought and he, therefore, ought to have been non-suited or at least a verdict directed as to the horses shipped to New York. If not offered to show 30

conversion, it was inadmissible as not pertinent to the issue because if the horses were sold under the terms of the contract, Baldwin had a right to the money until his share of the profits should be ascertained.

See Ninth, Fourteenth, Seventeenth and Twenty-first Assignments of Error.

The motion for non-suit should have been granted for the reasons stated on pages 76, 77 and 78 of State of Case.

- 10 Exception was duly taken to refusal and error assigned thereon, (Pg. 242).

Plaintiff having endeavored to prove conversion of the horses by proof of a conversation had with Richardson, it was a matter of vital importance to defendants to show what relations existed between Richardson & Baldwin on January 25, 1900.

- 20 Those relations were matters of fact and Moore's letter to Baldwin Exhibit D 2 (Pg. 238) and Moore's own testimony (Pg. 56) showed that he knew what those relations were.

Defendants offered in evidence a paper writing purporting to be a dissolution of copartnership between Richardson & Baldwin. (Pg. 146) It was over-ruled.

The Court also over-ruled this question, asked of Baldwin, "Q. When, if at any time, was the partnership between Baldwin and Richardson dissolved?" (Pg. 145).

Exceptions were duly taken and sealed.

- 30 This offer of evidence was made during the morning session of Court of January 8, 1902.

Both sides rested at the close of the afternoon session on that day (Pg. 203).

"On the following morning, (Pg. 203) the Court re-considered the ruling on this point and said "The Court will state now that although the evidence was declared closed last evening, yet the counsel not having yet summed up, I have reconsidered the matter of an offer that was made by the defendants in this case of the agreement of co-partnership. It was an agreement purporting to dissolve the partnership between Mr. Richardson and Mr. Baldwin, the defendants,— I forget the date. It is mentioned on the notes, no doubt. It was proved by Mr. Baldwin as being an agreement signed by the two defendants; and I reverse my ruling in that case as to ruling out the agreement of dissolution of partnership that was offered in evidence, and counsel may renew their offer and use that agreement and read it as part of the evidence in the case. I would admit it, not as in any way affecting the liability or releasing the defendants from any liability under their contract as to dealing with these horses, so far as the plaintiff is concerned, but I think it is proper evidence to show what relations Mr. Richardson and Mr. Baldwin bore to each other and as tending perhaps to explain other parts of the testimony, such as the letter which is in evidence from Mr. Moore, the plaintiff, to Mr. Baldwin, of January 22nd, I think, in which a reference was made about continuing in business; and for those purposes, showing the relations of the parties and as illustrating or explaining the evidence of the witnesses, I am willing to admit that paper in evidence."

For the reasons stated by counsel on Page 204 this reversal came too late to be of advantage to defendants.

The statement of the Trial Judge as to his reasons for reversing himself on this point shows how vitally important to defendants' case was this evidence. It had been offered in two ways, by oral testimony and by written document and had been erroneously over-ruled.

The question now is whether the defendants must suffer for this error.

Counsel for defendants can only say that when the announcement was made that the testimony was closed on both sides, they did what every other lawyer does under similar circumstances, they discharged their witnesses and went into Court the next morning prepared only for the argument. They told Baldwin his presence would not be further required. They had no intimation that the Court would re-consider its ruling.

The wrong done defendants by the absence of this testimony was not through any fault of defendants. The burden must be borne by the trial Court or by defendants' counsel.

10

It is for this Court to say, not whether the trial Court had a right to change its mind, but whether counsel were bound to know that the trial Court was going to change its mind, and be ready for the consequences.

We respectfully insist that, both in this matter and in the matter of Toboldt's testimony, the final action of the Court did not cure the initial errors.

What was said by Judge Lippincott in *State v Sprague*, 64
20 *N. J. L.* 419, is much in point.

"The motion to strike it (the evidence) out and the action
"of the Court on the matter came too late. It had been
"admitted to the jury after repeated strenuous objection on
"behalf of the defendant and had been fully heard by them.
"It had been allowed to stand and have its effect until the case
"was practically closed, and its admissibility had been per-
"sistently presented on the part of the State. It had gone
"deliberately to the jury and had been fully taken into their
"consideration, and I cannot perceive how its harmful and
30 "prejudicial effect could be obviated or cured by having the
"evidence, at this stage of the proceeding, merely and form-
"ally stricken from the record."

See Tenth, Eleventh and Twelfth Assignments of Error.

The true state of the account between plaintiff and defendants does not appear in the evidence.

Defendants' efforts to show what the facts were in that respect, previous to the New York sale, were thwarted.

See Twelfth and Fifteenth Assignments of Error.

As to what the account would show *after* the New York sale, the case is barren of evidence for the reason that, on the theory upon which the trial Court proceeded, no such evidence was permissible.

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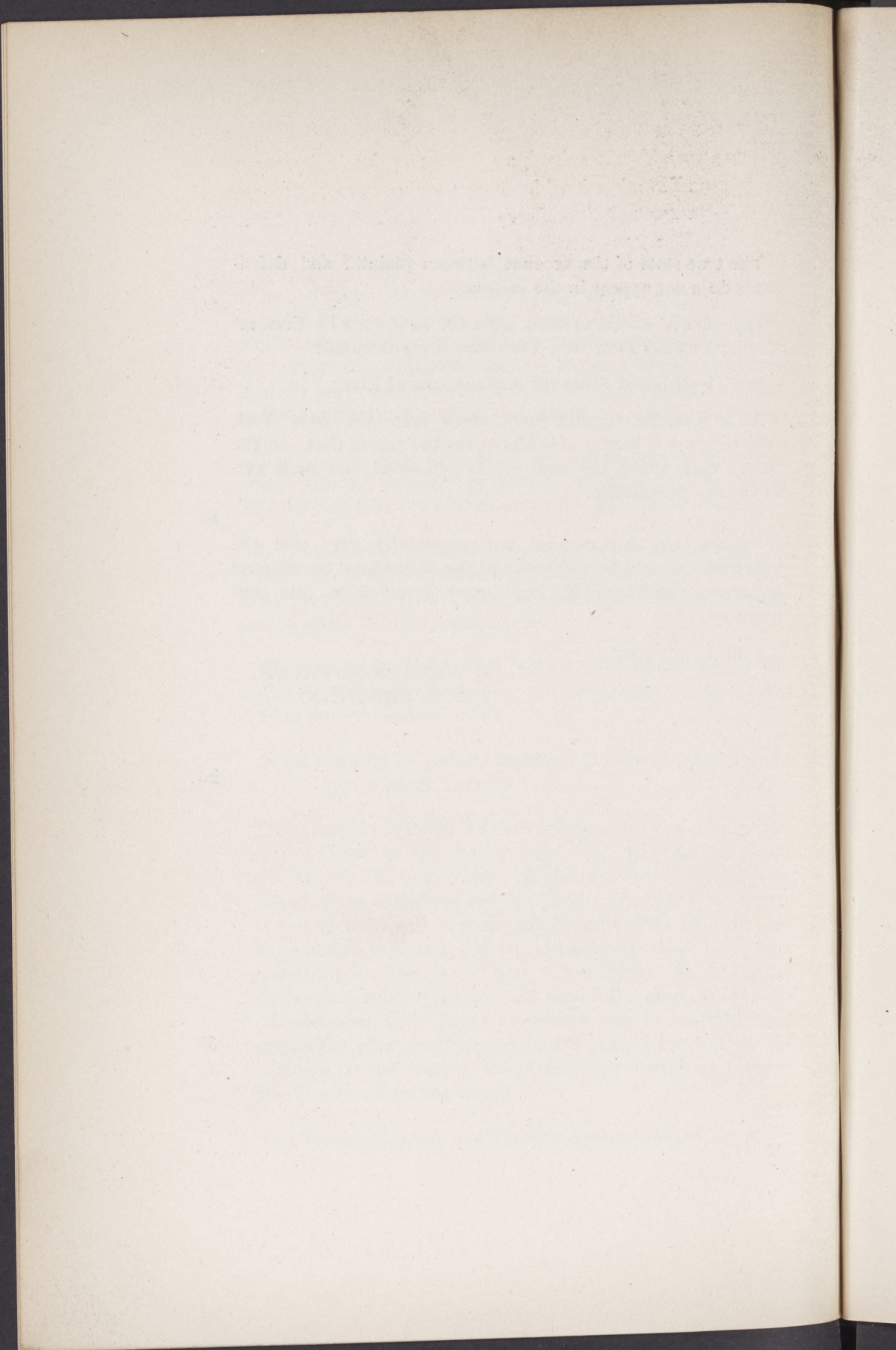
For the foregoing reasons, we respectfully urge that the judgement should be reversed and the defendants' be afforded opportunity to litigate the real issues involved in this controversy.

June Term, 1902.

WALTER H. BACON,
F. B. BRACKEN.

20

30



NEW JERSEY COURT OF ERRORS AND APPEALS.

I. WHILDEN MOORE,	}	10
Defendant in Error,		
vs.		
WILLIAM H. RICHARDSON and		
GEORGE S. BALDWIN, trading		
as Richardson & Baldwin,		
Plaintiffs in Error.		
		ON ERROR TO SUPREME COURT.
		20

BRIEF OF E. A. ARMSTRONG, Of Counsel with the Plaintiff, Defendant in Error.

This suit was commenced by a writ of foreign attachment. A history of the pleadings is as follows: 30

An affidavit was filed January 26, 1900, whereupon a writ of attachment was issued to the Sheriff of Hudson county. This writ was executed January 27, 1900. Bond was given to the Sheriff January 28, 1900, which

was approved March 3, 1900, by a Justice of this court. February 27, 1900, a rule was entered by the plaintiff appointing Nelson B. Gaskill auditor. March 6, 1900, appearance was entered for both defendants under Sec. 38, General Statutes. March 8, service of notice of appearance was acknowledged, and March 10, declaration was served. April 6, 1900, a plea of general issue was filed. Under this the defendants, upon demand, specified
 10 twelve grounds of defense. (See Case, p. 7.) Case finally came on for trial January 7, 1902, before Justice Hendrickson and a jury at the Cumberland Circuit, and resulted in the verdict of \$5,099.30 for the plaintiff. On this verdict judgment was given February 18, 1902, whereupon defendants sued out this writ.

The relation between these parties was instituted by a paper marked in the case Exhibit "P1," and is printed
 20 in the case, page 234.

There is no question but that the horses, at the cost price as shown in the bill of particulars attached to the declaration, pages 5 and 6 of the case, were received by the defendants. (See page 37, lines 10-20.)

At the time the writ of attachment was sued out, the defendants had disposed of some of the horses and had the proceeds, but had others of them on hand. The plaintiff alleged that the defendants had converted the horses
 30 to their own use, therefore that he was entitled to sue for and recover the value of the horses and that he might waive the tort and sue in assumpsit.

There can be no doubt at all, where a suit for trover and conversion would lie, that the plaintiff may waive the tort and sue for the value of the goods, treating the

transaction as a sale, because by so doing the defendant is not harmed but rather helped, and is required to respond to a less burdensome action. This is clearly held in this State as well as elsewhere.

Bryant vs. Holmes, 4 Vr., 189.

Wescott vs. Sharp, 21 Vr., 322.

McCoombs vs. Gill, 77 Tenn., 81.

Farson vs. Hutchinson, 62 Ill. App., 439.

Roberts vs. Evans, 43 Cal., 380.

10

Terry vs. Munger, 8 L. R. A., 216.

This question of fact, whether or not there had been a conversion, was left to the jury, and resulted in the plaintiff's favor, so that there was no question but that at the time the writ of attachment was issued in this cause, the sum claimed by the plaintiff was due and owing him. It was claimed at the trial that even had there not been a conversion of the horses remaining on hand, from the fact that they were afterwards disposed of by the defendants and the proceeds received by them would entitle the plaintiff to his judgment by virtue of section 54 of the attachment act. (Gen. Stat., 107.)

20

Devlan vs. Wells, 36 Vr., 213.

Blackford vs. Conover, 13 Stew., 205.

Davis vs. Magross, 26 Vr., 427.

Conley vs. Lerche, 27 Vr., 95.

30

The charge of the Court made us, however, depend entirely upon the fact whether or not the conversion had occurred before the writ was sued out.

As to the first, second and third assignments of error, the Court, on page 205, lines 15-30, rules out the testi-

mony on which those assignments of error are based. I thought then, and still think, that that evidence was clearly admissible, as the colored man was in such a position that what he said was binding on the defendants. Moreover, defendant Richardson, afterwards, in his conversation with Toboldt and Moore, confirmed all the colored man was reported to have said. However, in view of the final ruling of the Court, it would seem that the defendants had no ground for complaint.

The eleventh assignment is based upon the refusal to permit the paper of dissolution of partnership to go in evidence. I think that refusal was right, but the Court reversed its ruling (pages 203-205), so it would seem defendants have no complaint.

While there are a great number of exceptions and thirty-nine assignments of error, the case is really very simple. As to the fact of the shipping by the plaintiff to the defendant of horses and the price at which they were shipped, there never was any dispute, because plaintiff's demand was made up from the defendants' own statement to him. The profit realized, according to the defendants' own statement, on horses in excess of the cost price, was \$488.50. Of this one-half, or \$244.25, belonged to the plaintiff. This is also true of the credits claimed by the defendants for payments and for horses returned, so it will be seen that there was very little in dispute between the parties so far as figures were concerned. It is true that the defendants insisted that they were authorized to make sales for less than the cost price in some instances, but they were very hazy in their proofs concerning that; but as these were all facts left with the jury and resolved against the defendants, we are not concerned with them here.

An examination of the exceptions upon which all of the assignments of error are based, referring to the admission or rejection of evidence, shows clearly, it seems to me, that the learned Justice who tried the cause made no error against the defendants. In his charge, he summed up the issue very simply and clearly and left that freely to the jury, as to the fact whether or not, at the time the writ was sued out, the defendants had converted to their own use all of the horses. This the jury resolved 10
in our favor. As before stated, he might have made this broader for us within legal bounds.

The thirty-eighth assignment of error is based on the fact that the Trial Court permitted the jury to have the bill of particulars. What the Court did in this connection is found on pages 232-233. As will be seen from the testimony, this bill of particulars was examined and cross-examined upon very thoroughly. Without it much of the testimony is unintelligible. It was so used as to require 20
it to go to the jury, outside of the discretion resting in the Trial Court. When it was permitted to be taken only under such elaborate precautions as the Court imposed, and the specific directions and limitations he imposed, I do not see how the defendants can claim to be harmed.

It may be well said that this is not a case upon the defendants' side that appeals very strongly to the Court to disturb the verdict.

The defendants obtained from the plaintiff many thousands and dollars worth of horses with the idea that they would make sale thereof in such a way that he would realize a handsome profit thereon. When asked to make a settlement they refused and evaded the plaintiff, and when he was forced to invoke the aid of the Court, without at- 30

tempt to deny that they had his property, they hoped by technical advantage to deny him his remedy. Of course, if he has no legal remedy he may lose, but I take it the Court is not going to strain a point to enable these defendants to get out from under their just obligations.

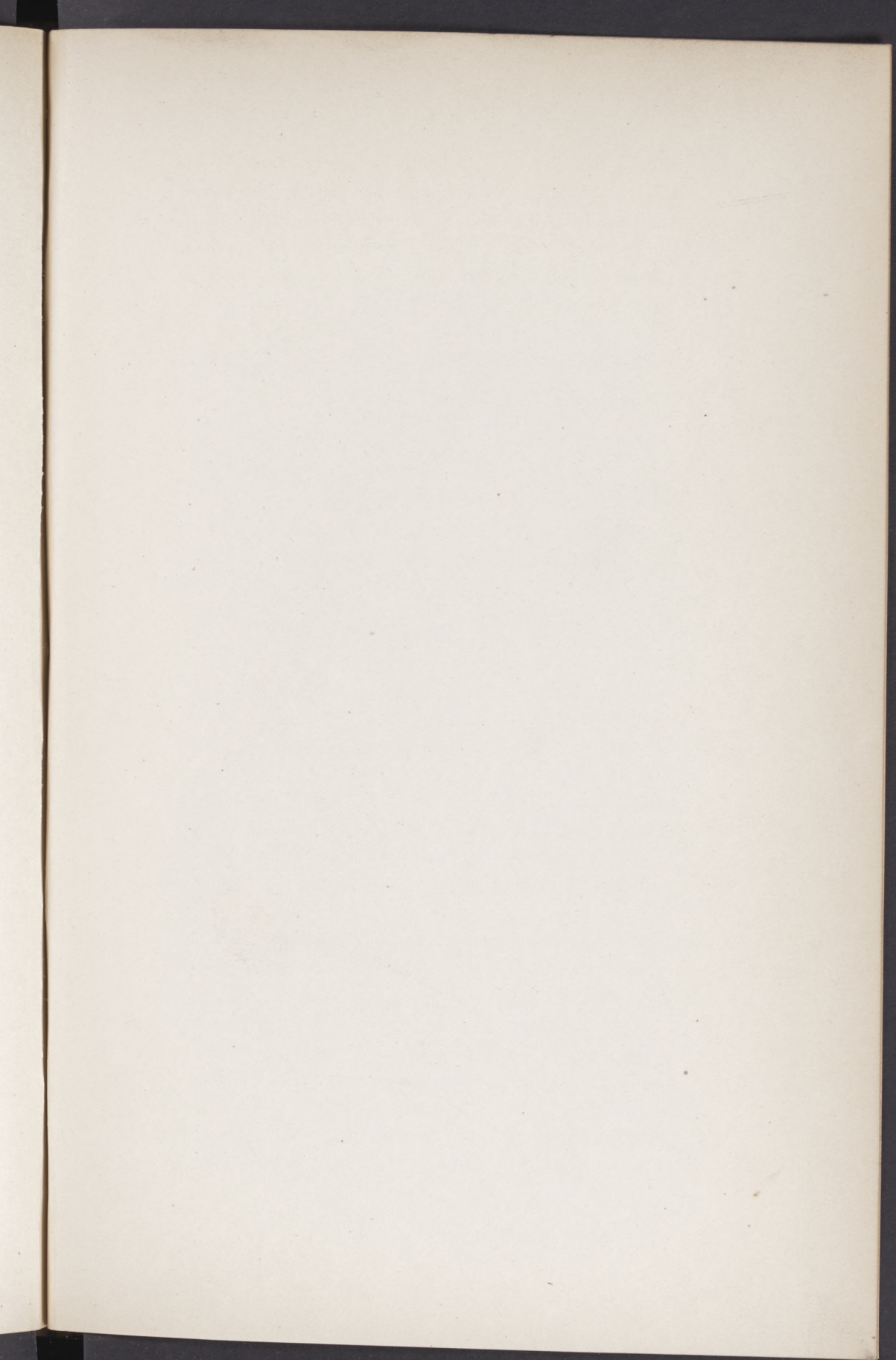
June Term, 1902.

E. A. ARMSTRONG,
Counsel for Defendant in Error.

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New Jersey Court of Errors and Appeals.

I. Whilden Moore,
Defendant in Error.

vs.

William H. Richardson and George S.
Baldwin, Trading as Richardson
& Baldwin.

Plaintiffs in Error.

On Error.

10

WRIT AND RETURN.

NEW JERSEY, ss.



The State of New Jersey to the Chief ²⁰
Justice and other Justices of our Su-
preme Court of Judicature, GREET-
ING:

For as much as in the record and proceedings, and also
in the giving of judgment in a certain cause which was in
our Supreme Court of Judicature, before you, between I.
Whilden Moore, plaintiff and William H. Richardson and
George S. Baldwin, trading as Richardson & Baldwin, de-
fendants, in an action upon contract, manifest error hath in-
vened to the great damage of the said defendants William ³⁰
H. Richardson and George S. Baldwin, trading as Richard-
son & Baldwin, as it is said; and we being willing that the

error, if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort, in all causes, at Trenton, on the Eighth day of March next, together with this writ, that the record and proceedings aforesaid being inspected, we may further cause to
 10 be done thereupon, for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the eighteenth day of February, A. D. nineteen hundred and two.

GEORGE WURTS,

Clerk.

WALTER H. BACON,

Attorney.

20

(ENDORSED)

NEW JERSEY COURT OF ERRORS AND APPEALS.

I Whilden Moore,
 Defendant in Error.

vs.

William H. Richardson and George
 S. Baldwin, Trading as Richard-
 son & Baldwin.

Plaintiffs in Error.

Writ of Error.
 Returnable March 8,
 1902.

30

WALTER H. BACON,
 Attorney for Plaintiff in Error,

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WILLIAM S. GUMMERE,

Chief Justice.

10

COPY OF JUDGMENT.

New Jersey Supreme Court.

I. Whilden Moore,

vs.

William H. Richardson and George
S. Baldwin, Trading as Richard-
son & Baldwin.

On Contract.
On Postea.

20

E. A. Armstrong, Attorney.

As yet of the fifth day of February, A.D., nineteen hundred.

Witness, WILLIAM J. MAGIE, Esq.,
Chief Justice.

WILLIAM RIKER, JR., Clerk.

CUMBERLAND COUNTY, ss.

30

William H. Richardson and George S. Baldwin, trading as Richardson & Baldwin, the defendants in this suit, were

attached by their rights and goods, moneys and effects, goods and chattels, lands and tenements, to answer unto I. Whildin Moore, the plaintiff therein, in an action upon contract; and thereupon the said plaintiff, by E. A. Armstrong, his attorney, complains for that whereas the said defendants, on the twenty-third day of January, in the year of our Lord nineteen hundred, at Bridgeton, in the County of Cumberland, within the jurisdiction of this Court, became and were indebted to the plaintiff in the sum of Ten Thousand Dollars, for the price
10 and value of goods sold and delivered by the plaintiff to the defendants, at their request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendants at their request; and in the like sum of money for the price and value of work done and materials for the same provided by the plaintiff for the defendants at their request; and in the like sum of money for money lent by the plaintiff to the defendants at their request; and in the like sum of money for money received by the defendants for the use of the plaintiff; and in the like sum of
20 money for money paid by the plaintiff for the use of the defendants at their request; and in the like sum of money for interest due from the defendants to the plaintiff for the plaintiff having forborne moneys due from the defendants to the plaintiff at the defendants' request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendants to the plaintiff on an account then and there stated between them; and the defendants afterwards [to wit] on the day and year last aforesaid, in the County aforesaid, in consideration of the premises, respectively,
30 promised to pay the said several last mentioned respectively to the plaintiff on request; yet the defendants disregarded their promises, and have not paid any of the said moneys, or any

part thereof, to the plaintiff's damage Ten Thousand Dollars, and thereupon he brings his suit, &c.

Notice to Defendants:—

The following is a bill of the particulars of the demand and copy of the account whereupon the annexed declaration is founded: and to recover the amount due thereon, this suit is brought.

MESSRS. RICHARDSON & BALDWIN,

10

To I. WHILDIN MOORE,

DR.

The cost price agreed upon between the parties as follows: for the following named horses, that is to say:—

Sorrel and black, long tails,	\$400 00
Gray and brown mares,	375 00
Pied mare,	75 00
Big Bay trotter,	300 00
Sorrel pacer,	150 00
Billy M.,	300 00 20
Bell Swigert,	400 00
Punch,	150 00
Dude,	250 00
Bright Bay cob,	250 00
Brown cob,	150 00
Roan cob,	85 00
Emerson cobs,	600 00
2 brown mares,	350 00
2 brown horses,	350 00
Bay horse trotter,	140 00 30
Bay horse, long tail,	115 00
Bay cobs, white feet,	400 00

Price and sorrel mare,	400 00
Bay cob,	175 00
Brown cob,	200 00
2 Bay cobs,	400 00
2 Bay cobs, white feet,	300 00
2 Grays,	200 00
To cash received for the plaintiff and on his account,	5,000 00

10

\$11,515 00

CR.

By cash,	\$1,000 00
" "	100 00
" "	214 00
" "	7 00
" McCaulley,	30 00
" Medicine,	30 00
" T. Cart,	45 00
" Harness,	35 00
20 " Stock returned, 2 sorrel mares,	125 00
" 1 Gray horse,	90 00
" Bay "	143 00
" 1 sorrel team,	400 00
" Brown mare,	100 00
	\$2,319 00
Balance due,	\$9,196 00

For which sum with interest from December 23, 1899,
 30 the plaintiff prays judgment, with costs of suit.

And the said defendants, by Walter H. Bacon, their
 attorney, comes and defends the wrong and injury, when &c.,

and say that they did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against them, and of this they put themselves upon the country, etc.

And the plaintiff doth the like.

Pursuant to your demand for a specification of the defences intended to be made by the defendants under the plea of general issue filed in the above stated cause, you are hereby notified that the following is a specification of such defences, 10
viz.:—

FIRST,—Fraud.

SECOND,—Release.

THIRD,—Accord and satisfaction.

FOURTH,—Payment.

FIFTH,—Want of consideration.

SIXTH,—Former recovery.

SEVENTH,—Arbitrament.

EIGHTH,—Higher security given.

NINTH,—Duress. 20

TENTH,—Illegality of alleged contract.

ELEVENTH,—Alteration in the terms of the contract.

TWELFTH,—Non-performance by plaintiff of conditions precedent.

Yours, &c.,

WALTER H. BACON,

Attorney for Defendants.

Dated May 2, 1900.

Therefore let a jury thereupon come before our Chief 30
Justice or some other Justice of the Supreme Court of the
State of New Jersey, at a Circuit Court to be holden at

Bridgeton, in and for the County of Cumberland, on the first Tuesday of January, in the year of our Lord, one thousand nine hundred and two, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit; the eighteenth day of February, A.D., nineteen hundred and two, before our said Supreme Court at Trenton comes the said plaintiff by his attorney aforesaid, and the Justice before whom etc., having
 10 first sent hither his record had before him in these words, to wit:—

Afterwards, to wit; at a Circuit Court holden at Bridgeton, in and for the County of Cumberland, before his Honor Charles E. Hendrickson, one of the Justices of the Supreme Court, on the ninth day of January, in the year of our Lord, one thousand nine hundred and two, according to the form of the statute in such case made and provided, comes as well the said plaintiff as the said defendant, by their respective attorneys
 20 within mentioned, and the jurors of the jury, between the parties aforesaid, in the plea aforesaid, being summoned, also come, who, to speak the truth of the matters and things within contained, being chosen, tried and sworn, say upon their oath, that the said defendant, William H. Richardson and George S. Baldwin, trading as Richardson & Baldwin, did undertake and promise in manner and form as the said plaintiff, I. Whilden Moore, hath in his said declaration alleged; and they assess the damages of the said plaintiff, by reason of the not performing said promises and undertakings,
 30 over and above the costs and charges by him about his suit in this behalf expended, at the sum of Five Thousand and Ninety-nine Dollars and Thirty Cents, &c.

Therefore it is considered that the said plaintiff do recover against the said defendants his said damages by the jury in form aforesaid found to Five Thousand and Ninety-nine Dollars and Thirty Cents, and also One Hundred and Four Dollars and Twenty-nine Cents, for his costs and charges aforesaid by the Court now here adjudged to the said plaintiff and with his assent, which said damages, costs and charges in the whole amount to FIVE THOUSAND TWO HUNDRED AND THREE DOLLARS AND FIFTY-NINE CENTS. 10

Judgment signed the eighteenth day of February, A.D., nineteen hundred and two.

WILLIAM S. GUMMERE,
Chief Justice.

I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office. 20



IN TESTIMONY WHEREOF, I have set my hand and the seal of said Court at Trenton, this twentieth day of March, A. D., nineteen hundred and two.

WM. RIKER, JR.,
Clerk.

BILL OF EXCEPTIONS AND TESTIMONY UPON
WHICH THE SAME ARE FOUNDED.

New Jersey Supreme Court.
CUMBERLAND CIRCUIT.

10

I. Whilden Moore,	}	On Contract.
Plaintiff,		
vs.		
William H. Richardson, et al.,		
Defendants.		

BRIDGETON, N. J., January 7, 1902.

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TESTIMONY.

BEFORE HON. CHARLES E. HENDRICKSON, JUDGE AND A
JURY.

APPEARANCES.

For Plaintiff,—HON. E. A. ARMSTRONG,
J. H. FITHIAN. Esq.

For Defendants,—WALTER H. BACON, Esq.,
with whom was

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F. B. BRACKEN, Esq.,
(of the Philadelphia Bar.)

CARL W. TOBOLDT, Sworn.

DIRECT EXAMINATION.

BY MR. ARMSTRONG:—

Q. Mr. Toboldt, where do you live?

A. Pittsburg, Pennsylvania.

Q. In 1899 where did you live?

A. Atlantic City, New Jersey.

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Q. Do you know Mr. Moore?

A. Yes, sir.

Q. Had you any association in business with him?

A. Yes, sir.

Q. In the month of December, 1899, did or did not you accompany him to the city of Baltimore?

A. I did.

Q. Where did you go?

A. To a stable where I understood belonged to Mr. Richardson and Baldwin.

Q. Do you know whether or not Mr. Moore at that time recognized any horses there as having been shipped by him? 20

A. He did, sir.

Q. When you got to the stable whom did you see, if any one?

A. A colored man.

Q. What was this colored man doing there?

A. He was working in the interests of the stable.

Q. One of the employes there?

A. He said he was.

Q. What, if anything, was said to you as to the disposition of horses then in the stable about to be made?

MR. BACON:— One minute, please. By whom and in 30 whose presence? I object, if the Court please, to any statement. This gentleman has said the only gentleman there

was a colored man, an employe. He doesn't know that; at least he hasn't said so. It seems to me a statement made by a colored man, in the absence of the defendant, in the presence of Mr. Moore, cannot bind these defendants.

Q. (Continuing) —said to you by this man?

MR. BACON :— My objection stands.

MR. ARMSTRONG :— If your Honor please, I have already shown that this was a man there in charge of these horses at this stable of Richardson and Baldwin, an employe
 10 there and a servant of the defendants. Anything that he said, therefore, would bind the defendants, although they of course could disallow it or disavow it; but anything that he said would be, so far as the custody, the disposition or the use made of these horses, be evidential in the line of the opening that I have made. The only one that they could learn from would be the person who was then permanently or temporarily in the custody of the horses, and that declaration is a declaration of the defendants, not of a third party at all.

THE COURT :— I don't see hardly how it is admissible, what a mere agent or caretaker, might have to say, that
 20 would bind parties who are interested, perhaps, in these horses. I don't see. It might under certain circumstances be admissible, but I don't quite see, Judge, how it is, as he might say things that would not fairly represent the employers about such matters, about the horses. It must be some thing relevant and something within the scope of his proper duty and agency, it seems to me, otherwise it would be of course heresay that ought not to bind the parties. So that I think for the present I sustain the objection.

(Exception noted for plaintiff.)

Q. What was this man doing there?

A. Taking care of horses.

30 Q. Who else was at the stable than this colored man?

A. I think I saw a gentleman there that was lame; Carter I think was his name.

Q. Where was he?

A. If I am not mistaken, I think he was in the office, right about the front of the stable.

Q. What was he doing there in the office?

A. Nothing particular, to my attention; just around there.

Q. Who had charge of the stable?

A. As I said, the colored man said Mr. Baldwin --

(Objected to.)

THE COURT:—Yes; that is overruled.

Q. Did you inquire for the firm, and if so, of whom?

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A. Inquired for Mr. Richardson.

Q. Of whom did you inquire?

A. The colored man.

Q. What response, if any, did you receive to that inquiry?

(Objected to. Objection overruled.)

A. He said Mr. Richardson was down the street and would be along in a few minutes.

Q. What other inquiry did you make in relation to the firm or in relation to this man's connection with the business of him?

A. I didn't quite understand the question. Whose connection?

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Q. The colored man's.

MR. BACON:—I object, on the ground that any inquiry which this gentleman, who appears to have been entirely unauthorized, may have made of some person at the stable, can have no relevancy whatever to the matters in controversy in this suit.

THE COURT:—Does it lead up to something, Judge, that would make it valid?

MR. ARMSTRONG:—Certainly; but if your honor please, 30 I think I have demonstrated that this witness, in connection with the plaintiff, went to the place of business of these men,

that he inquired for the firm of the man there who had charge; that he was told that the members of the firm were away, but Mr. Richardson, one of them, would return in a few minutes. Then I asked him if he made inquiry of this man what his relation was. He was in charge of the thing. Now declarations made by him—of course they can be disproved by the other side, but he was in custody of the very things themselves. He was the man who spoke. If he made statements without any inquiry being made of this sort and they were mere voluntary statements, of course they could have no bearing. That, I take it, was the line of your Honor's ruling before; but if upon inquiry at the only place he could properly inquire, at the firm's place of business, he received from the man in charge a certain reply, I can conceive nothing more in line with relevancy than that.

MR. BACON:—I want to get on the record my objection. My objection is that this question as framed is incompetent, irrelevant and not pertinent to the issue.

THE COURT:—I think as an introduction, a party interested going to see the property, that this asking a question of the one in charge as to the whereabouts of the owners, which is in that line, as I understand it, it is an inquiry to open the way for something else. I admit it on that ground.

MR. BACON:—Your Honor's statement leads me to believe that the point which I have made has not been clearly made by me, and that is why I desired to before state clearly on the record what my position was. This gentleman is entirely unauthorized. This witness is not an interested party. Your Honor admits it on the ground that he is an interested party. The objection is that this witness is entirely an uninterested party, has no connection in business or anything with this person about whom he was to testify, could have no connection with the case.

THE COURT:—I thought for the moment that he was sent by Mr. Moore.

MR. ARMSTRONG:—It is already in testimony that he was there with Mr. Moore.

(Objection overruled.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL] 10

A. I asked the colored man where Mr. Richardson was. He said he was down the street, would be back in a few minutes. I asked him who had charge and he said he was taking care of it while he was away.

Q. What answer did he make to that?

A. He said he was taking care of things while he was down the street, away.

Q. Was Mr. Moore with you then?

A. Yes, sir.

Q. After this answer what further question concerning the horses did you ask of this man who told you he was in charge of them? 20

(Objected to as incompetent, irrelevant and immaterial. Objection overruled.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

A. I asked him why the horses were all trimmed up and groomed down so well. (Remainder of answer ordered stricken out.)

Q. What answer did he make to that question of yours? 30

MR. BACON:— I object. It is hardly necessary to argue the reason. They have already been stated and ruled upon

by your Honor, and under the ruling it is incompetent.

THE COURT:—Yes, of course. The reason I hesitated, I wanted to get from counsel upon what ground or what authority such evidence is presented, clearly, before I did rule. It strikes me that it is not material.

MR. ARMSTRONG:— The reason that I press that question is that up until that time there was no one else of whom any inquiry could be made. That is clear. He was in charge temporarily, at least. How long that should last depended
 10 entirely on the voluntary actions of the defendants themselves. The horses might be shipped, if they were to be shipped, before their return. They might be taken by this man himself, he being the custodian of them, no matter for how long. His purpose, or a purpose of which he was cognizant concerning them, of course, of the parties interested, is clearly proper evidence. Had he declared that those horses recognized by Mr. Moore in the presence of this witness as being the same horses consigned to this firm, had he claimed that they belonged to some one else, had he claimed that he was in custody of them for a particular purpose, had
 20 he claimed anything concerning those horses, it would be clearly evidence in this case. Our point that we propose to prove is that those horses at that time had been converted by these defendants to their own use; and we propose to show by their actions and by the words of their agent—and the mental process of conversion can only be by show of action, because actions speak louder than words—and certainly whatever is being done in their interest, and whenever, is admissible as against them.

THE COURT:—I think I will allow this evidence at the present time on the ground that it may be proper as information received by Mr. Moore through this gentleman, he being
 30 present, as it may have some bearing upon what followed, upon the case; as to its evidential character, what that may be, that is another question, but I will of course hear counsel

upon its evidential character. But as to the inquiry as a step in the incidents of the case I will allow it.

MR. BACON:—I would like to get my objections on the record, if your Honor please.

THE COURT:—It certainly is on the record and you have an exception.

MR. BACON:—In this recent case in the Atlantic Reporter by Judge Collins he says where counsel doesn't get his reasons on the record they are not regarded. 10

THE COURT:—I thought you had.

MR. BACON:—I think not, in view of Judge Armstrong's elaborate statement. His purpose is, I believe, to prove the statement in accordance with his opening. The opening is that the defendants are liable to the plaintiff because they made conversion of the goods consigned to the defendants by the plaintiff, and all the force this testimony now proposed to be produced can have is to prove conversion, to prove a tort. I submit that conversion cannot be proved by a casual conversation with a totally unauthorized person, as this conversation and this person are shown to be, and it is no more evidential for the purpose of proving this case than it would be to attempt to prove an intent on my part to commit a crime or conversion because I should step out of my office and leave a brother lawyer there reading a law book and say, "You take charge while I am gone. I am going down the street, down to the post office." In my temporary absence he is in charge of my office to prevent somebody from stealing what may be there, but not in charge for the purpose of binding me and making contracts for me. And it is for that purpose that I object to the testimony. It is that this colored man had charge while Baldwin had gone down the street; and that does not, cannot, possibly authorize him as an agent to speak for these defendants in such way as to transform their position 20 30

from lawful possession of this property from the plaintiffs to themselves. That is what this amounts to.

THE COURT:—I admitted it, as I stated before, simply as one of a chain of circumstances and upon the ground that the parties were inquiring and seeking information; and upon that basis I allow it for the present. I will fix later as to its evidential value.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

(Question repeated.)

A. He was preparing to send the horses to a sale.

Q. Where?

A. New York.

Q. Did he tell you at what time it was proposed to send them?

A. He did not.

Q. How long were you in conversation with this colored man, if you recall?

20 A. I should judge in the neighborhood of about ten minutes.

Q. After that where did you and Mr. Moore go?

A. We stayed right there at the front of the stable.

Q. Whom did you see later?

A. Mr. Richardson.

Q. One of the defendants?

A. Yes, sir.

Q. Had you met Mr. Richardson before that time?

A. Never to my knowledge.

Q. By whom were you presented to him, if any one?

A. Mr. Moore.

30 Q. Did or did not you communicate to Mr. Richardson the information you had received from the colored man in the stable?

A. Not at that time, sir.

Q. Did you at any time?

A. No, sir.

Q. What, if anything, was said to Mr. Richardson in relation to the horses and by whom?

A. Mr. Moore said that I represented him and I told him that I came down there for settlement on the horses that had been shipped by Mr. Moore to Baldwin & Richardson. And there was some few harsh words said there and we entered into a discussion with regards to it and he says, "We have the horses ready and prepared to send for the sale in New 10 York." And I says, "Yes, the horses look as if they were groomed for some purpose." So then we recalled the fact again that we came for a settlement, that we wanted the money for the horses that had been sold and wanted the horses that had not been sold. He says, "I have some horses here in the stable, I have one out at pasture," and I think he said one or two in Washington hadn't come over yet—Washington, D.C.—and that, "We have also sold a few of your horses in Norfolk at public auction," and he mentioned the prices at that time. I don't recollect the figures. Mr. Moore made the remark that it was below the price which 20 they were consigned to him for. So then we asked again for a settlement, and he says, "Mr. Baldwin is not here and if you should see Mr. Baldwin it will be all up." He made that remark. I don't know what he meant by it.

Q. What did he say as to sending the horses to New York for sale?

A. He said, "We are going to send the horses to New York for sale," and he related that Mr. Baldwin was out through the country scouring for other horses, and while the account that was due Mr. Moore, if the horses that belonged to Mr. Moore didn't bring it, whosever horses would be sold would be added to this and Mr. Moore would be paid first. I 30 says, "I don't think it is policy to send horses to New York under those conditions. I asked him first, "Who are you sending these horses to?" He says, "I am consigning them

to the New York Horse Exchange," I think it was. I says, "If you want to be fair, and you say Mr. Moore is going to get his money, why not consign these horses to I. Whilden Moore in care of the horse exchange?" He wouldn't consent to that. I says, "Well, I will be fair to you this way. You take the cost price of the horses and give Mr. Moore a writing, an agreement that he can collect from this firm the amount of cost on the horses that are sold at the sale." This he refused to do. So we couldn't get any satisfaction.

Q. Did he tell you in whose name the horses were to be sent?

A. He did at that time, but I don't quite remember. I know he said the American Horse Exchange, that is all I remember.

Q. How long were you in conversation with Mr. Richardson at this time?

A. I judge we were there a little over a half-hour. He showed us through the stables, showed us the horses, took us in another sub-stable and went in through his own stable and back through a little street in the rear and went through another small stable.

Q. The horses that he showed you, were they the same horses that the colored man had showed you?

A. Some of them, yes, sir.

Q. And the horses that were groomed, and as you say, ready apparently to be sent away, and the colored man told you were to be sent to New York for sale, were they the horses that Mr. Richardson pointed out that were to be sent to New York?

A. The majority of them.

Q. Were you present in Jersey City at the time the horses were attached by the sheriff?

A. I was, sir.

Q. After your interview with Mr. Richardson at the stable where did you and Mr. Moore go?

A. We left for Philadelphia and went from Philadelphia to Camden, New Jersey.

Q. Do you know whether or not as the result of what you told counsel this suit was then instituted?

A. Yes, sir.

Q. After the horses were taken by the sheriff under the writ of attachment in this cause did you see either Mr. Richardson or Mr. Baldwin, and if so, which one?

A. I saw Mr. Richardson in the Jersey City passenger depot.

Q. What information, if any, did you give him as to the attachment then?

A. I told him that we had taken the horses and he said to we made a mess out of it. He said the thing would be settled; and I asked him if he would return with us, referring to Mr. Moore and myself, to the sheriff's office, and he decidedly said no.

Q. You know of your own knowledge what became of those horses?

A. Yes, sir.

Q. What?

A. They were sold in the American Horse Exchange, I think it is, what you call the American Horse Exchange, Broadway near Fifty-third.

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Q. In whose name were they sold?

MR. BACON:—I object on the ground that anything that occurred after the issuance of the attachment is incompetent, irrelevant and impertinent to this issue. This is an attachment suit.

THE COURT:—Is this an attachment suit now?

MR. BACON:—Yes, sir.

MR. ARMSTRONG:—No; it is not an attachment suit at all. It pains me to differ with my learned friend. This was a suit commenced by attachment.

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THE COURT:—This very suit?

MR. ARMSTRONG:—This very suit, and an appearance was entered by defendants and a declaration filed, and they were simply brought into court by attachment. Now as I said before, the only way we can tell about mental processes under these conditions is to tell what they did, and that is what I propose to do.

THE COURT:—I think that is admissible.

MR. BACON:—What occurred after this suit was brought?

¹⁰ THE COURT:—Before or after, as bearing upon the question of how they were acting upon the question of the conversion of the horses in dispute.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL.]

THE COURT:—Of course there is another consideration, Judge, after the horses were attached, unless they had been released by bond.

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MR. ARMSTRONG:—That was my opening. That was done on the record.

THE COURT:—Of course what was done under attachment after sale would not be admissible.

MR. ARMSTRONG:—But the matter appears here on the record that they were released and taken charge of by these defendants under bond.

³⁰ THE COURT:—I think it is admissible, what acts the parties did, whatever interest they claimed in the horses, as bearing upon that subject matter, I would think was admissible.

(Question repeated.)

A. That I can't say. I can say by a newspaper advertisement.

THE COURT:— Don't state that, what you saw in a newspaper.

Q. Did you see an advertisement of these horses for sale?

A. Yes.

Q. Were they or not advertised in Mr. Moore's name?

MR. BACON:— I object, for the same reason, and for the 10 additional reason that an advertisement which does not appear to have been authorized by anybody cannot certainly be used to bind these defendants, to prove their mental processes.

THE COURT:—I will admit it to prove the fact of what he saw advertised, for what it is worth.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

A. They were not advertised in Mr. Moore's name.

Q. Following those advertisements and pursuant thereto, 20 were or were not those horses sold?

A. They were sold, to my knowledge, yes, sir.

Q. Do you remember whether or not Mr. Richardson, in the conversation you held with him in the presence of Mr. Moore, when, as you say, you were urging a settlement, made any suggestion to you as to the advisability of sending the horses to New York?

A. Yes; he made the remark that if he sent the horses there, "You would be sure to get your money."

Q. What did he say, if anything, as to any harm that would come to Mr. Moore's claim if they were not permitted to do this?

A. He said he was liable not to get a cent. 30

Q. Was the close of the conversation amicable or otherwise?

A. No; it led me to distrust a great deal.

Q. No; apparently as between you, were you apparently friendly as you left, or otherwise? I don't ask your impression at all.

A. We were not very friendly in our own feeling, yet we left that impression with him.

CROSS-EXAMINATION.

10 BY MR. BACON:—

Q. Where do you live, Mr. Toboldt?

A. Pittsburg, Pennsylvania.

Q. What is your business?

A. I am in the oriental rug business at present, sir.

Q. How long have you known Mr. Moore, the plaintiff?

A. I should judge going on three or four years.

Q. You stated that you were in his employ. In what way are you in his employ?

A. He had an art store in Atlantic City and I was an auctioneer at that time and I also worked in his store at Atlantic City and in his hotel, when he had his hotel.

20 Q. For what purpose did you go with him to Baltimore?

A. No other reason than to take care of his affairs, for I knew he was a very excitable man at that time and I went with him to represent him.

Q. That is, you went down to hold him down, you mean?

A. No, no; didn't have to do that.

Q. When did you go to Baltimore?

A. When?

Q. Yes.

A. It was in the day time.

Q. What day?

A. Well, I can't tell you the exact day, sir.

30 Q. Can you give the day of the month?

A. No, sir.

Q. What month was it?

A. Either January or December.

Q. Either January or December?

A. I believe that was right, sir.

Q. Well, January of what year?

A. I should say two years ago, about two years ago.

Q. About two years ago?

A. Yes, sir.

BY MR. ARMSTRONG:—

Q. If you can fix it in relation to the suit you can do that 10
in answer to the question.

A. Well, the only way you can tell the date is the date
that we had the papers drawn up in Camden. If you can
recollect.

BY MR. BACON:—

Q. Well, was it before that or after that?

A. Why, it was before that.

Q. How long before?

A. Perhaps twenty-four hours—twelve hours.

Q. Twelve or twenty-four hours before the papers were
drawn up in Judge Armstrong's office in Camden in this suit; 20
is that right?

A. We left Baltimore in the afternoon and I think we
arrived in Camden the same evening.

Q. Having reference now to the date when you left
Baltimore for Camden, how long was it before that that you
went down to Baltimore?

A. I just told you.

Q. The same day, do you mean? You went to Baltimore
in the morning and came back to Camden in the afternoon; is
that it?

A. We did, sir.

Q. And that same afternoon you went to Judge Arm- 30
strong's office.

A. We did.

Q. Mr. Toboldt, were you present in Judge Armstrong's office when the affidavit was made in this attachment suit?

A. That I can't say.

Q. Was the affidavit made the afternoon you went up from Baltimore to Camden?

A. We went to Judge Armstrong's office and talked the matter over and if I am not mistaken I didn't go back when the affidavit was made.

Q. I direct your attention to the fact that the affidavit was made on January 26th, 1900. In view of that statement, did
10 you go to Baltimore on January 25th, 1900, the day before?

A. That I couldn't say. I can't give you any positive date, thereabout.

Q. From what place did you and Mr. Moore start for Baltimore?

A. From what place?

Q. Yes.

A. Took the train at Broad Street Station.

Q. Well, do you understand what I want to know, without going into details.

A. We were in Atlantic City, sir.

Q. I said from what place did you and Moore start when
20 you went to Baltimore.

A. Atlantic City.

Q. Were you living in Atlantic City at that time?

A. I was, sir.

Q. How long have you been living there?

A. Well, I have lived in Atlantic City off and on for eight or nine years.

Q. Had you ever met Richardson and Baldwin previous to the day you and Moore went down there?

A. I have never met Mr. Baldwin; I have only met Mr. Richardson and only on the day I went there.

Q. Did Mr. Moore introduce you to Richardson?

30 A. He did, sir.

Q. By what name?

A. That I don't remember.

Q. Did Mr. Moore introduce you by your own name?

A. Not at the beginning, but when we left he knew who I was by my right name.

Q. By what name did Mr. Moore introduce you to Mr. Richardson?

A. That I couldn't tell you, for I don't recollect. But at the time I didn't know that he introduced me only by my own name. I only have one name.

Q. Don't you know that Moore introduced you to Richardson by an assumed name?

A. Yes; I created the impression myself.

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Q. Did you or Moore represent to Richardson what your business was?

A. That I represented him in this case.

Q. Did he not represent you as a lawyer and that your name was Garrison?

A. He never represented me as Garrison.

Q. Did he or not state to Richardson that you were a lawyer?

A. I didn't hear it if he did.

Q. If he did that is not true, is it?

THE COURT:—That is not the way to put it.

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Q. Well, are you a lawyer?

A. No, sir; I am not.

Q. What time in the day was it that you got to this stable?

A. Before sunset.

Q. Well, how long before sunset?

A. That I can't say, for I have so many things that happened, say in the past two years, that my mind is not supposed to recollect all those little insignificant things.

Q. Well, you are very clear what all these people said.

A. I certainly am, yes, sir.

Q. You remember that with great clearness?

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A. Yes, sir.

Q. Well, now what time did you get down to Baltimore?

A. About the middle of the day, I should judge. The sun was very bright.

Q. Was it before lunch or after?

A. We didn't have any lunch that day.

Q. Was it before the ordinary time?

A. We had something to eat in the evening. I was very hungry.

Q. You couldn't say whether it was before lunch or after?

A. Positively, I could not.

Q. What train did you leave Broad Street Station on?

10 A. Somewhere around eleven o'clock, I think, ten or eleven o'clock.

Q. Where did you go when you got to Baltimore first?

A. We got on a car and rode—sorry to say, I was born in Baltimore, but I don't know anything about it. We rode to a street and got off and went to Mr. Richardson's stable, Richardson & Baldwin's stable.

Q. Did you make any note of these various conversations you had with the unknown colored man and Mr. Richardson?

A. No, sir.

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RECESS TILL 1.30 P.M.

Trial of the cause resumed at 1.30 P.M.

MR. ARMSTRONG:—Under the 341st section of the Practice Act I served certain interrogatories on the defendants on the 18th day of December, 1901, requiring answer thereto. One of the defendants made answer. I propose to read those interrogatories and have my associate read the answers.

30 MR. BACON:—I object to the reading of the second and third interrogatories and answers, on the ground that they are incompetent, irrelevant and impertinent to the issue as stated

by counsel in his opening. The reliance placed by the plaintiff is upon an alleged conversion of these horses at Baltimore on the 25th day of January, 1900, and I submit that the measure of damages for the alleged conversion cannot be proved by any agreed cost price between the parties.

MR. ARMSTRONG:—Does your Honor want any reply to that?

THE COURT:—Yes.

(Mr. Bacon cites authorities.)

MR. ARMSTRONG:—If your Honor please, the contract already read fixed a certain price as being a stipulated price for which, under all circumstances, as your Honor remembers it, the defendants were responsible. They were also responsible for a contingent amount on prices in excess of that one-half.

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THE COURT:—Profit?

MR. ARMSTRONG:—One-half the profit. The point that is made by counsel is that we cannot rely on our contract, that these horses were all disposed of, that we cannot rely on the contract that is admitted between the parties and we cannot take their estimate. I in my opening anticipated,—as in this case I had a perfect right to do, because the questions had already been mooted on the part of the defendant,—I anticipated what the defendants would say as to the operation of these things included in the bill of particulars; that was that they were in possession, in being, so far as the property was concerned, at the time this suit was instituted, and therefore for those there had been no dispossession. I propose to show that there had been a disposition made of them in the way of conversion, which is under all circumstances,—if I were suing now for trover and conversion, if I were proving damages because a man had taken my property forcibly, I would not undertake to controvert the position the gentleman has taken; but the position I have taken is more favorable to

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the defendants, considering this. If they were guilty of trover and conversion in our state, of course, their liberty would be in jeopardy. Their liberty is not in jeopardy if I sue upon contract, and therefore I am permitted to waive the tort; I am permitted to waive all that and treat it as money had and received, or goods had and received; goods sold and delivered or anything of that sort under the common counts. That is what I am doing and what I propose in this case. I cannot ever so far as he is concerned, if I am permitted here, no matter whether I can get my money or not by execution, I would
 10 never be able to set up the tort because I had already waived that and taken the contract; the old idea that you could not go from one to the other is just as strong now as when we had common law pleadings. You can't go from one to the other after you have instituted your suit; but when you start your suit you can waive the thing that is more harmful to the defendant and take the thing that is more beneficial to him and demand money instead.

THE COURT:—Judge, his point is, as I understand it, that now claiming that there was a tort, a conversion, that though you waive the tort, yet your basis of recovery could not be placed upon this contract, that being at an end by the
 20 acts of the parties by election, you having elected also to accept what you might claim to be an abandonment of the contract on their part and suing them for practical conversion. As I understand the objection it is upon the manner and mode of proof as to the value of the horses, that you cannot choose the contract as the proof of the value. I only wanted to explain what I understand him to mean. I didn't know.

MR. ARMSTRONG:—I understand he says that.

THE COURT:—Now is there any part of your case which is not covered by this claim of conversion, that is, whether they owe you money by reason of not having accounted fully
 30 under the contract?

MR. ARMSTRONG:—The larger part of it is of that character.

THE COURT:—Then why is not this evidence admissible, as proof, at least of that part, Mr. Bacon?

MR. BACON:—Well, I think, if your Honor please, it is inadmissible for this reason. This is, as I stated this morning an attachment suit. An attachment suit will not lie for unliquidated damages, that is settled. I notice that your Honor was reading my printed brief a minute or two ago in order to get the copy of this contract. The matter went to the Supreme Court on rule to show cause why this writ should not be quashed, and that was the brief that I filed in that case.

THE COURT:—My point now is that they sue the same¹⁰ as in an assumpsit now. If there is any money that was due under the contract they claim that that would stand as an assumpsit, and in order to fix the value of horses that had been disposed of under the contract, that this would be relevant proof to show what the parties say themselves as to the cost price.

MR. BACON:—But I understand, if your Honor please, that they are not suing upon the contract. The contract forms no part of the pleadings at all.

THE COURT:—They are suing upon the common counts and they offer the contract as proof of part of their demand; 20 isn't that so?

MR. BACON:—The contract has not been offered.

MR. ARMSTRONG:—I read it to the jury.

MR. BACON:—You never offered it.

MR. ARMSTRONG:—Of course I have got to prove my case as I go along.

MR. BACON:—This contract has been construed by the court in Justice Vansyckel's opinion.

THE COURT:—Have we reached that yet?

MR. BACON:—I think so. The question is whether this³⁰ testimony is irrelevant or not. I say it is irrelevant on the opening of counsel, an attempt to prove the value of converted

property. It is an attempt to prove unliquidated damages, and an attachment will not lie for unliquidated damages. Therefore it is incompetent in any sense.

MR. ARMSTRONG:—My learned friend has lost sight of the fact that this is a lawsuit pure and simple. He is in court here. What is the difference whether I brought him in by a *capias ad respondendum* or by a *capias* which took his goods and made him answer by his goods? Because that is all it is. If I had arrested him it would be that they were attached to answer in the declaration.

10

THE COURT:—The suit now stands on the declaration, which is in the form of *assumpsit*, no matter how the process came, as I understand it. Now Mr. Bacon insists, as I understood he did on the start, that this method of proof would not be suitable in proof of the value of the horses converted. But I understand that the plaintiff claims money that is due while the contract was in existence and while they were acting under the contract.

20

MR. ARMSTRONG:—I will answer the other part of it when it comes later. I don't understand that I am to answer it now. I think I can answer it perfectly in this case, that it is admissible for all purposes here.

THE COURT:—Well, upon that point then, Judge, the point as to whether it is a basis of the proof of the value that you want to recover, for instance, for the horses that have been converted.

30

MR. ARMSTRONG:—By this contract the defendants' liability was limited and was fixed both; because it must work both ways. No matter how much or how little those horses were worth, the price was agreed upon as between themselves at which they should be billed to them. Death or any other contingency that did not produce more than the cost price did not at all increase the liability of these defendants, but did fix the liability. They were given, therefore, a certain sum of money, whether it was a sorrel horse or a black horse, a fast

horse or a slow horse, no matter what it was, it was fixed by the parties and their own action entirely. That was the value that was put in their hands. They had the right to dispose of those horses at any price they saw fit; having made the contract, however, to dispose of them at the best price they could and to account for the excess, one-half of the excess, above this fixed cost price. Now in arriving at the value—I shall argue it is conclusive later—now is not the time—but in arriving at the value of these horses that is one of the elements, certainly, necessary to be brought in; because should I attempt to say that the horses they got from us were worth \$10,000 I would be confronted at once with my agreement that they should only be worth \$6,500. As between ourselves that was fixed and it must bear both ways. The point that counsel is making, that when I am taking a man's body, unless he pays damages the jury has the right to say from all the evidence how much damage I have sustained; but when I am suing on a contract, as I am, because I waive the tort and call it a contract, no matter what I receive from your Honor, no matter how I get it, even if I make an infraction of the law to get it, you are not bound to call on the extraordinary remedies you have, nor are you bound to call upon the criminal process of the state. The state may be offended, but you are not bound to do that. You can go for your own property and get your own property and its value then if it has been agreed upon between us, when you are doing that way by a suit of law, would certainly be, as I shall argue later, conclusive. But as an element of proof now, what they were called by the plaintiff and what the defendant admitted they were when he received them is certainly a basis not only for what they had disposed of,—because in contemplation of our action they had disposed of all of them on the 25th day of January, the day before the bringing of this suit,—so that in either event, as your Honor will see, that price is fixed there unless they got more money for them afterwards; that would fix it, would fix the price at which I would bill them. I could not do otherwise. That is my contract.

THE COURT:—Mr. Bacon, you referred to some law. What is the point of that law? You need not read it now, but refer to the authority that you think bears upon this question.

MR. BACON:—I was about to read a portion from Judge Vansyckel's opinion which bears upon this agreement.

MR. ARMSTRONG:—I object to reading that to this jury on this preliminary motion.

10 MR. BACON:—I am objecting now and stating the law upon which I base my objection.

THE COURT:—I suppose you will have to state your legal principle and cite authorities; but this is not a final decision, is it? It is the view of the Court upon a preliminary motion, and you contend, Judge Armstrong, it cannot be quoted as the law of the Supreme Court?

MR. ARMSTRONG:—It cannot be quoted here. A preliminary motion in this case cannot be quoted as binding.

THE COURT:—In this particular case?

20 MR. ARMSTRONG:—No; certainly not.

THE COURT:—I think we had better avoid reading that in the presence of the jury in this case. You can pass it to me; I will look at it; but I would like you to state the authorities you call for.

MR. BACON:—I would like to inquire for what purpose this testimony is being offered, to prove which branch of the case.

MR. ARMSTRONG:—To prove the matters set out and contained in the declaration filed in this case by the plaintiff.

MR. BACON:—And not to prove the conversion, which
30 is not set out?

MR. ARMSTRONG:—The evidence is not set out in the declaration.

MR. BACON:—There is no charge of any conversion.

THE COURT:—Yes. I think, Mr. Bacon, you will have to infer from the counsel's argument. You heard him state about what he offers. He stated pretty fully. He claims that they have the right to use this contract as showing, at least, the amount which the defendant must respond for if he is held liable at all; that they can use that writing, the agreement, both parties, as fixing the value. That is the purport of what he said, in both branches of the case, one for money received from the sale of the horses and the other from conversion of horses, if that is shown. That is the way I understand it. 10

MR. BACON:—I think I will see where he lands with that.

THE COURT:—Then your objection is withdrawn?

MR. BACON:—I will withdraw that.

(Mr. Armstrong reads interrogatories and answers as follows:)

“NEW JERSEY SUPREME COURT.

I. Whilden Moore,

vs.

William H. Richardson and George
S. Baldwin, Trading as Richard-
son & Baldwin.

} Upon Contract.
Interrogatories.

20

To William Richardson and George S. Baldwin and each of them:

You and each of you are severally required to answer in writing under oath in the time limited by law after the service hereof upon you the following interrogatories: 30

1. Q. What numbers of horses were sent to you by the plaintiff, I Whilden Moore?

A. I, George S. Baldwin, do hereby submit my answers to the several interrogatories filed by the plaintiff in the above cause in manner following, to wit:

1. Thirty-three (33) horses were sent by the plaintiff to the firm of Richardson & Baldwin, of which I was a member.

2. Q. What was the cost price of each of the said horses so sent you?

2. A. The said horses were consigned to the said firm of Richardson & Baldwin for sale and the cost prices of said
10 horses were as follows, viz.:—

Sorrel horse,	\$200 00
Black horse,	200 00
Gray and brown horse,	375 00
Pied mare and roan mares,	160 00
Big bay trotter,	300 00
Sorrel pacer,	150 00
Belle Swigert mare,	400 00
Punch sorrel horse,	150 00
Dude horse,	250 00
Bright bay cob (\$250), Bay cob (\$175),	425 00
20 Team bay cobs	600 00
Team brown mares,	350 00
Team brown horses,	350 00
Bay horse,	140 00
Bay cob, white feet,	200 00
Bay cob,	200 00
Brown cob,	200 00
Billy M.,	300 00
Team bay cobs,	400 00
Team bay cobs,	350 00
Gray horse,	100 00
Sorrel team, horse and mare,	400 00
30 Team brown horse and mare,	425 00
	\$6,825 00

Same as bay br., \$140, error	\$ 50	
Less Br. cob,	150	
		200 00
		\$6,625 00

3. Q. What was the total cost price of all the horses received by you from the plaintiff, I. Whilden Moore?

3. A. Total cost price of all the horses received by the said firm of Richardson & Baldwin from the plaintiff I. Whilden Moore was \$6,625.00.

4. Q. Does the schedule annexed to the declaration as a bill of particulars in this case show the horses sent you by I. Whilden Moore? ¹⁰

4. A. Yes; the schedule annexed to the declaration as a bill of particulars in this cause shows all the horses sent to the said firm of Richardson & Baldwin by I. Whilden Moore and in addition thereto one gray long-tailed horse which was purchased by the said Richardson & Baldwin for the said I. Whilden Moore and which was intended to be resold for his account in the same manner as the other horses.

5. Q. Were they received by you?

5. A. All the horses mentioned in the said schedule were received by the said firm of Richardson & Baldwin.

6. Q. Of the horses received by you from I. Whilden Moore, how many were disposed of by you? ²⁰

6. A. Of the horses thus received twenty-eight (28) were disposed of by the said firm of Richardson & Baldwin.

7. Q. When and where were they disposed of by you?

7. A. The places where and the dates when said horses were disposed of are as follows, viz:

Sorrel horse Punch,	Baltimore, Nov. 24, 1899.	
Emerson team bay cobs,	" Nov. 26, "	
Gray and brown mares,	Baltimore, Nov. 28, 1899.	
Pied and roan mares,	Norfolk, about Dec. 6, "	
Sorrel pacer,	" " " 10, "	
Bay horse Ratty,	" " " 16, "	30
Brown horse team,	" " " 18, "	
Bay cob and big bay trotter,	Baltimore, " 30, "	

Sorrel horse,	"	"	Jan.	5,	1900.
Bay cob team,	"	"	"	15,	"
Brown mare team,	"	"	"	25,	"
Bay cob lugger,	"	"	"	15,	"

The following were disposed of in New York, on or about January 30th, 1900, viz:

	Brown cob,
	Bay cob team,
	Black long tail horse,
	Belle Swigert,
10	Dude horse,
	Brown horse.

8. Q. Of the horses sent you by I. Whilden Moore, the plaintiff, which, if any, were by you returned to him?

8. A. Of the said horses sent the said firm of Richardson & Baldwin by I. Whilden Moore, the plaintiff, the following were returned to him, viz:

Sorrel team horse and mare, cost price,	\$400.00
Brown mare, cost price,	100.00

9. Q. What sums of money, if any, did you pay to I. Whilden Moore for or on account of horses sent to you by him?

20 9. A. The sum of \$1436.00.

10. Q. Give the amount and date of each payment.

10. A. Amount and date of each payment are as follows, viz.:

Dec.	5th, 1899,	\$ 100 00
"	16th, "	1000 00
"	30th, "	60 00
"	" "	11 00
Jan.	2nd, 1900,	214 00
"	23rd, " paid for freight on horses returned,	51 00

Total,	\$1436 00
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30 11. Q. Of the horses taken by writ of attachment in this case, which of them were horses obtained by you from others than from I. Whilden Moore?

11. A. Of the horses taken by writ of attachment in this case the following were obtained from others than I. Whilden Moore, viz.:

One black mare; property (personal) of G. S. Baldwin.
Team sorrel and bay mares.
Team sorrel cobs.
Sorrel combination horse.
Black horse.

12. Q. Of the horses received by you from I. Whilden Moore which ones did you dispose of for a price above the cost price at which the same were sent to you and how much in excess did you obtain in each case? ¹⁰

12. A. Of the horses received by the said firm of Richardson & Baldwin from I. Whilden Moore, the following were disposed of for prices above cost prices, and the excess obtained in each case was as follows, viz.:

Sorrel horse,	\$5.00
Gray and brown mares,	205.00
Big bay trotter,	10.00
Sorrel pacer,	10.00
Punch sorrel horse,	25.00
Emerson cobs,	223.50
Bay cob,	10 00." ²⁰

MR. ARMSTRONG:—I call upon the other side to produce the agreement already referred to between themselves and the plaintiff.

MR. BACON:—Have you served a notice to produce it?

MR. ARMSTRONG:—I have not. If you haven't it in court I am not entitled to ask you to produce it.

MR. BACON:—Is that the paper to which you refer? (Producing paper.)

MR. ARMSTRONG:—I judge if you think it is, it is, and I find that it is. I offer this paper and ask that it be marked. ³⁰

(Paper marked Exhibit P₁ and read by Mr. Armstrong.)

I. WILDEN MOORE, Sworn.

DIRECT EXAMINATION.

BY MR. ARMSTRONG:—

Q. Are you the plaintiff in this case?

A. Yes, sir.

Q. Are you the I. Whilden Moore mentioned in the agreement Exhibit P 1?

A. Yes, sir.

10 Q. Are you acquainted with the defendants in this case?

A. Yes, sir.

Q. Are they the parties of the second part named in that agreement?

A. Yes, sir.

Q. When was your first shipment of horses, about, to these defendants, if you recall?

A. I am not positive. It was either in November or December.

Q. What year?

A. 1899.

20 Q. When you sent horses to Richardson & Baldwin were or were not they accompanied by a list showing the cost price?

A. Yes, sir.

Q. Have you a copy of the list of horses sent and the prices?

A. Yes, sir.

Q. Produce it, please.

(Paper produced.)

Q. How many horses in number were there?

A. Thirty-four.

Q. And what was the cost price, the total?

A. \$6,565.

Q. Were certain horses returned to you, Mr. Moore, from Richardson & Baldwin?

30 A. Yes, sir.

Q. I show you the schedule attached to the bill of particulars in this case and ask you whether or not that schedule

is a correct copy of the horses sent to Richardson & Baldwin and the cost prices thereof as sent with them?

MR. BACON:—If this is a copy of something else it seems to me we are entitled to have the something else; we are entitled to have the something else; we are entitled to have the original.

MR. ARMSTRONG:—You have that, you know. It was sent to you. That was my question. We haven't it, of course. My question was, was there a list accompanying each one; and he has here a copy of that which was produced 10 and I ask him now to verify the schedule so that we may have the pleadings instead of any copy.

MR. BACON:—Is this taken from any book account?

MR. ARMSTRONG:—No.

MR. BACON:—There are no books of account?

MR. ARMSTRONG:—No. You see your admission here is practically the same thing. That is, I asked it at the first start, whether we need go over the whole case,—this is the declaration itself,—whether you admit that the declaration is correct. 20

MR. BACON:—The point I was after is, whether there were any books of account. He says there were not. I am satisfied.

MR. ARMSTRONG:—If there was a dispute as to these items we would have to go over it, and I understood there was no dispute, that is, according to the answers to the interrogatories.

MR. BACON:—Yes; that is correct.

Q. Mr. Moore, what horses, if any, were returned to you from Richardson & Baldwin?

A. Of horses that I shipped them or horses — 30

Q. What horses were returned to you that you shipped them?

A. There was a sorrel team and a bay mare.

Q. Are they indicated in the credit there on the bill of particulars?

A. Yes, sir.

Q. Just read the credit, whatever it is.

A. "Sorrel team, \$400, one brown mare \$100."

Q. Are there any other credits of horses that you have allowed?

A. Yes, sir.

Q. What are they?

10 A. Pair of sorrel mares, \$125, one gray horse, \$90, one bay, \$143.

Q. Were these horses shipped by you to Richardson & Baldwin?

A. No, sir; I never seen them before.

Q. Were they sent you by Richardson & Baldwin?

A. Yes, sir.

Q. And how did you get the prices at which you credited those, from whom?

A. I got it from Mr. Richardson.

Q. And you have allowed credit for the prices that they indicated for those horses?

20 A. Yes.

Q. What other credits have you allowed?

A. A credit of cash, \$1,000, \$100, \$214 and \$7. That is cash.

Q. What other credits, if any, have you allowed?

A. \$30 was paid Mr. McCauley, medicine \$30, T-cart \$45, harness \$35.

Q. Were or were not you asked by the defendants to allow that credit?

A. Yes, sir.

Q. And you did so?

A. Yes, sir.

30 Q. December 30, 1899, Mr. Baldwin claims the firm paid you \$60 in cash. Was any such payment made?

A. No, sir.

Q. And also he makes the same claim of the same date of \$11 cash. Was there any such sum paid:

A. No, sir.

Q. What do you know, if anything, of the item of January 23, 1900, claimed to be paid for freight on horses returned, \$51?

A. I never heard of it before.

MR. ARMSTRONG:—Counsel for the defendants says that the \$60 credit claimed on December 30 is the McCauley and the medicine charge, which amounts to \$60?

Q. Did you ever receive any information from the defendants or either of them that some of these horses were sold in excess of the cost price? 10

A. Yes, sir.

Q. Do you remember how much that excess was?

A. No, sir.

Q. Mr. Moore, just before the commencement of this suit did you go to Baltimore?

A. Yes, sir.

Q. With whom?

A. Mr. Toboldt.

Q. Was Mr. Toboldt in your employ?

A. Yes, sir. 20

Q. How long had he been in your employ, about how long?

A. Oh, two years I guess. I don't know. I don't remember. Quite a time.

Q. As to your papers, accounts and transactions, what knowledge did he have?

A. Well, he was conversant with all of my affairs.

Q. Who made your statements and kept your accounts, so far as they were?

A. He did, as a rule.

Q. How did he come to go to Baltimore with you at this time? 30

A. Mr. Richardson came to my house in Bridgeton. He told me that he had a great deal of difficulty in keeping Mr.

Baldwin from making an assignment and disposing of the horses and that he had tried his best to save, or for me to get what I had in it, and that he wanted me to allow him to send the horses to New York. I asked him what horses he had. He told me they had thirty-three horses belonging to me. He said, "It is necessary that you should write a letter to Mr. Baldwin giving him this permission. If you don't I don't think you will get anything out of it."

Q. When was that, if you remember?

A. I think it was in January sometime of 1899. I don't
10 just remember the date.

Q. Before that time, without stating what, I ask you whether you had any reason to question the good faith of the defendants.

A. No, sir.

Q. Did or did not this interview and statement by Mr. Richardson arouse suspicion in your minds?

A. Yes, sir; it did.

Q. Was it because of that or otherwise that you went to Baltimore and took Mr. Toboldt with you?

A. After Mr. Richardson went away I concluded that there was something wrong. I went to Mr. Toboldt and
20 asked him if he wouldn't kindly go to Baltimore with me, that I thought there was something wrong.

Q. Well, did you go?

A. Yes, sir.

Q. When you arrived at Baltimore where did you go?

A. We went to the stables of Richardson & Baldwin.

Q. Had you met Mr. Baldwin?

A. Yes, sir.

Q. Did you know Mr. Richardson?

A. Yes, sir.

Q. Were either of them there?

30 A. No, sir.

Q. Whom did you see there?

A. George, a colored man. I think his name was George.

Q. At that time did you make any inquiry for the firm or either of them?

A. Yes, sir.

Q. What answer did you get, if anything?

A. He said Mr. Richardson was out, but would be back presently.

Q. Who did the most of the talking?

A. Mr. Toboldt.

Q. Do you remember whether or not Mr. Toboldt made any inquiry as to who had charge of the stable in the absence of the firm?

10

A. Yes; he asked the colored man who had charge.

Q. What did the colored man say?

A. He said that he had charge of the stable.

Q. Did the colored man know you?

A. Yes, sir.

Q. What was said as to horses that had been sent by you to Richardson & Baldwin then in the stable?

(Answer ordered stricken out.)

Q. Did you see any horses there that had been sent by you?

A. Yes, sir.

Q. How many?

20

A. I don't remember.

Q. Was there anything about the horses themselves and the condition of them that indicated they were to be removed from the stable?

A. Mr. Toboldt asked the colored man—

Q. I didn't ask you what he asked him. I asked you if there was anything about the horses themselves.

A. Yes; they were all groomed, the manes were fixed and tails, like as if they were being put in shape for market.

Q. After you had seen the horses, what, if anything, did Mr. Toboldt ask the colored man as to the disposition of the horses?

30

A. He asked him what they were being groomed and fixed up and the colored man said to ship to New York.

Q. That day did you see either member of the firm?

A. Yes, sir.

Q. Which one?

A. Mr. Richardson.

Q. Did you see Mr. Baldwin?

A. No, sir.

Q. Had Mr. Toboldt, so far as you know, ever met Mr. Richardson before?

A. I don't know. I think not. No, sir; I introduced him.

10 Q. How did you introduce him?

A. As Mr. Boldt.

Q. What did you say when you introduced him?

A. I introduced him to Mr. Richardson and Mr. Richardson—I said that he remembered me. Mr. Richardson says, "I suppose this is your attorney, eh?" I didn't make him any answer.

Q. After that time who principally carried on the conversation?

A. Mr. Toboldt.

Q. Was the first part of your interview mild or stormy?

A. Stormy.

20 Q. Before you concluded did or did not the storm calm down?

A. Yes, sir.

Q. What was said, if anything, by Mr. Richardson about sending the horses to New York?

A. Well, he said if I didn't allow them to go to New York the chances are I wouldn't get anything.

Q. Was there anything said to Mr. Richardson about a settlement?

A. Yes, sir.

Q. To be made for sales already had?

30 A. Mr. Toboldt said, "We have come here, Mr. Richardson, for a settlement." Mr. Richardson said he guessed we couldn't get any money out of that firm.

Q. What, if anything, was said as to the sales already made?

A. Well, I saw that the horses were not as represented by Mr. Richardson, that it was entirely different from what he had represented when he was in Bridgeton, and of course I felt that they were taking my horses and disposing of them, doing as they pleased with them without my consent, with the possibility of never getting anything out of it, and I naturally said that I wanted a settlement. He said Baldwin was in the country picking up some horses and he said that "Whatever is short on your bill when those horses are sold will 10 come out of the horses that Baldwin gets." I said I would like to see Mr. Baldwin. He says, "Well, if you see him everything is up, because he will sell the horses or make an assignment, and then," he says, "it is all off."

Q. How long were you with Mr. Richardson at this time?

A. Oh, I presume a half-hour, perhaps a little longer or a little less. I couldn't say.

Q. Up until the time Mr. Richardson first came to see you here in Bridgeton did or did not you have any idea that these horses were being used as their own by this firm?

A. Never until the last time he came to Bridgeton.

Q. I speak of this last time when you say you were 20 suspicious.

A. Never before that.

Q. Do you remember whether or not Mr. Toboldt, when Richardson told you the horses were going to be sent to New York, asked where they were to be sent?

A. Yes.

Q. Were you told?

A. Yes, sir; on Broadway, I think, to a stable by the name of American Horse Exchange, a man by the name of Grand.

Q. Was any request made by Mr. Toboldt, acting for you, that the horses should be consigned in your name? 30

A. Mr. Richardson expressed his desire to see me get my money. Mr. Toboldt said, "Well, if you want to do what is

fair in this matter just consign the horses to Mr. Moore and then he will be satisfied." He said no, they wouldn't consider that, that was all out of reason.

Q. What, if anything, was said about giving an order for the cost price of the horses on the sales stables?

A. He said that, "Well, then give Mr. Moore an order for the money after the horses are sold in New York." No, he said he wouldn't do that.

Q. I ask you, Mr. Moore, what you had concluded was the purpose of the defendants, from what you saw and what
10 Mr. Richardson said to you when you were there, as to the disposition of those horses?

MR. BACON:—I object to any conclusion that the gentleman may have drawn. The facts are, of course, a matter still to be presented to the jury, to let the Court and jury draw their conclusion. It makes no matter whatever what conclusion this gentleman drew.

MR. ARMSTRONG:—I would vindicate that question, if your Honor please, this way: that a suit was started immediately after.

20 THE COURT:—Judge, I don't think that is allowable or admissible.

Q. Mr. Moore, when you found from what Mr. Richardson said that the defendants proposed to take the horses and dispose of them without permitting them to be consigned in your name or without giving you an order for the proceeds, what, if anything, did you do?

A. I believed that if the horses went to New York—

Q. No; not what you believed, what you did.

(Question repeated.)

A. I went back to Philadelphia, I went over to Camden to my attorney's office and asked his advice and acted on it.

30 Q. After that time did you or did you not institute this suit?

A. Yes, sir.

Q Were you present when the writ of attachment was served in this case, when the horses were taken by the sheriff?

A. I don't remember. I think I was, but I am not positive.

Q. Did you see the horses in Jersey City?

A. Yes, sir.

Q. When did you next see the horses?

A. Over at Grand's stable on Broadway; in New York.

Q. Were you there when the horses arrived?

A. Yes, sir.

Q. In whose charge were they?

10

A. I don't know.

Q. Were the defendants there?

A. Yes, sir.

Q. Do you know whether or not those horses were sold?

MR. BACON:—I object. I understand that the Court overruled my objection this morning when the other witness was on the stand. Now that the plaintiff himself is on the stand I renew the objection that I then made to any testimony relative to transactions taking place after the writ of attachment was issued, namely, after the cause of action is alleged to have accrued. Of course the cause of action must have accrued sometime previous to the 26th day of January and I object to any testimony as to transactions between these parties in reference to this property after the date when the affidavit was made.

20

THE COURT:—Yes; after conduct could not, of course, have any bearing upon the merits of the issue as it stood when the attachment was issued; but sometimes acts of parties after as well as before the date of the issue may throw some light, perhaps, upon the acts of the parties in controversy. That was all. I admit it upon that ground, as throwing some possible light upon the nature of the claim of the defendants towards this property; that is, whether it was an act of absolute ownership and conversion or not. Sometimes, I say, acts after as well as before are admitted to throw light upon

30

the principal transaction. I admit it on that ground, subject to your exception, Mr. Bacon.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

(Question repeated.)

A. Yes, sir.

Q. Do you know whether or not they were sold in your
10 name?

A. They were not.

Q. Did or did not you receive the proceeds of the sale?

A. No, sir.

Q. Have or have not you been paid the cost price of any of those horses?

A. Excepting the credits that are mentioned here.

Q. The cost of those horses sold in New York, I am talking about.

A. No, sir.

CROSS-EXAMINATION.

20

BY MR. BACON:—

Q. The first time that you knew that these horses were to be taken over to New York was the day you went down to Baltimore, wasn't it, Mr. Moore?

A. No, sir.

Q. Well, did you know when you went down to Baltimore that the horses were going to be taken to New York?

A. Yes, sir.

Q. When did you first learn that?

A. When Mr. Richardson came to my home in Bridgeton
30 here.

Q. When was that?

A. Sometime in January. I can't just say the date.

Q. Then if you knew that these horses were going to be taken to New York, what special significance was there in the conversation that you had with the colored man?

A. My suspicions were aroused after Mr. Richardson came to me and told me how things were and I went there and found they were different.

Q. Well, didn't Richardson tell you that he was going to take the horses to New York?

A. Yes, sir.

Q. Then didn't you know it when you went there?

A. I knew that they expected to take them there, yes, 10
sir.

Q. It was no surprise for you when you went down there to find these horses in condition to ship, was it?

A. No, sir; none at all.

Q. It was what you went down there to see, wasn't it?

A. No, sir.

Q. You expected to see it when you got there, didn't you?

A. I didn't know. I went down there to see what was going on.

Q. Did you know when the sale was going to take place in New York?

A. No, sir. 20

Q. Did you know at the time?

A. No, sir; I don't remember. I might at the time.

Q. Did you know then?

A. I presume I did.

Q. Did you know where it was going to take place?

A. No, sir.

Q. Didn't you have catalogues of the sale?

A. No, sir.

Q. Didn't you know that these horses were catalogued at the sale?

A. No, sir.

Q. When did you first make the acquaintance of Mr. 30
Baldwin?

A. In Washington, I think in November or December.

Q. What year?

A. I think it was 1899.

Q. When did you first make the acquaintance of Mr. Richardson?

A. The same time.

Q. Where did you enter into the contract and agreement marked Exhibit P 1?

A. In Baltimore with Mr. Baldwin at his office.

Q. Was anybody there besides Mr. Baldwin and you?

10 A. I think there was a man by the name of Carter, and if I am not mistaken, Mr. Richardson's son.

Q. Who signed the paper?

A. Mr. Baldwin.

Q. Who else signed it?

A. I did.

Q. Who else signed it?

A. No one that I remember. There might have been a witness signed it. I don't remember just who.

Q. I ask you to look at it and see who else signed it.

A. This is the signature of Mr. Richardson, who signed it as a witness. He was called in, if I am not mistaken, to ac-
20 knowledge it or witness it.

Q. I call your attention to the fact that the paper is without date and ask you to state as nearly as you can recollect when it was actually executed.

A. I couldn't tell you. I don't remember.

Q. How soon after you first met Richardson & Baldwin?

A. I don't remember.

Q. Well, it was signed then sometime in November or December, 1899?

A. I presume it was. It was in the fall sometime, just what date I don't remember.

Q. Sometime in the fall or winter of 1899?

30 A. Sometime, I can't remember just when.

Q. In the fall or winter of 1899?

A. Yes, sir.

Q. How soon did you commence to ship them horses under this contract?

A. I don't remember that. I couldn't tell you.

Q. How many horses were there in the first shipment you made?

A. I couldn't tell you. I don't remember.

Q. Have you any books or memoranda from which you can answer this question?

A. At that time I had, yes, sir. I have the list there.

Q. What has become of your books of account?

A. I can't tell you. I have mislaid the book that I had ¹⁰ this account in.

Q. The account that you had with these people you have mislaid, have you?

A. Yes, sir, I have.

Q. Have you no means whatever of telling how many horses you shipped from time to time?

A. Yes, sir; I have.

Q. Well; produce the means of information.

A. I have an acknowledgment there from Baldwin & Richardson of the number of horses shipped. I also have a schedule of mine which is here. This was copied at the time ²⁰ from my books.

Q. This statement which you have handed me is headed "Statement of account, I. Whilden Moore and Baldwin & Richardson," and purports to contain a list of twenty-four items of horses, total thirty-four horses?

A. Yes, sir; that is correct.

Q. Is that a correct statement of the horses which you shipped to Baldwin & Richardson?

A. Yes, sir.

Q. Under the terms of the contract Exhibit P 1?

A. Yes, sir; there is an acknowledgment from Richardson & Baldwin.

Q. You handed me a paper writing on letterhead of ³⁰ Richardson & Baldwin, without date, and I ask you what that is.

A. That is a statement or formed the statement that I sent to Richardson & Baldwin as to the number and prices of horses.

Q. Which you shipped them under this agreement Exhibit P 1; is that correct?

A. Yes, sir; that is correct.

Q. Did Baldwin send you a statement of account on or about the first of January, 1900?

A. I don't remember the date, This is the only one I have ever received.

10 MR. BACON:—Well, I have served notice on counsel to produce the statement of account rendered by the defendants or one of them to the plaintiff on or about January 1st, 1900, also the letter written by the defendants or one of them to the plaintiff, bearing date on the first day or second day of January, 1900, which letter accompanied the statement above mentioned and also accompanied the check for \$214 drawn by the defendants or one of them to the order of the plaintiff and afterwards cashed by the plaintiff.

MR. ARMSTRONG:—I have no letter of that date?

20 MR. BACON:—You have no letter of that date?

MR. ARMSTRONG:—No.

MR. BACON:—No statement of that date?

MR. ARMSTRONG:—No.

Q. I ask you Mr. Moore, if you received about January 1, 1900, a check for \$214 from Richardson & Baldwin.

A. Yes, sir.

Q. For what was that money paid to you?

A. On account of the horses.

Q. Was that check accompanied by any letter or statement?

30 MR. ARMSTRONG:—Here is a letter. Possibly that is the one you mean, of January 12th..

MR. BACON:—Well, I don't know the date of the letter. I said on or about.

MR. ARMSTRONG:—Here is a letter of January 12th. That is it. It has a statement attached to it.

MR. BACON:—In response to notice the plaintiff produces an original letter dated January 12th, 1900, addressed "Mr. I. Whilden Moore," signed "Richardson & Baldwin," to which is annexed another sheet of paper headed "Statement in full to January 1st, 1900," showing credits of \$1,705, charges \$1,491, and a check for \$214 to balance the account. 10

Q. Did you receive that letter and statement from Richardson & Baldwin?

A. Yes, sir.

Q. In due course of correspondence?

A. Yes, sir.

Q. And was it accompanied by a check for \$214?

A. Yes, sir.

Q. To balance the account?

A. No, sir.

Q. It didn't balance the account?

A. This is the letter that aroused my suspicion, in buying horses for me without my authority, and that is the reason, 20 partially, that I went to Baltimore to find out what he meant by buying horses on my money.

Q. That is why you went to Baltimore?

A. Yes.

Q. When you got this letter of January 12th?

A. Yes, sir.

Q. How soon did you go to Baltimore after you got this letter?

A. I can't tell you the date. I was busy and I don't remember.

Q. But it was because of the suspicion that you had by reason of this letter that you went down there? 30

A. Yes, sir.

(Paper marked Exhibit A for Identification.)

Q. Between the date of the receipt by you of this letter and statement and check and the time of your going to Baltimore did you or did you not have any interview with Richardson or with Baldwin?

A. None excepting the interview with Mr. Richardson.

Q. Where did you have an interview with Mr. Richardson?

A. In my home on Commerce street.

Q. How did Mr. Richardson come to be at your home on Commerce Street?

10 A. He came there of his own free will.

Q. You didn't invite him to come?

A. No, sir.

Q. About when was that?

A. I couldn't tell you the date. It was some time, I presume, in December or January.

Q. I call your attention to the fact, Mr. Moore, that you have just testified that the visit of Mr. Richardson to you was after January 12th.

A. Then it was after January 12th.

Q. Can you state how long?

20 A. It might have been one day, it might have been two. I can't tell you.

Q. For what purpose did he come there?

A. He came to me and stated that he had dissolved with Baldwin, that he had difficulty in keeping Mr. Baldwin from making an assignment, and as he felt friendly toward me he wanted me to try and get my money and he was going to do all he could to help me get it, and he didn't see any other plan excepting the plan as stated, to send the horses to New York, and wanted to know whether I cared whether he did or not? He represented to me there was so many horses worth so much money. I said to him, "Why did you buy these
30 horses for my account? I never authorized you to buy them." "Well," he said, "I didn't suppose that made any difference to you, so I made some money for you." I afterwards met

Mr. Baldwin in—I think it was last summer or last summer year—in Atlantic City.

Q. Well, I am not talking about that now. We are talking about this interview at your house. Did Mr. Richardson have with him at that time any statement of account?

A. No, sir; he had some little notes; he had no statement whatever.

Q. Had no statement whatever?

A. No, sir; none.

Q. Then you didn't go over any statement with him? 10

A. No, sir.

Q. Was there anything said between you and him as to how many horses they had belonging to you?

A. Thirty-three.

Q. Was there any arrangement made to ship any of them to you?

A. Yes, sir.

Q. Well, how many were they going to ship to you?

A. Three.

Q. That is what they agreed to ship to you?

A. Yes.

Q. How many did they ship to you? 20

A. Five or six.

Q. Were they horses that you had bought and sent down there?

A. No sir; there was two of them, a pair of sorrel mares, that Mr. Baldwin told me Mr. Richardson paid \$83 for. He put them in to me at \$125. There was another horse that he had paid \$40 for that he put in for \$143. They were in very bad condition. They were brought on and I couldn't turn the horses out in the street, so I took them in and allowed them for them according to his statement.

Q. You say according to his statement. To what statement do you now refer? 30

A. According to the statement that they have presented here.

Q. But you don't refer to any statement that Richardson made to you at the time of his visit?

A. No, sir; I don't.

Q. How long did Mr. Richardson stay at your house?

A. I couldn't tell you. I think he stayed there all night.

Q. He did as a matter of fact, stay all night, didn't he?

A. I think he did. I think he arrived there late at night, if I am not mistaken, too late to get a train away, and he stayed till the next morning.

Q. He stayed at your house all night, didn't he?

10 A. Yes.

Q. Did you write a letter to anybody?

A. Yes.

Q. To whom?

A. Mr. Baldwin.

Q. What did you do with it?

A. Sent it to Mr. Baldwin, or gave it to Mr. Richardson.

Q. Have you a typewriter machine in your house?

A. Yes, sir.

Q. Did have at the time?

A. Yes.

Q. Do you operate it yourself?

20 A. Yes.

Q. Did you write that letter to Baldwin on the typewriter machine?

A. I couldn't tell you. I may. I couldn't say positively.

Q. Well, you wrote it while Richardson was there?

A. Yes, sir.

Q. Wrote it in Richardson's presence, didn't you?

A. Yes: I did, because I supposed it was the only way to keep Mr. Baldwin —

Q. I didn't ask you that, what you supposed; I asked you what you did. I show you, Mr. Moore, a typewritten letter addressed to Mr. George S. Baldwin under date of January
30 22, 1900, and signed "I. Whilden Moore," and I ask you if that is the letter that you wrote to Mr. Baldwin on this occasion.

A. This letter was written at the dictation of Mr. Richardson, solely for the purpose of keeping Mr. Baldwin from disposing of those horses. He sat down and dictated the letter himself and told me unless I sent this letter the chances were I would never get anything. That is why that letter was written.

Q. And you thereupon wrote it and signed your name to it?

A. I did, yes. I was going to save all I could.

Q. Now, Mr. Moore, in this letter you say, "Dear Sir: Mr. Richardson arrived to-day and we have gone over the 10 account together and found it correct."

A. That is this account here, sir. That is correct.

Q. "And he is to ship me to-morrow ten horses as for his account."

A. Those were horses that were my own. They were to be shipped back and returned what I had paid for them.

Q. What account did you refer to —

A. I referred to this account here.

Q. Wait a minute. You are in too big a hurry to testify. To what account do you refer in this letter when you say, "And he is to ship me to-morrow ten horses as per account?"

A. Yes; that is correct.

20

(Question repeated.)

MR. ARMSTRONG:—You didn't have this marked, did you? You called for this?

(Account marked Exhibit B for Identification.)

A. The account that I had in my book, in conformity with this Exhibit B. He was to take ten horses out of there and ship them back at what they were charged for.

Q. You now refer to Exhibit B for Identification?

A. Yes, sir.

Q. And that is the account to which you refer in this 30 letter?

A. Yes, sir.

Q. Now please pick out on that account the ten horses which were to be shipped back to you.

A. I can't do that.

Q. Why not?

A. Well, that is impossible. I had thirty or forty horses. I can't pick out which ones they were.

Q. I ask you to take the paper Exhibit B for Identification on the table before you and indicate which of those horses on that list are the ten horses which were to be shipped back to you.

10 A. I can't do it. I don't remember.

Q. You say further to Mr. Baldwin, "I understand you are going to continue in the horse business. Now I will be glad to continue to let you have horses on the same terms as at present." What did you mean by that?

A. That was exactly as Mr. Richardson advised it. That meant just whatever he meant in it, in order to try to get my money.

Q. Then you didn't mean anything?

A. No, sir; I didn't, excepting to try to get what was due me.

20 Q. "I have in my stable at the present time a nice lot which was bought very low, which you can sell at \$500 or \$600 team and make a good profit for both of us." What did you mean by that?

A. I meant the same by that as I meant by the above.

Q. That is, you didn't mean anything?

A. No, sir.

Q. You continue, "Mr. Richardson and I are going to New York to sell the balance of the Baltimore stock." What did you mean by that?

A. I didn't know anything about that part of it. I didn't mean anything. I don't know what it means.

Q. You don't know what that means?

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

Q. Well, you wrote it, didn't you?

A. I don't know whether I did or not, that part of it.

Q. Well, look at it. There it is. (Paper shown witness.)

A. Yes, sir; I evidently wrote that.

Q. Well, what you mean by that?

A. I meant the same by that as I meant by the other.

Q. That is, that it was a lie, wasn't it?

A. Yes, sir; it was.

Q. And you signed your name to it?

A. Yes, sir.

Q. "And will then go west and buy a carload of the best. Now I want you to write me just what you intend to do and if you want me to continue to supply you with stock." Did you write that?

A. Yes, sir.

Q. What did you mean by that?

A. It was all dictated by Mr. Richardson. It all means one thing, from start to finish.

Q. Well, what is that?

A. It means that I was trying to get my money and I was advised by Mr. Richardson to do it and I did it.

Q. And you were going to do it if you had to lie about it?

A. Yes, sir.

Q. That is what I thought. I refer you, Mr. Moore, to the statement of account annexed to the declaration, to which your attention has already been directed by your counsel, and ask you if the item in the credits of two sorrel mares were horses that you had shipped to Richardson & Baldwin.

A. No, sir.

Q. Referring to the next item, one gray horse, was that among those that had been shipped by you to Richardson & Baldwin?

A. No, sir.

Q. The next item, one bay horse; had that been shipped by you?

A. No, sir.

Q. The next item, one sorrel team; had that been shipped by you?

A. Yes, sir.

Q. The next item, one brown mare; had that been shipped by you?

A. Yes, sir.

Q. Mr. Moore, was it or was it not agreed by you and Richardson the night of the 22nd of January, at your house, that you should go down to Baltimore on the 25th?

A. No, sir; he tried to keep me away from there.

Q. When you got there did you or did you not meet Mr. Richardson standing in front of the stable door waiting for you to come there?

10 A. No, sir; he was down the street with a woman.

Q. Well, you saw him?

A. When I came to the door, when we were talking to the colored man and came to the door, I saw him standing down below some two or three hundred feet talking to a woman on the opposite side of the street.

Q. Didn't you see Mr. Richardson when you first got there standing in front of the stable?

A. No, sir; we went right into the stable.

(Question repeated.)

A. No, sir.

Q. When was it you first made up your mind to go to
20 Baltimore?

A. As soon as he came over to my house.

Q. As soon as Richardson came to your house?

A. Yes, sir.

Q. And you made up your mind to go as the result of the conversation with Richardson at your house, did you not?

A. Yes, sir.

Q. And not as the result of any conversation with Mr. Toboldt after you got back to Atlantic City?

A. No, sir.

Q. And whatever arrangement was made about going to Baltimore was made between you and Richardson, was it not?

30 A. No, sir.

Q. Was not?

A. No, sir.

Q. You just said it was.

A. No, sir; I didn't.

Q. What did you say about the arrangement to go to Baltimore?

A. You ask me the question and I will answer it.

(Former testimony read.)

Q. Then I say whatever arrangement you had about going to Baltimore was the result of your conversation with Mr. Richardson?

A. Yes.

Q. And not your conversation with Mr. Toboldt?

10

A. Yes, sir.

Q. Well, did you have any arrangement with Mr. Richardson that you should go to Baltimore?

A. No, sir; he tried to keep me away from Baltimore.

Q. Tried to keep you away from Baltimore?

A. Yes, sir.

Q. Why did he want to keep you away from Baltimore?

A. Well, that is why I became suspicious—why did he?

Q. Because he wanted to keep you away you were suspicious?

A. Yes, sir.

Q. And although you were so suspicious, you wrote this letter at his dictation and sent it?

20

A. I thought diplomacy was the better thing.

Q. Then you regard this letter as diplomacy, do you?

A. Yes.

Q. You got down to Baltimore on the morning of the 25th, didn't you?

A. I couldn't tell you. I don't remember.

Q. Well, you went to Baltimore on the morning of the day that you first consulted with Judge Armstrong about this matter, did you not?

A. I don't think we consulted Judge Armstrong first; I don't remember. I know we did when we came back. It is possible that I did. I don't remember.

30

Q. Well, after you left Judge Armstrong's office on the 26th where did you go, on the 26th of January, 1900?

A. We telegraphed Mr. Richardson, if I remember correctly, I was coming to Baltimore, to meet me.

MR. ARMSTRONG:—He has misunderstood your question as to that. He is mixed on dates.

THE WITNESS:—I don't remember the dates.

Q. I call your attention to the fact, Mr. Moore, that the
10 affidavit to procure this writ of attachment was made by you on January 26th, 1900. Now I ask you after you made that affidavit, to what place you went?

A. I don't remember. I might have went to Atlantic City. Might have come to Bridgeton. I don't know.

Q. When did you go to Jersey City, if at any time?

A. I went to Jersey City, but I don't remember when, whether it was the next day or when.

Q. I show you a telegram dated "January 27, 1900, Pennsylvania Depot, Jersey City, New Jersey. Mr. Baldwin, care of Richardson & Baldwin, 1,014, Morton Street, Baltimore. Meet me Judge Armstrong's office, Camden, New Jersey, this
20 afternoon. Wire answer his care. I. W. Moore."

MR. ARMSTRONG:—I shall have to object to them. Those are only duplicates.

MR. BACON:—I was going to show that to him and ask him if he sent that.

MR. ARMSTRONG:—You can't show that to him and ask him. The only thing you can show him is the telegram itself.

MR. BACON:—Well, this is the telegram.

30 MR. ARMSTRONG:—Oh, no; it is not.

MR. BACON:—I can't get the original that was filed.

THE COURT:—I don't know of any rule of law or evidence that excepts telegrams from the necessity of producing the original, if there is any.

MR. BACON:—The question I was going to ask this gentleman was if he sent such telegram. I don't know of any objection whatever there can be to such a question, if he sent such a telegram.

THE COURT:—The objection from the other side is that the best way to prove that is by producing the original from the files of the telegraph office; that is, that is the best evidence, and you cannot prove the contents. 10

MR. BACON:—Oh, well, if they want to keep these telegrams out—

MR. ARMSTRONG:—That is not a proper statement to make.

THE COURT:—I don't think you ought to make any comments on the action of counsel on either side.

Q. Did you go over to Jersey City after you left Judge Armstrong's office?

A. I couldn't say. I don't remember. I went to Jersey City, but whether I left Judge Armstrong's office and went to Jersey City, I can't say. 20

Q. Were you in Jersey City when the horses were attached?

A. Yes, sir.

Q. While you were in Jersey City did you attempt to communicate in any way with Richardson or with Baldwin?

A. Not individually, no, sir.

Q. How do you mean individually?

A. Myself. I didn't.

Q. You didn't send them any telegrams or write them any letters?

A. No, sir. 30

Q. Did anybody do it at your suggestion?

A. Yes, sir.

Q. Who did it at your suggestion?

A. Mr. Toboldt; not under my suggestion, his suggestion.

Q. Was it with your approval?

A. Yes.

Q. What did he say?

A. I don't know. He said he believed if he could get hold of Mr. Baldwin that Mr. Baldwin would pay up.

Q. You don't know what he did?

A. No; I don't remember what he did.

MR. BACON:—My associate calls my attention to the fact
10 that I have omitted something in the examination on this declaration.

Q. Just take the transcript again, will you, please, Mr. Moore. Taking now the first item of your charges against Richardson & Baldwin, "Sorrel and black long tails."

A. Yes, sir.

Q. Did you ship those horses to Richardson & Baldwin?

A. Yes, sir.

Q. The next item, gray and brown mares; did you ship those?

A. Yes.

20 Q. The next, pied mare; did you ship that?

A. Yes.

Q. The next, big bay trotter; did you ship that?

A. Yes.

Q. Sorrel pacer; did you ship that?

A. Yes, sir.

Q. Billy M.; did you ship that?

A. Yes, sir.

Q. Belle Swigert; did you ship that?

A. Yes, sir.

Q. Punch; did you ship that?

A. Yes, sir.

30 Q. Dude; did you ship that?

A. Yes, sir.

Q. Bright bay cob; did you ship that?

A. Yes, sir.

- Q. Brown cob; did you ship that?
 A. Yes, sir.
 Q. Roan cob; did you ship that?
 A. Yes, sir.
 Q. Emerson cobs; did you ship those?
 A. Yes, sir.
 Q. Two brown mares; did you ship them?
 A. Yes, sir.
 Q. Two brown horses; did you ship them?
 A. Yes, sir.
 Q. Bay horse trotter; did you ship that? 10
 A. Yes, sir.
 Q. Bay horse long tail; did you ship that?
 A. Yes, sir.
 Q. Bay cobs white feet; did you ship them?
 A. Yes, sir.
 Q. Prince and sorrel mare; did you ship them?
 A. Yes, sir.
 Q. Bay cob; did you ship that?
 A. Yes, sir.
 Q. Brown cob; did you ship that?
 A. Yes, sir.
 Q. Two bay cobs; did you ship them? 20
 A. Yes, sir.
 Q. Two bay cobs white feet; did you ship them?
 A. Yes, sir.
 Q. Two grays; did you ship them?
 A. Yes, sir.
 Q. Then you shipped all the horses in that list to Richardson & Baldwin?
 A. Yes, sir.
 Q. And none of them are horses that they purchased with your money elsewhere?
 A. No, sir.
 Q. Sure about that, are you? 30
 A. Yes, sir.
 Q. Mr. Moore, on January 22nd, didn't Richardson &

Baldwin ship you eight horses, one carriage and one set of harness?

A. I don't remember the number of horses. I remember there were horses and a carriage and harness.

Q. A set of harness?

A. Yes, sir.

Q. On January 22nd?

A. I don't know the date; I couldn't tell.

Q. Well, was it after Mr. Richardson's visit to you?

A. I couldn't tell you. I don't remember.

10 Q. Where have you given credit for that carriage and set of harness and eight horses?

A. Credits for whatever they sent. Here is a credit for a T-cart and a set of harness and two and three—

Q. Well, there were eight horses shipped you and you credit only six.

A. No, sir; there were seven: pair sorrel mares, one gray horse, bay horse, one sorrel mare and one brown mare.

Q. That is seven?

A. Yes, sir.

Q. Well, there were eight shipped you and where is the other?

20 A. No, sir; there was not.

Q. How many horses that were shipped to New York belonged to you?

A. I couldn't tell you. I don't remember.

Q. Well, some of them belonged to you, didn't they?

A. Yes, sir.

Q. Can't you give any idea how many belonged to you?

A. No, sir; it has been two years. I don't remember.

Q. You bought some of the horses at this horse sale, didn't you, in New York?

A. Yes, sir.

30 Q. Was Richardson there with you when you bought them?

A. Yes, sir.

Q. Did you and he buy them together?

- A. No, sir.
 Q. Did he buy them for you?
 A. No, sir.
 Q. Did you buy them for him?
 A. No, sir.
 Q. Who did you buy them for?
 A. Myself.
 Q. Some of these same horses that you claimed were yours?
 A. Yes, sir.

10

RE-DIRECT EXAMINATION.

BY MR. ARMSTRONG:—

Q. At the time Mr. Richardson visited you at your house did or did not he claim to be friendly to you?

A. Yes, sir.

Q. You say this letter marked for identification Exhibit A you wrote at his suggestion?

A. Yes, sir.

Q. At that time did you say anything to him about desiring to see Mr. Baldwin?

20

A. Yes, sir.

Q. Did he advise you that would be desirable or not?

A. He said I had better keep away from him.

Q. What was the purpose of his suggestion about writing the letter as though you were going to do some business with him and was satisfied with the way he had been doing?

A. Well, his suggestion was to lead him to believe that, the possibilities were that I would get my money by doing it.

Q. Was it at your suggestion or his suggestion that you wrote this letter that you say—

A. His suggestion.

Q. And the matters contained in that letter as to future 30 purposes you did not propose to carry out?

A. No, sir.

Q. The sale at New York when you bought these horses in yourself, as you spoke of, did you pay for them?

A. Yes, sir.

Q. How were you treated, as a stranger in the transaction entirely?

A. Yes, sir.

Q. Was it within a day or two after the visit of Mr. Richardson to you that you went to Baltimore?

A. I am not positive; I couldn't tell you.

Q. It was after the visit of Mr. Richardson to you?

10 A. Yes; some time afterwards; just as soon as I got a chance.

Q. Was it before you commenced this suit?

A. Oh, yes; yes, sir.

Q. Do you remember, as a matter of fact, whether or not you went to Trenton and got some papers which you took to the sheriff?

A. Yes, sir.

Q. From whom did you receive the papers to take to Trenton?

A. My attorney.

Q. After you went to Trenton and filed papers in the clerk's
20 office did you receive a writ from the clerk?

A. Yes, sir.

Q. What did you do with that?

A. Went to Jersey City and gave it to the sheriff.

Q. This was all after your visit to Baltimore?

A. Yes, sir.

Q. What had you been led to believe up to the time of the commencement of this suit was Mr. Baldwin's attitude toward you, or claim?

30 MR. BACON:—It seems to me that is hardly a proper question. I don't want to object. What this gentleman was led to believe is rather a wide-open question. I can't see how his belief cuts any figure in this case at all.

THE COURT:—Do you object to it?

MR. BACON:—Yes; I object. It has already been ruled out.

MR. ARMSTRONG:—Pardon me for being obtuse, if your Honor please. In cross-examination of this witness it has been shown that he wrote the letter to Mr. Baldwin which he frankly says was intended to prevent Mr. Baldwin from being inclined to do something to get the better of him; that it was to hold out the allurements to Mr. Baldwin that by dealing fairly with him there was a prospect of more business and greater pluckings in the future, and every line of the letter shows that; that it was proposed to him by a partner who pretended that he was interested for the plaintiff and desired to prevent his wicked partner from harming the plaintiff. That has been brought out. This is not as though it were an original thing undertaken to be injected in the case by me at all. It would be entirely improper then. I am simply explaining now what was brought out in cross-examination, as I am bound to do. It would be entirely improper for me to take it up on direct. 10

THE COURT:—I suppose the object of your question is to ascertain whether he understood from conversations that he had with Richardson that Baldwin's attitude was friendly toward him; and if that is the object, have you any objection to that Mr. Bacon? 20

MR. BACON:—Well, my understanding of it is that a witness cannot testify as to what his belief is; he can testify to facts and the inferences, as I said before, are for the Court and jury.

THE COURT:—Perhaps you had better limit it a little more, Judge, whether Mr. Richardson spoke as if he was friendly.

Q. Did Mr. Richardson say anything to you which, if true, showed that Mr. Baldwin desired to take advantage of you and cheat you? 30

MR. BACON:—That is still more objectionable. That leaves it entirely to this witness to draw the inference.

THE COURT:—I think that that broad form perhaps, Judge, is objectionable. My suggestion would be to ask what Richardson said, if anything, with reference to Baldwin's attitude, whether friendly or otherwise, towards Mr. Moore, whether Richardson said anything to him on that point.

MR. ARMSTRONG:—Does your Honor ask that question?

THE COURT:—No; I don't ask any question, but I
10 suggest that. You may adopt it or insist on your first question.

Q. I will ask that question. Did Mr. Richardson say anything to you which led you to believe——

MR. BACON:—That is not it at all.

THE COURT:—He has not finished yet.

Q. — Which led you to believe that Mr. Baldwin's attitude toward you was friendly or otherwise?

(Objected to for the reasons already stated.)

THE COURT:—I sustain the objection. You didn't adopt
20 my form.

MR. ARMSTRONG:—I undertook to ask your Honor's question.

THE COURT:—Well, I limited it to what Mr. Richardson actually said to him, to ask him to tell what he said if anything with regard to Baldwin's attitude towards him, whether friendly or otherwise.

Q. Did Richardson say anything to you which indicated, if true, Mr. Baldwin's attitude toward you, whether friendly or otherwise?

MR. BACON:—I object, for the same reason, because the
30 inference is to be drawn by the witness as to what the statement of Richardson indicated. There can only be one way to ask a question, what the man said.

THE COURT:—That is the same thing practically.

MR. ARMSTRONG:—It is the same thing, as I understand it, what your Honor allows me to show by this witness, whether what was said to him by another party, brought out on cross-examination, led him to do certain things. Why, the reason that a man does a thing and what induces him to do the thing is always admissible; not as it binds whether it was or was not, whether his conclusion was right or whether it was wrong. Of course what this man concludes does not preclude the other side; but suppose the man said yes; and from his manner the witness believed he meant no; the only way it could be proved is by what the witness understood, not what he said. 10

THE COURT:—I think it is objectionable on the ground that it asks the witness to give his opinion of what Richardson's statement indicated to him. I think we must judge, as the Court and jury, as to the effect of it.

Q. What led you to write the letter to Mr. Baldwin, Exhibit A?

A. In order that I might possibly get the amount of money that was coming to me, due me at that time.

Q. Why did you think it was necessary to write that letter? 20

A. Mr. Richardson said it was necessary. He said that Mr. Baldwin, the chances are that I would never get anything from him if I didn't.

Q. Had you any other reason than that for writing this letter?

A. No, sir.

Q. Did or did not Mr. Richardson at that time say you would not get anything from Baldwin unless you wrote such a letter?

(Objected to as leading.)

MR. ARMSTRONG:—"Did or did not" leading? 30

MR. BACON:—Just state what he said. It is putting the conversation directly in his mouth,

THE COURT:—It is rather suggestive, Judge, so much so that it becomes leading.

MR. ARMSTRONG:—I press that question.

THE COURT—I sustain the objection.

(Exception noted for plaintiff.)

Q. Did Mr. Richardson say why it was necessary to write such a letter as that?

10 A. He said he believed if I didn't write it—I first refused to write it. He said, "If you don't do it the chances are you will never get a penny."

Q. What did Mr. Richardson say, if anything, as to the feeling Baldwin had towards you, whether friendly or otherwise?

A. Very bitter, the way he expressed it. He also expressed it that way in Baltimore the time I tried to see Mr. Baldwin.

Q. Did or did not you believe that at that time?

(Objected to.)

20 THE COURT:—I think it is allowable to show the fact of his state of mind as a result of that. I will allow that.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

A. I did.

Q. After this did you all the time retain that same belief or otherwise?

A. He kept us apart until after the sale was over and then we got together.

30 Q. I ask you whether you retained that belief all the time after that or did you have occasion to change it?

A. Yes; I changed my opinion since.

RE-CROSS EXAMINATION.

BY MR. BACON:—

Q. What had you done to Baldwin to engender bitter feeling on his part towards you?

A. Nothing that I know of.

Q. There was then no reason whatever why he should feel bitterly towards you, was there?

A. None that I knew of, no, sir.

Q. Notwithstanding that fact, you were impressed with the truth of Mr. Richardson's statement that Mr. Baldwin felt 10
very bitterly toward you?

A. Yes, sir.

Q. Without any cause whatever?

A. Yes, sir.

Q. I show you Exhibit C for Identification, being your letter to Baldwin, and ask you to point out in it the portions of it which were intended by you to deceive Baldwin.

MR. ARMSTRONG:—If your Honor please, I suppose that is certainly improper. There was no detail of it, in answer to nothing that was brought out at all. He has taken every paragraph of that letter.

MR. BACON:—The question, it seems to me, was the third 20
or fourth from the last, as I recall it, as to his reasons and purposes in writing the letter, and I want him now to answer in reference to that.

THE COURT:—You see you examined him very fully, phrase by phrase, on this letter in your examination.

MR. BACON:—I asked him what he meant by that, by the different paragraphs.

THE COURT:—Now how is it changed by the re-direct? I don't think the Judge went into it.

MR. BACON:—Whatever the Court says about that. 30

THE COURT:—I think perhaps we had better exclude further examination on that.

PLAINTIFF RESTS.

MOTION FOR NONSUIT.

MR. BRACKEN:—If your Honor please, we desire to submit a motion for a nonsuit and my colleague has asked me to address a few words on the subject, with your Honor's permission.

10 As I understand the case, developed as it has been by the testimony, the suit is based upon a certain contract which has been introduced in evidence providing for the consignment by the plaintiff to the defendants of certain horses at cost prices, these horses to be sold or exchanged by the defendants and an account to be made to the plaintiff for the profits realized over and above the cost price named, the profits to be divided between plaintiff and defendants. If this claim proceeds upon that contract it was the duty necessarily of the plaintiff to make out first the consignment of horses under the contract, and that has been done; secondly, the disposition of the horses, designating the horses that were disposed of and the amounts realized from their sale; and
20 thirdly, the fact that as to the amounts realized there has been no accounting. From the testimony introduced here it is absolutely impossible for the Court or jury to draw any conclusion as to the particular horses as to the sale of which any claim is made in this particular case. I don't see how it is possible for any jury to reach any conclusion as to the amount which under this contract the plaintiff would be entitled to claim. There is absolutely no evidence of any failure to account for any horses which have been sold. As to the horses which were in the stable belonging to Mr. Moore under this contract in Baltimore and which were sent to New York, there is no evidence in the case as to their value; there is
30 no evidence from which you are able to distinguish those particular horses which certainly were not disposed of from any other horses which may have been sent to the stable;

and as to certain other of the horses which were not sent to New York, it appears from the interrogatories introduced in evidence that one or more of them, at least, were left in the stables at Baltimore. So there is an absolute lack of evidence upon which any possible judgment could be formed as to the state of accounts existing between the plaintiff and defendants under this contract.

In so far as any claim can be based, as it was intended to be based, as was indicated by my learned friend in his opening, upon the conversion of horses which had been sent under this contract, I take it that this court cannot consider any claim of that character at all. Under general law and particularly under New Jersey law as decided, you can of course waive a tort and proceed in contract for money had and received; but the money must be had and received; you must have disposed of the particular property as to which you allege a trover and conversion; you must have the money in your possession. You can't even give evidence as to the value, not if you waive the tort. 10

THE COURT:—Right there, Mr. Bracken, if there is an entire conversion of the horses, that is, to his own use; couldn't that tort be waived and the value of the horses recovered? 20

MR. BRACKEN:—Not unless there had been money received in exchange for it that is a basis for it.

THE COURT:—That is what I wanted to know, if a man is guilty of trespass or trover in taking one's horse and converts it to his own use, whether you can't waive the trespass and sue for the value of that horse that he has taken. That is what I meant.

MR. BRACKEN:—You can only do so in the event that you can show something of value, whether it is money, or it has ever been held in many cases that it must be money; it is only where you can show that something of value has been received for it, and your action is based upon the recovery of 30

the thing received, disregarding the thing entirely that has been pledged. And that is laid down by your own courts as a principle of law. (Cites authorities.)

It is admitted in this case that the horses were in the hands of the defendants under a claim of right, under a contract which gave them rightful and lawful possession; and that rightful and lawful possession they were never deprived of at any time and there consequently can be no conversion, and certainly there cannot be any claim based upon a conversion of property, because as to the horses alleged to have been converted, there is no allegation that there was any sale made of them prior to the time of the beginning of this suit or that any money for such horses had been received by the defendants in this case. Consequently, going upon that ground, there is absolutely no ground of action here.

And as I say, upon the other ground, the fact that certain horses may have been sold as to which no accounting has been made, there is no evidence of that at all in this case; and I don't see, therefore, how the case can be sent to the jury or why the defendants should be called upon to meet a case of this character. It is indefinite and it is vague as to the position which the plaintiff takes as to his right of action, and he has been wholly indefinite in attempting to show by his testimony as to the particular amount he claims to recover or as to the horses which he claims to have been sold and for which no account has been made.

(Mr. Armstrong replies.)

THE COURT:—I don't see my way clear at this time to withdraw the case by non-suit from the jury. I will hear the other side.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

DEFENDANT'S TESTIMONY.

MR. BACON:—I will offer in evidence now the papers that were offered here for identification.

I offer in evidence on the part of the defendants the letter dated January 12, 1900, addressed to Mr. I. Whilden Moore, signed Richardson & Baldwin, on three sheets of the letter-head of Richardson & Baldwin, to which is pinned another similar sheet on letter-head of Richardson & Baldwin, headed "Statement in full to January 1, 1900," showing balance of \$214 due from Richardson & Baldwin to Moore and a statement on the bottom that the statement is accompanied by check for that amount of balance. ¹⁰

(Paper marked Exhibit D 1.)

I also offer in evidence the typewritten letter dated January 22, 1900, written on letter-head of I. Whilden Moore, Importer of Art Goods, to George S. Baldwin and signed "I. Whilden Moore," and heretofore marked Exhibit C for Identification.

MR. ARMSTRONG:—I object to that as being incompetent and immaterial and not sufficiently proved to make it evidence in this case. ²⁰

THE COURT:—The witness identified it.

MR. ARMSTRONG:—That he wrote the letter; that is as far as he went. It is not evidence yet until it is seen that some action is taken under it.

THE COURT:—I suppose you will offer some other testimony in connection with it?

MR. BACON:—I will prove that it was received in due course of mail.

MR. ARMSTRONG:—I object to it at this time. ³⁰

THE COURT:—I don't admit it until it is supported by further proof.

GEORGE S. BALDWIN, Sworn.

DIRECT EXAMINATION.

BY MR. BACON:—

Q. Mr. Baldwin, you are one of the defendants in this suit?

A. Yes, sir.

Q. Where do you live?

10 A. Baltimore, Maryland.

Q. Do you know Mr. Moore, the plaintiff?

A. I do, yes, sir.

Q. When did you first meet Mr. Moore?

A. I think it was the latter part of November or the first of December.

Q. Of what year?

A. 1899.

Q. Where did you meet him?

A. I met him in Washington.

Q. Did you and he at that time or some later time make an agreement to go into the horse business together?

20 A. Yes, sir; I did.

Q. Do you know when you made that agreement?

A. It was the first part of December, I think.

Q. Of 1899?

A. Yes, sir.

Q. Was there a written agreement between you?

A. Yes, sir.

Q. I show you Exhibit P 1, being typewritten agreement, and ask you if that is the agreement which was entered into between you and Moore?

A. It was.

Q. And this is signed "I Whilden Moore" and "Richard-
30 son & Baldwin." Who wrote "Richardson & Baldwin" there?

A. I did.

Q. Then it is also signed "S. D. Richardson." Who is S. D. Richardson.

A. Son of William H. Richardson.

Q. Who was the firm of Richardson & Baldwin?

MR. ARMSTRONG:—I object. The pleadings show that.

THE COURT:—That is admitted by the pleadings, that the parties sued are the ones, I believe. That stands admitted and there is no plea of abatement or nonjoinder or misjoinder.

MR. BACON:—Well, it seemed to me proper to show the facts. 10

THE COURT:—You cannot contradict the record, can you?

MR. BACON:—Well, the difficulty about it is this. I can't have Mr. Baldwin swear that William H. Richardson was his partner if it was not the fact. I don't know how I am going to do that. I can't have this gentleman perjure himself to accommodate the pleadings.

MR. ARMSTRONG:—He has already sworn in here. (Indicating pleadings.) 20

MR. BACON:—No; he has not sworn to anything of the kind.

THE COURT:—Well, Mr. Richardson and Mr. Baldwin, he says they were in business together.

MR. BACON:—He has not said so, no, sir.

THE COURT:—You asked him if they entered into an agreement in writing.

MR. BACON:—He and Moore did. I haven't said a word about Richardson until just now. I asked him who S. D. Richardson was and he said he was the son of W. H. Then 30 I asked him who was the Richardson of Richardson & Baldwin and counsel objected.

THE COURT:—I suppose if there is any misnomer of names they can be readily amended. I don't see what material bearing it has. Of course the witness doesn't need to do anything to stultify himself. If he can only explain—

MR. BACON:—I only ask him to explain. We have not plead misjoinder or nonjoinder. We simply stated the fact for what it is worth.

MR. ARMSTRONG:—I object to letting anything in illegally that is not proper.

10 THE COURT:—The claim of property and bond ought to indicate who they are.

MR. ARMSTRONG:—The statement in the plea is William H. Richardson and George S. Baldwin, trading as Richardson & Baldwin, and this very witness swears that he is one of the plaintiffs in that case. I demanded a specification of defences and there was no suggestion of that in it.

MR. BACON:—I want to call the attention of the Court and counsel to the fact that I am not making any point of this at all.

20 MR. ARMSTRONG:—Then it is not evidential of course.

MR. BACON:—That is, I am not endeavoring to get a non-suit on that ground. I haven't said anything about that.

THE COURT:—Let the facts of his connection with this business, this contract and so on,—you will only prove the facts, I suppose?

MR. BACON:—That is all.

(Question repeated.)

THE COURT:—I think that that is hardly a proper question, as to who it was. The members of the firm is a question of fact from the evidence, and I think under the circumstances, the way the record is, you had better not ask him that question, for his opinion, unless you insist upon it. I

30

won't overrule it and will allow you to prove any facts related to this case. You can ask who the defendants are and who formed this written agreement, who they are on the paper. That is as far as I need to go. Is the question objected to, Judge?

MR. ARMSTRONG:—Oh, yes.

THE COURT:—That is, this particular question, who are the partners? I sustain the objection.

(Whereupon the defendants, by their counsel, pray a bill 10 of exceptions, which is hereby allowed and sealed accordingly.) CHARLES E. HENDRICKSON, J. S. C. [SEAL]

Q. Was S. D. Richardson a member of the firm of Richardson & Baldwin?

(Objected to on the same ground.)

THE COURT:—You see my suggestion is that you in some way identify your question with the defendants in this case. Now there may be some other firm of Richardson & Baldwin. Your question is very general, and that is why I don't think it is legal; but I want to allow you to prove, Mr. Bacon, anything relating to the case and the parties who entered into this agreement with Mr. Moore and the relations 20 of the written paper to those parties. But that far I am willing to allow you to offer any evidence you want to, but at this stage of the case I will overrule that question.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

Q. You testified, Mr. Baldwin, that you signed the name of Richardson & Baldwin to the contract which is marked here Exhibit P 1, have you not? 30

A. Yes, sir.

Q. What was the Christian name of the Richardson whose

name you signed to this contract?

MR. ARMSTRONG:—I object. This is a repetition of the same question and I object to it on the same ground.

THE COURT:—You see the name is simply Richardson & Baldwin on the written paper.

MR. BACON:—Yes. Now I ask him what the Christain name was.

THE COURT:—My thought is this: now after you have
10 connected it with the written agreement you may ask him who Richardson & Baldwin were whose names were signed to that paper.

MR. BACON:—Well, that is what I asked him.

THE COURT:—Well, if you limit is to that I think that is proper.

Q. What was the Christian name of the Richardson who was the firm—

THE COURT:—Who were the parties whose names are signed by him to this agreement.

20 Q. I will put it that way. Who were the parties whose names are signed by you to this agreement?

THE COURT:—If you know.

Q. If you know?

MR. ARMSTRONG:—I object to the question because by the testimony here now offered it is sought to contradict, as was opened by counsel—I can know what his purpose was because he opened; I am entitled to that— to contradict the record by showing—

THE COURT:—How does that contradict the record?

30 MR. ARMSTRONG:—It contradicts the record by showing that the firm here sued is a different one from the firm that signed that paper. You see, if your Honor please, there

must have been some plea to have called attention to that and there must have been some other circumstances to show it. He is forbidden to say that William H. Richardson and George S. Baldwin did not compose the firm of Richardson & Baldwin. Your Honor intimated to him that he might show that there was some other firm of Richardson & Baldwin, that there was another firm composed of some other Richardson or some other Baldwin or both; but he cannot, because it has been directed to this particular paper. This is in this case and he cannot be permitted to show that or contradict that. I want to call your Honor's attention also further that the name S. D. Richardson here—and that was the opening of counsel—is signed under the word "Witness."

MR. BACON:—Opposite a seal.

MR. ARMSTRONG:—Oh, it is not opposite a seal at all. If you will permit me to make my statement, it is under "Witness," for it bears a scroll and the name and the place of the seal; but the signature is not opposite the seal, not in the same handwriting and not opposite the scroll.

Adjourned to January 8, 1902, 10 a. m.

20

Bridgeton, N. J., January 8, 1902.,

Trial of the cause resumed at 10 a. m.

GEORGE S. BALDWIN, Resumed.

BY MR. BACON:—

Q. Taking the account, Mr. Baldwin; as it appears in the plaintiff's declaration, will you state which of the horses in that list were sold for cash, which of them were exchanged

for other horses, which were taken to New York and which were returned for Moore, if any? That is four things. I mean take them up now in the order I have given them. Give us first the list of those that were sold for cash.

A. Sorrel horse, \$210.

Q. State first the cost price and then the price received.

A. Sorrel horse, cost price \$200, sold at \$210.

Q. Which sorrel horse is that?

A. That is the sorrel horse that is coupled with the black long tailed horse.

10 THE COURT:—That was a pair, wasn't it?

MR. ARMSTRONG:—Well, they were split in my declaration.

Q. Proceed with the statement now of the horses sold for cash.

A. Piebald and roan mares, \$85 and \$75, sold for \$160. Sorrel pacer, cost \$150, sold at \$160. Pair of bay cobs, cost \$425, sold for \$160. Brown horse team listed at \$350, sold at \$142.50. A bay horse listed at \$140, sold at \$75. A bay cob listed at \$150, sold at \$150. Those are the horses exchanged.

20 MR. FITHIAN:—Mr. Bacon, I call your attention that there is no bay cob listed at \$150.

A. He is one of a team listed at \$300.

Q. Were these sales that you have referred to reported to Mr. Moore?

A. They were, yes, sir.

Q. Were they approved or disapproved by him?

(Objected to.)

THE COURT:—Well, you will have to show how they were approved by some words or letters. He cannot say generally, you know, whether they were approved or not. He is
30 to give the language of the letters.

MR. BACON:—Certainly; that is the next question.

Q. Did or did not Mr. Moore manifest his approval or disapproval of these sales?

(Objected to. Objection sustained.)

Q. If Mr. Moore manifested his approval or disapproval of these sales in what manner did he do it?

MR. ARMSTRONG:—I object; and on the further ground that there is a written contract here showing the relation as between the parties, and whether Mr. Moore objected or approved or disapproved of the sale cannot at all signify and is immaterial. The cost price was a thing fixed when the horses were sold or exchanged or otherwise disposed of, or whether they died or anything else happened to them. 10

THE COURT:—Oh, yes, Judge, as far as the cost price is concerned the paper sets that out; but I think as a part of the transaction counsel may show what passed between the parties with reference to any sales, and the "if" part in this question may be objectionable; but you have a right to call out what was said by letters or between the parties.

MR. ARMSTRONG:—Of course I can't object to any letters or word of mouth.

(Question repeated.)

20

MR. BACON:—It seems to me that can't be objected to.

MR. ARMSTRONG:—It is objected to, on both grounds stated.

THE COURT:—I think that is objectionable because it states the matter hypothetically, "If he did" and I rule it out on that ground. You may ask the question directly what passed between the parties on the subject, either by word of mouth or by letters.

Q. You have stated, Mr. Baldwin, that you reported these sales to Mr. Moore. What communication, if any, passed between you and him on the subject of these sales to which you have referred? 30

A. A statement was sent to Mr. Moore and approved—

(Objected to.)

THE COURT:—You must state how, not a general result; how it was approved, or state what information you received by word or letter from Mr. Moore.

A. I received no word from Mr. Moore until I got that letter of the 22d of January.

THE COURT:—That is a proper answer.

Q. Did you make remittances to Mr. Moore of cash resulting from these sales?

10 A. I did.

Q. What was the amount of your first remittance for the cash sales?

A. I will have to have that statement. I can't recall all of these things and don't want to attempt to do it.

(Copy of interrogatories and answers handed witness and examined by him.)

A. December 5, 1899, \$100.

Q. What is the date and amount of your next remittance to Moore on account of cash sales?

A. December 16, 1899, \$1,000.

20 Q. What is the amount and date of the next remittance of cash to Moore?

A. December 30, 1899, \$60. That was not a remittance; it is a credit.

MR. ARMSTRONG:—You see he has corrected that before, and the question is objectionable, I suppose,—I don't want to be objecting here all the time,—but a remittance, evidently, in this witness' mind, is anything that he charged against Moore. Now whatever he sent to Moore—

THE COURT:—Remittances of cash to Moore was the question.

30 A. Yes, sir; I see.

Q. Now this \$60 was not cash?

A. No, sir; that was not.

BY MR. ARMSTRONG:—

Q. Have you books, Mr. Baldwin, books of account?

THE COURT:—This \$60 is out for the present, Judge.

MR. ARMSTRONG:—Well, I suppose I have the right to cross-examine him and find out how this account is made up, and it seems necessary now.

Q. Have you books of account?

A. Yes, sir.

Q. Where are they?

A. I have some books here. 10

Q. Have you books showing this account?

A. The payments?

Q. The account with Moore.

A. Yes, sir.

Q. Well, produce your books then.

MR. ARMSTRONG:—He cannot testify except from books if he has it in the books.

BY MR. BACON:—

Q. Now give us a list of the horses that were exchanged. 20

MR. ARMSTRONG:—Well, I ask leave to ask some questions concerning that too.

MR. BACON:—It seems to me the proper time to cross-examine this gentleman is when I get through.

MR. ARMSTRONG:—Oh, no; it is perfectly proper to cross-examine when a witness is testifying as to particulars, whether there is any better evidence. That is always proper, otherwise I can't tell anything about it. You won't ask him the questions I want to ask, I feel very sure of that.

THE COURT:—Well, this matter that he is speaking of 30 now, he has what, the declaration? He has the questions and answers?

MR. ARMSTRONG:—No; he has the declaration and some of the questions and answers.

THE COURT:—Well, the witness is speaking from his recollection, refreshed by his memoranda. Now if he has books I don't see how he is compelled to put in evidence the books right on the start. It is better evidence in one sense, but not in the sense that it prohibits the witness from giving oral testimony of his recollection of the dealings, as I understand it.

10 MR. ARMSTRONG:—If your Honor please, the witness has already testified that he has books of account of his transactions with Moore. He has asked for his papers made up afterwards from those books. He is asking to see them. We are entitled to know if he can state by recollection and say without any refreshment. He knows the transaction. He can be required to produce the books also by us, but I am entitled to ask him, unless he is using something else. On my cross-examination I can require him to produce the books, but whenever the witness holds a paper in his hand—

20 THE COURT:—Yes; I suggest this, Mr. Bacon, that there is something in that. He ought to be refreshed from his original memoranda, either on the book or something else. I don't think, strictly speaking, that these interrogatories, while they are evidence here, I don't think he has a right to confine himself to them if the other side objects. He admits there is other memoranda of these entries and if he cannot speak without refreshing his memory from memoranda I think he is bound to produce his original memoranda and refresh his mind from that.

MR. BACON:—I don't dispute that proposition. The statement of the witness was that he had a book account of those credits.

30 THE COURT:—Well, if he can state without this memoranda in his hands he can do so; but if he needs his books to refresh his mind he had better refer to them.

Q. Have you a book account showing the exchanges?

A. Yes; I have a general memorandum of it.

Q. Well, if you have any original memoranda which you can produce to refresh your memory, produce it. Do you find that you have any book account showing the exchanges of horses that were made?

A. No; not concisely.

Q. Now take the transcript and state from that which of the horses were exchanged.

MR. ARMSTRONG:—Well, if your Honor please, I suppose I am entitled—he didn't make the transcript. I made that, and I am sure I didn't consult with him when I made it. Or, rather, I made the declaration, and I am entitled to examine him. He has certain memoranda that he held in his hands. 10

THE COURT:—You may examine him upon what memoranda he has in his hands in this transaction of which you have asked him.

MR. BACON:—Well, it is obvious, the sole purpose of this examination, to dispose of this list of horses and show what was done with them, which were sold, which exchanged, 20 which went to New York and which were returned to Moore. I still think that my original method of getting at that is the only clear way in which it can be done. The transcript is handed him so that there may be no confusion, so that we may all be looking at the same thing and talking about the same thing at the same time. That is why I ask him to take the transcript.

THE COURT:—If he has any original memoranda to go by, Mr. Bacon—

MR. BACON:—He says he has not.

THE COURT:—I know, but counsel wants to verify that answer by cross-examination on the subject. 30

BY MR. ARMSTRONG:—

Q. You keep books of account, I understood you to say a while ago?

A. Certain books.

Q. Well, don't you of all your transactions?

A. Well, I keep books of the principal ones, not of all little swaps, no. I kept that book you looked at.

Q. Did you keep any other books showing the transactions with Moore?

A. Some books I did, yes.

10 Q. You have made up memoranda which you have held in your hands and have used to refresh your recollection in this case, haven't you?

A. Yes, sir?

Q. From what did you get that memoranda?

A. I got that memoranda from that book, from one of my books.

Q. From one of your books only?

A. No; from two of my books.

Q. And those two books show all your transactions with Moore?

A. Well, principally yes. I have got a few items in a
20 third book.

Q. And these items were entered at the time of the several transactions?

A. Some were and some were not.

Q. Well, how soon after?

A. Well, I can't just answer that.

BY THE COURT:—

Q. Well, about as near as you can come at it.

A. Well, I don't exactly understand the question.

Q. Some of your books you said you didn't put down
30 immediately at the time of the transaction. He wanted to know about how soon after the transaction it was entered in the book.

A. Well, it depended on when the deal was completed.
 BY MR. ARMSTRONG:—

Q. Is that the only answer you can make?

A. That is the only answer I make, yes, sir.

Q. I didn't ask you that. I understand that; I can hear that it is the only answer you make. Is it the only answer you can make?

A. Yes, sir.

Q. And then these memoranda, you can't tell, speaking of them all, when they were made in your book?

A. No, sir.

Q. And the details you have given and propose to give are made up by you from these entries made in your books, are they? 10

A. Yes, sir.

MR. ARMSTRONG:—I object to the witness testifying from any memoranda without the production of the books; and then when he produces the books, the question then—

THE COURT:—Proceed, Mr. Bacon, with your examination of the witness, and if he needs memoranda, of course you will let him refer to the original; that is the one he made earliest.

MR. ARMSTRONG:—So I can dispose of the whole matter now—I presume my friend understands it—we have been bound to take the statement of sales and receipts made by this man. He kept the books. We had to take his figures of sales. We had to take what he said he sold above cost. We cannot do anything else than that. We are then in no way bound to take his books; we are bound to have all the knowledge he has and we are bound to have the best possible evidence of it; and if he cannot produce it in his books any further than what he has already testified, he certainly cannot go any further than that and is bound by the statement he has rendered in this statement. We are subject to his 20
 mercy,, but do not propose to be at his mercy on the witness stand with memoranda made up to suit the case. 30

THE COURT:—We will take up these matters as they are reached in the course of the examination.

BY MR. BACON:—

Q. Mr. Baldwin, the first horse charged in the plaintiff's account against you is in the item "Sorrel and black long tails." Did you receive those horses from Moore.

A. Yes, sir.

Q. What did you do with the sorrel horse?

A. The sorrel horse I sold.

10 Q. For how much?

A. \$210.

MR. ARMSTRONG:—Well now, if your Honor please, that is going by indirection—

THE COURT:—That is repeating what we have already had answered.

MR. BACON:—I understood that. It was obvious my purpose was to save time. I evidently cannot save time and I might as well go at it the best way. The books of account are only admissible because he cannot remember the trans-
20 action. If he can remember that disposes of any necessity for books of account.

THE COURT:—We have already gone down the list and we have had them at the list price and what he received. We have gone through several of them already.

MR. BACON:—That is all true. Now then I propose to ask him about the horses exchanged and that is objected to unless he can produce an account he cannot produce, namely, a tabulated statement. He has gone through the books and taken that off—

THE COURT:—What I meant it is necessary to repeat
30 what you have gone over. This sorrel horse at \$200 and \$210, you have already gone over that.

A. I have disposed of the black horse.

THE COURT:—You are reading from what, the delaration?

MR. BACON:—Yes, sir; and I am only obliged to do it because of Judge Armstrong's objection. I was going along in a way that would shorten the case by two hours.

Q. What did you do with the black long tail?

MR. ARMSTRONG:—This witness has already testified that his recollection is made up from books. I have asked him to produce those books. I cannot permit counsel to go on and after that take this secondary evidence. It comes right in line. That is why I made my objections so full. ¹⁰

THE COURT:—He certainly has a recollection of these horses and what he did with them, and so far as he can tell. He is not consulting anything. I think I will allow the question and you may have exception.

(Exception noted for plaintiff.)

(Question repeated.)

A. Shipped to New York.

THE COURT:—Is that the second one on the declaration?

MR. BACON:—Yes, sir. ²⁰

Q. The next item is, "Gray and brown mares, \$375." Did you receive those from Moore?

A. Yes, sir; I received them.

Q. What did you do with the gray mare?

A. The gray and brown mare were sold together as a team.

Q. For how much?

A. They were—

THE COURT:—Don't look at any memorandum unless you can refer to the original.

A. They were swapped, the gray and brown mare. ³⁰

Q. For what?

A. They were swapped for a team of horses and money,

Q. Did you account to Moore for the money?

A. I did.

MR. ARMSTRONG:—I object, both as to form and materiality.

THE COURT:—You have not stated the amount, have you?

MR. BACON:—I am coming to that.

(Objection overruled. Exception noted for plaintiff.)

10 A. They were swapped for money and a team.

Q. Did you account to Moore for the money?

A. I did, yes, sir.

Q. How much money did you receive and account for?

A. I accounted for \$577 and some cents. I can't memorize all this now. That is all in my declaration.

Q. If you have any original books to which you can refer for the purpose of answering these questions, get them.

(Book produced.)

MR. ARMSTRONG:—Now wait a moment before you look at that. This is one of the books in which the entries were not made at the time, according to the witness, and of course
20 he cannot use it unless made at the time. He cannot fix a time at all. It may have been after the suit is commenced. I did not suppose he could tell from his recollection.

THE COURT:—Mr. Bacon, you may examine him about this book in his hand and see whether it is the original memorandum.

MR. BACON:—It seems to me there is a misconception as to the value of and necessity for books in evidence. It seems to me that the law is that if the witness by using the books to refresh his memory can then testify, that that is all that is required. If he then can be impeached, either by the books or
30 in some other way, that testimony would of course be admissible for the purpose of impeaching him. These books are not offered in evidence as a book of a store account or ordi-

nary merchandise account, which he simply throws down and says, "There is the account; that is all there is of it. That is the account because that is in the book. I can't remember anything about it." This witness is now asked to testify how much he got for this team. He proposes to do that and he is entitled, I submit, to look at his book and then testify, after looking at his book, he can swear that he got so much money. Now then if counsel can impeach that book because it is inaccurate and because the witness, when he looked at it, did not refresh his memory as he says he did, it is up to him to do that. And this witness is entitled to look at it and testify after he looks at his book. 10

THE COURT:—I take a different view of it. The witness cannot refer to this book to refresh his mind unless he shows it was a memorandum made by him at or about the time of the transaction. If it is copied from another book it is not admissible for him to do so. I rule that way.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

MR. BRACKEN:—May I make a suggestion, if your Honor please, on that line?

THE COURT:—Yes.

MR. BRACKEN:—It occurs to me that if the witness takes any paper or memorandum made up from books or made up in any way by him to refresh his recollection of the particular facts and then is able to say that having thus refreshed his memory, that independently of such particular book or memorandum, whether it is an original or not, he can testify to the fact, that he is entitled so to do, and then as my colleague says, you can of course impeach his testimony. It is not a question here of the admissibility of evidence of these books, but it is a question of referring to some memorandum, the only thing in existence to enable the witness to refresh 30

his memory of transactions, and having thus refreshed his memory he can say he can testify independent of that, I think he can do so under the rules of evidence.

THE COURT:—I think he can only refresh his memory from some original, it seems to me, the best, that is, he has that is in his possession. Any memorandum or book that he may have made up afterwards the witness cannot make use of to refresh his memory about what he testifies to. It is not just to the other side. Of course, if he will say it was made up about the time or from a book that was lost, or made soon after, that might raise a different question. I don't know anything about this book the gentleman takes in his hands. I don't know who made it when it was made.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

Q. Mr. Baldwin, turning now to the book which you hold in your hand, in whose handwriting are the entries?

A. In my own.

Q. What is the book? For what purpose did you keep it?

20 MR. ARMSTRONG:—Don't look at the book.

MR. BACON:—He certainly has a right to look at it.

THE COURT:—Oh, yes; I will let him look at the book.

MR. ARMSTRONG:—But I won't allow him to look at the leaves of this book while he is on the witness stand. This book, he knows what it is from its physical contour. Of course he cannot refer to it now until it is admitted, but he can look at it.

BY THE COURT:—

30 Q. You know the book you have.

A. Oh, yes; I know it. I kept this book in order to render a statement to Mr. Moore; that is, to show what the horses

brought and what they cost and what the profit was and what the loss was.

BY MR. BACON:—

Q. Did you make the entries in the book of the different transactions which you had with Moore concerning these horses?

A. Yes, sir; I made the entry.

Q. Did you make these entries at or about the time the transactions were made?

A. Yes; I did in this book.

MR. BACON:—Now I ask that the witness be permitted to testify. 10

CROSS-EXAMINATION.

BY MR. ARMSTRONG:—

Q. What do you call this book?

A. Well, I don't know exactly what I should call it.

Q. Has it any other account in?

A. Yes; it has some other accounts. It is a sort of journal really.

Q. Were the accounts made from day to day of other 20 accounts in it than Moore's as they happened?

A. Yes, sir.

Q. And Moore's is the only one in it that was made subsequently?

A. Well, all of his was not made subsequently. How do you mean subsequently?

Q. Some of them were made——

A. Some of them were made, of course, when I came back from New York, because I didn't have the book there.

Q. That is after this suit was commenced?

A. Yes, sir.

Q. Does this book contain the entry of all your dealings 30 with Moore or only part of it?

A. All the net dealings with Moore, yes.

Q. What do you mean by net dealings with Moore?

A. I mean when I made a swap, made a deal it was shown in this book.

Q. The whole thing?

A. Yes.

Q. Then this book contains an account of all the horses you received, what disposition you made of them and what you received for them, does it?

A. Not concise disposition, no, sir. This book is a recapitulation of deals, not of any other book especially.

Q. And this recapitulation of deals was taken from what?

A. It was taken from the memory of what occurred.

Q. And now how long after that occurrence were these written down?

A. Well, mostly as soon as the deal was completed.

Q. And sometimes some days afterwards?

A. No; not any great time afterwards.

Q. What do you mean by that?

A. I mean every three or four days. I wouldn't set down every day, had no systematic way—

Q. You had no systematic way?

A. Not of doing one day one thing and another day another, no, sir.

Q. But you did keep the other accounts in there systematically?

A. I made entries of accounts, yes, sir.

Q. Previous to this book what paper record, if any, did you have of Moore's deals?

A. I had none. I entered the receipts of the horses in this book.

Q. You entered the receipts of the horses in that book?

A. Yes, sir. This was the first book, really.

Q. And do the accounts in that book appear under dates?

A. No, sir.

Q. Do the accounts for other than Moore appear under dates?

A. Not all of them, no, sir; I don't think so. I don't recollect every little point.

Q. Do they generally?

A. My recollection is——

MR. BACON:—If you can't answer the question without looking at the book I contend that you have the right to look at the book.

THE COURT:—If you ask him as to dates and contents he has a right to look at them.

MR. ARMSTRONG:—I ask him if he can tell without¹⁰ looking at it. I am examining him on the book to see whether he can tell without looking at it.

THE COURT:—It seems to me if you examine him as to the contents of the writings he has a right to look at it.

MR. ARMSTRONG:—That is entirely true if I am using that writing for evidence. It is not my evidence nor is he a witness called by me, but I am opposing the using of a certain thing and I am trying to see from him whether it is proper to use it or not. It is very different from the other. If I ask him about a paper that I am producing and ask him all about it I have got to put it in. That is the difference.²⁰

(Question repeated.)

Q. If you don't remember say so.

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

MR. ARMSTRONG:—I object to the use of the book.

BY THE COURT:—

Q. Mr. Baldwin, have you any other books, small books or others, that contain these items that you entered in this book?

A. No, sir; nothing that I have concisely.

Q. Well, any way, whether it is concisely or not? Have³⁰ you any other memoranda that is made at the time of these items in the book?

A. No, sir.

Q. This was made, you say, soon after each transaction, within a few days?

A. Yes, sir.

THE COURT;—You may proceed to use this book.

MR. ARMSTRONG:—I call your Honor's attention to the fact that part of it was made after this suit was commenced.

THE COURT:—Well, part of the sales were made after this suit also, which would necessarily have to be made afterwards, and they have been gone into.

(Exception noted for plaintiff.)

DIRECT EXAMINATION (Resumed).

BY MR. BACON:—

Q. Referring now to your book to refresh your memory, please state what disposition you made of the gray and brown mares and what you received for them.

A. I received \$580.

MR. ARMSTRONG:—I have suggested, if your Honor please, that there is a ruling here on the question of the evidence. That ruling is already made. It is manifest that the testimony of this witness can be of very little value in a whole string of figures, carrying it, unless those figures are identified with the figures in the pleadings. I have therefore suggested to counsel on the other side that in view of the ruling—and the ruling was to see what this witness had the right to use—in view of this statement, that we retire to the library and let him go over and identify and ask the questions then on each item as it comes, and then have the thing as it comes out in the statement, using the language of the witness in concise form.

THE COURT:—I think I prefer to go on in the regular way. I am not accustomed to that plan of taking evidence.

Q. In what way did you receive \$580?

A. In money and deals. In money I received it.

Q. Was part of that horses that you got for this gray and brown horse?

A. Yes, sir.

Q. And did you afterwards dispose of the horses you got in exchange?

(Objected to as leading.)

THE COURT:—Don't be leading.

Q. What did you do with what you got in exchange? 10

A. We sold those.

Q. Did you or did you not account to Moore?

MR. ARMSTRONG:—I object. That has already been ruled on.

MR. BACON:—It has been ruled that it is competent testimony.

THE COURT:—He said he turned over what cash he received, or accounted. Now what way did he account? That is a very general question Mr. Bacon. It is a sort of inference. 20

MR. BACON:—Well, I may be under a misapprehension of the witness' testimony. He said he received for the gray and brown mare a deal.

THE COURT:—How much cash was in that?

MR. BACON:—That is what I was getting at.

Q. How much cash did you get in the first deal?

A. I don't recollect.

Q. Did the result of the trade that you made and the subsequent sales of what you got in exchange net \$580, for which you accounted? 30

THE COURT:—I sustain the objection. That is leading.

Q. How did you get the \$580 which you realized from the gray and brown mares?

MR. ARMSTRONG:—He cannot cross-examine his own witness. He has already said he didn't recollect. He cannot then take it that way.

MR. BACON:—I asked him how much cash he got in the first deal. He said he didn't recollect.

(Objection overruled. Exception noted for plaintiff.)

10 A. In cash and in horses, and the horses were afterwards sold.

Q. Were they sold for cash?

A. They were.

MR. ARMSTRONG:—May I call your Honor's attention to the fact now that that was the asking of the question that I objected to by inference. He said he didn't recollect what he got for them but he sold for cash and accounted for \$580.

THE COURT:—Yes; he says he cannot give the exact amount of cash that he first received, but in cash and horses amounted to that; that is what he got for the horses. That
20 is what he says.

MR. BACON:—What he got for the horses afterwards.

Q. The next item is "Pied mare, cost price \$75." Did you receive that from Moore?

MR. ARMSTRONG:—I object. The questions that are being asked of this witness only call for yes, sir or no, sir.

THE COURT:—I will allow that, simply whether he received the horse.

A. I did.

Q. What did you do with it?

30 A. Sold it.

Q. For how much?

A. \$75.

Q. Did you account to Moore?

(Objected to.)

THE COURT:—I think I will have to overrule this about accounting to Moore. You can certainly be more specific. What did he do with the money? Accounting for it is an inference and I think we will get along a great deal faster if we put it in another way. You say, "Did you account to Moore?" Now we don't know what that means, and it is very difficult to find out. Instead of asking that just ask the different steps that he had in accounting, if you may call it so, in accounting, if he did account. Don't let him say he did account, but what he did. 10

MR. ARMSTRONG:—I call attention to another matter. This witness has already testified what moneys he has paid to Moore. He has already testified to that. Now he cannot be asked that, having testified, by his own counsel, what those moneys are, when there is no dispute about the amount.

Q. The next item is big bay trotter, \$300. What did you do with that?

A. It was sold.

Q. That was received from Moore, was it?

A. Yes, sir. 20

Q. How much was it sold for?

A. \$310.

Q. The next item is sorrel pacer, \$150. Did you receive that from Moore?

A. Yes, sir.

Q. What did you do with it?

A. Sold him.

Q. For how much?

A. \$160.

Q. The next item is Billy M, \$300. Did you receive that from Moore?

A. Yes, sir. 30

Q. What did you do with it?

A. He was returned to Moore,

Q. When?

A. After the New York sale.

Q. Was that horse taken to New York?

A. No, sir.

MR. ARMSTRONG:—I object to the answer, "After the New York sale," what happened after that sale, of course.

THE COURT:—I think you undertake to credit all horses that came back to Mr. Moore, Judge.

MR. ARMSTRONG:—We credit the account up to a certain date.

THE COURT:—Now if there was a horse that was delivered to them, returned and received by Mr. Moore, why isn't it evidence in connection with it?

MR. ARMSTRONG:—If your Honor please, the point that we make is that the horses were not returnable after the time of the alleged conversion or the annulment of it, because when we undertake to take that off, that part of it, as at all bearing, any return after that, wouldn't at all do. It would have to be a counter-charge against us and would have to be in the pleadings.

20 THE COURT:—I think inasmuch as you have offered evidence as to what became of the horses taken to New York and whether they were sold, and also generally as to the horses they had at the time you spoke of the conversion, I think it becomes relevant for them to show that one of those horses that you say was converted was returned.

MR. ARMSTRONG:—This same witness, if your Honor please, has already himself given an account of the horses that were returned to Moore.

THE COURT:—Was this among them?

MR. ARMSTRONG:—Oh, no; not included in them at all,
30 not mentioned. Of course he cannot contradict that in any way or impeach that. He simply says it was returned to Moore. Of course that thing wouldn't do.

THE COURT:—I think I will admit that question; not affecting the account, Judge, but the relations of the parties; not affecting the account; that must be governed by the date of the attachment. We cannot go, of course, after that. We have to take things as they stood at the time, of course.

(Objected to as immaterial. Objection overruled.) (Exception noted for plaintiff.)

Q. Was or was not that horse left in the stable in Baltimore when the other horses were taken to New York?

A. Well, it was turned out, yes, sir: right outside of Baltimore.

10

Q. But it was left in Baltimore?

A. Yes, it was left, practically left in Baltimore.

Q. And subsequently delivered to Moore?

(Objected to as improper.)

THE COURT:—The shape is objectionable.

Q. What was subsequently done with it?

THE COURT:—Tell what he did with it.

A. Well, the horse was—when I say returned to Mr. Moore I mean it eventually went to Mr. Moore. It was taken charge of by Mr. Richardson, who was then supposed to be—

20

(Objected to.)

THE COURT:—What is it you object to now?

MR. ARMSTRONG:—"Who was generally supposed."

THE COURT:—Oh, that won't do, what was generally supposed. The witness must not go into that.

A. He was turned out and turned over to Mr. Richardson.

BY THE COURT:—

Q. Is that all you know of it personally?

A. All I can say is Mr. Richardson took him in charge.

Q. That is all you know?

A. Yes; that is all I know.

30

THE COURT:—Just stop right there then.

BY MR. BACON:—

Q. Was he delivered to Mr. Richardson for your use?

(Objected to. Question withdrawn.)

Q. The next item is Belle Swigert, \$400. Did you receive that horse from Mr. Moore?

A. Yes, sir.

Q. What did you do with it?

A. She was sent to New York.

Q. The next item is Punch, \$150. Did you receive that horse from Mr. Moore?

10 A. Yes, sir.

Q. What did you do with it?

A. He was sold.

Q. For how much?

A. \$175.

BY THE COURT:—

Q. What was he listed at?

A. \$150.

BY MR. BACON:—

20 Q. The next item is Dude, \$250. Did you receive that horse from Mr. Moore?

A. Yes, sir.

Q. What did you do with it?

A. Sent to New York.

Q. The next item is bright bay cob, \$250. Did you receive that from Mr. Moore?

A. Yes, sir.

Q. What did you do with it?

A. He was sold in Baltimore.

Q. For how much?

30 A. He was coupled with a bay cob and sold for \$160. If I am permitted to say that, that same clear bay cob listed at \$175, he was sold with the team for \$160.

BY MR. ARMSTRONG:—

Q. The two were sold for \$160?

A. Yes, sir; the two.

BY THE COURT:—

Q. The cob was listed at \$250; is that right?

A. Yes, sir.

BY MR. ARMSTRONG:—

Q. And the other at \$175?

A. Yes, sir.

10

BY MR. BACON:—

Q. The next item is brown cob, \$150. Did you receive that from Mr. Moore?

A. No, sir; that cob was not received from Mr. Moore.

Q. Where did you get that cob from?

A. That cob was bought for Mr. Moore's account.

Q. For Mr. Moore's account?

A. Yes, sir.

Q. Explain in what way it was bought for Mr. Moore's account.

A. It was bought with the proceeds, some of the proceeds 20 that we held of Mr. Moore, bought for his account to be held for him.

Q. With Mr. Moore's money?

A. Yes, sir; with Mr. Moore's permission.

MR. ARMSTRONG:—I object to that answer and ask that it be stricken out. That is not responsive.

THE COURT:—That is, the part of it about Mr. Moore's permission.

MR. ARMSTRONG:—Yes; of course I cannot divide the question. I ask to strike it all out, and then let him answer 30 it properly.

THE COURT:—Well, there is no objection to that part,

some proceeds of Mr. Moore's. Then he added, "With Mr. Moore's permission." I strike that out.

Q. Was or was not the transaction with the knowledge of Mr. Moore?

(Objected to.)

THE COURT:—That is too general. State any facts.

Q. Did Mr. Moore know of this transaction?

MR. ARMSTRONG:—I object. That calls for Mr. Moore's knowledge. He can tell about what he did; that is about all
10 he ought to be permitted to tell.

THE COURT:—Try and shape your question so as to get at the fact.

Q. Did you or did you not bring this transaction to the attention of Mr. Moore?

(Objected to for the same reason. Objection overruled. Exception noted for plaintiff.)

A. I did.

Q. In what manner?

A. By my statement.

Q. In any other manner?

20 A. No; I am not permitted to say that.

Q. Personally?

A. No; not personally.

Q. I am talking about what you did personally.

A. I understand.

Q. The next item is roan mare, \$85. Did you receive
that from Moore?

A. I did.

Q. What did you do with it?

A. Sold it.

Q. For how much?

A. \$85.

30 Q. The next item is Emerson cobs, \$600. Did you receive
them from Moore?

A. Yes, sir.

Q. What did you do with them?

A. Sold them.

Q. For how much?

A. \$1716.75. I sold them. They were sold and other horses gotten for them.

BY THE COURT:—

Q. How many did you sell, two?

A. Two, yes, sir. I received horses and money?

Q. Well, that is putting it horses or money, so that we don't know how much of either. Go on. 10

BY MR. BACON:—

Q. Explain that transaction in detail.

A. We swapped those two horses for money and for horses, the swappers were sold and the deal netted \$1,716.75. I beg your pardon; I mean \$716.

Q. The next item is two brown mares, \$350. Did you receive them from Moore?

A. Yes, sir.

Q. What did you do with them?

A. I sold them, swapped them; sold them and swapped them. 20

Q. How much did you receive for the brown mares and the horses you got in exchange?

A. \$311.

BY THE COURT:—

Q. What were they listed?

A. They were listed at \$350.

BY MR. BACON:—

Q. And you got how much?

A. \$311.

Q. The next item is two brown horses, \$350. Did you 30 receive them from Moore?

A. Yes, sir.

Q. What did you do with them?

A. Sold them.

Q. For how much?

A. \$142.50.

Q. The next item is bay horse trotter, \$140. Did you receive that from Moore?

A. Yes, sir.

Q. What did you do with it?

A. Sold him.

Q. For how much?

10 A. \$75.

Q. The next item is bay horse long tail, \$115. Did you receive that from Moore?

A. Yes, sir.

Q. What did you do with it?

A. Sold him.

Q. For how much?

A. \$50.

Q. The next item is bay cobs, white feet, \$400. Did you receive those from Moore?

A. Yes, sir.

Q. What did you do with them?

20 A. Sold them.

Q. For how much? What did you sell them at?

A. \$225. There are three or four bay cob teams here and I will have to be a little careful.

BY THE COURT:—

Q. Is this a bay cob?

A. That is a bay cob team, yes, sir.

BY MR. BACON:—

Q. In your statement of the horses that have been sold so far have you included any that were sold in New York?

A. Oh, yes.

Q. Well, I don't want that.

A. Well, these horses were sold in New York, this team you just spoke about. You didn't ask that.

Q. I only want the horses that were sold before you went to New York.

A. This team was not sold. This team went to New York.

Q. That team did go to New York?

A. Yes, sir.

Q. And was sold there at auction?

A. Yes, sir.

Q. Well, now, which others of the ones we have already gone over were sold in New York? 10

MR. BACON:—Has counsel any objection to my showing him this list, so as to show how far we got, to see which they sold before they went to New York?

MR. ARMSTRONG:—No.

Q. Now state which were sold in New York.

A. The black long tail was sold in New York, Belle Swigert was sold in New York, Dude, the bay cobs white feet, the ones you just gave.

Q. The next item is Prince not sorrel mare, \$400. Did you receive those from Mr. Moore? 20

A. Yes, sir.

Q. What did you do with them?

A. They were returned to Mr. Moore.

Q. When?

A. About the 23rd, I think it was, of January, or 22nd.

Q. The next item is bay cob, \$175. Did you receive that from Mr. Moore?

A. Isn't that the cob I coupled with the other bay cob at \$250?

Q. It may be. I don't know.

A. (After examining list.) Yes, sir.

Q. That is the one which you have already mentioned in connection with the bright bay cob, is it? 30

A. Yes, sir.

Q. And which was sold with the bright bay cob for \$160?

A. Yes, sir.

Q. Was that sold in Baltimore or New York?

A. They were sold in Baltimore.

Q. The next item is brown cobs, \$200. Did you receive them from Mr. Moore?

A. Brown cob, it is.

Q. Brown cob it is.

A. Yes, sir.

Q. What did you do with it?

10 A. Sold in New York.

Q. The next item is two bay cobs, \$400. Did you receive them from Mr. Moore?

A. Yes, sir.

Q. What did you do with them?

A. Sold them.

Q. Were they sold in New York?

A. No, sir; sold in Baltimore.

Q. For how much?

A. One for \$210 and the other for \$150.

Q. The next item is two bay cobs, white feet, \$300. Did you receive them from Moore?

20 A. Yes, sir.

Q. What did you do with them?

A. Sold in New York.

Q. The next item is two grays, \$200. Did you receive those from Moore?

A. I only received one gray from Mr. Moore.

Q. Where did you get the other?

A. You will find that I haven't got the other, I think, on that—what do you call that document?

Q. Answers to interrogatories?

A. Yes. I only have one gray.

Q. Well, what is your explanation as to that?

30 A. That gray cob was swapped.

Q. That is, the one you received was swapped?

A. Yes, sir.

Q. Well, do you or do you not mean to say that you only received one gray?

A. That is all, yes, sir.

Q. And is or is not the charge of two grays erroneous?

A. That I originally received, yes, sir; that is wrong.

Q. Did you or did you not get a gray in one of your exchanges, which makes up the two grays in this item?

A. We bought a gray for Mr. Moore's account.

Q. Well, is or is not the gray which you bought for Mr. Moore's account the other one of the grays in this item?

A. Yes, sir; that is the other gray. 10

Q. Now then what did you do with those two grays?

A. One gray was sent back to Bridgeton, returned, and the other one was swapped for a brown mare.

Q. What became of the brown mare?

A. The brown mare was sent back to Bridgeton.

BY MR. ARMSTRONG:—

Q. That is the other one in the declaration of the two you sent back?

A. Yes, sir.

BY MR. BACON:— 20

Q. Mr. Moore charges you with \$200 for those two grays. Now I direct your attention to the credit items on Mr. Moore's account, one gray horse \$90, and ask you if that is the gray horse which is included in this item of two grays?

A. Yes, sir.

Q. And I direct your attention to the credit item, one brown mare, and ask you if that is the brown mare which you received in exchange for the gray horse?

A. Yes, sir.

Q. With which he charged you?

A. Yes, sir.

Q. When did you first make a statement of account to Moore? 30

A. About January 12th.

Q. I direct your attention to Exhibit D 1, being your letter and statement to Moore, and ask you if that is the first statement that you rendered to Moore?

A. Yes, sir.

Q. Are there any items in that account of horses bought by you from Moore?

A. Yes, sir.

Q. Is there any statement in there of exchanges made by you for Moore?

MR. ARMSTRONG:—I object. That will speak for it-
10 self.

MR. BACON:—Well, I don't think it does. I press that question.

MR. ARMSTRONG:—Well, you have got to show that it doesn't before you undertake to explain a writing.

THE COURT:—Where is the statement?

(Statement produced by witness and examined by Court.)

THE COURT:—Well, I think, Mr. Bacon, the statement, together with the evidence you have already given, would
20 explain, for instance, if there were names of horses here that were not appearing in the paper.

MR. BACON:—We want to know if there were any horses on there that do not appear in the list.

THE COURT:—Can't you ascertain that from the counsel, from the statement itself in evidence? Well, can't you ascertain from him? Ask him the question. The contents of the paper is what is objected to.

MR. BACON:—No; I am asking if there were any horses there that were exchanged.

THE COURT:—Can't you tell as well as he?
30

MR. BACON:—No, sir; I am not familiar enough with the horse business to tell whether this particular sorrel pacer No.

3 is the one on the list. I would rather he would tell the jury than for me to venture to state the facts.

THE COURT:—I will allow the question, subject to cross-examination.

MR. ARMSTRONG:—I object to it, on the ground that the paper must speak for itself, having already been offered in evidence, and the explanations of the witness cannot be called.

THE COURT:—I admit this question because there are so many horses named in the evidence and declaration, with the privilege of cross-examination, so that the witness may state what horse is referred to in these items, whether it is one of the original horses received or whether it was a different horse. I will allow that. 10

MR. BACON:—I will reframe the question so as to keep it within the limits of your Honor's ruling.

Q. Mr. Baldwin, referring now to the statement annexed to your letter and forming part of Exhibit D 1, are there any horses which you accounted for in that statement which are not mentioned in the bill of particulars annexed to the plaintiff's declaration? If so, state which horses they are. 20

A. Yes, sir; the gray horse and the sorrel horse.

Q. Numbers which on your statement? You have numbers down the side there, and indicate which numbers they are, so that we can identify them.

A. Oh, no; there are no horses sold here that are not—I don't understand the question.

(Question repeated.)

A. No; there are no horses there. I misunderstood your question.

Q. Did you or did you not on your statement charge to Moore horses which you had bought with Moore's money? 30

(Objected to.)

THE COURT:—You see he has answered the question and

it would be in contradiction of this question you are now seeking; it would be in contradiction of his previous answer.

MR. BACON:—When I look at the statement, if your Honor please, I think the witness was confused by my question. The account is made up of charges and credits.

THE COURT:—Wouldn't the question be better as to whether there are any horses named on that statement other than those he received from Mr. Moore in the consignment?

10 MR. BACON:—I will ask that question.

Q. Are there any horses named on that statement other than those received by you from Moore on consignment?

A. Yes, sir.

Q. Specify which horses.

A. The gray horse and the sorrel horse.

Q. That statement shows a balance due from you to Moore of \$214. Did you remit that amount to him?

20 MR. ARMSTRONG:—I object to that, as being entirely improper, summing up and having this witness stating a balance due and all that. The latter part of the question, "Did you remit?" would be proper enough if it had not been already gone over by this witness and testified as one of the credits given, to which there is no objection appearing in the declaration. He cannot be in detail examined and then examined again.

THE COURT:—The paper speaks for itself as to whether it was a balance or not. That is in evidence.

MR. BACON:—It strikes me as being a very captious objection.

MR. ARMSTRONG:—I object to counsel making such a comment.

30 THE COURT:—I wouldn't say that between counsel. It is not exactly a courteous thing. Counsel have a right to be heard. The point is here whether a balance due at the time

can be looked at from so many standpoints unless you prove the facts showing a balance. It is hardly valid testimony. In this case the statement shows whatever is on it and you can state the fact that he remitted. I think the question is objectionable, that part of it.

(Question repeated.)

MR. ARMSTRONG:—My objection is to the form of the question and the fact that it is an immaterial thing, because it has already been proved by them in the interrogatories on the part of the plaintiff on direct examination of this witness and in the declaration, so the fact of his sending it cannot add anything at all. It is improper and immaterial. 10

THE COURT:—Yes; that part in which you undertake to characterize the paper as showing a balance due, that part of the question I think is objectionable.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL.]

THE COURT:—You see the statement closes, "Check to balance, \$214." That is all it says about that—check to balance; and the paper shows what it is itself; and for you to exactly characterize what it showed I thought was objectionable. The matter of remittance, of course, is proper. 20

Q. Did you make remittance to Moore of the balance shown to be due from you to him by your statement of January 12, 1900?

MR. ARMSTRONG:—I repeat the objection.

(Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.) 30

CHARLES E. HENDRICKSON, J. S. C. [SEAL.]

Q. The letter Exhibit D 1 contains this sentence: "We

enclose statement in full to January 1st, also check for \$214. to balance same." Did you send Moore the check to which you refer in that letter?

MR. ARMSTRONG:—I object.

THE COURT:—On what ground?

MR. ARMSTRONG:—Exactly the same ground as before. The question is simply a statement, to use another word, to refer to the same thing.

10 THE COURT:—He is simply stating, I think, accompanying this statement which is already in evidence—amounts to that—"Did you enclose your check?"

MR. ARMSTRONG:—No; but that was not the question that was asked.

THE COURT:—He repeats what appears on a paper, does he not, Judge?

MR. ARMSTRONG:—He undertakes to have this witness say that he sent a statement.

THE COURT:—Oh, no.

20

MR. ARMSTRONG:—Well, that would be his argument, if your Honor please. As I said before, I don't care anything about his statement. He has already proved by the plaintiff, by the defendant and in the pleadings that \$214 was sent on such a date, and therefore it is clearly improper. Your Honor will not permit it to be proved five times after it has been proved four.

THE COURT:—Well, it may be offered in a different connection. What you credit \$214 sent as so much cash credited, they have a right to show any writings, papers or circumstances to show that they sent it, if they choose, or that they
30 sent it in the form of a statement or balance, and that is their object. Of course it is not exactly proving the same thing over; it is an effort on their part to show that their letter and

statement together should have this weight before the Court and jury, as to whether it was sent and accepted by Mr. Moore as a sort of settlement. That is the attitude.

MR. ARMSTRONG:—That is the attitude, but the thing is clearly illegal because these papers and the letters themselves will show there is no dispute that that was sent. The papers will show all that they can legally show. They cannot show it by this man. There is no dispute of the fact that the \$214, if that is the amount, was the check received and is the amount that was credited.

10

THE COURT:—The question is overruled because it incorporates in it a portion of the letter accompanying the statement. The letter and statement are in writing. They speak for themselves, and I overrule the question for that reason.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

Q. On or about January 12, 1900, did you send Moore a check for any money?

A. I did.

Q. For how much?

20

A. \$214.

Q. Did you accompany that check with any statement or letter in which you stated to him what you remitted?

THE COURT:—Just refer to your exhibit.

MR. BACON:—But you ruled it out twice.

THE COURT:—No, I didn't. If you choose to ask the witness if he sent any check along with Exhibit D 1, certainly that question would not be objected to, what he enclosed with the letter. I understand there is no objection to that at all.

Q. Did you enclose that check with Exhibit D 1?

A. I did, yes, sir.

30

Q. Was the check cashed?

A. It was.

Q. Was it charged to your account in bank?

A. Yes, sir.

Q. Did or did not Moore make any objection to the acceptance of that check?

MR. ARMSTRONG:—I object, as absolutely immaterial, whether he did or whether he did not.

MR. BACON:—It is cashed, given credit, and the credit appears in the account.

10 THE COURT:—He has a right to show whether he received anything in the nature of a reply to this letter.

MR. ARMSTRONG:—That is not the question asked.

THE COURT:—I know it is not. I suggest that to counsel for consideration. Whether he made any objection to it I don't think is quite the shape it should be in. However, I will allow that question to be asked, subject to cross-examination. It is simply showing what objection was made, if any.

(Exception noted for plaintiff.)

(Question repeated.)

20 MR. ARMSTRONG:—Now, if your Honor please, you see how wrong a question as that, if permitted to be answered yes or no by this witness, because it is manifest I don't mean to cross-examine for that,—he cannot know whether he made any objection or not, he cannot possibly know. He is giving a conclusion of his own. It is not proper to go to the jury.

THE COURT:—I see it is not limited to any objection to this witness that he knows of.

MR. ARMSTRONG:—I mean the word "to you"—"Did Moore make any objection to you?" He would have to show what he did in relation to it.

30 THE COURT:—You may answer that question.

(Exception noted for plaintiff.)

A. He did not.

Q. Were there any of the horses mentioned on this statement of January 12th, 1900, that were sold by you for less than the price as stated by Moore?

MR. ARMSTRONG:—The identification of those, I suppose would have to be a question for the jury. It is not for him to say as to that and the figures themselves will speak. He cannot say as to that.

THE COURT:—I think it is a sort of recapitulation of evidence by the witness.

MR. BACON:—I think not, if the Court please. At least ¹⁰ the purpose of the question is this: these prices as given by Mr. Moore in his statement are purely arbitrary prices; they are cost prices as fixed by him. I take it he had a perfect right at any time afterwards to put another price upon these horses or to agree that they might be sold for less than the cost price. Now the question is, did he do that. I can only get at it by getting out first, whether any of the horses on this statement rendered to Moore were sold for any less than the original cost price given by him.

THE COURT:—I see your object, but the paper shows for itself just what he sold them for. Besides he has testified what the amounts were and the declaration shows what they ²⁰ were listed at, so that any one can tell; and I think, therefore I shall overrule so much of the testimony that seems not to be exactly rutable, and it is making the record so great. You should, I think, bring the attention of the witness directly to any horses, you know, and whether there were any circumstances occurred by which he could sell a horse at any less than the cost price.

MR. BACON:—I suppose it would take me longer to go over it than him.

THE COURT:—I suppose it would, Mr. Bacon, but I don't know of any other regular way to get at it. ³⁰

Q. Mr. Baldwin, referring now to this statement, I notice that the pied and roan cobs are put down here at cost \$160,

selling price at \$133.50. Was or was not the sale of those horses at less than cost price approved by Mr. Moore?

(Objected to.)

THE COURT:—I overrule that because it is leading and calls for an inference of what an approval is. I call counsel's attention to that, that if you can show approval by acts, letters and circumstances, they should be proven here before the Court and jury.

(Whereupon the defendants, by their counsel, pray a bill of 10 exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

Q. Referring to the sale of the pied and roan cobs stated on this list, was or was not Mr. Moore consulted about that sale before it was made?

A. He was.

Q. Who consulted him?

A. Mr. Richardson and I. I don't know how fully I can answer those things.

MR. ARMSTRONG:—The witness very frankly says that he doesn't know how far he can answer it. A consultation is 20 a conclusion altogether.

THE COURT.—That is a caution which should be noted. He should speak of his own knowledge.

MR. ARMSTRONG:—And the witness has answered it here in a way that if calling for such an answer would be clearly objectionable and I trust counsel will not in asking the questions put them so. I don't want to be making objections all the time, but I do want the witness to testify only to such things as he knows.

THE COURT:—I think this last question, though, was 30 proper. He asked him whether or not Mr. Moore was consulted about that and he was asked by whom and he said Mr. Richardson and himself.

MR. ARMSTRONG:—I thought so too, but I see the word "consultation" was a conclusion altogether, so far as he was concerned. If he asked him or wrote him or something of that kind it might be different.

THE COURT:—But it might have been a personal consultation. I don't know.

Q. If you communicated with Mr. Moore, either personally or by letter, as to this sale, state what the consultation was and its result.

MR. ARMSTRONG:—You mean before the sale?

10

MR. BACON:—Yes.

A. This communication was verbal and it was made passing through the stable, within my hearing, that the pied and roan mares were high and possibly not saleable; and Mr. Moore said, "Cut them out; don't want any superfluous stuff." He said it walking through the stable to Mr. Richardson, in my hearing,—not to hold on the cost price.

BY MR. ARMSTRONG:—

Q. What did he say?

A. I don't recollect word for word. I know the purport though, and we acted on the purport.

20

Q. You used the words "cut out."

A. He used the words not to hold on to the cost price and sell them to the best advantage, and not hold on to the cost price, but to get rid of them.

BY THE COURT:—

Q. There were two of those?

A. Yes, sir; that pied and roan mare.

BY MR. BACON:—

Q. I direct your attention to the item "Long tailed bay 30 horse, not on list, sold in Norfolk." Will you explain what you mean by not on list?

A. That horse was never to have been listed. He was sent down to sell right away. He was really not accepted by us and we sold him on instructions of Mr. Moore.

THE COURT:—How is that described?

MR. BACON:—It is not in the declaration.

THE COURT:—How on your list?

MR. BACON:—"Long tailed bay horse, not on list, sold
10 in Norfolk."

Q. Among the charges made by you against Moore in this state there is "December 30, advanced Dr. Fossard \$10; paid for room, \$1; total, \$11." Explain why you charged those two items, aggregating \$11, to Moore's account.

A. Mr. Moore told me to advance that money to Fossard. That is my recollection, that he told me.

Q. What is the \$1?

A. The \$1 I don't distinctly remember. I don't remember that—some small charge. I don't remember that at all.

Q. The next item is "Bought one gray horse, \$145, bought one sorrel, \$175,—\$320." Explain why you charged those
20 horses to Moore.

MR. ARMSTRONG:—I object. He is going over it item by item. He said in the letter, I suppose, all that he can say, and in the statement and letter together. We have had this ruled on several times.

THE COURT:—They are mentioned in the letter, are they?

MR. BACON:—I don't know, sir. I haven't read the letter.

THE COURT:—These are not in the declaration, Judge.

MR. BACON:—They are not in the declaration. Moore
30 is charged with them. Richardson & Baldwin took credit for it. Now I want to know why they took credit for those two horses.

MR. ARMSTRONG:—You see they couldn't charge a matter of sale unless they had pleaded it in some way anyway. It is not in the pleadings.

THE COURT:—Well, if anything transpired in reference to that matter before the letter was sent between Mr. Moore and Mr. Baldwin, he may state it. If there didn't, I think the question is not admissible, as the writings must speak for themselves, and the acts of these parties.

(Question repeated.)

MR. BACON:—That calls for anything that happened between him and Moore showing why he charged it. I don't want to be leading. Certainly there can be no question less leading than that. 10

THE COURT:—Judge, is there any credit in your account for these two items?

MR. ARMSTRONG:—No, sir; and no charge, and they don't appear; no pleadings, no offset or anything of that sort.

THE COURT:—Well, all I want, Mr. Bacon, is to limit this inquiry to something that passed between the witness and Mr. Moore, either verbal or by letter. That leaves it open 20 for him to give his own ideas and reasons, and that is why I overrule the question in that form.

Q. State what, if anything, transpired between you and Moore relative to the charge referred to in the previous question?

MR. ARMSTRONG:—Now the place need be fixed in that question, if your Honor please.

A. Do you mean previous to the writing it, previous to the charge?

Q. Yes.

A. Mr. Moore authorized—

30

MR. ARMSTRONG:—I object to such an answer as that. He has got to show what Mr. Moore did.

THE COURT:—Yes; the witness will confine himself to what was said to him.

A. Nothing was said to me personally.

BY THE COURT:—

Q. No writing to you about it, personally?

A. No, sir.

BY MR. BACON:—

10 Q. After you sent the statement to Mr. Moore did you have any conversation with him relative to this item in which he approved or disapproved it?

A. No, sir.

THE COURT:—Well, just leave the latter part out—any conversation in reference to it.

MR. BACON:— Well, he says he didn't.

Q. When did you, if at any time, make up any other statement of your account of Richardson & Baldwin with Moore?

A. I made up a statement for Mr. Richardson previous to his going to Bridgeton. That was around January 20th, in
20 the vicinity of that date.

Q. You gave that statement to Mr. Richardson, did you?

A. Yes; I gave it to him.

Q. I suppose of your own knowledge you don't know whether he gave it to Moore or not?

A. No, sir; I don't. I suppose he went over it with him.

Q. I show you Exhibit C for Identification, being the letter which Moore admitted that he wrote, and ask you if you ever received that letter?

A. I did, yes, sir.

Q. In what way did you receive it?

A. Through the mail.

30 Q. Addressed to you where?

A. Morton Street, 1014, the stable address.

Q. In what city?

A. Baltimore.

(Letter offered in evidence and marked Exhibit D 2.)

Q Had you mailed to Moore any statement of account other than the one of January 12th.

(Objected to.)

MR. BACON:—Well, the first part of this letter is, "I have gone over the statement of account with Mr. Richardson and find it correct." Now I am trying to find out what statement it was.

MR. ARMSTRONG:—You cross-examined Mr. Moore on the papers he said he received. 10

MR. BACON:—He denied that he received any account of any kind and swore that the account he referred to was this Exhibit D 1. Now I am going to prove that is not so.

(Objection overruled. Exception noted for plaintiff.)

A. No, sir.

MR. BACON:—Judge, notice was served on you to produce that statement that is referred to in this letter and I ask you to produce it. 20

(Paper produced.)

MR. BACON:—In response to notice to produce the account referred to the letter Exhibit D 2, plaintiff produces the paper marked Exhibit B for Identification.

Q. I now hand you, Mr. Baldwin, the paper marked Exhibit B for Identification and ask you whether that is the statement which you gave to Richardson to give to Moore.

MR. ARMSTRONG:—He called, of course, if your Honor please, for a paper. Under all the rules of evidence he is bound to offer that in evidence when he calls for it. He cannot call for it and inspect it and keep it. If he proposes to examine the witness on it he must first offer it in evidence. 30

THE COURT:—I suppose it is to be offered in evidence.

Mr. BACON:—Well, I don't know. If I call on the other side to produce a paper and they produce a paper which is manifestly not the paper for which I called, I certainly am not bound to offer that in evidence. Now I called for the statement which is mentioned in a certain letter. They say this is the statement. I don't know whether that is the fact or not. Now I ask the only man who knows about that whether this is the statement which he furnished Richardson to give to Moore. If he says it is, it is in; if he says it is not, I don't offer it.

10 MR. ARMSTRONG:—Of course he is bound to offer the paper when he calls for it. It may not be of any probative force. He calls for it. When he calls for it and produces it he is bound to offer it. That is a rule time out of mind.

THE COURT:—It is a question whether this is the paper he calls for.

MR. ARMSTRONG:—He can show that by other witnesses, if he can, but it must go in now. He may show, if he can, that it is another paper altogether. It doesn't prevent him from showing it if he can.

THE COURT:—I will allow it under the circumstances.

20 MR. ARMSTRONG:—I ask for an exception to the Court's permitting this witness to testify to a paper having been produced by the other side on a call, until it is offered in evidence.

(Exception noted for plaintiff.)

A. You mean when he went up to Bridgeton?

Q. On the occasion of Richardson's visit to Moore, about January 22, 1901.

A. Yes, sir. I don't remember whether or not I did.

MR. ARMSTRONG:—I renew my demand that the other side put that in evidence, having called for it and examined
30 upon it.

THE COURT:—Do you offer that paper that you called for?

MR. BACON:—No, sir.

THE COURT:—Do you wish to offer it, Judge?

MR. ARMSTRONG:—I wish your Honor to take it in evidence on the defendants' side. I submit as a matter of law it has been put in evidence here and I wish to have it so considered.

THE COURT:—I will pass it for the present. I will look at that matter and reserve my decision.

Q. Mr. Baldwin, did you give to Richardson to hand to 10 Moore a statement showing the state of account between Moore and Richardson & Baldwin on going to New York with the final shipment of horses, made up from your books of account?

(Objected to as to form and materiality.)

THE COURT:—I think I sustain that objection. It doesn't matter what he gave to Richardson. You have got to show something beyond that. It doesn't bring it to the plaintiff at all.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.) 20

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

Q. Mr. Baldwin, will you state what horses were disposed of by you on this account after the statement of January 1, 1900?

MR. ARMSTRONG:—If your Honor please, this witness has undertaken in this case heretofore to give day, date and place of the disposition of every horse. It is done. It is in the case. Your Honor has permitted the greatest latitude in the examination of the witness. The matter now is here and I cannot and am unwilling to have the jury more confused 30 than it is bound to be with all these things, and certainly we are entitled to have some rule applied on that.

THE COURT:—On what account do you mean, the plaintiff's account?

MR. BACON:—Yes, sir.

THE COURT:—After January 1st?

MR. BACON:—Yes, sir.

THE COURT:—I think you went over each one, did you not, to tell what was done with it?

MR. BACON:—Not when.

10 THE COURT:—You see the dates show in the interrogatories which are offered in evidence, and could he make it any clearer?

MR. BACON:—I am endeavoring to formulate some statement of account.

THE COURT:—Is there any doubt about the dates and times?

MR. BACON:—It seems to me the interrogatories were framed to conceal the defence—

THE COURT:—That is not right. The question is
20 whether you want anything additional to what there is there and what reason you have.

MR. BACON:—I do.

THE COURT:—I say is there anything wrong in the interrogatories, anything different from what is given there, the day and date? The dates are given.

MR. BACON:—Well, it may be possible to argue it out. I don't know.

THE COURT:—Proceed then with something else.

Q. Did you pay any money for Moore's account after January 1st, 1900, which is not shown in the answers to the
30 interrogatories which have been read in this case?

(Objected to as to form and materiality.)

THE COURT:—If he paid anything since the attachment?

MR. BACON:—No, since the statement of January 1st.

THE COURT:—Between that and the suit?

MR. BACON:—Yes, sir.

MR. ARMSTRONG:—Well, it is objectionable as to the form of the question, anyway. Of course, there is another objection to it after the form is remodeled.

Q. Well, look at the answers to the interrogatories.

MR. ARMSTRONG:—Oh, no.

THE COURT:—Just look at the declaration. I don't think you had better show him the interrogatories. If there is anything that you omitted that you know about, I think it is right for you to call the witness' attention to it. If you know of any payment or any data or you see anything that has been omitted, call immediate attention to it. I don't see any harm in that, if you can do it. But I suppose you must have some information on that subject, some credit or something, if he has called attention to it. Of course, the other way of examining, we have to go over long repetitions to get at it. 10

Q. Look at the transcript and to the statement of credits and say if there are any items of credit accruing after January 1, 1900, to which you are entitled and which are not included in that list of credits. You can refer to your books and anything else that there may be to ascertain that fact. 20

THE COURT:—Of course you limit that to the 29th of January, isn't it, the beginning of this suit?

MR. BACON:—Yes, up to the 26th of January, 1900, being the day that the affidavit in attachment was made.

A. Yes, sir; there are credits here that I should be entitled to.

Q. State what they are, please.

A. Do you mean in cash or horses and cash in any way?

Q. State all the credits to which you are entitled between January 1, 1900, and January 26, 1900, which are not included in the statement of credits made by the plaintiff in this case. 30

MR. ARMSTRONG:—I object, as it calls for the exercise of an opinion by this witness and is not calling for matters of evidence.

THE COURT:—I think it is open to that objection. I sustain the objection.

Q. State what charges you have against Moore between January 1, 1900, and January 26, 1900.

(Objected to on the same grounds.)

MR. BACON:—It seems to me you have got to prove the
10 account somehow.

THE COURT:—What charges do you mean?

MR. BACON:—The charges against Moore on this account.

THE COURT:—You must show how they became charges on his account by the testimony of the witness what he did in pursuance of some authority or direction, or what he has delivered in cash or in goods to Mr. Moore; because there is no offset, I think, filed, no account filed, and it must be confined, therefore to some goods in part payment of the account that is charged.

20 Q. What moneys have you paid to Moore or what goods have you delivered to Moore between January 1, 1900, and January 26, 1900, on this account?

MR. ARMSTRONG:—I ask that the question be divided.

THE COURT:—Well, just divide that question. Say cash first then.

Q. Well, what cash, then, have you paid?

A. No cash.

Q. What cash have you paid for his account, if any?

MR. ARMSTRONG:—I object. That is a repetition of
30 the same thing.

THE COURT:—You see you must get the transaction on which any money was paid for Mr. Moore.

MR. BACON:—Suppose he says he has paid some, and then afterwards he answers it in detail, how he came to pay it. It is not possible to put it any other way.

THE COURT:—The only thing I say about it is this: if he paid any money on Mr. Moore's account he must have had some order or direction, some transaction that will explain just how and why he paid the money. You see you get before the jury a fact which afterwards may have its effect entirely destroyed by explaining circumstances.

Q. Did you have any authority from Mr. Moore to pay any money for him during that period? 10

A. I did.

BY THE COURT:—

Q. State what authority it was that you had from Mr. Moore on any occasion to pay any money that has not already been credited.

A. I had authority to buy horses.

Q. Well, now, what authority? What was the nature of the authority?

A. The authority was that we were—

Q. What is the nature of the authority? Was it verbal or written? 20

A. It was verbal. It was not given to me personally.

MR. ARMSTRONG:—Now you see the objection.

THE COURT:—Well, that is the end of it, if it was not given to you personally.

BY MR. BACON:—

Q. Did you or did you not return any horses to Mr. Moore in that period which were not included in the credits in the declaration?

MR. ARMSTRONG:—I object. You see my ground of objection. You may say "If he actually did give horses to Mr. Moore, delivered horses to Mr. Moore, he might show that if it were a payment on account," But you see all these "if's" 30

come right in there; but the answer to this question has been made in other forms by this witness in the affirmative, that is, to his interest; when afterwards, in the second breath, he has destroyed it by saying that it has been delivered to somebody else, and in no case has it been delivered to Moore.

THE COURT:—The question is whether between those dates you returned any horses to Mr. Moore, between those dates, what you personally delivered.

THE WITNESS:—You mean returned to Bridgeton?

10 THE COURT:—Yes; returned to Bridgeton, to Moore.

Q. Shipped to Bridgeton.

(Objected to.)

THE COURT:—Well, there is no impropriety in the question whether he shipped goods to Bridgeton to Moore, as I understand it. At least it might not be efficient finally as evidence, but it comes pretty near it. If he shipped goods to Mr. Moore by rail to Bridgeton he ought to show it.

BY THE COURT:—

20 Q. Do you know, of your own knowledge, of any horses being shipped by you to Mr. Moore that are not credited there?

A. Yes, sir.

Q. What do you know about it yourself personally?

BY MR. BACON:—

Q. I show you a freight receipt.

MR. ARMSTRONG:—I object to its being shown to him.

MR. BACON:—It is my purpose to show to the witness a freight receipt.

MR. ARMSTRONG:—Do that at side bar.

30 MR. BACON:—I don't know why I haven't a right to try this case under the rules of court and the instructions of the Court in my own way.

THE COURT:—Proceed then.

MR. ARMSTRONG:—Counsel wants it in his own way. I propose, if I can, to have it done in a legal way, and therefore I ask that the paper that he proposes to ask questions from of this witness be exhibited to your Honor, and that plainly and clearly it is proper that we be heard at side bar in relation to it.

THE COURT:—I will hear you counsel if you will come up here.

(Counsel argue at side bar.)

10

Recess to 1.30 p.m.

Trial of the cause resumed at 1.30 p.m.

GEORGE S. BALDWIN, Resumed.

BY MR. BACON:—

Q. Mr. Baldwin, this morning, when you were shown ²⁰ Exhibit B for Identification and you were asked the question whether or not that was the statement which you handed Richardson to give to Moore, you said you didn't remember, During the noon recess have you refreshed your memory on that point?

MR. ARMSTRONG:—Well, that, if your Honor please, is so clearly improper that I must object to it. If he has had consultation with any one while he was off the stand of course he has destroyed his credibility as a witness and his ability as a witness.

MR. BACON:— I don't understand when a man says he ³⁰ doesn't remember, I don't understand if he afterwards says he remembers the testimony that he cannot correct his erroneous

testimony so made. It is not going to be assumed that this gentleman will perjure himself because he has had his dinner.

THE COURT:—I have known that in my practice, Judge Armstrong, where a witness said a certain thing and afterwards desired to correct his testimony about a certain thing, it is permitted to be done.

MR. ARMSTRONG:—He has not corrected his testimony or anything of that kind.

10 THE COURT:—I understand so. The paper was shown to him and with some hesitation I think he said he didn't remember. But I think it would be proper under such circumstances to let him look at it and refresh his memory. I don't see at present anything that would suggest any impropriety in such a course.

(Exception noted for plaintiff.)

A. I have.

Q. I show you now the paper and ask you if that is the paper which you gave to Richardson to give to Moore.

A. I did not, sir.

20 Q. What was the paper that you gave to Richardson to give to Moore?

(Objected to.)

MR. BACON:—I ask him that now so as to describe the paper, so as to direct Richardson's attention to it, so that we may identify the paper.

THE COURT:—He says this is not the paper. You called for a certain paper and that is produced.

MR. BACON:—I called for a paper which Mr. Richardson gave to Mr. Moore.

30 MR. ARMSTRONG:—Read your call.

(Mr. Bacon reads notice to produce.)

MR. BACON:—In answer to that call this paper is presented.

MR. ARMSTRONG:—No; not in answer to any such call as that. This paper was presented on the examination of Mr. Moore. That paper was presented and marked there and Mr. Moore said that was the paper referred to in his letter. Now you are asking this witness about something else altogether. I don't care what he gave to Mr. Richardson. That doesn't matter.

MR. BACON:—Not unless we follow it up and show it got ¹⁰ to Moore's hands.

MR. ARMSTRONG:—You will have to do more than that in order to get in a paper of that order.

MR. BACON:—In order that there may be no mistake between counsel about the matter, I call on the other side to produce a statement of account rendered by Richardson & Baldwin or George S. Baldwin, rendered on going to New York with final shipment of horses.

MR. ARMSTRONG:—I don't know of any such paper.

THE COURT:—The other call was for the account that ²⁰ accompanied a certain letter of January 12th.

MR. BACON:—I have that. I asked Moore for the statement of account to which he referred in this letter of January 22d as being handed to him by Richardson, and which he says in his letter he had gone over with Richardson and found correct. In answer to that he produced this paper. I asked Baldwin this morning if that paper which you hold in your hand was the paper which he, Baldwin, gave Richardson to give to Moore, and he said he didn't remember. Now he says that is not the paper which he gave to Richardson to give to Moore. Now I call for the final statement of account and ³⁰ counsel says that he has no such thing. I think that closes the incident.

Q. Mr. Baldwin, did you pay the freight on the horses that you shipped to Moore on January 22d?

(Objected to.)

MR. BACON:—Moore admits that he got horses.

MR. ARMSTRONG:—That doesn't make any difference.

MR. BACON:—Moore admits that he got the horses and I asked this man if he paid the freight on them.

MR. ARMSTRONG:—That doesn't matter.

10 THE COURT:—And is this matter of freight——

MR. BACON:—He has charged it to Moore. Whether it is properly chargeable or not is another question.

MR. ARMSTRONG:—Counsel makes that statement. It is not in proof yet.

MR. BACON:—I am going to prove it.

THE COURT:—I suppose you had better show what authority he had to charge it to Moore before proving that he paid the freight.

20 Q. Were these horses which you shipped back to Moore about January 22nd shipped back at his request?

(Objected to.)

THE COURT:—You want the occasion and circumstances. I sustain that objection. Doing the thing at a request—I think you ought to come nearer than that. What kind of a request was made, if any?

Q. Did Moore request you personally to ship these horses back to him?

A. He made mention of it in that letter of January 22nd.

Q. Did you ship them back pursuant to that letter?

A. I did.

30 Q. Did you pay the freight on them and charge the freight to him?

(Objected to.)

THE COURT:—He was requested to send these horses back and pay the freight. What is the objection, Judge?

MR. ARMSTRONG:—The letter says what he has done. It comes back to the same thing. This gentleman is telling what Moore's letter meant.

MR. BACON:—He is telling what he did pursuant to the letter.

THE COURT:—Does it appear in evidence, Judge, that these horses shipped were horses received?

10

MR. ARMSTRONG:—No, sir.

MR. BACON:— Moore admits seven.

MR. ARMSTRONG:—Receiving seven horses.

MR. BACON:—That is admitted in the credits, that he received seven horses. I can't see why it is not proper to show, if they were shipped back at his request, that we paid the freight on them and charged it to Moore.

THE COURT:—Are these supposed to be horses originally consigned or some other horses?

MR. BACON:—I don't know, sir.

20

MR. ARMSTRONG:—Three of them, as a matter of fact, according to the account, were originally consigned. But according to the statement of this witness he had substituted a horse there in one of them, in a team, as I recollect. Anyway, three of them were consigned. You see the viciousness of this question appears on this. He says on this letter, "I understand you are going to ship ten horses."

THE COURT:—Upon what ground do you think they ought to pay freight upon horses consigned to Mr. Moore, I mean upon what theory?

30

MR. BACON:—It seems to me that that is a question of law, whether he is entitled to charge freight to Moore. We

can't discuss the question of law until we find out whether he did pay the freight on the horses sent back. I believe that he did.

THE COURT:—The question is to the propriety of the question.

MR. ARMSTRONG:—(Reads from agreement.) They were to care for them and feed them. We don't care whether they shipped them back or not.

10 THE COURT:—You claim for the cost price of the team?

MR. ARMSTRONG:—Oh, certainly. We took them back at the cost price.

THE COURT:—You are entitled to the cost price without any reduction?

MR. ARMSTRONG:—Yes, sir; if they come back to us they come at cost price, no matter what we shall sell them for afterwards.

20 THE COURT:—I can't understand how, unless Mr. Moore agreed to pay the freight, you can fasten that as a charge against him, as you obligated to pay, at the utmost, cost; and if you choose to send back the horses billed to you at cost, you are only credited with cost; is that it? Unless there was something in the agreement or an after understanding or arrangement that he would take back the horses themselves and pay the freight on delivery.

MR. BACON:—That, of course, is the question.

THE COURT:—It occurs to me I should overrule that for the present.

Q. Were there any horses returned to Moore, to your knowledge, that are not accounted in the list of credits in the transcript?

30 MR. ARMSTRONG:—I object. The question is whether any horses were received by Moore, to his knowledge.

Q. Well, returned to Moore and received by him.

THE COURT:—To your personal knowledge.

Q. To your knowledge.

THE COURT:—Mr. Baldwin, you have been examined nothing about that, but tell only what you know and did personally, and not what anybody else said. Answer the question that way, if you can, of your own knowledge.

A. They were shipped to Moore.

MR. ARMSTRONG:—You see the witness is intelligent enough to know, after your Honor's ruling. 10

THE COURT:—Besides the shipping he must show what is necessary and show that there was a delivery.

MR. BACON:—It seems to me that testimony is competent, to show that this man loaded upon a railroad car or steamboat horses billed to Mr. Moore and that they were consigned to Moore in the ordinary course of business and were not returned to Richardson & Baldwin. I offer to prove that by this witness, it being material and necessary to the defence.

THE COURT:—You may offer what you think is legal proof of that fact and then I will rule on it. 20

Q. Mr. Baldwin, state, please, what horses, if any, were shipped by you to Mr. Moore between January 1st and January 26th, 1900.

(Objected to.)

THE COURT:—This word shipped is to a certain extent a legal term. You may ask what he did with certain horses and show what evidence you have got of it. That is all I can allow.

Q. What did you do with the gray and sorrel horses?

A. The gray and sorrel horses? I don't just understand.

(Mr. Bacon shows list to witness.) 30

MR. ARMSTRONG:—You have shown him a paper here that I objected to this morning, in his own handwriting, and

which I objected to before. He has had it to look through when off the stand, a thing that is not proper, and now coming here with it.

(Question repeated.)

A. The gray horse was shipped to Bridgeton.

MR. ARMSTRONG:—Now, if your Honor please, you have already——

BY THE COURT:—

10 Q. You were asked to tell what you did with the horses. The question of shipping we will deal with later. You may call it shipping; we want to know what you did with the horses, physical possession.

A. I returned it to Bridgeton.

Q. Well, you didn't go to Bridgeton with it, did you? You must tell what you did with the horse spoken of. If you took him to any place of shipment, tell us what it was, if you were along.

A. I didn't take the horse to the boat myself, no, sir. I was not in the habit of leading horses down to the boat myself.

20 THE COURT:—We can't talk about shipments in that way.

A. My man took the horse.

THE COURT:—You must not tell what somebody else did in your absence.

BY MR. BACON:—

Q. State what you did yourself with the horse.

THE COURT:—He says he didn't take the horse himself to any place of shipment. What else can he state about it?

30 MR. BACON:—It seems to me if he swears that he put it in the custody of his hostler and told him to lead it down to the boat——

THE COURT:—That wouldn't amount to anything.

MR. BACON:—And he paid the freight—

THE COURT:—Well, that is another thing. We will come to that later. Now it is what he did physically with the horse, and he says he didn't take the horse to the boat himself.

BY THE COURT:—

Q. Now where was the horse when you last saw the horse?

A. In my stable.

10

THE COURT:—That seems to end his knowledge of it.

BY MR. BACON:—

Q. What did you do with the sorrel horse?

A. The same things apply to the sorrel horse.

Q. Mr. Baldwin, was Mr. Moore at your stable between the time that you made this contract with him that has been offered in evidence here, Exhibit P 1, and the 25th of January, 1900?

A. He was, yes, sir.

Q. Was he there more than once?

20

A. I didn't see him but once. I can't say.

Q. When was the time you saw him there?

A. I saw him twice.

Q. When?

A. I saw him both times, the latter part of November—within the month towards the end of November and towards the end of December, in the intervening month; that is my recollection.

Q. When, if at any time, was the partnership between Baldwin and Richardson dissolved?

MR. ARMSTRONG:—I object to that as immaterial. The dissolution of that partnership does not affect us at all.

30

THE COURT:—If you will come up here and let me know what bearing that has in this offer—

(Counsel argue at side bar.)

THE COURT:—I overrule that because that question involves a legal question of what is a dissolution. I cannot admit it on that ground. The witness cannot say that the partnership was dissolved. He must show some evidence of it.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

10 CHARLES E. HENDRICKSON, J. S. C. [SEAL]

Q. I show you a paper writing purporting to be a dissolution of co-partnership between Richardson & Baldwin and ask you if that is the dissolution agreement.

(Objected to, as improper, immaterial and not legal evidence.)

THE COURT:—I overrule that as immaterial and as not shown by any evidence to be binding upon the plaintiff in this suit.

20 (Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

MR. ARMSTRONG:—My ground was as to its form even if it is not offered to be proved.

THE COURT:—Well, yes, it is offered, I presume, because the signatures of the parties are there and there is a witness; but if he is out of the state and cannot be produced—

MR. ARMSTRONG:—Well, show that.

30 THE COURT:—Well, if you have any objection, Judge, and they can do that, I think they should do it.

MR. ARMSTRONG:—Well, my objection was on all three grounds I don't care on what ground you Honor rules it out,

THE COURT:—I think under the pleadings we ought to allow them to show that there can be proper proof of it. It is objected to on the ground that it has not been properly proved by the witness.

MR. BACON—I thought the ruling was on the ground that it is not properly admissible, assuming that I can properly prove it.

THE COURT:—I will overrule it and let the record stand that way.

MR. BACON:—Perhaps we had better not take any ¹⁰ chances on it, because I think it is very material.

Q. Mr. Baldwin, the paper which I show you is witnessed by H. H. Carter as subscribing witness. Is Mr. Carter in the state of New Jersey?

A. No, sir.

Q. Are you familiar with his handwriting?

A. Yes, sir.

Q. Did you see Mr. Carter sign his name to this paper?

A. Yes, sir.

MR. ARMSTRONG:—This is one of the parties to it and it is hardly to be proved by him, his own signature. ²⁰

THE COURT:—I know, but can't he prove that the witness does not live in the State of New Jersey?

MR. ARMSTRONG:—He has done that.

THE COURT:—That is as far as you can go, and I think under those circumstances you are allowed to prove signatures by parties themselves.

MR. ARMSTRONG:—No; you are bound to prove the signature of the subscribing witness by some one not interested.

THE COURT:—No; you don't have to do that, I think, ³⁰ Judge. I don't think you have to prove that by any one at all if the witness is out of the state.

MR. ARMSTRONG:—You don't have to produce him.

THE COURT:—No; you don't have to prove his signature either, I think. However, that is not important now. The regular way to prove the execution now would be by asking the party if he was present and if he signed and saw the other signature, that would be the proof of it.

Q. Were you present and signed this paper?

(Objected to. Objection overruled. Exception noted for plaintiff.)

10 A. Yes, sir.

Q. Did you sign your name to this paper?

A. Yes, sir.

Q. Did you see Mr. Richardson sign his name to this paper?

A. Yes, sir.

MR. BACON:—I offer it now formally.

THE COURT:—I overrule it now on the grounds previously stated, that it is immaterial and not binding on Mr. Moore. It is not shown that he was a party to it.

Q. Mr. Baldwin, I hand you your account book which
20 you had this morning and ask you to state what was the condition of the account between Richardson & Baldwin and Moore on shipping the horses to New York.

(Objected to. Objection sustained.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

CROSS EXAMINATION.

30 BY MR. ARMSTRONG:—

Q. Where do you live?

A. Baltimore, Maryland,

Q. Do you recall when you first met Mr. Moore?

A. I think I met him in Washington.

Q. When?

A. The latter part of November, I think it was.

Q. Did you learn what Mr. Moore's business was?

A. No; I don't know whether I did at that time or not.
I don't recollect.

Q. Do you know whether or not at that time Mr. Moore complained of not being in good health?

A. Yes; I heard him——

Q. Don't you remember Mr. Moore saying to you that be- 10
cause of his physician's direction that he should be somewhat
relieved from the pressing duties of his stores and so forth at
Atlantic City, he had secured a farm and was picking up
where he could stock?

MR. BACON:—I object to that as not proper cross-examination, even of a party.

THE COURT:—Well, I suppose it is simply calling the witness' attention as preliminary as an opening to see if he remembers, test his recollection. Is that it, Judge?

MR. ARMSTRONG:—To test his recollection, his knowledge of the transaction between the parties and the circum- 20
stances of the transaction.

(Objection overruled.)

A. I can't say that I got that from Mr. Moore.

Q. You got that information, however, didn't you?

A. I am under the impression, yes, that it was something
of that sort.

Q. Said to you by some one at about that time?

(Objected to.)

A. I am not familiar with him, merely under the impression that Mr. Moore's health was impaired and that he had
other interests. That is as far as I can answer that. 30

Q. But you are clear that you had that?

A. Yes; I am under that impression.

Q. Before any horses were shipped to you at all was Exhibit P 1 executed?

A. No, sir.

Q. When was it executed?

A. I should say three weeks afterwards. I should say that; that is approximate.

A. After the first shipment?

A. Yes, sir.

Q. Were the horses that were shipped to you by Moore under this arrangement?

10 A. They were shipped previous to that arrangement.

Q. Were they made under this arrangement?

A. I can't exactly answer that, no.

Q. Did you buy them?

A. No.

Q. Were they consigned to you?

A. Yes.

Q. Were they consigned to you under the terms here contained?

A. Yes; I will admit that.

Q. Yes; I should think you would admit that. In whose handwriting is this paper? (Showing witness Exhibit B for
20 Identification.)

A. That is in mine.

Q. You have been examined as a witness on interrogatories, have you not?

A. Yes, sir.

Q. I ask you whether you recall having had in the interrogatories this question asked you: "4. Does the schedule annexed to the declaration as the bill of particulars in this cause show the horses sent you by I. Whilden Moore?" and making this response: "Yes; the schedule annexed to the declaration as a bill of particulars in this cause shows all the horses sent to the said firm of Richardson & Baldwin by I.
30 Whilden Moore and in addition thereto one gray long tailed horse that was purchased by the said Richardson & Baldwin for the said I. Whilden Moore and which was intended to be

resold for his account in the same manner as the other horses." Was that asked you and did you make that reply?

A. Yes sir.

Q. Is that the gray horse to which you refer in answer to your counsel's examination as being one of the two grays in the list at the time of the bill of particulars?

A. It is one of the two grays, yes, sir.

Q. I show you now Exhibit B for Identification and ask you what item No. 22 thereon, which you say is in your handwriting, is?

A. That is a gray horse. 10

Q. Is that a gray horse?

A. No; I was going on further.

Q. That is the last item in the bill of particulars, isn't it, two grays?

A. Yes, sir: two gray horses.

Q. \$200, that is what it is marked here?

A. Yes, sir.

Q. And that is your statement rendered to Moore, isn't it?

A. I don't recollect that statement.

Q. You don't recollect that statement?

A. Let me see it. No; I don't recollect just when this statement was sent. 20

Q. Oh, I didn't ask you that. You said that this morning, you didn't recollect when it was that statement was sent. I ask you whether you didn't send that statement?

A. I don't remember sending that statement.

Q. You made it out?

A. I made it out, yes, sir.

Q. Do you remember making it out?

A. No; I can't say that I remember that.

Q. Do you remember the purpose for which it was made?

A. No; I can't recall that.

Q. You can't account for Mr. Moore having this statement? 30

A. I don't remember when I sent it and I don't remember when it was made up.

Q. I ask you to look at this statement and look at the bill of particulars and tell me whether that does not include the horses contained in the bill of particulars.

A. You mean Mr. Moore's? (Examines paper.) I can't see that these are exactly the same, no, sir. I didn't want to answer it, you know, until I had gone over it carefully. I don't want to make an admission until I am positive.

(Mr. Armstrong reads items from bill of particulars and the witness compares them with his list.)

Q. The accounts don't agree?

10 A. There are two omissions from this statement (referring to Exhibit B) and the list contained in the bill of particulars, yes, sir.

THE COURT:—Which way is the difference?

MR. ARMSTRONG:—I was going to ask him.

Q. They are the bay cob, \$175, and the long tailed bay horse, \$115?

A. Yes, sir.

THE COURT:—Those two are not on that?

MR. ARMSTRONG:—Those two are not on this list
20 Exhibit B for Identification.

Q. I now show you what you didn't look at, evidently. There are two horses on the other side of the sheet, one long tailed bay horse, \$115, and the other a bay cob, \$175, and ask you if, including those, they are not all there?

A. Yes, sir.

THE COURT:—Now, Judge, this paper you are examining him in regard to now is the one which you insisted should be in evidence, isn't it?

MR. ARMSTRONG:—Yes, sir.

THE COURT:—It seems to me that counsel on the other
30 side having not only called for it but inspected it and used it before the court, it is bound to be put in evidence, bound to go in evidence.

MR. BACON:—I have no objection to its being offered on the other side.

THE COURT:—It becomes evidence, you having used it.

MR. BACON:—I objected to it. It was not what I called for.

THE COURT:—It must be considered in evidence because you examined it and inspected it. It must be so marked, as being in evidence in the case.

MR. BACON:—In so far as the paper is put in evidence as the result of my calling for the production of the paper which I described, I desire to take exception to the ruling.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

THE COURT:—Well, it was produced as the paper and if you had any doubt about that paper you should have returned it, it seems to me. Having used it with your witness on the stand I think it becomes evidence. Of course it can stand that way and you can have your exception.

(Paper marked Exhibit D 3.)

20

Q. As I understand you to have already said, Mr. Baldwin, the total cost of the horses received by you on Moore's account was \$6625; is that correct?

A. Let me see.

Q. Those are my figures. I don't know whether you recall them. I was not going to show you my figures. There is what you swore to, the declaration we made out.

A. \$6625, yes, sir.

Q. The cash you paid to Mr. Moore consisted of \$1,000, \$100 and \$214, didn't it?

A. Yes, sir.

Q. Did you pay this \$1314 you paid him in cash or by 30 check?

A. By check.

Q. Have you the checks?

A. I think my attorney has the checks.

MR. ARMSTRONG:—Will you produce them?

MR. BACON:—I have the check for \$100. I haven't the other two.

MR. ARMSTRONG:—You haven't the \$214 check?

MR. BACON:—Nor the \$1,000 check.

MR. ARMSTRONG:—You examined him and asked him
10 if the check was returned to him.

MR. BACON:—I asked him if the check was paid and he said it was paid. I haven't that check nor the \$1,000 check. I made no effort to produce them because the credits were admitted by you.

MR. ARMSTRONG:—That is what I said, you needn't go into that. I ask you to produce all the checks you have.

MR. BACON:—Well, I have the \$100 check. That is the only thing I have found among these papers in the way of checks.

20 MR. ARMSTRONG:—I was not asking you, I was asking him. (Referring to witness.)

A. I thought I had sent them to you.

Q. You have those checks?

A. I have them, yes.

Q. What receipt did you get for these checks from Mr. Moore?

A. I got no acknowledgment otherwise than the checks.

Q. What receipt or acknowledgment did you get for the check sent Moore between the 12th and 22nd of January for \$214, any?

A. No; nothing else than acquiescence, that is all, of the
30 check.

Q. What acknowledgment did you get, sir?

A. I got no acknowledgment.

Q. Why did you say acquiescence then?

A. I meant by silence.

Q. You heard nothing at all?

A. No; nothing at all.

Q. If you will confine yourself to answering my questions I will be extremely obliged.

A. Well, it was purely a mistake, that is all.

Q. It was an unfortunate mistake. Isn't it true that what you paid for Mr. Moore at the hotel was \$7 and not \$11?

A. I don't recall that.

Q. Didn't you say to Mr. Moore that it was \$7 that you ~~10~~ paid?

A. I don't remember that.

Q. The charge that you have made against Mr. Moore of \$60 cash in the answer to the interrogatories was McCauley's \$30 and medicine \$30?

A. Yes, sir.

Q. These medicines were spent on the horses, for the horses?

A. I can't answer that.

Q. The T-cart and the harness for which you have made no charge against Mr. Moore, but which he has allowed you in the bill of particulars, were \$45 and \$35 respectively, ~~20~~ weren't they?

A. Yes, sir.

Q. Making \$80?

A. Yes, sir.

Q. The sorrel team and the brown mares returned to Mr. Moore, which he acknowledges to have received, he allowed you at the same rate there charged, \$400, didn't he?

A. The sorrel mare and horse; it was sorrel team, you mean?

Q. Sorrel team.

A. \$400, yes, sir.

Q. And the brown mare he allowed \$100, didn't he? 30

A. Yes, sir.

Q. The two sorrel mares \$125, one gray horse \$90, and

the one bay horse \$143, were the prices at which you indicated to Mr. Moore you charged him for them, weren't they?

A. Yes, sir.

Q. And they are allowed in this account?

A. Yes, sir.

Q. Then, as I understand you, Mr. Moore has allowed you in this account for all the horses he acknowledges having received from you, for the harness and T-cart, the hotel bill as he said it was on the stand from information from you, and the McCauley and medicine account, the horses that he had billed
10 to you, the three horses, and the cash you paid; is that correct?

MR. BACON:—How does this method of examination relative to those horses that were returned differ from my examination or attempted examination on the same subject which was overruled? I tried my best to get this evidence about the shipment of these horses and it was repeatedly overruled.

THE COURT:—This is in regard to horses that there was no dispute about.

MR. BACON:—Those were the very horses I was asking about, those horses that were shipped back.

20 THE COURT:—Well, there is a difference in the number of horses.

MR. ARMSTRONG:—I said the horses acknowledged to have been received by Mr. Moore.

THE COURT:—You are limited to those.

MR. ARMSTRONG:—That is all we know anything about.

A. Yes, sir; that is correct.

Q. The total amount of those credits is how much, Mr. Baldwin?

A. \$2,319.

30 Q. Then from Mr. Moore's standpoint, from his claim, if all the horses had been disposed of at that time there was due him \$4,306, wasn't there?

A. Yes, sir; that is according to Mr. Moore.

Q. You say that of the horses, nine, I think, were disposed of for more than cost as billed to you, and I ask you how much more.

A. Yes, sir.

Q. Nine horses and how much?

A. \$488.50.

Q. One-half of that is how much?

A. \$244.25.

Q. And then in accordance with Mr. Moore's claim, what sum was due him at the time of the commencement of this suit? 10

MR. BACON:—I object to the frame of that question.

MR. ARMSTRONG:—The witness doesn't admit it, but of course I am basing it upon that.

(Question withdrawn.)

Q. According to Mr. Moore's claim there was due him \$4.550.25 at the time of the commencement of this suit, was there not?

(Objected to.)

MR. ARMSTRONG:—I would like to hear the ground of 20 the objection to that.

MR. BACON:—On the ground that it is not proper cross-examination. It is a mere matter of account. He can swear to the items of the account and counsel can make his own figures.

THE COURT:—I think, Judge, that it is a matter of calculation for the counsel. I don't think the witness is required to calculate what it would amount to in case the plaintiff establishes his side of the case.

MR. ARMSTRONG:—I see counsel has overlooked it, but 30 I did not expect the Court to overlook the fact that the figures are of necessity made up from these defendants.

THE COURT:—Now you are asking him on a contingency to state how much.

MR. ARMSTRONG:—No; I am asking what the claim is made as against him.

THE COURT:—I don't think he is bound to tell that. It is not a matter of original knowledge of his. You can calculate that as well as the witness.

MR. ARMSTRONG:—No; but I can't unless he identifies
10 all those figures. They are not my figures. I don't know at all and my client doesn't know and cannot know except by his return. He makes the return of the question of profit, he makes the return as to the prices. You see he is called on here for an accounting. That is why he is asked to add the figures together. He must give the details of it.

(Objected to.)

Q. What horse was that that was running around, you said, on a farm outside of Baltimore?

A. Billy M.

Q. You have spoken of a conversation with Mr. Richardson at the stable, between him and Mr. Moore. Whom do
20 you mean by that?

A. On what occasion was the conversation?

Q. Well, you only spoke of one conversation. I don't know the occasion. You spoke of it in your examination, something about cutting a horse out, a pair out.

A. I meant Mr. William H. Richardson and Mr. Moore, I. Whilden Moore.

Q. When did the long tailed bay horse and the bay cob come to you?

A. I don't exactly recollect.

Q. Was it in the first shipment or in some of the later shipments?

30 A. The later shipments, I believe.

Q. Who is the Mr. R. referred to in Exhibit D 3?

A. Mr. William H. Richardson.

Q. I show you Exhibit D 1 and ask you who the Mr. R. is referred to in that letter.

A. Mr. William H. Richardson.

Q. Is that true wherever Mr. R. is referred to?

A. Yes, it is; or I wouldn't have written it.

Q. In whose handwriting is this letter?

A. It is in mine.

Q. You spoke about certain horses that were taken to New York and sold. Were they included in the horses sent you by Moore?

A. Were his horses included in that, do you mean? 10

Q. Yes.

A. Yes, sir.

Q. Nine, were there not?

A. Yes, sir.

Q. Can you indicate to me on this list contained in the declaration which of the horses were taken by you to New York?

A. The black long tailed horse—

Q. What was the cost price of that, please?

A. \$200. Belle Swigert, \$400; Dude, \$250; pair bay cobs, \$400; brown cob, \$200; two bay cobs, \$350. That is all in this list. 20

Q. A total cost price of \$1800, isn't it?

A. I didn't add it up.

Q. Those horses were sold, were they, by you?

A. Yes, sir.

Q. When were they sold?

A. Either the very last of January or the first of February; I don't exactly remember.

Q. Can you tell by looking at the interrogatories you have already answered?

A. About January 30th, that is what I had it.

Q. About January 30th?

A. Yes, sir. 30

Q. You are not sure as to the date?

A. No; I haven't that clear. I didn't look it up.

Q. You received the proceeds of that sale?

MR. BACON:—I object, on the ground that that is after the attachment suit was brought, some five or six days, and it could make no possible difference what they brought. This is not an accounting for that sale. Counsel's position is that the shipment to New York was a conversion of the horses and the conversion must have taken place before the suit was brought. Some of this testimony was admitted yesterday on the ground that the Court wanted to know what these people
10 did in order to show what their intentions were. Now it could make no possible difference how much he got for the horses; that doesn't make any difference at all. The horses are sold and they are to be accounted for some other time; we admit that.

THE COURT:—Yes; it doesn't figure there at all as I can see.

MR. ARMSTRONG:—That question has not been asked.

THE COURT:—Whether he received the proceeds.

MR. ARMSTRONG:—I don't care how much he got for
20 them.

THE COURT:—You don't object to that, do you, Mr. Bacon?

MR. BACON:—Yes; I object to that.

THE COURT:—Well, I admit that under the other testimony, of course. That was under the attachment and it is not admitted as having anything to do with the question of conversion; that is, directly. It is only a circumstance which may be explained in two ways, as I intimated yesterday. It may be explained that they did not know what there was of
30 this money until this other suit now on is disposed of. A bond was given and they were sold and of course disposed of and they obtained the money. I will admit it,

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

A. Yes, sir.

Q. These horses with others were attached, were they not, by the sheriff from Hudson County in this state?

A. Yes, sir.

Q. And did you or not obtain these from the sheriff by giving bond?

A. I did, by giving bond.

Q. Where did you put that claim in, in Jersey City?

A. Yes, sir.

Q. And after putting in the claim and giving bond to him were the horses returned?

(Objected to as irrelevant, incompetent and impertinent to the issue as framed by the pleadings.)

THE COURT:—It is admitted in the record that they were in possession when attached by these defendants and they had possession of the horses and they kept possession, as I understand, by giving the usual bond.

MR. BACON:—Then that speaks for itself.

THE COURT:—That speaks for itself. I don't see that there is any harm in this particular question, that they retained possession.

A. To me?

Q. Yes.

A. Oh, yes, sir.

RE-DIRECT EXAMINATION.

BY MR. BACON:—

Q. Mr. Baldwin, were there horses in the lot shipped to 30 New York that were other than horses that had been shipped to you by Moore?

MR. ARMSTRONG:—I object to that as not re-direct. He has already testified to that in direct examination.

THE COURT:—That is in testimony and in this examination counsel was particular to say among the horses taken there were some of them consigned by Mr. Moore, so that is clearly understood.

MR. BACON:—Well, if that is understood that is all right.

10

(WILLIAM H. RICHARDSON called as a witness by Mr. Bacon.)

MR. ARMSTRONG:—I call your Honor's attention to the fact that a demand was made on this defendant to answer interrogatories. He has made no response. He is offered here now as a witness. Your Honor is authorized to go so far as to suppress the testimony, in view of the opening made by counsel.

THE COURT:—Just refer to the section in the statute.

MR. ARMSTRONG:—Section 341 of the Practice Act.
20 Your Honor has the right to go so far as to suppress the defence. I don't ask you to go so far as that, because one of the defendants has answered. I am free to say, if your Honor please, that your Honor, in the use of discretion, can admit him as a witness. It does not disqualify him as a witness, but your Honor can suppress even the defence and keep him off as a witness, if you wish.

THE COURT:—The statute seems to put it in the power of the Court to compel an answer to interrogatories by an attachment for contempt, suppression of the defence, a stay of the proceedings or otherwise. It says, "May compel an
30 answer to the interrogatories."

MR. ARMSTRONG:—Even to the suppression of the defence.

THE COURT:—It seems to me that the motion should have been made earlier in the case. We came here the first day of the court and no motion was then made in the matter with a view of compelling an answer to the interrogatories.

MR. ARMSTRONG:—I cannot so far as this defendant is concerned, nor would it be fair, because he answered within the time. He is a witness without objection here, because he has a right to be.

THE COURT:—I see there is nothing said in the statute about rejecting a party as a witness because he does not answer interrogatories. The remedy indicated would seem to be to compel an answer, and I think that it is rather too late now to exclude the witness entirely, and especially as it would seem that these two are partners and stand in very much the same attitude, and here are very full answers to interrogatories made by Mr. Baldwin, and to a certain extent would seem to have given all the information plaintiff desires; so I would not like to visit any particular penalty.

MR. ARMSTRONG:—Well, it occurs to me that it is entirely proper for your Honor to say now—if your Honor says that I will take no further exception and have no further exception—if your Honor will permit this witness to inspect these same interrogatories and if he makes the same answers to these interrogatories as here made, that is all I want.

THE COURT:—Well, no action having been taken to require them to be answered before going into the trial, I don't think that I should require now that we should delay the trial by answering the interrogatories, and counsel may put questions to him as a witness, if he chooses.

MR. ARMSTRONG:—I ask an exception to the refusal.

THE COURT:—I understand it is in the discretion of the Court. I would like to hear through Mr. Bacon, by questions, any explanations why the interrogatories were not answered. The Court ought not to pass such a thing by.

MR. BRACKEN:—May it please the Court, the defendants are Baltimoreans. These interrogatories were served upon Mr. Bacon and sent to me. Mr. Baldwin came on and gave the information at my office upon which his answers were based. These answers were then prepared and sent to him by mail with an affidavit attached and a request from me that Mr. Baldwin sign the affidavit which was attached to the interrogatories as I sent them down. Mr. Richardson did not sign that affidavit attached, stating that the answers made by Mr. Baldwin were correct; Mr. Baldwin explaining to me in reply that Mr. Richardson did not sign because he thought it would be an admission that he was a partner of Mr. Baldwin, he contending that S. D. Richardson was the real partner, and therefore he did not sign that paper. I sent the interrogatories as they were completed by Mr. Baldwin to Judge Armstrong a few days before trial and he simply acknowledged receipt of them. Mr. Richardson made no explanation to me prior to the trial.

THE COURT:—Judge Armstrong, if you desire, you may put to this witness these questions now, if you wish, first, before he is regularly examined. There was no motion, I say; with reference to this matter. This is the first time the Court has heard it in this case and we want to treat the parties on both sides with justice and fairness in such a matter; and I say now if you desire you may examine the witness upon that.

MR. ARMSTRONG:—Well, of course, after what the counsel has said on the other side, I will not ask this witness questions in regard to the interrogatories. (Confers with Court at side bar.) Your Honor, I will not delay the Court. After consultation with my associate I will take the chances.

THE COURT;—Then the witness is admitted without any exception on your part?

MR. ARMSTRONG:—Well, I don't suppose I have any legal right to an exception.

THE COURT;—Well, I mean, to settle that matter right

now, I don't think you have, as long as I am offering you an opportunity before the case is closed.

MR. ARMSTRONG:—I ask no exception.

WILLIAM H. RICHARDSON, Sworn.

DIRECT EXAMINATION.

BY MR. BACON:—

Q. Where do you live, Mr. Richardson?

10

A. Baltimore.

Q. Do you know I. Whilden Moore?

A. Yes, sir.

Q. Were you at his house on the 22nd of January, 1900?

A. I was at his house in Bridgeton in January, 1900. I don't remember the exact date.

Q. He testified yesterday when shown Exhibit D 2 that he wrote that letter in your presence at your dictation. Did he?

A. He did not, sir.

Q. Did you dictate that letter to Moore?

A. I did not.

20

Q. Did you see him write it?

A. I don't think that Mr. Moore wrote this letter while I was in his room, sir. He was at his typewriter there, but I never dictated a letter in my life to anybody.

Q. Did you tell Moore what to put in this letter?

A. I did not, sir.

Q. He spoke in that letter of a statement of account which you and he went over together. Did you go over a statement of account with him?

A. I had a lot of memoranda, sir, of horse swaps and so forth, accounts, that Mr. Moore and myself went over after supper. We went upstairs in a private room and I suppose I remained there till eleven o'clock, maybe later; went over the list and memoranda and showed him the list of different trades

and talked this New York matter over with him, suggested what horses I thought were fit to go to New York and what were fit to go to Bridgeton, and we decided—

(Objected to.)

THE COURT:—What you decided is objected to. Tell what was said between the parties.

Q. What horses were they which you talked about in this conversation?

A. They were horses that I had bought and horses that
10 Mr. Moore had shipped to Baltimore.

Q. Horses that you had bought for whom?

A. Horses that I had bought for really Moore and myself.

Q. Did you make up any statement of account then from these memoranda and strike any balance?

A. I did not, sir.

Q. Did Moore?

A. I handed Mr. Moore what memoranda and statements I had. He went through them all with me.

Q. Were they memorandums of all transactions between Richardson & Baldwin and Moore up to that time?

MR. ARMSTRONG:—I object. That of course is not ad-
20 missible. He cannot prove the contents.

THE COURT:—Well, he is not proving the contents, but whether they include all the memorandums concerning the matters between them. I suppose he can answer that, as far as he knows, provided he does not give the contents.

(Exception noted for plaintiff.)

A. To the best of my knowledge, they were.

Q. Did they show credits as well as charges?

(Objected to.)

THE COURT:—Oh, yes; you can't go into the contents
30 without you produce the papers or account for them.

Q. Where did you leave those papers, if you left them anywhere?

A. With Mr. Moore.

MR. BACON:—Now I call on counsel to produce them under the notice.

MR. ARMSTRONG:—What this man is talking about?

MR. BACON:—Yes, sir.

MR. ARMSTRONG:—Search me.

Q. Did Moore make up any statement in your presence from these statements and memoranda? 10

A. Mr. Moore did a great deal of figuring there on his table from the different papers.

Q. Did those figures show a balance in his favor or in Richardson & Baldwin's favor?

(Objected to.)

MR. BACON:—I have asked him to produce the papers that they had there.

MR. ARMSTRONG:—No; you have not. You are talking now about Mr. Moore's papers and the figuring Mr. Moore did and what this man said to him.

THE COURT:—What notice have you given, any written notice? 20

(Mr. Bacon reads notice.)

THE COURT:—Well, now you can prove by this witness any statement of account. I have understood that he had certain memoranda as to swaps and certain other matters which he showed to Mr. Moore and they were examined between them; that is all.

MR. ARMSTRONG:—And Mr. Moore made figures, he said, and he called on me to produce the figures that Mr. Moore made. 30

Q. Was there any specific account or paper that you had with you that you left with Mr. Moore showing this account?

MR. ARMSTRONG:—I object to that as leading. He has already testified that he had certain memoranda and so on, and now this witness, his own witness whom he introduced yesterday to our attention, he is put on the stand and asked that question.

(Objection overruled.) (Exception noted for plaintiff.)

A. I had a lot of memorandums of swaps, money sent—

MR. ARMSTRONG:—I object. That is not in answer to the question. That can be answered yes or no.

THE COURT:—Read the question again. You know we have had it given to us once.

(Question repeated.)

A. I left with Mr. Moore what memorandums I had.

BY THE COURT:—

Q. There was no specific account then, I understand, making out an account between the parties as to how you stood? That is the point, seemingly, they want to know about, whether you had an account looking toward a settlement of the balance due on either side of the account.

A. I had memorandums from Mr. Baldwin's book—

Q. Answer the question.

A. I have answered the question. Well, judge, I am not an educated man. I don't know how to answer.

Q. You spoke of memorandums of particular transactions. The question now is whether there was any general account made up.

A. I don't think there was, sir, what you would term a general account.

Q. Well, all the items, both sides.

A. I don't know really how to answer that question. I left what accounts I had there with him.

BY MR. BACON:—

Q. What arrangement, if any, did you make with Moore on that occasion to return to him horses which Richardson & Baldwin had in Baltimore?

A. My arrangement with Mr. Moore was that I was to ship so many of them up here that was not fit to go to New York.

Q. How many?

A. I think we decided upon ten, as well as I remember, sir.

Q. Did or did not Moore agree to that?

10

A. He did, sir.

Q. Can you specify what horses they were that were to be shipped up to you.

A. I think it was left in my judgment to cull out what was not fit for New York and ship him. I shipped him——

MR. ARMSTRONG:—Wait a moment. Answer the question. That is fast enough to go.

Q. Were the horses that you were to cull out and ship him by arrangement with Moore actually culled out by you and shipped him?

MR. ARMSTRONG:—I object, because it includes in it matter that has not been testified to and because the question itself is improper. 20

(Objection sustained.)

Q. What did you do with the horses you were to cull out?

A. Shipped some of them to Bridgeton.

MR. ARMSTRONG:—I object. He can answer whether he culled out or not.

THE COURT:—Tell what he did with the horses. This shipping business is something we don't know until we know how it was done. If you took the horses anywhere you can tell it. 30

A. I didn't take them anywheres.

THE COURT:—Then that ends that.

(Question repeated.)

Q. Won't you answer that?

A. I didn't do anything with them.

Q. What did become of them?

THE COURT:—Only speak of your own knowledge.

A. I couldn't say. Yes, I beg pardon. One moment, please. The question was what did become of them?

Q. Yes.

10 A. They came to Bridgeton.

Q. How do you know that?

A. I sold them here afterwards, handled them here.

Q. As a matter of fact, didn't you see those horses here in Moore's stable after this conversation that you had with him?

A. I did, sir.

Q. Now how many?

A. I think seven. I can't say positive.

Q. For whose account were they sold by you after they reached Bridgeton.

A. Moore's account.

Q. Were you employed by Moore?

20 A. I was connected with Mr. Moore, not employed by him sir.

Q. How were you connected with him?

A. By partnership arrangement, as I thought, under an agreement similar to the one in Baltimore.

Q. When was that made?

A. That was made verbally before I left Baltimore.

Q. When?

A. I think, sir, in about the 1st of January, probably.

Q. How long did it last?

A. Until the following March or April, I don't remember.

30 Q. That is in 1900?

A. Yes, sir. It was in a written agreement later on, but verbally before I left Baltimore. Then it was put in writing,

I think, some time in February, probable; I don't remember exactly.

Q. Then were you in error——

MR. ARMSTRONG:—Just wait a moment. He says it was put in writing. We would like to see the writing.

Q. Where were you associated with Moore in business?

MR. ARMSTRONG:—There is a writing here, it appears. We want to see the writing.

MR. BACON:—I am not bound to prove that.

10

MR. ARMSTRONG:—You are not?

MR. BACON:—I think not, this man's relations with Moore, if he was engaged in business.

THE COURT:—What do you wish to prove in connection with this case? What is the point? The affair in New York occurred in January. What is this that was in March and April? What has that to do with the case?

MR. BACON:—Mr. Moore testified that up to the time of the receipt by him of the letter of January 12th and up to the time of his interview with Mr. Richardson at his (Moore's) house on the 22nd of January, that he had entire faith and confidence in these gentlemen, and that immediately after this interview with Richardson his faith and confidence was shaken. Now the fact that at that time he and Richardson were engaged in partnership together, that they continued to be engaged in business as partners, negatives conclusively, it seems to me, that statement of his.

THE COURT:—Well, as a general fact he has testified that they were having business together afterwards. I think that sufficiently shows that, doesn't it, without going into details about partnership.

MR. BACON:—I didn't go into the details.

30

MR. FITHIAN:—Mr. Moore only said he was suspicious of Baldwin and not of Richardson.

MR. BACON:—The question objected to is simply where he was engaged with Moore. I didn't ask him when.

THE COURT:—You had better get that first.

Q. Where were you engaged in business with Moore in January of 1900?

(Objected to.)

THE COURT:— You see the point is yet whether he was engaged with him in business at all. That must be proved first.

10 MR. BACON:—He already testified that he was.

THE COURT:—That he was in business with him in a certain way. Well, now, you fix the time in January and you want to know in what place?

MR. BACON:—Yes, sir.

THE COURT:—I think I will allow that on the showing of feeling between the parties.

MR. ARMSTRONG:—If he undertakes to show a relation he must show it by the best evidence.

20 THE COURT:—But it is alleged now Mr. Bacon, that Mr. Moore did not testify to any disagreement or ill feeling towards Mr. Richardson, only towards Baldwin; so how does your evidence rebut anything on that subject matter? It ought to be material now, your offer. I think as far as you have gone you have shown that they had some relations with each other and that he sold some horses for Mr. Moore. That certainly shows their relations and good feeling.

Q. Mr. Moore testified yesterday, and so did Mr. Toboldt, that on the occasion of their visit to Baltimore on the 25th of January, 1900, that you had an angry controversy, as I understand it, as I recollect the testimony. Is that the case?

30 A. Not to my knowledge, sir.

Q. An angry controversy with you; is that true?

A. I didn't understand it that way.

Q. Were you or were you not at that time on friendly terms with Moore?

A. Yes, sir; I was.

Q. And engaged in business with him, as you have stated?

MR. ARMSTRONG:—I object. That is objectionable on half a dozen grounds.

MR. BACON:—I think it is competent.

MR. ARMSTRONG:—No; it is an unnecessary and improper repetition. 10

THE COURT:—It is rather too general. You had better ask a more specific question. As to the angry controversy and that their relations were friendly, that is admitted.

Q. When you were at Moore's house on the 22nd of January did you or did you not have any arrangement that Moore was to go to Baltimore and meet you thereafter?

A. I did not.

Q. Did you know that Moore was coming to Baltimore on the 25th of January?

A. It seems to me as if I had a telegram from Mr. Moore to that effect. I can't say positively. 20

MR. ARMSTRONG:—Well, now, if your Honor please, the witness guessing and can't say, I can't anticipate what the witness is going to do with that. He ought to be cautioned that he has no business to do that, and the answer ought to be stricken out.

THE COURT:—Yes; that may be stricken out, that he had a telegram about it,—he is giving the contents of a telegram,—unless they conversed about it, if you can bring it in by conversation.

Q. Did you meet Mr. Moore in Baltimore on the 25th of January? 30

A. I met Mr. Moore in Baltimore about that date, sir. I judge that was the date. I don't know the exact date.

Q. Was anybody with Moore?

A. Yes, sir; Mr. Toboldt was with him.

Q. Where were you when they reached the stable?

A. When they reached the stable I was about fifty yards below the stable, talking with a young lady.

Q. Did you meet them at the stable?

A. I did, sir.

Q. Did you know the gentleman who was with Mr. Moore?

A. I did not at that time.

10 Q. Did Mr. Moore introduce him to you?

A. He did, sir.

Q. Under what name?

A. I understood him as Mr. Garrison, his attorney.

Q. Did you have any conversation there with Moore about shipping these horses to New York?

A. Yes, sir. Mr. Moore accompanied me through the stable and we looked over the stock and we came in and talked the matter over, he wanting to—— Well, I will stop there. Stop me if I go wrong. I don't intend to.

Q. Did you and Moore go to New York and attend this sale?

20 A. I met Mr. Moore in New York. He didn't accompany me there, no, sir.

Q. Well, did you go there by previous arrangement?

A. Yes; he was to meet me in New York.

Q. When did you make that arrangement that you and he were to go to New York or meet together at the horse sale?

A. Up at his house that night I was at Bridgeton.

Q. Did you and he act together when you went over there in the purchase of any of these horses?

30 MR. ARMSTRONG:—I object. I have allowed more latitude than I ought to have allowed here. The questions are immaterial, illegal in that they are leading, and certainly there ought to be a limit somewhere to this case.

THE COURT:—Well, I think in view of all the testimony that has been admitted here, the acts of the parties, that it has been extended through the whole period, I think you can ask whether he and Mr. Moore were there and what they did about the sale, whether they did certain things.

MR. ARMSTRONG:—Well, your Honor is asking other questions.

(Question repeated.)

MR. ARMSTRONG:—If that question can be vindicated on any ground, both as to form and materiality, I would like to hear it.

(Objection sustained.)

Q. Did you purchase at this sale in New York any of the horses that had been shipped by Richardson & Baldwin to New York?

(Objected to as improper and immaterial.)

THE COURT:—How is it material whether he purchased any horses or not? I can't see that.

Q. Did Moore purchase any of these horses at this sale?

(Objected to on the same grounds.)

20

THE COURT:—I will admit it.

MR. ARMSTRONG:—The question was leading, if your Honor please.

THE COURT:—I think that is allowable.

A. Yes, sir.

Q. How many?

A. I can't say readily. Eight or ten probably. I don't really know.

MR. ARMSTRONG:—If you can't say, why don't. Stop there.

A. Well, I don't know.

30

MR. ARMSTRONG:—Now you see, if your Honor please, he doesn't know; he is guessing.

THE COURT:—Well, he said about eight or ten, he couldn't remember exactly.

Q. Of the horses consigned to Richardson & Baldwin by Moore, were any of them exchanged for other horses by Moore's consent?

(Objected to.)

THE COURT:—Yes; the form of your question is not right. You must prove the facts and not in inference whether there was a consent or not.

10 Q. Were any of the horses consigned by Moore to Richardson and Baldwin exchanged for other horses?

A. Yes, sir; there were.

Q. Did you consult with Moore about the making of any such exchanges?

MR. ARMSTRONG:—I object on the same ground, that it has been ruled on heretofore.

(Objection overruled. Exception noted for plaintiff.)

A. In making exchanges of horses that were shipped there, you mean, on others?

Q. Yes.

20 A. Yes, sir; I did.

Q. Did you personally talk over with him these matters of exchange?

(Objected to as leading and improper. Objection overruled. Exception noted for plaintiff.)

Q. What did he say about making the exchanges which you talked over with him?

(Objected to because it does not fix the time and place. Objection overruled. Exception noted for plaintiff.)

A. Over there at one time on the Emerson exchange, he was over there at that time, and showing him the four horses in exchange he spoke of it as being an excellent deal.

30 Q. Did you talk with him about any other exchanges?

A. Only in a general way, sir. I don't think of any specific changes, any special changes.

Q. Did you talk with him about the exchanges before they were made or after they were made?

A. After they were made, sir.

THE COURT:—This is the only one I understood him to say he talked about specially.

MR. ARMSTRONG:—Only in a general way, he said.

Q. Did you talk over with him the matter of exchanges when you were at his house the 22d of January, the exchanges that had been previously made.

10

MR. ARMSTRONG:—I object, on the ground that it was a matter completed, of exchanges that had already been made, if the question supposes they were entirely completed, exchanges already made.

THE COURT—The question is whether anything was said about it, and I suppose the offer is to show by Mr. Moore, by what he said or acted, to express his acquiescence and approval in what had been done. I don't know what else. It might have a bearing. I will admit it.

(Exception noted for plaintiff.)

(Question repeated.)

20

A. Yes, sir.

Q. What did he say about that?

A. He raised no objection, sir.

MR. ARMSTRONG:—I object and ask that that be stricken out.

THE COURT:—I will allow that to stand. He says he talked with him about the swaps and showed him the memorandums, and he has a right to say that he made no objections.

Q. Were any horses consigned by Moore to Richardson & Baldwin sold for less than the list price?

A. There were, sir.

30

Q. Did you talk with Moore before these sales were made at less than list price about the making of the sales?

A. On some of them I did.

Q. What did he say about—

MR. ARMSTRONG:—He says on some of them he did. He must fix it.

Q. Specify the ones that you remember.

A. Well, I can remember a piebald mare that he had there and a long tailed bay horse that he shipped there.

Q. Well, what was said by Moore about that?

A. Well, he just says, "It is no use to hold on to them," He says, "They were bought too high;" and he says, "Cut
10 them out."

Q. What do you mean by cut them out?

MR. ARMSTRONG:—I object. He didn't say cut them out; Moore said cut them out.

Q. What did you understand Moore to mean by saying that?

(Objected to.)

BY THE COURT:—

Q. Is this a phrase that has a meaning among horse dealers, cutting out, has it any special meaning?

20 A. Yes, sir; it is a word of ours, means a high dollar, put them under the wire, sell them for the high dollar.

BY MR. BACON:—

Q. Put them under the wire and sell them for the high dollar?

A. Yes, sir.

Q. That is the special meaning among horsemen?

A. Yes, sir; that is my understanding.

THE COURT:—Well, we don't want your understanding.

A. My experience is, no two horsemen mean the same
30 thing.

THE COURT:—Well, then we had better cut it out. I supposed you had a general meaning.

Q. What was it then that Moore said to you?

A. Well, I gave you his words; as near as I can remember was, "If they were bought too high cut them out."

Q. What other sales do you recall that were made at less than list price that you submitted to Moore before they were made?

A. I can't recall any.

Q. When you went over your statement and memorandum with him on the 22d of January did they disclose the fact that certain horses had been sold at less than list price?

A. Yes, sir.

Q. What did Moore say about sales of horses at less than list price on that occasion?

10

MR. ARMSTRONG:—I object. He has already testified to that once, and he said that was general conversation, that he raised no objection. Your Honor admitted it over my objection.

MR. BACON:—That was as to exchanges. This is as to sales,—a very different branch of the case.

MR. ARMSTRONG:—And it must be limited to a particular case.

20

THE COURT:—Yes; you must limit it to a particular case and circumstance, where he sold them.

THE COURT:—You were asking whether you sold them at less than list price?

MR. BACON:—Yes, sir.

THE COURT:—Well, if you can specify where he sold them in a particular case you may do so, but generally it would not be proper.

Q. What cases were mentioned where horses were sold at less than list price?

30

A. I can't specify the horses, but Mr. Moore raised an objection on one horse being sold at the price he was sold.

I explained to him that the horse was blind, and we talked the matter over, and there it stood; and I remember his distinctly thinking this horse was sold too low. I explained to him why he was sold.

Q. What did he say after your explanation?

A. Well, he submitted to the transaction.

THE COURT:—Well, that is not evidence.

Q. What did he say?

A. I don't remember what he said.

10

BY MR. FITHIAN:—

Q. What horse was this?

A. I don't remember what horse it was.

MR. ARMSTRONG:—Then we ask to strike it out.

Q. Was it one of the horses that he sent to you?

MR. ARMSTRONG:—I object. We are entitled to know when he goes on the stand and talks about a horse what one it was of the thirty-three.

Q. Wasn't there a brown horse sold for less than list
20 price?

(Objected to.)

THE COURT:—Well, that is a leading question.

MR. BACON:—Well, he says he doesn't remember without going over this list. It is already in evidence that certain horses were sold for less than list price. They are already specified. I only want to call his attention to this list and ask him what he knows about this particular horse.

THE COURT:—You see "Wasn't there" is leading.

Q. Was there a brown horse sold for less than list price?

30 (Objected to.)

MR. BACON:—That doesn't suggest an answer, because he can say yes or no.

MR. ARMSTRONG:—My objection to the question is that this man has been asked, being one of the parties to this suit, about his relations there. He said he couldn't remember generally, except one horse that he couldn't remember. It is not proper for counsel to suggest the answer. He has been asked generally and said he couldn't tell. The question is leading and improper in view of what has already been given.

THE COURT:—Well, where there are so many horses it is different under the circumstances. He might be asked as to a certain horse.

10

MR. ARMSTRONG:—The witness can take the list and go over and point out each one sold; he can't do anything else. I didn't ask him the number of horses that were consigned.

(Objection overruled.)

A. Yes, sir; there was.

THE COURT:—Let's find out what brown horse it was. There are several brown horses.

Q. Describe this brown horse.

A. I couldn't give an accurate description of this horse. 20

Q. Can you point it out on the bill of particulars?

A. I could not, sir. I don't know how many brown horses there is on there. There is more than one, I know. I remember a brown horse that was sold, but whether that is on there and his cost, I couldn't say.

Q. Can you specify any other that was sold for less than list price?

A. I cannot.

Q. Excepting those you have already specified?

A. I cannot.

Q. Did the firm of Richardson & Baldwin use moneys received from the sale of horses consigned by Moore in the purchase of other horses? 30

MR. ARMSTRONG:—I suppose, if your Honor please, that that is an immaterial question, and I object to it on that ground.

MR. BACON:—I don't think it is immaterial or I wouldn't have asked it.

THE COURT:—How is it material?

MR. BACON:—These people, Moore and Richardson & Baldwin, maintained the relations, as I understand it, of persons engaged in a joint venture. And under the statements made by counsel on the other side it seems to me quite important for us to show that the acts of Richardson & Baldwin were in some things confirmed by Moore; and I desire to know from this witness, first, whether any horses were bought with the money which was received from the sale of Moore's horses, and if so, what became of those horses so purchased with Moore's money and whether that was done with Moore's consent and approval.

THE COURT:—The objection made to this question is that it is not material, because according to the agreement, as I understand it, your clients were to be responsible for these horses and if they were sold they were to pay for them at cost price and one-half the net profit; and I don't see anything in the agreement—I don't know what counsel may contend about it—that required you to hold that particular money for any purpose. It is not material unless you can show that something was done in this matter by Mr. Moore's direction, and there has been so much said about that you had better show Mr. Moore's consent or direction in that business before you attempt to prove what was done with the money or what stock was bought. Just connect it in that way.

30 Q. Did Richardson & Baldwin buy any horses with money received from the sale of Moore's horses?

(Objected to.)

THE COURT:—I sustain the objection as it at present stands, unless you prove that Mr. Moore had in some way expressed his approval of it.

Q. By Moore's direction did Richardson & Baldwin purchase horses for his account, with the moneys that had been—

THE COURT:—I sustain the objection to that unless you first show what the nature of this transaction was. Let him tell us what that was, the direction: give us the circumstances and dates.

Q. What, if anything, did Moore say to you about spending 10 money which you had received from the proceeds of horses consigned by him to Richardson & Baldwin in the purchase of other horses?

MR. ARMSTRONG:—Before such expenditures were made, is that your question?

MR. BACON:—I don't care whether it was before or after.

MR. ARMSTRONG:—Well, it makes a difference to me.

MR. BACON:—Well, I will make it now before.

(Question repeated.)

(Objected to as immaterial. Objection overruled. Excep- 20
tion noted for plaintiff.)

A. Well, Moore's instructions to me was, when there was a horse that was bought high, that I wanted to mate him up, to use my own judgment, to buy a horse to mate with him so as to sell the team at a proper price.

Q. Did you carry out those instructions?

(Objected to as too general.)

Q. Well, did you purchase horses pursuant to those instructions?

(Objected to.)

THE COURT:—He says the instructions of Mr. Moore to him personally were generally if he saw an opportunity, as I 30 understand it, he was permitted to do so, and he merely now testifies that what he did, he acted under that instruction.

MR. ARMSTRONG:—He has not testified that he did anything.

THE COURT:—Well, that is the question, whether he did anything, and whether he ought to be allowed to say what he did generally.

MR. ARMSTRONG:—Why, certainly not. He can show what he did specially under a general instruction.

Q. What did you do under those instructions?

A. I bought some horses.

10 Q. Did you pay for them with Moore's money?

MR. ARMSTRONG:—Well, if your Honor please, I am entitled to have him——

THE COURT:—Yes; that is leading, asking him about money. You can ask him how he paid for them.

MR. ARMSTRONG:—Well, I am entitled to have a little more than that; I am entitled to have what horses he bought.

MR. BACON:—You can bring that out on cross-examination.

MR. ARMSTRONG:—On, no; not on cross-examination.
20 You are to bring it out and show the materiality.

THE COURT:—I sustain the objection to that. It is leading and suggestive.

Q. What horses did you buy under those instructions?

A. I couldn't say, sir.

Q. How many did you buy?

A. I couldn't say that.

Q. Can you state about how many?

(Objected to.)

THE COURT:—Oh, yes; I think he has very clearly stated that he can't tell how many. Of course if he knows about how many I suppose that would be proper.

30 Q. Were any of the horses so purchased by you in the lot of horses that you sent to Moore at Bridgeton after the 22nd of January?

MR. ARMSTRONG:—I object, because this witness has not testified that he sent any to Moore. He testified that seven were sold.

(Question repeated.)

MR. ARMSTRONG:—If I need to recall your Honor's attention to it, this witness did nothing with the horses, he said, but he afterwards saw seven horses in Bridgeton which he sold. That question is not whether it was any of those seven horses in Bridgeton which he sold. I have no objection to that question. Counsel is embodying in the question something that has not been proved here. 10

MR. BACON:—It is admitted in the declaration. That is all I am talking about.

MR. ARMSTRONG:—Why don't you ask what the witness said. He didn't say he sent any.

THE COURT:—You may ask whether any of them that he saw in Bridgeton.

Q. Were any of the horses that you saw in Moore's possession, being a part of the horses that had previously been in Baltimore, horses which you bought under the instructions which you have stated? 20

A. Yes, sir; some of them were.

Q. How many?

A. I couldn't say how many.

Q. Were any of the horses that were sent to New York horses that you had so purchased?

A. Yes, sir.

Q. How many?

A. I couldn't say the amount.

Q. Were any of the horses so purchased sold and the proceeds of them accounted for to Moore?

MR. ARMSTRONG:—I object. That has already been ruled on. 30

THE COURT:—Horses in Bridgeton, do you mean?

MR. BACON:—No; the horses that he bought under the instructions, whether he bought them and sold them again.

THE COURT:—Were there any such instructions testified to?

MR. BACON:—General instructions to buy good horses to make up a team whenever he had a chance. Now I am asking whether any of those horses that he so bought were sold there. He says part of them were sent to Bridgeton and part of them sent to New York. I ask him whether he sold any.

10

MR. ARMSTRONG:—That is not the question you asked.

MR. BACON:—Well, that is the one I ask now.

MR. ARMSTRONG:—And that question is just as improper.

THE COURT:—Let him answer that question.
(Question repeated.)

MR. ARMSTRONG:—You don't allow that question, if your Honor please.

20

THE COURT:—Yes; the objection is that that was accounted for. You can ask if they were credited in any statement.

Q. Were any of the horses so purchased sold in Baltimore?
(Objected to on the same ground. Objection overruled. Exception noted for plaintiff.)

A. I don't think there was, sir.

30

Q. Were all of the horses that were consigned by Moore to Richardson & Baldwin and all of the horses that were purchased by you and all of the horses received in exchange by you mentioned in these memoranda and statements that you had at Moore's house on the 22nd of January?

(Objected to as improper in form and improper and immaterial to this issue.)

THE COURT:—I think I will have to sustain the objection to that. The papers are not produced here and there has been no notice given of any precise papers such as are mentioned in your question.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

CROSS-EXAMINATION.

10

BY MR. ARMSTRONG:—

Q. Were their any exchanges, so far as you can recollect, made after the middle of January, Mr. Richardson?

A. I don't recall any, sir.

Q. Were or were not all of the exchanges made, made before Christmas time, as near as you can recall?

A. I don't think there was any exchanges made after I was up here. I don't remember of any.

Q. You were not up here until in the neighborhood of the 22d of January, were you?

A. No; I think that is when I was here.

Q. Well, how long before that, as best you can recall it, ²⁰ were any exchanges made? I refer to Christmas time because I think in one of the letters from your firm there was something said about nothing doing during the Christmas time.

A. It is generally a very dull season.

Q. And were not all your transactions before Christmas time practically?

A. Well, the bulk of our business was before that time.

Q. I now show you Exhibit D 3 and ask you whether or not that was not before you and Mr. Moore when you were there?

A. I couldn't say, Judge. I don't know.

Q. You don't recall? 30

A. No, sir.

Q. You recognize that paper, don't you?

A. I see this is Mr. Baldwin's handwriting.

Q. You recognize the horses, do you, that are named there?

A. Indeed I couldn't recognize them under that name. I don't know.

Q. You don't know them under that name?

A. No.

Q. And so far as the book entries and the names of the horses called there, you have no recollection of them yourself?

A. No; that is something I had nothing in the world to do with, the books and that part of it.

10 Q. You only know a horse as you saw it in the stable and knew the horse as you disposed of it?

A. Yes, sir.

Q. Do you remember a bay cob at \$175 sent by Mr. Moore to Richardson & Baldwin that you thought was too high to be accepted by them and go on the list?

A. Yes, sir.

Q. Which was afterwards accepted and put on the list?

A. I remember a bay cob coming there at \$175 that I said was too high and instructed Mr. Baldwin to write to that effect.

20 Q. I will read from the second page of Exhibit D 1: "You may put bay cob at \$175 on your list, although Mr. R. thinks him terribly high. He can be mated with the white feet cob and we will take him and thereby make all the horses shipped accounted for." That was the one referred to?

A. Yes; I judge that was what was referred to in that letter. I remember a bay cob coming in at that price.

Q. The horses shipped to you were shipped by Moore and his cost price put after them, wasn't it, in the list that was sent, and you then accepted or rejected them as they seemed to you best; is that correct?

30 A. Well, the first horses that was there, Judge, came from Washington there, from Mr. Moore.

Q. But there was a list of cost prices that Mr. Moore put them in at given, wasn't there?

A. There was a list of prices that he left with Mr. Baldwin a few days after the horses were there. I was away at the time.

Q. And you went over the list with the horses and accepted them at that price or rejected them, as it seemed to you best, as indicated by this letter?

A. No; I didn't reject any. I was up here to Bridgeton on several occasions and picked out some horses of Mr. Moore's and of course accepted his prices.

Q. But I mean of the horses you took and retained you accepted the prices you received with those horses? Some you 10 returned, didn't you?

A. Yes, sir.

Q. And all those that you retained you accepted Mr. Moore's prices as they were given?

A. Yes, sir.

Q. And that was what was called the cost price?

A. Yes, sir.

Q. When you came to see Mr. Moore January 22nd, if that was the date, what was said, if anything, about writing a letter to Baldwin?

A. Mr. Moore and myself had a general conversation there about our future business we were to engage in, wanting to 20 retain Baldwin as a customer, to have an outlet for the horses. I suggested to Mr. Moore that he write Mr. Baldwin what he would do with him in the future, and I thought it advisable to ship these horses to New York—I was going there with a concern—and settle up all matters. Mr. Moore agreed with me.

Q. Did you suggest to Mr. Moore that he should intimate to Mr. Baldwin that he would continue in the business very extensively and that you and he were going west to buy some horses, or something to that effect?

A. That was Mr. Moore's suggestion to me, sir. 30

Q. To write to him to that effect?

A. Mr. Moore said he would write to him.

Q. Did Mr. Moore say that he would write to Mr. Baldwin that you two would go west and buy horses?

A. I couldn't say whether he said that or not. He said he would write to Mr. Baldwin explaining everything fully.

Q. And Mr. Moore was very anxious to get a settlement, wasn't he?

A. No; he didn't seem to be so anxious about a settlement, sir.

Q. Didn't he?

A. He didn't appear that way to me.

10 Q. Didn't you discuss the financial affairs of Mr. Baldwin with Mr. Moore?

A. I did, yes, sir.

Q. And didn't Mr. Moore express some concern as to the safety of his money?

A. No; he didn't.

Q. Are you sure of that?

A. I think so, sir. If I didn't, I wouldn't say so.

Q. Didn't you suggest to him that there was some likelihood of loss?

20 A. No, sir; I didn't suggest to him any likelihood of loss, because these horses were all turned over to him then at that time, through me, some to go to New York and the others to come here.

Q. Turned over to him, were they?

A. Yes, sir; I rendered him a statement to that effect.

Q. You considered at that time then that Mr. Moore had possession of those horses and not Richardson & Baldwin?

A. I regarded it as such, yes.

Q. Didn't you at that time suggest that Mr. Moore should come and meet you and see if you could not arrange to get his money?

A. I did not, sir.

Q. You are sure of that, are you?

30 A. I said I didn't.

Q. Didn't you write to him the next day expressing regret that he had not met you and saying that you hoped to be able

to get him his money?

A. I haven't any recollection of a letter of that kind, sir.

(Letter shown witness and he is asked:)

Q. Did you write that letter? I will just ask you to look at the signature.

A. Yes, sir.

MR. BACON:—Let him see it all.

MR. ARMSTRONG:—Well, I will let him see it when I get ready.

10

MR. BACON:—He is entitled to look at the letter and see whether that is his letter or not.

A. Well, I don't know whether it is my letter or not.

Q. Don't you know whether it is your signature or not?

A. The signature at the bottom is mine. I don't know about the body of it.

Q. The seven horses that you sold at Bridgeton, do you remember them?

A. Do I remember them in what way, do you mean?

Q. I mean can you tell what they were that you sold for Mr. Moore?

20

A. I remember two of them were sorrels.

Q. Sorrel team?

A. Yes, sir.

Q. Was there one brown mare?

A. I think there was, yes, sir.

Q. Were there two sorrel mares?

A. That was the sorrel team we just spoke of, I think, wasn't it?

Q. I don't know.

A. Well, I don't remember.

Q. Was there one gray horse?

A. I think there was.

30

Q. And one bay horse?

A. I just can't call colors.

Q. Well, it has been said here by everybody—as I understand it, there is no dispute—that there was returned of the horses sent by Moore to Richardson & Baldwin one sorrel team billed at \$400 and one brown mare billed at \$100. Do you remember whether or not you sold those?

A. No; I don't think I sold those, judge. I think I sold the brown mare, but the sorrel team I don't think I sold.

Q. But you did sell one sorrel team?

A. Yes, sir.

Q. Well, here there is marked two sorrel mares \$125 that
 10 were sent by Richardson & Baldwin. Those were horses that were sent by Richardson & Baldwin and charged to Moore?

A. Yes, sir.

Q. You sold those?

A. I think I did.

Q. And you sold one gray horse?

A. Yes, sir.

Q. Billed at \$90?

A. Yes, sir.

Q. And one bay horse billed at \$143?

A. No; I don't think I sold that horse.

Q. You don't think you sold that?

20 A. No; I think Mr. Moore sold that. Mr. Moore sold some horses and I sold some, I don't remember which.

Q. But you remember there were seven in the lot?

A. I think that was about what there was.

Q. When Mr. Toboldt was introduced to you by Mr. Moore do you remember whether he said that "He is an attorney," or you said "This is your attorney, is it?"

A. No, sir. My recollection of it is that Mr. Moore introduced him to me as his attorney, and I was under the impression that he gave me the name of Garrison.

Q. Didn't he say Boldt?

30 A. I heard him say that he did, but I didn't understand it that way. I understood it the other way.

Q. You say you looked around the stable and something was said about the horses being sent to New York and he

wanted—you started to say, and then you said you were not asked that and stopped. What were you going to say?

A. He wanted to ask where Mr. Baldwin was. I told him he was down seeing about a car to load these horses. He then wanted to know when they were to be shipped. I then told him, as well as I remember, either that day or the next day, to the best of my recollection.

Q. What did he say about getting settlement or seeing Baldwin then, as far as you recollect?

A. He then remarked to me that the horses that had come up here wasn't in the condition that he expected to find them in, and he thought we had better have matters settled up there.

Q. What did he say about seeing Mr. Baldwin in relation to a settlement?

A. He asked where Mr. Baldwin was. His excuse to me was that he was enroute for Washington to attend to some business and stopped in to look at these horses, and thought there were in very good shape to go to New York, and then asked something about a settlement and then my reply was to Mr. Toboldt, who was, as I thought, acting for Mr. Moore in the matter, I says, "The matter is all arranged satisfactory for these horses to be shipped and they will be shipped to-day or to-morrow, as soon as they can obtain a car for them to go in."

Q. Who was shipping them?

A. Richardson & Baldwin, and they had been catalogued in New York in the name of them. I suggested if he was uneasy in any way I would give him an order on Grand for the money.

Q. You volunteered that?

A. Yes; I did. Mr. Toboldt and Mr. Moore went outside and talked for a moment or two; they came in, I think I walked up a part of a block with them; they bid me good-by as nice as a man could, and the next I heard the horses were attached. I was in New York waiting for them.

Q. You came over to Jersey City, didn't you?

A. Yes, sir.

Q. And met Mr. Moore?

A. Yes, sir.

Q. And what part did you have in getting the horses from the sheriff and over to the sale?

A. I was much surprised when I came over there. I met Mr. Moore and asked him what it meant, and Mr. Toboldt; and everything was in a confusion. I didn't know what it meant.

Q. You had understood then and all the time that you and
10 Mr. Moore were entirely friendly, hadn't you?

A. I had always thought so, to that effect.

Q. And all that you had been doing up to that time, you considered you had been acting as friendly to Mr. Moore?

A. We had always been friends, even up to that time and afterwards.

Q. And Mr. Moore said to you, didn't he, at that time, that he had some question of what Mr. Baldwin was doing or going to do?

A. Not to my knowledge.

Q. What did he say induced him to attach these horses?

A. Nothing to lead me to believe that he had the slightest
20 dream of attaching them.

Q. No; I am speaking about after it was done, when you had this pleasant conversation with him.

A. Well, I couldn't say really what was his excuse on that. I couldn't say. I don't know whether we went into that or not.

Q. But you considered on the 22d, if that was the time that you were at Bridgeton, that the horses had been turned over by Richardson & Baldwin to Mr. Moore, did you?

A. My understanding, sir, with Mr. Moore, was that these horses were to be shipped to New York.

Q. On whose account?

30 A. For Mr. Moore's account, part of them to go to Bridgeton, the other part to go to New York.

Q. Who attended the sale in New York?

A. I don't hardly think that was attended, sir. Mr. Baldwin, I think, was attending to it, what was done with it.

Q. That is what I am talking about.

A. Yes, sir.

Q. And the horses were disposed of in New York, weren't they?

A. Yes, sir.

Q. Well, at that sale Mr. Moore, I understood you to say, bought some horses.

A. Yes, sir.

Q. Did he pay for them?

10

A. He did, sir.!

Q. How many of them did he buy?

A. I couldn't say readily how many there were, nor the amount.

Q. I understood you to say eight or ten.

A. Well the amount, I think, was somewhere in that neighborhood. We bid off for a quantity of them and Mr. Moore went up there and gave his check for them and I endorsed the check to W. D. Grand.

Q. So as to show the check was good?

A. Well, we were, as I thought, buying these horses together. We then shipped from there to Bridgeton.

20

Q. Well, you endorsed the check?

A. Yes, sir.

Q. But it was Mr. Moore's check?

A. Mr. Moore's check. I suppose Mr. Moore's desire was to show that he paid this money out on my account.

Q. You did it at his request?

A. Yes, sir.

Q. It was not to show that his check was good to these people to whom the horses were sent?

A. That may have been it, for they knew me and didn't know him.

Q. You say you talked with him about the Emerson deal and showed him the horses you got for the Emerson deal?

A. Yes, sir.

Q. That was after it was consummated?

A. Yes, sir.

Q. And the deals that you talked about were deals that had all been made?

A. Yes, sir.

THE COURT:—What is the Emerson deal?

MR. ARMSTRONG:— I don't know. It is a deal that has been talked about here as the Emerson deal.

Q. I understood you to say you knew nothing about the figures and the book-keeping here at all?

10 A. Nothing at all.

Q. What induced you to go to Bridgeton to see Mr. Moore?

A. I couldn't say positively, Judge, what was the inducement specially, only to straighten out, I think, this Baldwin matter.

Q. To talk about this Baldwin matter?

A. Yes; I think so, to talk the matter over and get it straightened out.

Q. Well, no money had been given to you or any authority to straighten it out from Baldwin, had there?

A. I never bothered with money at all. Never a dollar passed between Mr. Baldwin and myself. Mr. Baldwin
20 attended to all that, sir.

Q. In the business what did you do particularly? What part did you have, the handling of the horses, the selling of the horses and showing them?

A. Yes, sir; I generally sold them and showed them usually. Then I bought horses for other people. I was not up to the barn all the time myself.

Q. You were more of an experienced horseman, than Mr. Baldwin, I mean, more experience in it?

A. Yes, sir.

Q. And Mr. Baldwin kept the financial part of it?

A. Mr. Baldwin kept the financial part and sold and
30 swapped horses too.

Q. But you worked up the principal part of the business?

A. Yes, sir.

Q. I understood you had nothing to do with that end of it, the accounts, the financial part?

A. No, sir.

Q. So the accounts, the financial part, he did principally and the other part you did principally; is that correct?

A. Well, he did as much selling probably as I did at the place.

Q. How about the other deals and examining horses?

A. Well, I say he made lots of deals, I suppose, himself.

Q. But outside work, who did that generally?

A. I did that generally. I was away buying horses and bought for other parties the same time I did there. 10

Q. You said that was your signature? Is the rest of the letter in your handwriting? (Paper shown witness.)

A. Yes, sir; that is my handwriting, the letter that I wrote Mr. Moore.

(Letter marked Exhibit C. for Identification.)

RE-DIRECT EXAMINATION.

BY MR. BACON:—

Q. You said something about renting Moore a stable which I didn't understand. Won't you explain that? 20

A. No: I didn't say anything about that. I didn't get any question of the kind, I don't think.

Q. You said something about accepting Moore's prices on those horses. What did you mean by that?

A. Accepting his prices?

THE COURT:—The list prices.

Q. About accepting. The Judge asked you about whether when Mr. Moore sent you this shipment of horses he didn't accompany them with a statement showing cost prices and asked you whether you didn't accept those prices. What did you mean by that? 30

A. I mean whatever statement of cost prices he filed with Mr. Baldwin, it had gone on the books.

Q. Did you or did you not have anything to do with that part of it?

A. No; I had nothing to do with that part of it at all.

RE-CROSS EXAMINATION.

BY MR. ARMSTRONG:—

Q. You mean the putting on the books, you had nothing to do with that?

A. No; I had nothing to do with the putting it on the
10 books or that contract. That was signed by Mr. Baldwin sometime before I knew he had signed it.

Q. But you know there was claimed to be a cost price on each of the horses that came in the stable?

A. Yes, sir.

Q. You knew all about it, but as to the details of the bookkeeping you didn't know anything about it?

A. No, sir.

BY MR. BACON:—

Q. Did you have any authority to accept any prices?

20 (Objected to.)

THE COURT:—You see the only thing—he is a party and he has testified that he accepted the horses at the list prices. I don't think that is in dispute. Baldwin admits it, everybody admits it, that the list prices, the cost prices the contract speaks of, were plainly stated here, and the only thing is whether there was any arrangement afterwards made as to any particular horse. That was another matter.

MR. BACON:—I just wanted to know what he meant by that.

THE COURT:—That was all he meant, the same as the
30 others meant, I understood it, that the horses were consigned at certain list prices, cost prices. Isn't that your understanding, Mr. Richardson?

THE WITNESS:—Yes, sir.

DEFENDANTS REST.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

CARL W. TOBOLDT, Recalled.

10

DIRECT EXAMINATION.

BY MR. ARMSTRONG:—

Q. Did or did not Mr. Richardson offer to give you an order on this sales stable for the proceeds of the sale?

MR. BACON:—I object, on the ground that it is not rebuttal. That question was asked. The question was all gone into on the examination of this man and he stated what demand he made and what the reply was.

MR. ARMSTRONG:—Yes; he testified that he requested that and it was refused. The witness on the stand said he offered to do it and they consulted and declined to take it. I am contradicting that.

20

THE COURT:—You call attention to this that Mr. Richardson testified to? I thought yours was a reiteration. I will admit it. He testifies that he did offer to give him an order. The question is correct.

A. He did not.

Q. Did or did not you and Mr. Moore or you in Mr. Moore's presence ask in relation to a settlement of what Moore claimed to be owing him at that time?

30

A. I asked him for a settlement.

Q. What reply did he make?

A. He said he couldn't give it.

Q. Did or did not you ask to see Mr. Baldwin so as to arrange to have a settlement?

(Objected to for the reason that the question was asked.)

THE COURT:—Wasn't that asked before? He inquired for him of the colored man and of Richardson.

MR. ARMSTRONG:—This witness testified distinctly that he asked for Mr. Baldwin and was anxious to see him. Your Honor may remember that I asked the question of Mr. Richardson on the stand whether or not they or one of them did not inquire for Mr. Baldwin and ask to see Mr. Baldwin to get a settlement.

THE COURT:—You didn't go into this before on your direct?

MR. ARMSTRONG:—I asked on the initiative from that, but I am contradicting now simply what he has stated.

THE COURT:—I think you asked him. You are the one that asked Mr. Richardson, didn't you, on cross-examination?

MR. ARMSTRONG:—Yes, sir; and I must ask practically the same question of this witness that I asked on cross-examination. These are questions I asked on cross-examination.

THE COURT:—Well, if there is any uncertainty, you may ask it.

(Question repeated.)

A. I asked to see Mr. Baldwin, sir.

Q. What reply did Mr. Richardson make to that?

A. He said if I would see Mr. Baldwin everything will be up, and he advised me to keep away from Mr. Baldwin.

MR. BACON:—I object. That is just exactly word for word what he said before.

THE COURT:—Yes; he testified to that before.

NO CROSS-EXAMINATION.

I. WHILDEN MOORE, Recalled.

DIRECT EXAMINATION.

BY MR. ARMSTRONG:—

10

Q. Mr. Moore, Mr. Richardson testifies that he offered you an order on some people in New York who were to sell those horses for the proceeds of the sale; is that true or not?

A. That is not true. We asked him for it, but we didn't get it.

Q. He said that you didn't suggest going to see Mr. Baldwin or to try and get a settlement from Mr. Baldwin; is that true or not?

A. It is not true.

Q. The writing of this letter on January 22nd—that is the date it appears, Exhibit D 2—Mr. Richardson says he did not suggest the writing of the letter, but that you suggested the 20 writing of the letter; is that true or not?

MR. BACON:—I object, on the ground that this was fully gone into on the examination in chief. The witness stated distinctly it was written by Richardson's dictation and he denied it.

MR. ARMSTRONG:—That was on cross-examination. It was not in chief at all. You produced the letter and it was testified to.

THE COURT:—You see that was on cross-examination of yours. Now that he is here, the other witness, I think that 30 he may be asked about it now, his attention being called to it by Mr. Richardson's testimony.

MR. BACON:—I object to it, on the ground that the question is improperly framed and is not proper rebuttal.

(Objection overruled.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

(Answer ordered stricken out.)

(Question repeated.)

10 A. It is not true.

Q. Will you state in what manner that letter was written?
(Objected to as not proper rebuttal.)

THE COURT:—I think that was very fully testified to.

MR. ARMSTRONG:—It was on cross-examination. I didn't ask any questions about it.

MR. BACON:—He stated it in detail fully.

THE COURT:—Now you are going into detail on the same subject matter, while Richardson didn't give it in detail.

MR. ARMSTRONG:—He said he didn't know anything
20 about it. I propose to go into it and show what he did do.

THE COURT:—I think he has already fully stated that he dictated the whole thing. He had it over four or five times, that Mr. Richardson dictated the whole letter.

Q. Did or did not you give Mr. Richardson any authority to buy horses for you on your account?

A. No, sir; I never did under any circumstances.

Q. Mr. Richardson says that at one time he spoke about the cost of one horse in the list being too high and you said cut it out. Did you say that?

A. No, sir; I didn't use the expression.

Q. Mr. Richardson says that you approved of sales made
30 of horses below the cost prices as being sold on your account.
Is that true or not?

A. It is not true.

Q. Did you at any time consign any horses to Richardson & Baldwin or place in their possession any horses for sale under any other agreement than that of Exhibit P 1, the agreement between you, and if so, what was it?

MR. BACON:—I object, on the grounds that that is reopening the case, is not in any sense rebuttal or contradictory of anything that the defendants have testified to.

(Objection overruled.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.) 10

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

A. No, sir; I did not.

CROSS EXAMINATION.

BY MR. BACON:—

Q. Did you and Richardson go over any accounts at your house on the night of the 22d of January?

A. Yes, sir.

20

BOTH SIDES REST.

Adjourned till January 9, 1902, 10 a. m.

Bridgeton, N.J., January 9, 1902.

Trial of the cause resumed at 10 a.m.

THE COURT:—The Court will state now that although 30 the evidence was declared closed last evening, yet the counsel not having yet summed up, I have reconsidered the matter of

an offer that was made by the defendants in this case of the agreement of co-partnership. It was an agreement purporting to dissolve the partnership between Mr. Richardson and Mr. Baldwin, the defendants,—I forget the date. It is mentioned on the notes, no doubt. It was proved by Mr. Baldwin as being an agreement signed by the two defendants; and I reverse my ruling in that case as to ruling out the agreement of dissolution of partnership that was offered in evidence, and counsel may renew their offer and use that agreement and read it as part of the evidence in the case. I would admit it,
 10 not as in any way affecting the liability or releasing the defendants from any liability under their contract as to dealing with these horses, so far as the plaintiff is concerned, but I think it is proper evidence to show what relations Mr. Richardson and Mr. Baldwin bore to each other and as tending perhaps to explain other parts of the testimony, such as the letter which is in evidence from Mr. Moore, the plaintiff, to Mr. Baldwin, of January 22nd, I think, in which a reference was made about continuing in business; and for those purposes, showing the relations of the parties and as illustrating or explaining the evidence of the witnesses, I am willing to admit that paper in evidence.

20 MR. BACON:—The defendants except to the present ruling of the Court at this time on the ground that counsel on both sides announced at the close of the session yesterday that the case was closed on both sides; that the defendants are both out of the state, having been permitted by counsel to go away yesterday with the understanding that the case on both sides was closed and that their further presence in court was unnecessary; that the admission of this paper in evidence at this time, in the absence of the defendants and without opportunity to use it in connection with the oral testimony of the defendants, is valueless to the defendants and that they are deprived of a substantial right by the reversal of the de-
 30 cision of the Court in this matter.

THE COURT:—Well, I wanted to have you understand that you have a perfect right at this time to offer the agree-

ment of dissolution spoken of which you offered yesterday, that you have an opportunity to offer it at this time, and for that purpose it is considered that the offer to rest on your part is permitted to be withdrawn and to offer that in addition to your testimony if you see proper. Of course the Court does not wish to compel anything. That particular piece of evidence may be received and marked now, if you choose, before the case is finally closed and the summing up commences.

MR. BACON:—In answer to the concluding remark of the Court counsel feel constrained to respectfully decline to avail themselves of the offer of the Court to reopen the case for the purpose of offering this paper in evidence, for the reasons already stated, and ask an exception to the ruling of the Court. ¹⁰

THE COURT:—I don't see that you are entitled to any exception to this ruling. I simply offer to change my ruling and allow it to be admitted. I don't think you are entitled to any exception. Of course if we all find out that you are entitled to it you may have it. Now in reference to another matter, the evidence of Mr. Moore the plaintiff and Mr. To-boldt with regard to what the colored man said in charge of the horses at Baltimore with reference to what was to be done with the horses, about their being sent to New York for sale, or something to that effect, whatever it was, all that evidence, since considering the matter over I have concluded to rule out. It may be considered as stricken out, and I direct the jury not to consider that part of the evidence only so far as the answer was made to the inquiry of where Mr. Richardson was and Mr. Baldwin, what was said in answer to that inquiry. ²⁰

MR. ARMSTRONG:—I understand, if your Honor please, you rule out what the colored man said because—

THE COURT:—Because he is a mere man in charge and not one of the parties. ³⁰

MR. ARMSTRONG:—You simply rule out what he said and not what Mr. Richardson said after he returned?

THE COURT:—Oh, not at all. The evidence of what Mr. Richardson said will be allowed to stand.

MR. ARMSTRONG:—My thought about that was that it was so connected by what Mr. Richardson said afterwards as confirming that, that it would stand as confirmed by the parties, even assuming—I can't understand your Honor's ruling as to that—that is, assuming if it stood it would not be of importance.

10 THE COURT:—I didn't think it was of any importance, but I didn't think it was legal testimony.

MR. ARMSTRONG:—Mr. Kelly tells me, and it shows it was not marked, that the letter of January 23rd, from Richardson to Moore, the writing of it proved by Richardson when he was on the stand in cross-examination, was not offered by me. Of course I could not offer it then and it was not offered by me afterwards. I did think that I offered it, but in the confusion of the thing my friend said it was not offered, and I now offer it.

20 MR. BACON:—I object, on the ground that the case was closed on both sides last night; and while I understand that this, of course, is a matter which is addressed to the sound discretion of the Court, as to whether a case may be opened after it has been closed, yet I submit that in this case the discretion ought not to be exercised in favor of the admission of the paper because of the fact that Judge Armstrong did not avail himself of his right to offer it when that right accrued and when the witness was on the stand who proved it. Now the witness has left, with the consent of counsel, with the understanding that the case was closed, and upon that belief, after I had made inquiry of counsel whether he had closed his case.

30 THE COURT:—In what way would it harm you, if your client was here, Mr. Richardson? In what way does it harm

you to have the letter which he identified as his own writing and not disputed? Would that harm you?

MR. BACON:—I understand that when a man writes a letter and that letter is offered in evidence it is always competent to ask him the circumstances under which the letter was written, what induced him to write it and explain the letter itself. Now we are deprived of asking him any questions about it. I don't know what is in the letter, what the letter means or anything about it. It ought to have been offered while he was on the stand; but, in fact, I asked Judge Armstrong—if it was a mere motion I would not say anything—I 10 asked Judge Armstrong if it was in evidence and he said it was not, and he took it and put it over on his side of the table and kept it there until after Richardson had left the stand, so I had no opportunity of examining Richardson on the letter after it was shown.

MR. ARMSTRONG:—My friend thinks I called Mr. Richardson to the stand. I could not offer any letter in evidence while he was on the stand and the defence was still on. As your Honor will recall, somewhat hurriedly, because I had a witness from Pittsburg, and because I held him on rebuttal, and Mr. Richardson was still on, and while your Honor was 20 here, I said yes, the letter was offered, yesterday afternoon. I said yesterday afternoon the letter was offered. I said it was not offered and I said, "It will be;" and my associate said it was a matter of discretion.

MR. BACON:—I understood it was to be offered. There will be another objection to it, and that is, that its receipt has not been proved by anybody.

THE COURT:—It is in their possession. That is presumed, isn't it?

MR. BACON:—Well, I thought so till Judge Armstrong said that was not the case yesterday when I offered a letter. 30

THE COURT:—I think that I will admit the offer now to be formally made. Counsel understood and said last night in

the presence of the Court that it was offered, just after the recess was taken.

(Letter marked Exhibit P 2.)

BOTH SIDES REST.

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CHARGE OF THE COURT.

GENTLEMEN OF THE JURY:

This is a suit in an action of contract, commenced by a foreign attachment against the defendants, William H. Richardson and George S. Baldwin, partners, trading as Richardson & Baldwin, for moneys claimed to be due to the plaintiff for the price and value of certain horses—I think thirty-three or thirty-four in number—consigned by the plaintiff to the defendants, who were horse dealers in Baltimore, or were at the time, to be sold later according to the terms and conditions of a written contract executed between the parties. The contract, which is in evidence, is not dated, but the proofs indicate that it was executed somewhere about the middle of November, 1899. Under its terms the plaintiff was to supply the defendants with horses known as cobs and driving horses, upon condition that defendants were to care for, feed, sell and assume responsibility for them after the horses had left the plaintiff's stable and to assume responsibility in case of accident or death, to the plaintiff, to the amount of actual cost to him of said horse or horses, and upon further condition that defendants should pay to the plaintiffs, upon the sale or exchange, in cash, the amount of such actual cost as specified by the plaintiff, with one-half the profit above the amount of such actual cost. Provisions were added to this agreement that the horses were to be the property of the plaintiff until paid for as therein agreed upon, and that the contract was subject to annulment at the option of the plaintiff, Mr. Moore. I have stated the agreement in substance, but the jury will look at the agreement itself, which is in evidence, in order to perceive its exact terms.

The plaintiff claims to have proved that the defendants, after receiving consignments of horses under this contract, sold and disposed of some twenty-eight of these horses to various

customers at various times between November 24, 1899, and January 25, 1900, and what these horses aggregated you will be able to ascertain from the bill of particulars attached to the transcript and the other exhibits in the cause, and upon the amount which the plaintiff claims to be due on the sale or exchange of these horses he admits credit, as I understand his evidence, made up of cash and horses returned and delivered to him by the defendant, amounting to about \$2319, as near as I can recall now.

According to these figures the plaintiff claims a balance
 10 due him upon horses actually sold and disposed of, of about \$2050. Upon whatever amount you find in his favor upon this part of his agreement, if any, you will give him interest on the sum from January 25, 1900. I have indicated some of these figures from my recollection and hurried examination, but you are to settle the figures yourselves from the evidence and you are also to settle all the facts in the case. They are for you alone to settle. Should I fall into an error in any statement of fact you must not be led or governed by such a misstatement, but make the correction and be governed by your own finding of the facts.

I will direct your attention to the answers to plaintiff's
 20 interrogatories made by the defendant Baldwin, which have been read in your hearing and which are evidence in the case, in regard to the matters and figures above alluded to, and you may see how far they go, if at all, in support of the plaintiff's claim in this regard. Of course you must look at all the testimony on both sides, giving to that of each witness the weight to which it is entitled, in your judgment, in arriving at the conclusion as to what amount, if anything, is due to the plaintiff for horses thus sold and disposed of, after allowing the credit to which you find the defendants entitled. In the same manner are you to settle all the facts of the case which are in controversy. The burden of proof is upon the plaintiff
 30 to establish his claim and every part of it; that is, he must recover, if at all, by the weight or preponderance of evidence. Under this contract the plaintiff is entitled to be paid by the

defendants at the cost price specified for all the horses that you find to have been sold or exchanged by the defendant, in cash, and in addition, one-half of the profits of the sale over and above the cost price; and he is entitled to recover in this suit for such amounts, after deducting the credits thereon to which the defendants are entitled.

Under this construction of the contract, which is for the Court, gentlemen, you will observe that even where defendants have traded or swapped one or more of plaintiff's horses for other horses or for part cash and part in horse stock, the defendants are liable for such cost price in cash for each one so swapped or exchanged, unless you find some other or different agreement made between the parties after the written agreement and while the horses were in the defendants' possession, as to any particular horse or horses. So that under this contract the defendants are not entitled to be credited on the account with any horses so traded for unless such horse or horses may have been delivered to and accepted by the plaintiff at a specified price. I would say, however, if the defendants have satisfied you by the evidence that since the contract was executed they were authorized by the plaintiff by word or letter to exchange any of his horses for other horses in whole or in part, and that they had not sold or parted with such horses so received in exchange at the time of the beginning of this suit, but were holding the same as the property of the plaintiff under his direction, then to the extent of the value of such horses so held, the defendants would be entitled to a credit upon the plaintiff's bill of particulars as charged in the declaration. That is, if they are charged in the declaration for all the respective horses and it turned out afterwards that contrary to the written agreement, if you so find from the evidence, that in any particular case, the case of any particular horse, the plaintiff authorized the defendant to make an exchange for some other horse, to be held for him, and that the horse was unsold at the time of the attachment, of course to make that straight as against the defendants, it would be necessary to strike that horse out of the plaintiff's charges, or

else, allowing the plaintiff for all the horses consigned, you should add a credit for the horse so on hand to that same amount. You understood, I think, what I mean by what I have said in reference to that matter.

This construction is given, however, subject to what I am about to say upon another branch of the plaintiff's claim; and before proceeding with that, in looking at the credits to be allowed, if any, to the defendants, beyond what they are credited with upon the plaintiff's bill of particulars, it is claimed by the defendants that there is some evidence that
 10 some particular horse or team among these horses consigned to them were sold at a loss and that they were so sold at a loss under the direction of the plaintiff himself, under some instructions from him that he thought it would be better to sell them at once, even at a loss. Now of course you will see if that is established to your satisfaction by the evidence; the evidence, you know, is contradictory upon both sides upon that. Mr. Richardson stated that on one or two occasions, I think there was something of that kind said, about selling at once, even at a loss. Mr. Moore denies that. Of course you will look at the statements of the parties and you must be satisfied in the case that Mr. Moore did agree to authorize a
 20 sale at a loss; otherwise the defendants should not be benefitted by such a loss. Of course if there was such an order from Mr. Moore and they were sold at a loss, that loss ought to be allowed to the defendants in finding out what is due from them to the plaintiff, if anything, from these dealings.

I was about to remark that in what I had previously said with reference to allowing deductions upon the account for horses that might have been thus exchanged, if you so find under a new contract between the parties, and which were not disposed of at the time of the attachment, that, of course, if there were any such cases the defendants should be allowed,
 30 as I have already stated to you, for such horses, that is, for their value.

But this is subject to another branch of the plaintiff's claim,

which is based upon an alleged conversion by the defendants of the balance of the plaintiff's horses on hand at or about the date of the attachment in this case, which was January 26th, 1900. He claims to have established by the declarations and conduct of the defendants with regard to the horses of plaintiff then in defendants' hands, under a contract, that the defendants had at or about the time of the issuing of the attachment converted those horses to their own use; that they thereby became liable to him, the plaintiff, in an action of tort for damages for the conversion of such horses; and that he the plaintiff, thereupon elected to waive the tort and sue 10 the defendants in an action of assumpsit, or contract, as it is called, as he has in this suit, to recover of them the money value of the horses which he claims the defendants thus converted to their own use. Such an action of tort may be waived and an action brought by the person injured to recover the value of goods taken and converted by a trespasser where there are contractual relations between the parties, as there were in this case. The defendants had the custody and care, upon a trust set forth in the agreement, of horses which were to belong to the plaintiff until they were paid for, or until, what amounts to the same thing, there was a sale made in the regular course under the terms of the contract. So that if 20 the plaintiff has established such a conversion in this case, he may recover in this action, along with such other money as he is entitled to recover, the value of the horses so converted. Of course the horses consigned to the defendants by the plaintiff, so long as the contract was in existence and being recognized and so long as the defendants were in good faith acting under its provisions, they were lawfully in the possession of the defendants, although the plaintiff retained, as I said, the title to the property until there was a sale. Now so long as these relations of the parties to this property continued there could manifestly be no conversion established, and the plaintiff could not recover from the defendants for 30 the value of the horses unsold, at cost price or otherwise; and before the plaintiff can recover in this suit for the value of

the horses which were being shipped to New York to be sold and were in transit at the time of the attachment, he must satisfy you by the weight of the evidence that the defendants had changed their relationship toward these horses from that of custodians and care-takers for the purpose of sale under the agreement to that of trespassers who had determined to repudiate the terms of their agreement, which required them, as you remember, to pay to the plaintiff, upon the sale or exchange, in cash, the actual cost price of the horses as specified, and to proceed and sell the horses and apply the proceeds to their own use. That is, it must appear that, instead of being custodians and caretakers under the agreement, they must have repudiated its terms and have proceeded with the view of selling the horses and applying the proceeds to their own use. In other words, in order to justify such recovery by the plaintiff for the cost price of horses then in transit to New York, you must find from the evidence that the defendants had determined to repudiate the plaintiff's right to this property and to be paid for the same at the cost price in cash upon the sale thereof, and had determined to appropriate this property, the horses and the proceeds of the sale thereof, to their own uses and purposes and that at the time of the attachment they were then moving the horses to New York with this unlawful purpose in view. If you do so find that, you may include in your verdict in this case the valuation of the plaintiff's horses so converted. The only evidence of value in such case is that fixed by these parties in the agreement, the cost price; so that if you reach the conclusion that I have stated, you may assess the value at such cost price as specified by the plaintiff at the time of the consignment of the horses to the defendants.

But if you are not satisfied by the weight of the evidence that there was such a conversion of the horses by the defendants, but if, on the other hand, you find that the defendants were arranging to make this sale under the terms of the agreement in good faith, with the knowledge that they could and would pay for the horses to be sold at such sale, or that the

removal to New York was being made for the purpose of such sale, with the knowledge and consent of the plaintiff, then the act of conversion is not established and you should not include in your verdict anything for the horses remaining unsold at the time of the attachment. Before reaching a conclusion upon this part of the case you should examine carefully all the facts and circumstances on both sides. From the plaintiff's standpoint you may look at what occurred in defendant's stables in Baltimore upon the visit there of the plaintiff and his business agent, Toboldt, just before the shipment to New York. The plaintiff and his witness say that a settlement of accounts for previous transactions was suggested to Mr. Richardson before the sale be made, or some words to that effect; that the latter said he could not make any settlement; that upon plaintiff's expressing a desire to see Mr. Baldwin Mr. Richardson replied advising plaintiff not to speak to Mr. Baldwin about it or it would be all off; that he had had trouble to keep him from making an assignment; that Mr. Richardson further advised the plaintiff that the only way to get his money would be to let the sale in New York go on. It was testified, I think, in the plaintiff's case, that Mr. Richardson further advised the plaintiff that the only way he could get his money would be to let the sale in New York go on; that plaintiff then proposed to Mr. Richardson that he should have an order from the defendants on the horse exchange in New York for the payment of the cost price of the horses to be sold, out of the moneys to be realized, or that the horses be shipped to New York in the plaintiff's name, as I recollect the testimony, gentlemen of the jury; and it will be for you to say what the testimony was. I only give you impressions of my own; you are not bound by them.

As a circumstance you may look at the condition of the account at that time between the parties upon the previous transactions, as to whether there was or was not a considerable amount in arrears upon payments due the plaintiff. You may look also to the fact whether the shipment to New York including all of the remaining horses of the plaintiff and other

horses of the defendants, to be sold at auction, was in accord with the previous manner of making sales of horses under the agreement, or whether it indicated an intention to close out the defendants' business then in hand. You look at these as circumstances, I say, of more or less weight, according as you determine from all the evidence. You may also look at the after conduct of the defendants, after the attachment. The fact that they gave bond and retained the horses at Jersey City will naturally have little weight in this connection, because if they were still acting under the contract, as they
 10 claimed to be, they had a right to sell the horses and they had an interest in any profits that might be realized on the sale. But as to how they sold the horses afterwards which, if the contract was still recognized by them, were the property of the plaintiff, and whether they afterwards paid or offered to pay any part of the proceeds of the sale to this plaintiff, these are circumstances to which you may also look in your effort to reach a conclusion whether the horses were actually converted by the defendants to their own use at or before the date of the attachment. What occurred after the attachment has no effect whatever to change the relations of the parties to the property in question or to the suit we are now trying.
 20 The merits of the controversy, as I have already explained, must be decided according to the relations of the parties, to wit, at or before the attachment suit was commenced. The only effect that you could give to the circumstances occurring after as well as before the attachment was levied is to see if they throw any light upon the question of what the relationship of the parties was to this property at the time the suit began. In other words, these circumstances can only be considered by you as throwing light upon the question as to whether or not a conversion had been made before the suit began.

From the defendants' standpoint, in your effort to determine
 30 this question you may look at the fact whether there was anything concealed or hidden in the arrangement to make the sale in New York, or was it made openly and with the knowledge

or consent of the plaintiff. Upon this point you may look at the letter of January 22, 1900, written by the plaintiff to Mr. Baldwin, of Baltimore, and received by the latter. In it the plaintiff speaks of the sale to be made in New York and says, if I remember rightly, he and Mr. Richardson were going on to attend the sale. He also speaks of Mr. Baldwin's going on in business and offers to furnish him with horses to sell for the plaintiff. You may look also at the statement in the letter to the effect that Mr. Richardson tells him that Mr. Baldwin was to send him, the plaintiff, some ten horses; also to the fact that some time after this seven of the horses were transferred to the possession of the plaintiff at Bridgeton; and they are, I think credited upon the plaintiff's demand in this suit. I understood counsel of the plaintiff to admit making such a credit, that they desired to credit those horses. 10

You may look also to see if in this letter or at any time before the attachment the plaintiff made objection to the defendants' taking the horses to New York to be sold. You may look at Mr. Richardson's testimony also, that from the time of this letter he was in business with the plaintiff, selling horses for him in Bridgeton, and that friendly relations continued between him and the plaintiff up to the time of the sale in New York, and that he presented to the plaintiff at Bridgeton memoranda and statements with regard to the dealings which the plaintiff up to that time had had with the defendants; and also that at the interview at the stables in Baltimore that Mr. Richardson, as he swears, then offered to give plaintiff an order to collect his money for the horses to be sold in New York. Of course you will recall the fact that the plaintiff and Mr. Toboldt have sworn to the opposite of this and that plaintiff swears that he wrote the letter solely at the dictation of Mr. Richardson. Now it is for you to say as sensible, practical men, what the facts were in this and other particulars alluded to; and, as I before stated, if you find that the plaintiff had consented to this sale in New York and that he did not by word or action bring to the notice of the defendants his change of mind in this respect, then you would 20 30

be justified in finding that no conversion is found in this case, and in refusing to award a verdict of anything for the horses unsold at the date of the attachment. And if you find under the evidence that there was no conversion such as I have stated up to and including such date, then you should not include in your verdict, if you find for the plaintiff, anything for the horses unsold on that date.

It is proper to say that if such should be the result of your verdict it would not prevent the plaintiff in another action from recovering a judgment against the defendants for the money they claim due under the contract after the sale was made in New York. With this, however, or with other matters not directly at issue in this trial, you must have nothing to do. Pay no regard to any matter of feeling or sympathy on either side. You must be governed in finding your verdict entirely by the evidence produced before you here on the trial and by the instructions of the Court upon the law to be applied to the facts which I have endeavored to make clear to you. I want you to be careful and painstaking in your examination and consideration of the testimony and the exhibits offered in evidence, so as to arrive at a just and proper verdict in this case. The trial has necessarily been quite protracted and it is important that you should be so just, fair and impartial in your finding that the result would be a complete and final ending of the controversy involved in the present suit, so far as can practically be accomplished. You will find that the plaintiff's bill of particulars attached to the transcript contains his whole claim, both for what he claims to be due for the horses sold before the attachment and also for the horses at that time which he claims were converted. Of course, gentlemen, if you find from the evidence that there was such a conversion, then you may give the plaintiff the benefit of all of his charges for the horses consigned, as stated, subject to proper credit to which reference has been made. And in case your verdict should be for the plaintiff, but only for the horses actually sold or exchanged, it would then be your duty to exclude from the plaintiff's demand or account

the horses and values in that list which were unsold at the time of the attachment.

There is an item of cash charged at the end of the plaintiff's bill of particulars of \$5,000. I think counsel will agree with me in saying that that appears there as a matter of legal form or procedure, and that it is not intended to be charged or allowed the plaintiff in addition to the other items or claim there for the horses so sold or exchanged.

MR. ARMSTRONG:—It is only for a share of the profits, unknown at the time.

THE COURT:—And such an amount as would represent a share of the profits? 10

MR. ARMSTRONG:—That is to be in place of that \$5,000, of course.

THE COURT:—The profits, I think, were testified to as about \$488.50, one-half of which would of course belong to the plaintiff.

There are some requests to charge in this case which I will advert to now. The plaintiff requests these charges:

1. The paper Exhibit P 1 shows the agreement between the parties and cannot be altered or varied by any contemporaneous parol agreement or understanding. 20

I so charge, gentlemen, that the written agreement cannot be varied by what might have been the talk or conversation between the parties at the time. That is what it means. Their conclusion is placed in the written contract.

2. It was the duty of the defendants in this case to pay the plaintiff the cost price as specified for horses sent them which were sold or exchanged by defendants, together with one-half of profits above amount of such actual cost realized by defendants.

I so charge, as I have already charged in that matter.

3. The actual cost as specified by plaintiff to defendants for horses delivered to them by him is the sum of \$6,625, from the undisputed evidence in this case. 30

There is no dispute about that, that the items charged separately for the different horses amount to \$6,625. Of course you will observe that, however, right from the papers. I so charge.

4. The profit realized by the defendants for sales of horses above amount of actual cost as admitted by defendants, is \$488.50.

I so charge, as I have already charged.

5. All the cash paid the plaintiff by defendants, from the undisputed evidence in this case, was the sum of \$1,314.

10 I made a note during Mr. Fithian's opening in which I thought he made it \$1385.

MR. ARMSTRONG:—There are only three payments of cash, only three checks. The other was \$60 they claimed paid on account.

MR. FITHIAN:—\$60 and \$11. We claim \$7.

MR. ARMSTRONG:—They said paid to somebody else.

THE COURT:—It is admitted, I think, as a credit in his account?

20 MR. ARMSTRONG:—Yes.

THE COURT:—Then the cash items, there is no dispute, amount to \$1314. I so charge.

6. From the evidence in this case it is immaterial what price defendants sold or exchanged the horses for if they were not sold or exchanged in excess of the cost price; no such loss being chargeable to plaintiff under the agreement Exhibit P 1.

30 That is true, gentlemen as a request to charge. I charge it subject to what I have already charged with reference to cases where there has been a different agreement between the parties, if you find any, which was made subsequent to the written agreement, while the horses were in the possession of the defendants.

7. If on or before the 26th day of January, 1900, the defendants had converted the horses in their possession to their own use they are responsible for the cost price of the same to the plaintiff in this suit.

That I charge, as I have already charged.

8. In determining whether or not the defendants have converted said horses to their own use the jury are entitled to consider all the facts and circumstances and the conduct of the defendants on, before and after said 26th of January, 1900, concerning said horses.

I so charge, as I have already charged.

10

9. Merely the receipt of the sum of \$214 sent by a check with the letter Exhibit D 1 does not constitute the acceptance of the correctness of the account attached or the statement contained therein.

I so charge, gentlemen, that the check was simply a check for \$214, and the acceptance of that check does not bind the plaintiff as an acceptance of the account stated by the other side. As to the correctness of these accounts in the defendants' letter and statement, of course you are to look at the evidence and all the facts and settle what is right under the charge that I have already delivered.

20

The defendants have also requested me to charge:

1. To find a verdict for the defendants.

That I decline to charge.

2. That to warrant recovery by plaintiff he must prove his case by a preponderance of legal testimony.

I so charge.

3. That under the written contract between plaintiff and defendants, the title to all the unsold horses remained in plaintiff on the day the affidavit in attachment was made and that there was no conversion.

I refuse to charge that.

4. That the defendants being lawfully in possession of the 30 unsold horses on the day the affidavit was filed, and not having sold or disposed of the same at that time, plaintiff could

not waive the alleged conversion and sue in assumpsit for money had and received.

I refuse to charge that.

5. The horses not having been sold and not having been converted into money or money's worth, and there having been no promise to pay, plaintiff cannot recover in this suit for the value of the horses shipped to New York.

I refuse to charge that.

6. An attachment will not lie for unliquidated damages; hence plaintiff cannot recover in this suit for unliquidated
10 damages.

That I refuse to charge, because there is no question in the case as to unliquidated damages. The claim, if any, is for a definite amount or amounts that may be made definite from the testimony under the pleadings in this cause.

7. A writ of attachment is not intended as a substitute for process and unless plaintiff has shown that on January 26, 1900, he was a creditor of defendants for a debt of a definite amount, he cannot recover in this suit.

I refuse to charge that, except as I have already charged upon that subject.

20 8. Plaintiff having assented to the shipment to New York of the unsold horses, there was no conversion by defendants.

I refuse to charge that.

9. An action of assumpsit can never be maintained unless upon a contract expressly made or implied in law and, as to the horses shipped to New York, there is no evidence in this cause, legally sufficient, on a reasonable interpretation of it, to warrant the conclusion that there was any contract on the part of the defendants, expressly made or implied in law, to pay plaintiff for said horses or to account to him for them, until after the New York sale.

30 I refuse to charge that except as I have already charged.

10. The written agreement between plaintiff and defendants was a contract of joint venture in horse dealing; under

its terms defendants did not become liable to plaintiff for the cost price of the horses unless they were sold by defendants or unless they were injured by accident or died; in case of sale or exchange defendants' liability was to account to plaintiff for the actual specified cost price plus one-half the profits above amount of actual cost to plaintiff; hence, in order to recover in this suit, plaintiff must prove the cost price of the horses and the fact of their sale or exchange by defendants.

I refuse to charge that, except as I have already charged.

11. The contract was not subject to annulment by the plaintiff, at his option, unless he re-imbursed defendants for the care and feed of the unsold horses in their hands at the time of the annulment.

I decline to charge that because there is no question in the case as to the annulment of the contract. That is not a question.

12. If the jury find from the testimony that certain of the horses consigned by the plaintiff to the defendants were exchanged by the latter for other horses, and that such exchanges were authorized under the agreement between plaintiff and defendants or that such exchanges were authorized or approved by the plaintiff, then and in such case the plaintiff cannot recover any sum in this action for plaintiff's horses so exchanged, unless it appears from the testimony that the horses received by defendants in said exchanges have been sold by them and not accounted for to plaintiff before the commencement of this action.

I decline to charge that request.

[13. If the jury find from the testimony in this case that certain of the horses consigned by plaintiff to defendants under the agreement in evidence were exchanged by the latter with the consent and approval of the plaintiff, and that the horses received by defendants in such exchanges were not sold by defendants prior to the commencement of this action, and were in the hands and custody of defendants at the time of the commencement of this action, then and in such case there can be no recovery in this suit for or on

account of the said horses consigned by plaintiff to defendants and exchanged by the latter for other horses so in their custody at the time of the commencement of this action.]

The thirteenth request I do not charge in the form in which it appears. I will charge it with amendments that I have attached:

13. If the jury find from the testimony in this case that certain of the horses consigned by plaintiff to defendants under the agreement in evidence were exchanged by the latter with
 10 the consent and approval of the plaintiff, manifested by a subsequent agreement in words or otherwise by him with the defendants, and that the horses received by defendants in such exchanges were under such subsequent agreement to be the property of the plaintiff and to be held in place of the horses so exchanged and which were not sold by defendants prior to the commencement of this action, and were in the hands and custody of defendants at the time of the commencement of this action, then and in such case there can be no recovery in this suit for or on account of the said horses consigned by plaintiff to defendants, and exchanged by the latter for other horses so in their custody at the time of the commencement of
 20 this action.

I charge that as amended, as I have already tried to charge you, gentlemen.

14. The contract between plaintiff and defendants having been shown by the testimony to be one of joint venture, a settlement and accounting between them under said contract can only be enforced in the Court of Chancery, and is not cognizable in a court of law. The jury are therefore directed to find a verdict of no cause for action.

That I decline to charge.

[15. If the jury believe that there were horses in possession of defendants on January 26, 1900, which had been consigned
 30 by plaintiff to defendants, or which had been purchased by defendants with plaintiff's money, by his direction or with his approval, or which had been taken in exchange with his

approval, then, as to such horses, there can be no recovery in this suit for the alleged cost price thereof.]

The fifteenth request I charge with a slight amendment:

15. If the jury believe that there were horses in possession of defendants on January 26, 1900, which had been consigned by plaintiff to defendants, or which had been purchased by defendants with plaintiff's money, by his direction for the plaintiff, or which had been taken in exchange, under his like direction, for him, then, as to such horses, there can be no recovery in this suit for the alleged cost price thereof unless they were afterwards converted by the defendants to their own use, in the way I have before explained. 10

With this addition I charge as requested.

16. If the jury believe that the only contract between plaintiff and defendants was the written agreement marked Exhibit P 1, plaintiff cannot recover in this suit for the alleged cost price of any horses which were not actually sold or exchanged by defendants before this suit was brought, there being no evidence that any of the horses had died or were injured by accident. 20

That is so, with the addition that of course if the horses were found to have been converted, as already charged, by the defendants to their own use, then of course their value is to be added to those so sold or exchanged.

Gentlemen, there was one matter that I did overlook and to which my attention has been called, and that is, that when it comes to the question of establishing other parol agreements, verbal agreements, after the written agreement was executed, as they are offered to be proved or have been in the case by the defendants, and upon which they base a reduction of the plaintiff's claim by credits or otherwise, the burden then changes to the defendants and they must satisfy 30

you by the weight of evidence that there were such other agreements, verbal agreements, affecting the matters to which I have referred.

MR. BACON:—I object to the transcript going to the jury.

MR. ARMSTRONG:—It was used in the trial and examined on by both sides and it was incorporated, part of it, in the interrogatories and otherwise, so in this case the transcript is proper.

10

MR. BACON:—I understand it is never proper for the transcript to go to the jury and I therefore object to its going to the jury and take exception to all reference in the charge to the plaintiff's bill of particulars included in the transcript.

THE COURT:—Then I think we will just retain the transcript.

20

30

DEFENDANTS' EXCEPTIONS.

1. The defendants except to that part of the charge which says that the conduct of the defendant after the New York sale may be considered as determining the question of conversion.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

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2. The defendants also except to that part of the charge which permits the jury to assess the values of the horses alleged to be converted at the specified cost prices.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

3. The defendants also except to that part of the charge in which the jury are instructed that the plaintiff may recover in this action for the horses converted.

(Which exception is hereby allowed and sealed accordingly.) 20

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

4. The defendants also except to the Court's charging the seventh request of the plaintiff.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

5. The defendants also except to the Court's charging the eighth request of plaintiff.

(Which exception is hereby allowed and sealed accordingly.) 30

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

6. The defendants also except to the refusal of the Court to charge the defendants' first request.

(Which exception is hereby allowed and sealed accordingly).

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

7. The defendants also except to the refusal of the Court to charge the defendants' third request.

(Which exception is hereby allowed and sealed accordingly.)

10 CHARLES E. HENDRICKSON, J. S. C. [SEAL]

8. The defendants also except to the refusal of the Court to charge the defendants' fourth request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

9. The defendants also except to the refusal of the Court to charge the defendants' fifth request.

(Which exception is hereby allowed and sealed accordingly.)

20 CHARLES E. HENDRICKSON, J. S. C. [SEAL]

10. The defendants also except to the refusal of the Court to charge the defendants' sixth request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

11. The defendants also except to the refusal of the Court to charge the defendant's seventh request.

30 (Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

12. The defendants also except to the refusal of the Court to charge the defendants' eighth request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

13. The defendants also except to the refusal of the Court to charge the defendants' ninth request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL] 10

14. The defendants also except to the refusal of the Court to charge the defendants' tenth request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

15. The defendants also except to the refusal of the Court to charge the defendants' eleventh request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL] 20

16. The defendants also except to the refusal of the Court to charge the defendants' twelfth request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

17. The defendants also except to the refusal of the Court to charge the defendants' thirteenth request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL] 30

18. The defendants also except to the refusal of the Court to charge the defendants' fourteenth request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

19. The defendants also except to the refusal of the Court to charge the defendants' fifteenth request.

(Which exception is hereby allowed and sealed accordingly.)

10 CHARLES E. HENDRICKSON, J. S. C. [SEAL]

20. The defendants also except to the refusal of the Court to charge the defendants' sixteenth request.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

21. The defendants also except to the charge by the Court of the defendants' thirteenth request as modified.

(Which exception is hereby allowed and sealed accordingly.)

20 CHARLES E. HENDRICKSON, J. S. C. [SEAL]

22. The defendants also except to the charge by the Court of the defendants' fifteenth request as modified.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

PLAINTIFF'S EXCEPTIONS.

1. The plaintiff excepts to that part of the charge wherein the Court spoke about repudiating the contract.
2. The plaintiff also excepts to the thirteenth request to charge of the defendants as charged.

(After the jury had retired they returned to the courtroom and were addressed by the Court as follows:)

THE COURT.—Gentlemen, I received a note from you a while ago making some inquiry, and I cannot, of course, answer such communications except in open court and in the presence of counsel. If there is anything you want to request now just state it.

A JUROR:—Just what is in the note is all.

THE COURT:—It is on the note that "We would like to have list of horses returned to Bridgeton by Baldwin & Richardson to Mr. Moore, also cost price of same, also price of T-cart and harness."

All the exhibits, I think, that are offered in the case,—what we call exhibits—papers offered in evidence,—were given to you; and with reference to the list of horses returned to Bridgeton and cost prices of same,—Mr. Bacon, they do not appear, I suppose in any exhibit that is in the case?

MR. FITHIAN:—May it please the Court, they appear in transcript, and the prices as appearing in the transcript were verified, as I understand it, by the evidence.

THE COURT:—Well, it doesn't appear in the transcript what horses were returned to Bridgeton, does it? They appeared in the interrogatories and answers, did they not?

MR. FITHIAN:—They appear in the transcript.

THE COURT:—Well, gentlemen, at present you see the only way in which those items appear is in the transcript from the supreme court—what is called the transcript of the pleadings, with the bill of particulars attached,—and the Court has been in some doubt as to the right of the Court to send out this with the jury, this paper. I will tell you more about it, perhaps, a little later. I shall want to look into the matter. I am busy with this case now, and while there was any doubt about it I did not wish to send out the transcript to you lest it might be an irregularity in the trial, and I had to state it in
 10 this public way. And you will necessarily have to retire to your room and do the best you can with the papers you have for a while. I may perhaps decide this later, whether this paper can go to you or not. It depends on what I decide.

A JUROR:—But there is no way that we can obtain the amount that Mr. Moore gave them credit for these horses until we get that.

THE COURT:—I don't know of any other way except what you remember of the testimony until you get this. That is all I can say at present.

20

(The jury was again recalled to the courtroom and addressed by the Court as follows :)

THE COURT:—Gentlemen of the jury, I have considered this matter and I have concluded to leave with you the bill of particulars containing the items of the account of the plaintiff and with credits that the plaintiff has given credit for on this bill of particulars. I have pinned it in such a way that it will only show the account which was examined upon and used by counsel on both sides in examining the witnesses. You may refer to these items on the account, understanding that
 30 this is not offered in evidence and it is not to be considered as in evidence in the case only to refresh your memory as to any items that you wish to be refreshed upon. As I understand

it, that was the request you have already made and stated here in my presence, that you wanted to look at certain items; and I have nothing else that I could give to you except this account, which was a part of the transcript from the Supreme Court containing the plaintiff's account as sued upon. You are not to be controlled in any way by the items of the account or credits because it is presented in this way, as I before informed you, because the defendant has also offered exhibits, and he claims credits, of course, to a greater extent than those on this paper; understand that. And of course they contest, in a certain way, under their evidence, the items charged 10 against them. You are, of course, to consider the evidence under my charge as given to you before, and you are to use this itemized account in connection with the proofs that have been offered by the witnesses as to the items of the account, and you are not to use it as evidence. It can only be used for the purpose of aiding your memory as to the items and amounts claimed by the plaintiff for which he has given credit. But you must still consider all the evidence separate from this altogether, giving due weight to the claims both of the defendant as well as the plaintiff, under the instructions that I have already given you.

MR. BACON:—It seems to me, if the Court please, that it 20 is proper for me to renew my objection to this paper going to the jury, and I do object and ask an exception.

THE COURT:—Well, I will allow whatever is usual and customary. If you are entitled to it you may have an exception.

(Which exception is hereby allowed and sealed accordingly.)

CHARLES E. HENDRICKSON, J. S. C. [SEAL]

EXHIBITS.

EXHIBIT "P 1."

Bridgeton, N.J.

This Agreement made the above date between I. Whilden
 10 Moore, party of the first part, of Bridgeton, N. J., and
 Richardson and Baldwin, parties of the second part, of Balti-
 more, Maryland.

Party of the first part agrees to furnish parties of the second
 part cobs and driving horses under the following conditions:

That parties of the second part are to care, feed, sell and
 assume the responsibility after horses have left the stable of
 party of the first part. Party of the second part agrees to
 assume responsibility in case of accident or death to the
 amount of actual cost to the party of first part horse and
 horses; and it is also agreed by parties of the second part to
 20 pay party of the first part upon the sale or exchange the
 amount of actual cash as specified by parties, amount of actual
 cost as specified by parties of the first part, with one-half
 profit above amount of actual cost to party of first part.

And it is further understood, that the said horses are the
 property of the party of first part until paid for as agreed
 upon as in this agreement, this contract is subject to annull-
 ment at option of party of first part.

I. WILDEN MOORE. (SEAL)

Witness RICHARDSON & BALDWIN. (SEAL)

S. D. RICHARDSON. (SEAL)

EXHIBIT "P 2."

Richardson & Baldwin,
Dealers in
All Types of High
Class Horses.
1014 Morton Street.
C. & P. Telephone 1698.

Our specialty is
having Horses well broken
and acclimated.

Baltimore, Md., Jan. 25, 1900

10

Mr. Moore

Dear Sir:

Enclose List of horses from Baldwins Books sole at a Lost
will have 18 good ones in N Y Sunday donte you fail to meete
me Sunday the 28 in N. Y. important. I have got every-
thing in good shape now so as you will get all of your money.

Respy

W. H. RICHARDSON.

20

EXHIBIT "D 1."

Richardson & Baldwin,
Dealers in
All Types of High
Class Horses.

Our Specialty is
Horses well broken
and Acclimated.

1014 Morton Street.

C. & P. Telephone 1698.

Baltimore, Md., Jany. 12, 1900.

Mr. I. Whilden Moore,

Bridgeton, N.J.

Dear Sir:—

30

We inclose statement in full to Jany. 1st, also check for
\$214.00 to balance same. You understand of course that

Emerson deal is not closed, so only render cash due up to present status. The short tail gray horse Mr. R. shipped from Norfolk here and thinks he is a cracker jack having gotten well. He also bought for your account a gray and sorrell horse as per charge on statement, so as to split up the black and sorrell team, mating the black with the dapple gray, and putting the sorrel with the sorrell. Thus making two nice teams, making the cost less and giving us the opportunity of getting out on them better. You may put the bay cob at \$175.00 on your list. Although Mr. R. thinks him terribly high, he can be
 10 mated with the white foot cob and we will take him and thereby make all the horses shipped accounted for. The long tail bay horse that was sick, Mr. R. sold in Norfolk. He wouldnt stay tied, also was a regular panthar, being badly broken. Fifty dollars clear of expenses was all Mr. R. could get for him, so thought it best to let him go. Are sorry he lost you money, but would have lost more by keeping him.

Regarding the horses you wrote about having, you had better keep them until we have room. We now have here 29 horses and only 26 stalls, besides a bunch in Washington.

There is nothing doing at present as the weather is such it is impossible to show horses, the streets are like glass, and it
 20 is so cold people will not ride. However have sewerl deals in view as soon as weather permits. Mr. R. says the Hutchinson matter will be closed when weather conditions suit. The horses are all doing well and getting real fat.

Please acknowledge receipt of check, and wishing you a Happy and Prosperous New Year, we are,

Very truly,

RICHARDSON & BALDWIN.

Statement in full to Jan'y 1st, 1900.

30 Deal.	Cost.	S.P.	Bal.Due.
No. 1. Gray and Brown Mares,	375.00	580.00	477.50
2. Pied and Roan Cobs,	160.00	133.50	160.00

3.	Sorrell Pacer,	150.00	160.00	155.00
4.	Sorrell Horse, "Punch," (Washington)	150.00	175.00	162.50
5.	Long Tail Gray Horse, not on list,	100.00	100.00	100.00
6.	Long Tail Bay Horse (sold in Norfolk)			50.00
7.	Emerson Team (deal not completed)			600.00
				1705.00 10

Charges.

Dec. 5.	Advanced		100.00	
16.	"		1000.00	
30.	Dr. F. E. White		30.00	
30.	Paid McCaulley		30.00	
30.	Adv. Dr. Fossard	10.00		
	Paid for Room	1.00		
			11.00	
30.	Bought 1 Gray Horse,	145.00		
	" 1 Sorrel "	175.00		
			320.00	
				20
			1491.00	
			\$214.00	
			214.00	
Check to balance,				

EXHIBIT D 2.

I. Whilden Moore,
Importer of
Art Goods

Philadelphia, Pa.
St. Louis, Mo.

From
Austria, Germany,
France and Italy.
1315 & 1421 Boardwalk.

Atlantic City, N. J., Jan. 22, 1900.

10.

Mr, George S, Baldwin

Dr, sir Mr, Richardson arrived to-day and we have gone over the act, together and find it correct and he is to ship me to morrow ten horses as per, act, i understand you are going to continue in the horse buisness now i will be glad to continue to let you have horses on the same terms as at present I have in my stable at the present time a nice lot witch was bought very low wich you can sell at five or six hundred a team and make a good profit for both of us Mr, Richardson and I are going to New York to sell the balance of the Baltimore stock and will then go west to buy a car load of the best
20. now I want you to write me just what you intend to do and if you want me to continue to supply you with stock Mr, R, has agreed to see that the horses are shipped and to go to N, Y, with them hoping to see you there tuesday and expecting to relize good prices.

I remain very respect,

I, WHILDEN MOORE

EXHIBIT D 3.

Richardson & Baldwin,
 Dealer in
 All Types of High
 Class Horses.
 1014 Morton Street.
 C. & P. Telephone 1698.

Our Specialty is
 Horses well
 Broken and Ac-
 mated.

Baltimore, Md.

1	Sorrell & Black long tails	400.00	
2	Gray & Brown Mares	375.00	10
3	Pied Mare	75.00	
4	Big bay Trotter	300.00	
5	Sorrell pacer	150.00	
6	Billy M.	300.00	
7	Belle Swigert	400.00	
8	Punch	150.00	
9	Dude	250.00	
10	Bright Bay Cob	250.00	
11	Brown Cob	150.00	
12	Roan Cob	85.00	
13	Big Bay Cobs	600.00	
14	Brown Mares team	350.00	20
15	" Horses "	350.00	
16	Bay horse trotter	140.00	
17	" Cobs white feet	400.00	
18	Sorrell team	400.00	
19	Brown Cob	200.00	
20	Bay Cobs two (2)	400.00	
21	" " " (2) White feet	300.00	
22	Gray " " (2)	200.00	

The Long Tail Bay Horse \$115.00 went to Norfolk, and the Bay Cob \$175.00 is here, both of which we have not yet listed as received, as Mr. R. wants to look them over first. The sorrell "Prince" is still making music.

30

RICHARDSON & BALDWIN.

New Jersey Court of Errors and Appeals.

I. Whilden Moore, Defendant in Error, vs. 10 William H. Richardson, Et. Al., Plaintiffs in Error.	}	On Error to Supreme Court. Assignment of Errors.
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Afterwards, to wit, on the second day of April, nineteen hundred and two, in the Court of Errors and Appeals, come the said William H. Richardson and George S. Baldwin, by Walter H. Bacon, their attorney, and sav that in the record and proceedings aforesaid, and also in the giving of judgment in the Supreme Court of the State of New Jersey, there is manifest error in these respects, to wit:—

20 FIRST.—Because the honorable judge before whom the said cause was tried, against defendants' objection, permitted Carl W. Toboldt, a witness produced on the part of the plaintiff below, to testify concerning an alleged conversation had by him with a person at defendant's stables, in defendants' absence, relative to defendants, acts and intentions respecting certain horses, the ownership of which was in controversy in the suit.

30 SECOND.—Because said judge, against defendants' objection, erroneously and unlawfully admitted evidence of an alleged conversation with a person at defendants' stable, which evidence was offered for the purpose of showing an intention in the minds of defendants to convert to their own use certain horses, the ownership of which was in controversy in this suit.

THIRD.—Because said judge, against defendants' objection, erroneously and unlawfully permitted Carl W. Toboldt, a witness produced on the part of plaintiff, to testify as follows:—

"A. I asked the colored man where Mr. Richardson was. He said he was down the street, would be back in a few minutes. I asked him who had charge and he said he was taking care of it while he was away."

"Q. What answer did he make to that?"

"A. He said he was taking care of things while he was down the street, away." 10

"Q. Was Mr. Moore with you then?"

"A. Yes, sir."

"Q. After this answer what further question concerning the horses did you ask of this man who told you he was in charge of them?"

"A. I asked him why the horses were all trimmed up and groomed down so well."

"Q. What answer did he make to that question of yours?"

"A. He was preparing to send the horses to a sale."

"Q. Where?"

"A. New York." 20

FOURTH.—Because said judge, against defendants' objection, erroneously and unlawfully admitted evidence concerning acts of defendants, or one of them, after this suit was brought, relative to the disposition made of the horses in controversy in this suit.

FIFTH.—Because said judge, against defendants' objection, erroneously and unlawfully admitted evidence of the contents of an alleged advertisement, without requiring production of the advertisement or showing that same was authorized by defendants, or by one of them.

SIXTH.—Because said judge, against defendants' objection, erroneously and unlawfully permitted said Carl W. Toboldt to testify as follows: 30

"Q. Did you see an advertisement of these horses for sale?"

"A. Yes."

"Q. Were they or not advertised in Mr. Moore's name?"

"A. They were not advertised in Mr. Moore's name."

SEVENTH.—Because said judge, against defendants' objection, erroneously and unlawfully admitted evidence concerning the sale of the horses in controversy, after the issuance of the attachment in this suit, i. e. after the cause of action is alleged to have accrued.

10 EIGHTH.—Because said judge, against defendants' objection, erroneously and unlawfully permitted plaintiff to testify as follows:—

"Q. Did or did not you believe that at that time?"

"A. I did."

NINTH.—Because the said judge refused to order that plaintiff below be non-suited at the close of his case, although motion therefor was duly made, to which refusal the defendants below, by their attorney, duly excepted; whereas the said judge should have directed such non-suit.

20 TENTH.—Because the said judge unlawfully and erroneously refused to permit George S. Baldwin, one of the defendants, to answer the following questions, viz:

"Who was the firm of Richardson & Baldwin?"

"Was S. D. Richardson a member of the firm of Richardson & Baldwin?"

And over-ruled evidence tending to show that the firm of Richardson & Baldwin had been dissolved before this suit was commenced.

30 ELEVENTH.—Because the said judge unlawfully and erroneously refused to admit in evidence, as a part of defendants' case, the paper writing dissolving the partnership agreement between Richardson & Baldwin; whereas said judge should have admitted such paper writing in evidence.

TWELFTH.—Because the said judge unlawfully and erroneously refused to permit George S. Baldwin, one of the defendants, to answer the following questions, viz.:

“Q. Mr. Baldwin, referring now to this statement, I notice that the pied and roan cobs are put down here at cost \$160, selling price at \$133.50. Was or was not the sale of those horses at less than cost price approved by Mr. Moore?”

“Q. Mr. Baldwin, did you give to Richardson to hand to Moore a statement showing the state of account between Moore and Richardson & Baldwin on going to New York with the final shipment of horses, made up from your books 10 of account?”

“Q. When, if at any time, was the partnership between Baldwin and Richardson dissolved?”

“Q. I show you a paper writing purporting to be a dissolution of co-partnership between Richardson & Baldwin and ask you if that is the dissolution agreement?”

“Q. Mr. Baldwin, I hand you your account book which you had this morning and ask you to state what was the condition of the account between Richardson & Baldwin and Moore on shipping the horses to New York.” Whereas said judge should have permitted said questions to be answered and should not have overruled such evidence. 20

THIRTEENTH.—Because the said judge erroneously and unlawfully, and against defendants’ objection admitted in evidence the paper marked Exhibit D 3.

FOURTEENTH.—Because the said judge, unlawfully and erroneously required the defendant George S. Baldwin, on cross-examination to answer the following question:

“Q. You received the proceeds of that sale?”

Whereas said judge should have over-ruled said question.

FIFTEENTH:—Because the said judge, unlawfully and 30 erroneously refused to permit William H. Richardson, one of the defendants, to answer the following question:

"Q. Were all of the horses that were consigned by Moore to Richardson & Baldwin and all of the horses that were purchased by you and all of the horses received in exchange by you mentioned in these memoranda and statements that you had at Moore's house on the 22d of January?"

Whereas said judge should have admitted said question and have permitted the same to be answered.

SIXTEENTH.—Because the said judge unlawfully and erroneously permitted I. Whildin Moore, the plaintiff, on re-direct examination, to answer the following questions:

10 "Q. The writing of this letter on January 22d—that is the date it appears, Exhibit D 2—Mr. Richardson says he did not suggest the writing of the letter but that you suggested the writing of the letter; is that true or not?"

"Q. Did you at any time consign any horses to Richardson & Baldwin or place in their possession any horses for sale under any other agreement than that of Exhibit P 1, the agreement between you, and if so, what was it?"

Whereas said judge should have over ruled said testimony.

20 SEVENTEENTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully charged the jury that the conduct of the defendants after the New York sale might be considered as determining the question of conversion.

EIGHTEENTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully charged the jury that they might assess the value of the horses alleged to be converted at the specified cost prices.

30 NINETEENTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully charged the jury that the plaintiff might recover in this action for the horses converted.

TWENTIETH.—Because the said judge, in the trial of said cause, erroneously and unlawfully charged the jury as

follows: "If on or before the twenty-sixth day of January, nineteen hundred, the defendants had converted the horses in their possession to their own use they are responsible for the cost price of the same to the plaintiff in this suit."

TWENTY-FIRST.—Because the said judge, in the trial of said cause, erroneously and unlawfully charged the jury as follows: "In determining whether or not the defendants have converted said horses to their own use, the jury are entitled to consider all the facts and circumstances and the conduct of the defendants on, before and after said twenty-sixth day of January, nineteen hundred, concerning said horses." 10

TWENTY-SECOND.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below to find a verdict for the defendants, to which refusal defendants only excepted; whereas said judge should have charged as requested.

TWENTY-THIRD.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "That under the written contract between plaintiff and defendants, the title to all the unsold horses remained in plaintiff on the day the affidavit in attachment was made and that there was no conversion," to which refusal defendants duly excepted; whereas said judge should have charged as requested. 20

TWENTY-FOURTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "That the defendants being lawfully in possession of the unsold horses on the day the affidavit was filed, and not having sold or disposed of the same at that time, plaintiff could not waive the alleged conversion and sue in assumpsit for money had and received," to which 30

refusal defendants duly excepted; whereas said judge should have charged as requested.

TWENTY-FIFTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "The horses not having been sold and not having been converted into money or money's worth, and there having been no promise to pay, plaintiff cannot recover in this suit for the value of the horses shipped to New York," to which refusal defendants duly excepted; whereas
10 said judge should have charged as requested.

TWENTY-SIXTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "An attachment will not lie for unliquidated damages; hence plaintiff cannot recover in this suit for unliquidated damages," to which refusal defendants duly excepted; whereas said judge should have charged as requested.

TWENTY-SEVENTH.—Because the said judge, in the
20 trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "A writ of attachment is not intended as a substitute for process and unless plaintiff has shown that on January 26, 1900, he was a creditor of defendants for a debt of a definite amount, he cannot recover in this suit," to which refusal the defendants duly excepted; whereas said judge should have charged as requested.

TWENTY-EIGHTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "Plaintiff having assented to the
30 shipment to New York of the unsold horses, there was no conversion by defendants," to which refusal defendants duly excepted; whereas said judge should have charged as requested.

TWENTY-NINTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "An action of assumpsit can never be maintained unless upon a contract expressly made or implied in law and, as to the horses shipped to New York, there is no evidence in this cause, legally sufficient, on a reasonable interpretation of it, to warrant the conclusion that there was any contract on the part of the defendants, expressly made or implied in law, to pay plaintiff for said horses or to account to him for them, until after the New York sale," to which refusal defendants duly excepted; whereas said judge should have charged as requested. 10

THIRTIETH.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below as follows: "The written agreement between plaintiff and defendants was a contract of joint venture in horse dealing; under its terms defendants did not become liable to plaintiff for the cost price of the horses unless they were sold by defendants or unless they were injured by accident or died; in case of sale or exchange defendants' liability was to account to plaintiff for the actual specified cost price, plus one-half the profits above amount of actual cost to plaintiff; hence, in order to recover in this suit, plaintiff must prove the cost price of the horses and the fact of their sale or exchange by defendants," to which refusal defendants duly excepted; whereas said judge should have charged as requested. 20

THIRTY-FIRST.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "If the jury find from the testimony that certain of the horses consigned by the plaintiff to the defendants were exchanged by the latter for other horses, and that such exchanges were authorized under the agreement 30

between plaintiff and defendants or that such exchanges were authorized or approved by the plaintiff, then and in such case the plaintiff cannot recover any sum in this action for plaintiff's horses so exchanged, unless it appears from the testimony that the horses received by defendants in said exchanges have been sold by them and not accounted for to plaintiff before the commencement of this action," to which refusal defendants duly excepted; whereas said judge should have charged as requested.

¹⁰ **THIRTY-SECOND.**—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "If the jury find from the testimony in this case that certain of the horses consigned by plaintiff to defendants under the agreement in evidence were exchanged by the latter with the consent and approval of the plaintiff and that the horses received by defendants in such exchanges were not sold by defendants prior to the commencement of this action, and were in the hands and custody of defendants at the time of the commencement of this action, then and in such case there can be no recovery in this suit for
²⁰ or on account of the said horses consigned by plaintiff to defendants and exchanged by the latter for other horses so in their custody at the time of the commencement of this action," to which refusal defendants duly excepted; whereas said judge should have charged as requested.

THIRTY-THIRD.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "The contract between plaintiff and defendants having been shown by the testimony to be one of joint venture, a settlement and accounting between them,
³⁰ under said contract, can only be enforced in the Court of Chancery, and is not cognizable in a Court of Law. The jury are, therefore, directed to find a verdict of no cause for action,"

to which refusal defendants duly excepted; whereas said judge should have charged as requested.

THIRTY-FOURTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "If the jury believe that there were horses in possession of defendants on January 26, 1900, which had been consigned by plaintiff to defendants, or which had been purchased by defendants with plaintiff's money, by his direction, or with his approval, or which had been taken in exchange with his approval, then, as to such horses, there can be no recovery in this suit for the alleged cost price thereof," to which refusal defendants duly excepted; whereas said judge should have charged as requested. 10

THIRTY-FIFTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully refused to charge the jury, having been thereto requested by counsel of the defendants below, as follows: "If the jury believe that the only contract between plaintiff and defendants was the written agreement marked Exhibit P 1, plaintiff cannot recover in this suit for the alleged cost price of any horses which were not actually sold or exchanged by defendants before this suit was brought, there being no evidence that any of the horses had died or were injured by accident," to which refusal defendants duly excepted; whereas said judge should have charged as requested. 20

THIRTY-SIXTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully charged the jury as follows: "If the jury find from the testimony in this case that certain of the horses consigned by plaintiff to defendants under the agreement in evidence were exchanged by the latter with the consent and approval of the plaintiff, manifested by a subsequent agreement in words or otherwise by him with the defendants, and that the horses received by defendants in such 30

exchanges were under such subsequent agreement to be the property of the plaintiff and to be held in place of the horses so exchanged and which were not sold by defendants prior to the commencement of this action, and were in the hands and custody of defendants at the time of the commencement of this action, then and in such case there can be no recovery in this suit for or on account of the said horses consigned by plaintiff to defendants, and exchanged by the latter for other horses so in their custody at the time of the commencement of this action."

10 THIRTY-SEVENTH.—Because the said judge, in the trial of said cause, erroneously and unlawfully charged the jury as follows:—"If the jury believe that there were horses in possession of defendants on January 26, 1900, which had been consigned by plaintiff to defendants, or which had been purchased by defendants with plaintiff's money, by his direction for the plaintiff, or which had been taken in exchange, under his like direction, for him, then, as to such horses, there can
20 be no recovery in this suit for the alleged cost price thereof unless they were afterwards converted by the defendants to their own use, in the way I have before explained."

THIRTY-EIGHTH.—Because the said judge, in the trial of said cause, unlawfully and erroneously and against defendants' objection, permitted the transcript of the pleadings to go to the jury, and to be taken by the jury for use in reaching their verdict, to which action exception was duly taken by defendants' attorney.

THIRTY-NINTH.—Because the Supreme Court gave the judgment for said plaintiff, when it should have, by the law of the land, given judgment for the said defendants.

Dated April 2, 1902.

30

WALTER H. BACON,

Attorney for Plaintiffs in Error.

Service of a copy of the within is hereby acknowledged this
11th day of April, 1902.

E. A. ARMSTRONG,
Attorney of Defendant in Error.

New Jersey Court of Errors and Appeals.

10

I. Whilden Moore,	}	Errors to Supreme Court. Joinder in Error.
Defendant in Error,		
vs.		
Richardson & Baldwin,		
Plaintiffs in Error		

And the said I. Whilden Moore, by E. A. Armstrong, his Attorney comes into Court and says—as to the First, Second, Third and Eleventh assignments of Error, they do not truly narrate the final ruling of the Justice who tried the said cause, and that said final ruling was in favor of the defendant, the defendant in Error, so that regarding the same there is and can be no error as complained of. 20

And further says, that there is no error either in the record and proceedings aforesaid or in the giving of the judgment aforesaid and he prays here, that the Court here may proceed to examine as well as the record and proceedings aforesaid, as the matters aforesaid assigned for error and that the judgment aforesaid, in manner aforesaid, may in all things be affirmed &c.

E. A. ARMSTRONG, 30
Attorney for and of Counsel with Plaintiff,
Defendant in Error.

